IN RELATION TO CRN 6029679/21, WAS THE EVIDENCE AND CASE FOR THE DEFENCE WHICH WAS PRESENTED TO THE ADMINISTRATIVE COURT IN 2023 BY POLICE SOLICITOR, ANDREW HOLT, ON BEHALF OF THE METROPOLITAN POLICE, DEFICIENT?

A forensic examination of the evidential foundation placed before the Administrative Court in Sexton & Hyland v Commissioner of Police of the Metropolis

1. The question examined

This paper asks a precise question which is potentially of considerable constitutional importance:

Was the evidence and factual case presented on behalf of the Metropolitan Police materially deficient because the Administrative Court was not provided with a full and accurate account of the circumstances in which CRN 6029679/21 had been assessed, reviewed and ultimately not recorded as crime?

The issue is not merely whether a particular document was omitted.

The duty of candour in judicial review is fundamentally information-based.

The relevant question is whether the Court was given the factual information necessary fairly to understand the decision under challenge.

The official Treasury Solicitor's guidance describes the governing principle in striking terms: the objective of a public authority is not to win litigation at all costs, but to assist the Court in reaching the correct result. Judicial review is to be conducted with *“all the cards face upwards on the table”*, and the duty applies from the outset to all information relevant to the issues before the Court.

That provides the proper starting point.

2. An important point relating to Exhibit PH10B

PH10B was an exhibit within the claimants' Administrative Court material. Its cover identifies it expressly as *“EXHIBIT PH10B”* in the proceedings brought by Mark Sexton and Philip Hyland against the Commissioner of the Metropolitan Police and the Chief Constable of Suffolk Police.

The underlying document to which the Exhibit relates is Detective Superintendent Tor Garnett's letter of 18 May 2022.

That means it would be wrong now to suggest that the Administrative Court was simply deprived of Garnett's contemporaneous description of what the MPS had done.

It was, unquestionably, before the Court.

That point should be conceded expressly.

But what PH10B actually says creates a more sophisticated question concerning the factual case advanced for the defence.

Garnett stated that the MPS had undertaken a:

"proportionate review of the material that was provided in support of the allegations"

and that, upon review, the threshold for recording the allegations as crime had not been reached.

More importantly still, she addressed the description of what had occurred as an *"investigation"*.

She said that if complainants had been informed that the allegation was subject to an investigation:

"this would not have been an inaccurate representation; the allegations were, in fact, being reviewed/investigated to determine whether a crime should be recorded."

That is an unusually important contemporaneous admission.

The significance is no longer that this fact was necessarily hidden from the Court.

It is that the Court possessed evidence capable of describing the MPS activity as *"reviewed/investigated"*, while the defence case must now be examined to determine whether that evidence was accurately incorporated into the factual characterisation advanced by the Metropolitan Police.

That is a more precise enquiry.

3. What exactly was being defended?

The distinction between two propositions is fundamental.

The first is:

There was no criminal investigation because no crime had been recorded.

The second is:

There was nevertheless an investigative or evidential process undertaken for the purpose of determining whether the allegations crossed the threshold for crime recording.

PH10B expressly supports the latter proposition.

Indeed, Garnett herself used the compound expression:

"reviewed/investigated".

Consequently, any defence which reduced the factual history simply to *"there was no investigation"* risked obscuring a materially more complicated position.

The correct factual question was not merely:

Was there a formally recorded criminal investigation?

It was also:

What investigative activity actually occurred before the decision not to record crime was reached; who participated in it; what material was considered; and what external or national policing considerations, if any, informed its outcome?

That distinction becomes substantially more important in light of evidence disclosed after the proceedings.

4. The significance of the official duty-of-candour guidance

The Treasury Solicitor's guidance is particularly instructive.

Although directed principally to government departments and litigation case-handlers, it sets out the established public-law principles concerning candour upon which the present analysis can properly draw.

It states that:

“The facts and relevant issues must be set out truthfully based on a rigorous analysis of the evidence.”

It immediately adds:

“Inconvenient facts or relevant considerations must not be ignored.”

More importantly, it explains what candour requires from a public authority defending judicial review:

“to set out fully and fairly all matters that are relevant to the decision that is under challenge, or are otherwise relevant to any issue arising in the proceedings.”

The obligation extends expressly to material which assists the claimant's case or gives rise to additional, otherwise unknown grounds of challenge.

That is directly relevant here.

The test was not whether material assisted the Metropolitan Police defence.

The question was whether it was relevant to understanding the decision under challenge.

5. The obligation extended beyond formal disclosure

It would be too simplistic to ask merely whether ordinary civil disclosure under CPR Part 31 occurred.

The guidance expressly recognises that standard disclosure ordinarily does not apply in judicial review precisely because the respondent public authority owes the Court the more particular duty of candour and the duty is not confined to documents.

It is information-based.

Therefore, even if a particular Operation Talla document was not technically subject to standard disclosure, the material question remains:

Did it contain information relevant to the true provenance, context or making of the decision challenged before the Administrative Court?

If it did, the candour question remains engaged.

6. The duty applied to Andrew Holt's own pre-action involvement

This is an especially important feature of the official guidance.

It states that the duty applies as soon as the authority knows that somebody is likely to challenge its decision and extends through:

“letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions.”

Andrew Holt's involvement therefore cannot properly be examined only at the moment the proceedings reached the Court.

His pre-action response formed part of the relevant public-law process.

That matters because Holt made positive factual assertions concerning the manner in which the Metropolitan Police had dealt with CRN 6029679/21.

The question becomes whether those assertions rested upon a sufficiently complete enquiry into the underlying records.

7. The solicitor's position is especially important

The Treasury Solicitor's guidance contains an entire section entitled:

“Solicitor's duty”.

It records two important obligations identified in Al-Sweady:

“The duty to make sure that the client is fully aware of the duty to ensure that proper disclosure is given”

and:

“The duty to go through the documents disclosed by the client to make sure, as far as possible, that no documents have been omitted from the client's list”.

The guidance goes further, however.

In judicial review, even where disclosure by list is unnecessary, it says that the solicitor conducting the case should undertake an equivalent exercise sufficient to satisfy himself that the evidence served complies with the duty of candour.

The solicitor cannot simply act as a passive conduit.

The guidance describes an:

“overall responsibility of careful investigation and supervision”

and states that where there are reasonable grounds for suspecting the existence of further documents, the solicitor must investigate further, albeit only by taking reasonable steps.

That places the present enquiry upon considerably firmer ground.

The question is not merely:

What did Andrew Holt personally know?

It is:

What reasonable enquiries were undertaken by the solicitor conducting the defence to establish the complete factual position upon which the Metropolitan Police case was presented?

8. PH10B itself should have generated further questions

This is perhaps the most important current point.

PH10B was not a document whose significance depended upon hindsight.

It was already before the Court and it contained language which should naturally generate further forensic enquiry.

Garnett said that the allegations had been:

“reviewed/investigated to determine whether a crime should be recorded.”

Once that was known, several obvious questions arose.

- Who conducted that review/investigation?
- When did it commence?
- Who supervised it?
- What material was considered?
- Was CID involved?
- Was the review entirely internal to the Metropolitan Police?
- Was there a peer review?
- Were other police bodies consulted?
- Were the NPCC or Operation Talla involved?
- Was any national guidance relevant to the decision whether these allegations should be recorded?
- And what records documented those processes?

Those questions become particularly important because subsequent evidence appears to provide answers to some of them.

9. The 12 January 2022 Operation Talla material

The subsequently disclosed Chiefs' meeting material appears to place CRN 6029679/21 expressly within the national Operation Talla structure.

The recorded action was:

“Op Talla team to share the results of the peer review assessment relating to the Crime Report submitted to the Met Police in relation to Anti Vaccinations with all chiefs.”

That is not peripheral context.

It appears to identify:

- the Metropolitan Police crime report;
- a peer-review assessment concerning it;
- the Operation Talla team; and
- intended dissemination of the result to all chiefs.

The date is 12 January 2022.

The chronology therefore places this national activity squarely within the period during which the allegations were, according to Garnett, being *“reviewed/investigated to determine whether a crime should be recorded.”*

That produces a question which the 2023 defence apparently did not answer:

What relationship existed between the *“reviewed/investigated”* process acknowledged by Tor Garnett and the *“peer review assessment”* being handled through Operation Talla?

That question is now central.

10. The search obligation

The official guidance becomes particularly important at this point.

It says:

"The sufficiency of the search (and particularly the original search) is all-important."

It requires the case-handler to be proactive and says that searches should be thorough and transparent.

Even more significantly, it specifically addresses positive assertions made in pre-action correspondence and Summary Grounds:

"It is important to make sufficiently full searches to ensure that all statements made in pre-action correspondence are full and accurate and can be sustained and that statements made in Summary Grounds are full and accurate."

That passage bears directly upon the present issue.

If positive assertions were made concerning the nature of the MPS assessment, the independence of that assessment, the absence of an investigation, or the provenance of the decision not to record crime, what searches were undertaken to establish that those assertions were complete and sustainable?

That is not speculation. It is precisely the sort of question contemplated by the published guidance.

11. The question of Operation Talla cannot now be treated as collateral

The subsequent Operation Talla evidence materially changes the analytical landscape.

It appears to demonstrate that the CRN had entered a national policing process.

That is important because the Administrative Court was asked to consider the lawfulness of what was presented as a policing decision concerning whether particular allegations should be recorded and investigated.

If national policy, national guidance, peer review or Operation Talla materially influenced that decision, those matters were potentially relevant to understanding:

- who actually made the decision;
- upon what basis it was made;
- whether it represented an individual evidential assessment or implementation of a wider policy;

and

- whether the investigative independence upon which the defence case depended accurately described the decision-making process.

12. "Independent investigator"

Poole J approached the case against authorities emphasising the exceptionally high threshold for judicial interference with decisions of an *"independent investigator and prosecutor."*

That proposition is orthodox, but its application necessarily depends upon the factual premise that the decision being examined was indeed an exercise of independent investigative judgment.

The subsequently obtained material therefore creates a potentially significant counterfactual.

If the Court had been told:

- that the Metropolitan Police allegations were being *"reviewed/investigated";*
- that the crime report was simultaneously the subject of a peer-review assessment within Operation Talla;
- that the Operation Talla team was tasked with disseminating the result to all chiefs;

- and, if ultimately established, that wider national guidance concerning non-recording existed and was relevant to this category of reports,

would that have affected the Court's understanding of the provenance and independence of the decision?

13. The significance of 18 May 2022 becomes greater, not smaller

There is another striking feature.

Poole J twice identified 18 May 2022 in dealing with limitation and the definitive decision not to record the allegations as crimes.

That was the date of Garnett's PH10B letter.

Yet PH10B did considerably more than announce a decision.

It explained that allegations had been:

“reviewed/investigated to determine whether a crime should be recorded.”

Thus, the very document upon which the definitive closure date appears to have rested also contained evidence of investigative activity preceding that closure.

The difficulty is therefore not simply whether PH10B was available, because it plainly was.

The deeper question is whether the defence's characterisation of the process enabled the Court properly to appreciate what PH10B actually revealed, particularly when the wider national context apparently surrounding that review was not before the Court.

14. The defence cannot necessarily answer the issue by saying that the claimants possessed PH10B

This distinction is important in public law.

The duty of candour belongs to the respondent public authority.

The official guidance expressly says that the obligation extends to material which assists the claimant and to information capable of generating additional grounds of challenge.

Consequently, the question is not exhausted by asking:

“Did Sexton and Hyland possess PH10B?”

They did.

The proper question is:

Did the Metropolitan Police provide the Court with a full and fair explanation of the factual circumstances surrounding the decision under challenge?

Those are different enquiries.

15. The records which should now exist

The official guidance makes another point of considerable evidential importance.

It says that records should be maintained identifying searches undertaken, decisions concerning the scope of searches, decisions about disclosability and what material was reviewed.

It further recommends retaining a disclosure statement recording:

“all searches made”

and:

“all decisions (by lawyers and clients) about the extent of searches”.

Accordingly, there is an obvious evidential route by which the present question may be answered.

The relevant enquiry should seek the contemporaneous record of:

- Andrew Holt's instructions;
- the persons from whom instructions were obtained;

- the repositories searched;
- the search terms used;
- whether CRN 6029679/21 was searched across MPS correspondence;
- whether “Operation Talla”, “NPCC”, “peer review”, “anti-vaccination”, “Weatherill” or associated terminology was searched;
- what documents were supplied to Holt and counsel;
- what consideration was given to PH10B's “reviewed/investigated” language;
- and what records were maintained concerning the candour exercise.

If those records exist, they may substantially resolve the issue.

16. The question is therefore one of deficiency before it could potentially become one of misconduct

This distinction should remain central to the paper.

The presently available evidence does not establish that Andrew Holt knowingly withheld relevant material.

It would be premature to allege deliberate concealment.

But, deliberate concealment is not the threshold for asking whether the defence was deficient.

A defence can be materially deficient because relevant information was not discovered, because inadequate enquiries were undertaken, because instructions were incomplete, because the significance of documents was missed, or because the decision-making architecture was inaccurately characterised.

The official guidance itself recognises the seriousness of failures in this area. Potential consequences identified include adverse evidential inferences, adverse costs, reputational damage and, in sufficiently serious circumstances, allegations of deliberate concealment.

That is precisely why the evidential enquiry should precede any allegation concerning personal culpability.

17. The emerging evidential problem

The position can now be stated simply.

- First, the MPS contemporaneously accepted that the allegations were being *"reviewed/investigated to determine whether a crime should be recorded."*
- Second, subsequently disclosed contemporaneous records appear to show that the same Metropolitan Police crime report was being subjected to a *"peer review*

assessment" involving the Operation Talla team and that its result was to be shared with all chiefs.

- Third, further evidence obtained since the Judicial Review has exposed a wider national policing approach to Covid-related reporting, including the now-important reference to *"guidance to not record"* and its reported *"success."*
- Fourth, the Administrative Court's reasoning proceeded, at least in part, upon the very high threshold applicable to judicial interference with an independent investigator.

Those propositions make the completeness of the factual defence a matter requiring proper investigation.

18. The central question for Andrew Holt

The question which should now be put to Andrew Holt is therefore considerably more precise than an accusation that he *"withheld evidence"*.

It is this:

When preparing and presenting the Metropolitan Police defence to the 2023 Judicial Review concerning CRN 6029679/21, what enquiries did you undertake to establish the complete factual circumstances surrounding the review/investigation, peer-review assessment and ultimate decision not to record the allegations as crimes; what

Operation Talla and NPCC material was identified; and what factual basis permitted the case to be presented in the terms ultimately placed before the Administrative Court?

19. Conclusion

PH10B prevents any responsible suggestion that the Court was simply unaware that Tor Garnett had described the allegations as having been *"reviewed/investigated"*.

That evidence was before it.

That does not, however, dispose of the matter.

It actually exposes the more important question.

Was the Court provided with the factual architecture necessary to understand what that "reviewed/investigated" process actually consisted of?

And, in addition,

- Who conducted it?
- Who influenced it?
- What was the peer review?
- Why was Operation Talla involved?
- Why was the result to be disseminated to all chiefs?
- Was national guidance relevant?

- And was the ultimate non-recording decision genuinely an autonomous exercise of MPS investigative judgment, or was it materially informed by a wider national policing position?

The duty-of-candour guidance makes the standard against which that question should be examined unusually clear.

The public authority is not simply another civil litigant seeking victory. The process is one in which:

“all the cards face upwards on the table”.

The solicitor conducting the case has responsibilities extending beyond passive receipt of instructions.

The evidence must be founded upon sufficiently careful enquiry and positive assertions in pre-action correspondence and Summary Grounds must be supported by searches adequate to ensure that they are *“full and accurate”*.

The evidence presently assembled does not establish that Andrew Holt deliberately withheld material. It does, however, provide a substantial evidential basis for asking whether the Metropolitan Police defence for which he acted was materially deficient because the Administrative Court was not presented with the complete factual and institutional context within which CRN 6029679/21 was reviewed, investigated, peer-reviewed and ultimately not recorded as crime.

That question is now capable of empirical resolution.

The relevant records should show what was searched, what was found, what was known, what was provided to the lawyers, what was provided to the Court – and, what was not.

The issue is therefore no longer whether further evidence exists.

We now know that it certainly does and it originates from within policing itself.

The issue is why evidence capable of materially altering the Court's understanding of the provenance and context of the challenged decision does not appear to have formed part of the factual case upon which that decision was defended.

And that is a question to which the Metropolitan Police, and those responsible for presenting its case to the Administrative Court, should now provide a documented answer.

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