The Upper Tribunal
(Administrative Appeals Chamber)

UT NCN: [2025] UKUT 199 (AAC)
UT Case Number: UA-2024-001304-GIA

Summary: Freedom of Information (93.5 Freedom of Information – qualified exemptions)

Freedom of Information Act 2000 – section 30(1)(a) and (2) – section 30 was not engaged in relation to the information in question.

Before

UPPER TRIBUNAL JUDGE JACOBS

Between

Police Ombudsman for Northern Ireland	**Appellant**
v	
Information Commissioner	**First Respondent**
Mark Rainey	**Second Respondent**

Decided on 21 August 2025 following an oral hearing on 30 April 2025

Representatives

Police Ombudsman:	Simon McKay of counsel, instructed by the Ombudsman's Legal Directorate
Information Commissioner:	Antonia Fitzpatrick of counsel, instructed by the Commissioner's Legal Department.
Mark Rainey	Spoke on his own behalf

DECISION OF UPPER TRIBUNAL

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: EA-2023-0218
Decision date: 29 July 2024
Hearing: Online

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

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Abbreviations:

1996 Act	Criminal Procedure and Investigations Act 1996 (also CIPA in some quotations)
1998 Act	Police (Northern Ireland) Act 1998
FOIA	Freedom of Information Act 2000
Ombudsman	Police Ombudsman for Northern Ireland

The *remaining information* is the information in issue in this appeal. See further at [4].

A. What this case is about

1. This is one of two cases before the Upper Tribunal that arise from Mr Rainey's request for information from the Ombudsman. The Ombudsman relied on the exemptions in FOIA sections 30 and 44.

2. Both cases relate to the Ombudsman's second report into the Loughinisland Massacre of 1994, when gunmen killed and wounded customers at a public house that was known to be frequented by Catholics. There were suspicions that there had been collusion between the attackers and the security services. At the request of the victims' families, the Ombudsman at the time investigated the conduct of the police. This led in

2011 to the Ombudsman's first report, which found no evidence of collusion. A new investigation was carried out under that Ombudsman's successor. This led om 2016 to the second report, which found that there had been collusion and that the police investigation was undermined by their concern to protect informers. Subsequently, documentaries were made, one of which was *No Stone Unturned*.

3. The First-tier Tribunal dealt with the section 44(1)(a) exemption in October 2023. This is an absolute exemption under FOIA. The Ombudsman argued that disclosure of the information requested was 'prohibited by or under any enactment'. The tribunal rejected that argument. The Ombudsman's appeal came before the Upper Tribunal under reference *UA-2023-001905-GIA*. I held an oral hearing of the appeal on 17 July 2024. The First-tier Tribunal was due to deal with the section 30 exemption a few days later. In the circumstances, I decided to wait before making a decision on section 44 to allow time for any appeal to the Upper Tribunal on section 30. I have now made my decision, which will be published as *Police Ombudsman for Northern Ireland v Information Commissioner and Rainey (section 44 FOIA)* [2025] UKUT 198 (AAC).

4. This is the Ombudsman's appeal to the Upper Tribunal on section 30, which is a qualified exemption under FOIA. This concerns what the parties called *the remaining information*. There is no dispute about the character of this information. 'It is administrative in nature and relates to the facilitation of meetings between the Police Ombudsman then in post and journalists responsible for the making of the documentary *No Stone Unturned*.' Those are Mr McKay's words from his skeleton argument. Essentially, the Ombudsman argued that the information was 'held … for the purposes of … any investigation which the public authority has a duty a conduct with a view to it being ascertained whether a person should be charged with an offence'. The tribunal rejected that argument. The Ombudsman's appeal came before the Upper Tribunal under reference *UA-2024-001304-GIA* (this case). I held an oral hearing of the appeal on 30 April 2025. This is the decision on that appeal. It will be published as *Police Ombudsman for Northern Ireland v Information Commissioner and Rainey (section 30 FOIA)* [2025] UKUT 199 (AAC).

B. What this case is not about

5. This case is about section 30 and only about section 30. The First-tier Tribunal found that section 30 did not apply and I have decided that the tribunal did not make an error of law in that conclusion. In those circumstances, it has not been necessary to apply the balance of public interests.

6. Mr McKay set out the Ombudsman's concerns at the disclosure of the remaining information. It is possible that some of those concerns would have been significant if the balance of public interests had to be applied. In the event, though, the balance did not have to be applied.

7. It is also possible that some of the concerns might be significant under other exemptions. In particular, Ms Fitzpatrick suggested section 31. Mr McKay argued that that exemption was concerned with protecting methodology. I accept that section 31 does protect methodology, but it is not so limited. Section 31(1)(g) read with section 31(2)(a) and (b) would cover matters that fall outside the scope of section 30. In the event, though, the Ombudsman did not rely on section 31.

8. My point is to emphasise that this decision does not diminish or reject the importance of the Ombudsman's concerns. My decision is limited to whether or not the conditions in section 30 were satisfied.

C. Legislation

FOIA

9. These are the relevant provisions:

> **1 General right of access to information held by public authorities.**
>
> (1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> **2 Effect of the exemptions in Part II.**
>
> …
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> …
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> **30 Investigations and proceedings conducted by public authorities.**
>
> (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—
>
> (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
>
> (i) whether a person should be charged with an offence, or
>
> (ii) whether a person charged with an offence is guilty of it,
>
> …
>
> (2) Information held by a public authority is exempt information if—
>
> (a) it was obtained or recorded by the authority for the purposes of its functions relating to—
>
> (i) investigations falling within subsection (1)(a) or (b),
>
> …
>
> and
>
> (b) it relates to the obtaining of information from confidential sources.
>
> **31 Law Enforcement**
>
> (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime,

…

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

…

40 Personal information

…

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which does not fall within subsection (1), and

(b) the first, second or third condition below is satisfied.

…

Criminal Procedure and Investigations Act 1996

10. These are the relevant provisions:

1 Application of this Part

…

(4) For the purposes of this section a criminal investigation is an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained—

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it.

Police (Northern Ireland) Act 1998

11. These are the relevant provisions:

56 Formal investigation by the Ombudsman.

(1) Where a complaint or matter is to be formally investigated by the Ombudsman under section 54(2) or (3)(a) or 55(3), (5) or (6), he shall appoint an officer of the Ombudsman to conduct the investigation.

…

(6) At the end of an investigation under this section the person appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman.

57 Formal investigation by a police officer.

(1) Where a complaint is referred to the Chief Constable under section 54(3)(b), he shall appoint a police officer to investigate it formally on behalf of the Ombudsman.

…

(8) At the end of an investigation under this section the police officer appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman.

58 Steps to be taken after investigation – criminal proceedings.

(1) The Ombudsman shall consider any report made under section 56(6) or 57(8) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.

(2) If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director together with such recommendations as appear to the Ombudsman to be appropriate.

(3) Where a report is sent to the Director under subsection (2), the Ombudsman shall, at the request of the Director, ascertain and furnish to the Director all such further information in relation to the complaint or matter dealt with in the report as appears to the Director to be necessary for the discharge of his functions.

58A Steps to be taken after investigation – mediation.

(1) If the Ombudsman—

(a) determines that a report made under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force, and

(b) considers that the complaint is not a serious one,

he may determine that the complaint is suitable for resolution through mediation.

…

59 Steps to be taken after investigation – disciplinary proceedings.

(1) Subsection (1B) applies if—

(a) the Director decides not to initiate criminal proceedings in relation to the subject matter of a report under section 56(6) or 57(8) sent to him under section 58(2); or

(b) criminal proceedings initiated by the Director in relation to the subject matter of such a report have been concluded.

…

62 Statements by Ombudsman about exercise of his functions.

The Ombudsman may, in relation to any exercise of his functions under this Part, publish a statement as to his actions, his decisions and determinations and the reasons for his decisions and determinations.

D. The First-tier Tribunal's reasoning

12. After introductory matters, the tribunal identified the issues and summarised the parties' submissions. It then set out its **Discussion and conclusions**:

> 22. The Ombudsman relies on section 30(1)(a) and section 30(2).
>
> 23. It is important for the purposes of both those subsections to identify the relevant investigation. The relevant investigation must be one which 'the public authority has a duty to conduct with a view to it being ascertained ... whether a person should be charged with an offence'
>
> 24. The use of the definitive article ('the public authority' rather than 'a public authority') is important because it means that the relevant investigation must be one that the public authority holding the information has a duty to conduct, rather than any other public authority.
>
> 25. Section 30(1)(a) and (2) can only be relied on by public authorities that have a duty to conduct an investigation with a view to it being ascertained and it will only be engaged if the information has been held, at any time, for the purposes of an investigation conducted by that public authority.
>
> 26. The body that has to ascertain whether a person should be charged with an offence can be a different body from the one conducting the investigation (*Williams v ICO* [2023] UKUT 142).
>
> 27. We are satisfied that the Ombudsman has the duty to conduct investigations with a view to it being ascertained whether a person should be charged with an offence. The functions of the Ombudsman are set out in detail in the 26 October decision. Section 58 of the 1998 Act provides for steps to be taken after investigation by the Ombudsman, The Ombudsman must consider the investigation report 'and determine whether the report indicates that a criminal offence may have been committed by member of the police force' (see section 58(1)). If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, the Ombudsman shall send a copy of the report to the Director of Public Prosecutions ('DPP') together with such recommendations as appear to her to be appropriate (see section 58(2)).
>
> 28. We accept that the investigation conducted by the Ombudsman into the Loughinisland Massacre was an investigation which the Ombudsman had a duty to conduct with a view to it being ascertained whether a person should be charged with an offence. The fact that the Ombudsman did not, ultimately, conclude that there was insufficient evidence to support submissions of a file for direction to the PPS in relation to a specific, identifiable officer, does not alter that.
>
> 29. That investigation concluded in 2015. Paragraph 29 of *Re: Hawthorne's Application* [2020] NICA 22 explains what happened at the conclusion of that investigation:
>
> > [29] The investigation was concluded by September 2015 and the Ombudsman submitted an investigation report to the PPS [Public Prosecution Service] indicating that it was not believed that the evidence would support submission of a file for direction to the PPS in relation to a specific, identifiable officer but that the enquiries revealed what would be

> better described as significant concerns in respect of disciplinary and/or corporate matters for the RUC. It was intended that these would be detailed in a subsequent public statement. The Ombudsman's Director of Investigations (Historic) met with the PPS on 14 April 2016 and the PPS confirmed that they had not identified sufficient evidence to charge or report any police officer for any offence in connection with the investigation.
>
> …
>
> [31] The Ombudsman issued [a public statement under section 62 of the 1998 Act] on 9 June 2016. It consists of an executive summary followed by nine chapters and an appendix which includes a summary of findings in relation to the core complaints. In respect of those core complaints in some cases the Ombudsman sets out a narrative explaining why the complaint is made out and in others a narrative explaining why the complaint is not made out.

30. As a result of a legal challenge to that public statement, an amended public statement was issued on 9 March 2018 to make clear that certain findings did not apply to a particular individual.

31. Mr. MacKay referred to and relied on a number of other actual or potential criminal investigations including 'extant' criminal investigations arising out of the same incident. Mr. MacKay submitted that this correspondence will form part of the material which would be disclosable in future criminal proceedings.

32. He submitted that under the Code of Practice issued under section 23 of the Criminal Procedure and Investigations Act 1996 the investigator (any police officer involved in the conduct of a criminal investigation) is required to pursue all reasonable lines of inquiry and to seize and record any material of potential relevance to the investigation. He submitted that these are decisions for the investigatory and any material seized and later disclosed is subject to a duty of confidentiality. He submitted that these are issues for the criminal courts as the sole forum for determining guilt.

33. Any investigations by the police are conducted by bodies other than the Ombudsman, and therefore they cannot be the relevant investigation that triggers the application of section 30. Section 30 only applies where information has been held at any time for the purposes of an investigation carried out by the body holding the information.

34. The next question for the tribunal, having identified the relevant investigation is to decide whether the requested information has been held by the public authority, at any time, for the purposes of that investigation.

35. The relevant investigation concluded in 2015. The requested information consists of correspondence in 2016 and 2017. It is correspondence between the Police Ombudsman's Office's former Director of Information and the filmmakers relating to the documentary 'No Stone Unturned' released in 2017. The specific information with which we are concerned today consists of information provided purely to facilitate administrative arrangement for organising meetings.

36. In our view there is no basis upon which we could conclude that that correspondence is held or has been held at any time for the purposes of that investigation.

37. FOIA as a whole and the exemption in section 30 apply to information rather than documents, and we have considered whether, even though the correspondence itself was created after the conclusion of the investigation, there is any information contained in the correspondence which has been held at any time for the purposes of the investigation. The correspondence with which we are concerned today contains information purely to facilitate administrative arrangements for organising meetings. There is no basis upon which we could conclude that this information has been held at any time for the purposes of the investigation.

38. Mr. Mackay made a broader argument along the following lines. The criminal investigations being carried out or that will be carried out by the police exist as a result of the investigation by the Ombudsman. He referred to *Re McEvoy's Application* [2022] NIKB 10, an application for judicial review, which concluded that the Ombudsman's public statement and the information published in the 'No Stone Unturned' documentary were sufficient to trigger a revival of the state's article 2 and 3 obligations, that there was a genuine connection between the article 2 and 3 obligations and the attack at Kilcoo in 1992 and that the state had failed to carry out an article 2 or 3 compliant investigation into the attack within a reasonable time.

39. He submitted that the link between the Ombudsman's investigation and subsequent police investigations meant that the information was held for the relevant purposes and that it is likely that the entirety of the information held by the Ombudsman will be passed over to the police to investigate.

40. We do not accept that the fact that future or current police investigation was triggered by the Ombudsman's Public Statement assists us in determining whether the particular information in question has, at any time, been held for the purposes of the Ombudsman's investigation. Our conclusion, as set out above, is that it has not been held at any time for those purposes. For that reason, section 30(1)(a) is not engaged.

41. The Ombudsman relied in the alternative on section 30(2)(a)(i) although Mr. McKay did not address us on section 30(2). We conclude that it does not apply because the remaining information does not relate to the obtaining of information from confidential sources, which is a necessary element of the exemption (see section 30(2)(b)).

42 For those reasons we conclude that section 30 is not engaged.

43. The application of section 40(2) is not controversial and so we do not set out our reasoning, but we accept that the Ombudsman is entitled to withhold the contact details of any individuals, the names of any individuals that are not employed by the Ombudsman, and the names of any junior employees of the Ombudsman.

E. The grounds of appeal and the grant of permission

13. These were the grounds on which Mr McKay, on behalf of the Ombudsman, applied for permission to appeal to the Upper Tribunal. I have re-ordered the paragraphs for convenience.

PROPOSED GROUNDS OF APPEAL

(i) The FTT erred in law in relying on *Williams* to underpin its decision. The decision in *Williams* was wholly distinguishable from the present facts. The issue in that case was whether material obtained following a stop under terrorism legislation (which did not require reasonable suspicion on the part of the constable exercising the power) was exempt under section 30 on the speculative basis it might 'form a building block' in some future investigation. That was not an issue in the present case: there had been an investigation, which had precipitated and formed the foundation of a further investigation. The material derived from the Appellant's investigation was subject to the provisions of the Criminal Procedure and Investigations Act 1996 (CPIA).

> An application for permission to appeal was refused on 16 August 2024. The FTT indicated in relation to the first ground of appeal that although it included reference to the decision in *Williams* this was not in fact the reason for its decision. Yet, the FTT went on to say that it was however bound by the decision. This is anomalous. In any event the Appellant's position is that the facts of *Williams* were clearly different, and any ruling did not have the reach or binding effect contended for by the FTT. The Appellant submits that it is a matter of general public importance to have the definition of what constitutes a criminal investigation clarified by the Upper Tribunal.

(ii) The FTT further erred in determining that the Appellant's investigation ended for the purposes of applying the exemption, in 2015, on the publication of the Public Statement. The question was whether the exempt information was held for the purposes of the investigation, regardless of when the investigation concluded. If the approach of the FTT is correct, any material that arises after an investigation is concluded would fall outside the exemption. This would be to impose a temporal limit on an investigation (and the statutory and common law duties arising therefrom) and would not only interpret the provision too narrowly but is inconsistent with authority: see *Nunn v Chief Constable of Suffolk* [2014] UKSC 37 at [18]-[20].

> As to the second ground, the FTT did not deal with the effect of *Nunn* and appears to constrain its finding to one of fact. The Appellant's position is that the FTT made a finding of mixed fact and law. It was bound by *Nunn* or at the very least needed to explain why it was not in its reasons for refusing permission. It is an issue of general public importance that the Upper Tribunal clarify whether the temporal limit identified in *Nunn* applies to section 30 of the 2000 Act.

(iii) The FTT erred in not finding that where material held for the purposes of an investigation would need to be revealed to a prosecutor under the CPIA (which was beyond doubt in the present case) that there was a clear inter-relationship between the operation of the exemption and disclosure in criminal proceedings. The former should not be permitted to undermine the latter as this would be a

usurpation of the role and jurisdiction of the criminal courts: *Breeze v Information Commissioner and NHS Business Services Authority*, FTT, 22 January 2014, at [39] and the ICO's own guidance on Investigations and Proceedings, at paras [53]-[62].

> The FTT's approach to the third ground misses the point raised on the appeal. It is precisely because the FTT limited the scope of relevant investigation and therefore failed to consider the inter-relationship between the two jurisdictions in play and the deference that needed to be given to future criminal proceedings once the duties and obligations under the CPIA were engaged. It is an issue of general public importance for the Upper Tribunal to delineate the circumstances when it is appropriate for disclosure to be ordered under the 2000 Act where such disclosure could prejudice or even jeopardise a related future criminal prosecution.

14. I gave permission to appeal on 2 October 2024, saying: 'each of the grounds of appeal contains a point of law arising from the decision (section 11(1) of the Tribunals, Courts and Enforcement Act 2007).'

15. When I read Mr McKay's skeleton argument for the oral hearing, I did not understand how some of his arguments related to the grounds of appeal. I put this to him and he explained to me how the arguments in the skeleton related to the grounds of appeal. I am grateful to him for that. I note that he did not apply to amend the grounds, as he might have done: see Section III of *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC).

F. The First-tier Tribunal's refusal of permission to appeal

16. Mr McKay's grounds refer to the reasons the First-tier Tribunal gave for refusing permission on each of his three grounds of appeal.

17. The judge was entitled to give reasons for refusing permission to appeal. An appeal to the Upper Tribunal lies only against the tribunal's decision on 29 July 2024. The reasons given for refusing permission are not part of that decision. The Upper Tribunal does not review those reasons: *CIS/4772/2000* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2008] EWCA Civ 536, [2009] 2 All ER 279 at [67].

18. In deciding this case, I have confined myself to the tribunal's written reasons on the appeal.

G. The first ground of appeal

19. The tribunal cited *Williams* once, in paragraph 26. It did so as authority for the proposition that: 'The body that has to ascertain whether a person should be charged with an offence can be a different body from the one conducting the investigation'. That is correct. Indeed, it is self-evident from the language of section 30. Mr McKay 'accepted' that proposition in his skeleton argument at paragraph 7.

20. I accept that the facts of *Williams* were different from the facts of this case. That does not mean that they were materially different. It does not mean that the tribunal misdirected itself on the legal proposition that it set out in paragraph 26.

21. I cannot see that *Williams* underpinned the tribunal's decision. It was just one of a number of points that it made in its structured application of section 30(1)(a). The

tribunal dealt with section 30(1) in paragraphs 23 to 40. Those paragraphs conveniently divide into two sections:

- Paragraphs 23 to 33 deal with the identity of the investigation.
- Paragraphs 34 to 40 deal with the issue whether the remaining information had been held at any time for the purposes of that investigation.

22. I will start with the identity of the investigation. The tribunal began in [23] by quoting the relevant language from section 30(1)(a). In [24], it said that the investigation had to be one that the public authority had a duty to conduct. And in [25], it said that the information had to be held at some time for the purposes of that investigation. It is then, in [26], that the tribunal referred to *Williams* for the proposition that I have quoted and Mr McKay has accepted. The tribunal went on, in [27], to set out the steps required under section 58 of the 1998 Act. And in [28] to accept that the Ombudsman had a duty to conduct the investigation into the Loughinisland Massacre, even though it was not possible to submit a file to the Public Prosecution Service in relation to any identified individual. The tribunal mentioned *Hawthorne's Application* and the amended statement by the Ombudsman in [29] and [30].

23. Paragraphs [31] to [33] deal with Mr McKay's reliance on other actual or potential criminal investigations. He argued that the remaining information would be disclosable in future criminal investigations. The tribunal concluded at [33] that any investigations would not be conducted by the Ombudsman, which would be outside the scope of section 30.

24. I now come to the purpose for which the information was held. The tribunal identified that as an issue at [34]. In [35], the tribunal said that the investigation into the Massacre concluded in 2015. The remaining information was contained in correspondence in 2016 and 2017 and was concerned with administrative arrangements for organising meetings. And in [36], the tribunal concluded that the information had not been held for the purposes of the investigation.

25. The tribunal considered at [37] the possibility that the correspondence might contain information held for the purposes of the investigation, despite having been written after it had concluded. It rejected this, relying on the nature and content of the information.

26. Mr McKay had argued that any police investigation would be carried out as a result of Ombudsman's investigation, Given this link, the information was held for the purposes of that investigation. It was likely that the Ombudsman would pass all the information held to the police. The tribunal set out these arguments at [38] and [39], and rejected it at [40].

27. That is, of course, just a summary. I have already set out the tribunal's reasons in full. The point of my summary is to show the limit role that *Williams* played in the tribunal's reasoning. It cited the case once and set out the proposition of law for which it was an authority. It did not refer to the particular facts of the case and did not rely on any comparison between those facts and the facts of this case.

H. The second ground of appeal

28. Mr McKay argues that the tribunal was wrong to find that the investigation 'concluded in 2015'. What matters is whether information is held for the purposes of the investigation, regardless of when it was concluded. The tribunal did not make an

error of law on this count. It considered in [37] the possibility that the correspondence might contain information that was held for the purposes of the investigation, even though it was created after 2015. Having considered this, it rejected it for the same reason it gave in [35] and in the same words: it was 'purely to facilitate administrative arrangements for organising meetings.' So, the timing of the correspondence was not material to the tribunal's reasoning. What was material was the nature of the information in the correspondence, not the timing.

29. The tribunal did not misconstrue section 30. It applied its plain wording. It did not produce a result that was inconsistent with *R (Nunn) v Chief Constable of Suffolk Police* [1915] AC 225 at [18]-[20]:

> 18. The Criminal Procedure and Investigations Act 1996 put the common law prosecution duty of disclosure into statutory form. It recognised a two-stage process of disclosure, initially under section 3 and continuing under what is now section 7A. It also inaugurated a duty of defence disclosure, which, although one of imperfect obligation, is connected to the prosecution duty since the defence statement required by section 5 and the advance notices required by sections 6C and 6D help to define the issues and thus to identify material which may be relevant to the duty of continuing disclosure. The Act somewhat modified the test for disclosure from that variously articulated in *R v Ward* and in *R v Keane* [1994] 1 WLR 746 at 752, whilst maintaining its purpose. Both the initial duty under section 3 and the continuing duty under section 7A are couched in the same terms. They apply to any material which the prosecution has or has inspected and which:
>
> > '….might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.'
>
> 19. The Act dealt specifically with the timing of the duties which it created. In this and generally it gave effect to the recommendation of the Royal Commission on Criminal Justice (the Runciman Commission) (1993) (Cm 2263) which had expressed concern that the common law risked requiring detailed disclosure of 'matters whose potential relevance is speculative in the extreme' and about the impracticability of the sheer bulk of disclosure which might be within the principle (chapter 6, p 95, at para 49). The Act met those concerns firstly by providing the test for disclosure set out above. By section 21, where the statutory duties created by the Act apply, they displace the former common law duties which cease to operate. The Act then recognised the two-stage disclosure procedure described above and it defined the period during which its statutory duties of disclosure are imposed. For trials on indictment, the duty begins with the arrival of the case (by whatever route) in the Crown Court: section 1(2). It ends with the end of the trial, whether by conviction, acquittal or the Crown discontinuing proceedings: section 7A(1)(b). It follows that the duty of disclosure created by the Act does not apply to the present claimant.
>
> 20. The end of the trial is, however, not always the end of the criminal process. Any convicted defendant has the right to appeal to the Court of Appeal (Criminal Division) if he can show an arguable case that his conviction is not safe. If that fails, a defendant cannot mount a second appeal, because the court is functus officio. But, again in response to the recommendations of the Runciman Commission, the law of England and Wales (and also of Northern Ireland and

> Scotland) has put in place a separate body, the Criminal Cases Review Commission ('CCRC'), which has the power to review any conviction and which is charged, if it thinks that there is a real possibility that the Court of Appeal might quash the conviction, with the power to refer the case back to that court for, exceptionally, the hearing of a second appeal – and on any grounds, whether the same as before or different. Such a referral by-passes the requirement for leave to appeal. An arguable case is assumed. The Court thereupon has the duty to investigate the safety of the conviction and must quash it if it is unsafe. The CCRC's extensive investigative powers include the power to require the production to it of any material in the hands of the police or any other public body, to appoint an investigator with all the powers of a police officer, and to assemble fresh evidence not before the court of trial.

Those paragraphs are, of course, authoritative and binding on both the First-tier Tribunal and Upper Tribunal. They do not justify giving an extended meaning to 'investigation' in section 30.

30. He then argued that this would place a temporal limit on the investigation. First, as I say below, the 1998 Act assumes that there will be an end to the investigation. Second, at the time of the request, the investigation had come to an end. Third, section 30 FOIA refers to the past. If there is a concern about what may happen later, section 31 provides an exemption that may be relied, as Ms Fitzpatrick pointed out.

I. The third ground of appeal

31. I will *assume* for the sake of argument that the remaining information would need to be disclosed under the 1996 Act. I do not accept that this means there is any relationship between the exemption and criminal disclosure. There is nothing in section 30 to establish this relationship. Quite the reverse – the section is limited to information held by the Ombudsman for the purpose of functions relating to his investigations. The section says nothing about investigations by others. There is no link to criminal disclosure under any other legislation or, for that matter, at common law. and since there is no link, no issue arises of priority or respect between civil and criminal jurisdictions.

32. I accept that it is an issue of public importance to delineate when disclosure is required under FOIA if it would prejudice or jeopardise future criminal prosecutions. But that was not the issue before the First-tier Tribunal. The issue was limited to section 30, not to FOIA as a whole. So, the important issue is when disclosure is required under that section.

J. Extending the scope of 'investigation'

33. There is a theme running through the grounds of appeal. It was made more clearly in Mr McKay's skeleton argument. In short, the theme is to extend the meaning of 'investigation'. I do not know whether that was his intention. It was certainly the effect of his argument. The argument weaves together a range of statutory powers and duties, common law powers and duties, the potential for further investigations arising from or building on the remaining information, and the proper relationship between criminal and civil jurisdictions.

34. Section C of this decision contains a selection of sections from the 1998 Act. Some are set out in full, others in part. Together, they show a clear structure to the

procedure before the Ombudsman. Mr McKay argued that 'There is nothing in the 1996 Act or [FOIA] that defines the end of an investigation.' That is correct. There is no definition in the 1998 Act either, but it operates on the basis that there is a point when the investigation ends.

35. Section 56 provides for a formal investigation by the Ombudsman and section 57 provides for a formal investigation by a police officer. Both sections end with the same provision:

> At the end of an investigation under this section the person/police officer appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman.

Those provisions envisage that there comes a point when an investigation has ended. The conclusion of the investigation triggers the duty to provide a report to the Ombudsman. Sections 58, 58A and 59 deal with what happens next: criminal proceedings, mediation and disciplinary proceedings. The heading for each section begins: **Steps to be taken after investigation**. Each begins by referring to the report and operates on the basis that there has been a report, which was triggered when the investigation ended. I have quoted part of the heading for each of those sections. That wording accurately conveys the contents of the sections within the overall structure of the Act.

36. The issue for the First-tier Tribunal was whether section 30 applied. The request was made to the Ombudsman. It could only relate to information held by the Ombudsman. It had to relate to an investigation that the Ombudsman had a duty to conduct. That was the investigation into the Loughinisland Massacre.

37. There are two flaws Mr McKay's extended argument in his skeleton argument.

38. The first flaw is that section 30 only applies to an investigation that the Ombudsman has the power to conduct, which means one that is authorised by the 1998 Act. It does not apply to any investigation that has been, or may be, conducted by any other body under any other legislation.

39. The second flaw is that the remaining information does not relate to the investigation that the Ombudsman conducted. That investigation had by the terms of the 1998 Act ended before Mr Rainey made his request. The Ombudsman could have re-opened that investigation, but did not. The Ombudsman had power to conduct an entirely new investigation, but did not.

40. Mr McKay argued that section 30 'is not concerned about the nature of the information – only whether it is or was held for the investigative purpose'. I accept that the legal test is whether it is or was held for the purposes of an investigation. I do not accept that the nature of the information is irrelevant. The nature of the information may be relevant to the purpose for which it is held. That is how the tribunal used it.

K. Conclusion

41. For those reasons, I dismiss the appeal.

Authorised for issue
on 21 August 2025

Edward Jacobs
Upper Tribunal Judge