



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0051

**Decided without a hearing
On 30 June 2021**

Before

**JUDGE SOPHIE BUCKLEY
AIMÉE GASSTON
KATE GRIMLEY EVANS**

Between

EDWARD WILLIAMS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50867142 of 3 February 2020 which held that the Chief Constable of Devon and Cornwall Police ('the Police') was entitled to rely on s 31, 38 and 40 of the Freedom of Information Act (FOIA) to withhold the remaining information. The Commissioner required no steps.

Factual background to the appeal

2. In 2012 an individual died in police custody after being restrained with an emergency response belt (ERB). A number of Police staff members were charged with and acquitted of manslaughter by gross negligence. The Police with prosecuted by the Health and Safety executive for safety breaches. They pleaded guilty and were fined in excess of £230,000. It is possible that there will be further proceedings and an inquest arising out of the death. The request is for information relating to that event.

Request and Decision Notice

3. The Appellant made the request which is the subject of this appeal on 3 May 2019 to the Police in the following terms:

Background:

[link to newspaper report on the incident, redacted]

1. Disclose all images held of your victim on the day he was killed.
 2. Disclose the custody record.
 3. Disclose your guidance, rules etc. for use of ERB.
 4. Disclose all data relating to the training, education etc. that those who applied the ERB had undertaken at time of the victim's death.
 5. Disclose how much you have paid in legal fees for this killing.
4. The Police replied to the request on 5 June 2019, confirming that it held information falling within the terms of the request, that it considered that s 30 (investigations and proceedings), s 38 (health and safety) and s 40 (personal information) applied and that it would take a further 20 working days to make a decision as to where the public interest lay under s1(1)(b).
 5. The Police provided a substantive response on 5 July 2019. It withheld the information under s 30(1), 38(1) and 40(2).
 6. The Appellant requested a review on 5 July 2019 and the decision was upheld on review on 14 August 2019, with the exception of parts (3) and (5) of the request. In relation to parts (3) and (5) the review concluded that no exemption applied and provided certain information in response to those parts of the request.
 7. The Appellant complained to the Commissioner on 17 August 2019. During the course of the Commissioner's investigation the Police withdrew their reliance on s 30(1) and relied on s 31(a), (b) and (g) instead.
 8. In a decision notice dated 3 February 2020 the Commissioner concluded that the Police were entitled to rely on s 31, 38 and 40 of the Freedom of Information Act (FOIA) to withhold the remaining information. The Commissioner required no steps. Her investigation was limited to parts 1, 2 and 4 of the request.

9. In relation to s 30(1) she held that the arguments provided by the Police related to the relevant applicable interests, namely the prevention or detection of crime, the apprehension or prosecution of offenders and the ascertaining of whether any person is responsible for improper conduct. She was satisfied that the prejudice envisaged was real and of substance and that there was a causal relationship between the disclosure of the requested information and the prejudice which the exemption was designed to protect. She considered that the disclosure of evidence being considered in an ongoing misconduct investigation clearly had the potential to affect the investigation's outcome and would almost certainly negatively affect public perceptions of its integrity. She was satisfied that section 31(1)(g) by way of s 31(2)(b) was engaged.
10. The Commissioner also considered that 31(1)(a), (b) and (c) were engaged. She considered that with a coroner's inquest and possible proceedings against the Police outstanding, disclosure into the public domain of evidence that would form a key part of any such proceedings was likely to prejudice their integrity and fairness. Premature disclosure of key evidence risks undermining public confidence in the integrity and fairness police investigations which could jeopardise the Police's ability to conduct further investigations. If the credibility of guarantees of confidentiality where enquiries are ongoing is undermined, this may deter people from cooperating with enquiries or volunteering information which would impact on the Police's ability to conduct efficient and well evidenced investigations.
11. In relation to the public interest test, the Commissioner accepted that openness itself is in the public interest and that public confidence will be increased by openness and transparency with regard to actions taken by the police. She considered that in this case there was a clear public interest in the independent scrutiny of the events which led up to the death. The Commissioner noted that a significant amount of relevant information was already in the public domain. She held that this went some considerable way towards satisfying the public interest in scrutinising the Police's handling of these events.
12. Disclosure of the custody record, prior to proceedings being concluded could prejudice the outcome and would be counter to the public interest in justice and could undermine public confidence in their eventual findings. The Commissioner also considered that the likely adverse impact on the Police's investigations and efficient law enforcement was not in the public interest.
13. The Commissioner concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
14. In relation to s 38(1)(a) the Commissioner accepted that it was engaged. She concluded that an individual's mental wellbeing fell within the scope of the exemption and that she was satisfied that the harm the Police envisaged related to the applicable interest. She considered it self-evident that the consequences of

disclosure of unreleased footage of the deceased would cause significant distress and upset to the deceased's family members and friends.

15. In relation to the public interest under s 38 the Commissioner held that there was a clear public interest in the police being open and transparent with regard to information about individuals who have died in or shortly after being held in police custody. She notes that the incident remained a live matter and it is not the case that disclosure would lead to a fresh look at a matter which had otherwise been forgotten. Some images have already been released to the public which goes a considerable way to meeting the public interest in the matter.
16. The Commissioner concluded that the public interest in disclosure was heavily outweighed by the public interest in maintaining the exemption in order to safeguard the mental health of the deceased's family.
17. In relation to s 40 the Commissioner concluded that details of the training and education of those who used the ERB was information relating to individuals who were identifiable from information available in the public domain. She held that disclosure would contravene principle (a). The Commissioner held that disclosure would inform public debate and therefore there is a legitimate interest which would be furthered by the request and that disclosure was necessary to meet those legitimate interests.
18. The Commissioner determined that the data subjects would have a reasonably held expectation that the withheld information would not be disclosed more widely and for purposes not directly to do with any further, formal investigation into the incident. Disclosure would effectively re-open for public debate matters which have been concluded, given that the data subjects have been acquitted of all criminal charges and misconduct charges against them withdrawn. The Commissioner considered that disclosure would be unfair, in that the individuals would have a reasonable expectation of being able to move on with their lives once acquitted. She accepted that the data subjects would find it highly distressing to have the information disclosure to the world at large and that it might leave them open to personal attacks from members of the public who disagreed with the verdicts.
19. The Commissioner considered that the level and adequacy of officer training with regard to ERB use is something which a formal investigation with full access to the full facts of the matter and an in-depth knowledge of processes is the appropriate forum for such a determination as opposed to a less informed evaluation by the general public. She concluded that disclosure would not be lawful and there was insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms.

Grounds of Appeal

20. The Grounds of Appeal in summary are:

- 20.1. The Commissioner did not ask Mr Williams for his views when the Police relied on different exemptions;
- 20.2. When the internal review/final response was served on 14 August 2019 the only open matter was the misconduct proceedings against the two detention officers;
- 20.3. The Commissioner erred in its application of s 31. Mr Williams believes that the custody record was referred to in open court at the criminal proceedings and later health and safety proceedings. The Commissioner did not explain why releasing the custody record would prejudice the misconduct proceedings. The custody record is a police document not information volunteered by the public. It can be inspected by the detainee, a legal representative or an appropriate adult.
- 20.4. Given that some images had been released it was unreasonable for the Commissioner to conclude that Mr Williams was not entitled to any of the images. Some of the video was shown to the jury in the trial and therefore shown to the world.
- 20.5. The Commissioner was wrong to conclude that releasing images would affect the family. They have called upon the coroner to examine the circumstances publicly, openly, in honesty and constructively.
- 20.6. The Commissioner was wrong to conclude that the public interest balance favoured withholding the images.
- 20.7. The personal data is professional data.
- 20.8. It is for the Commissioner to prove that the personal data was not released in open court.
- 20.9. The Commissioner was wrong to take account of the fact that release would reopen public debate.

The Commissioner's response

21. The Commissioner's response states as follows.

Tribunal's jurisdiction

22. The jurisdiction of the Tribunal is not supervisory – the appeal is not a judicial review of the Commissioner's processes. The Tribunal has no power to quash the Decision Notice on the basis of a procedural flaw in the Commissioner's processes. The Commissioner operated within the lawful limit of her power. There is no requirement as to the number of times she must seek representations. Consulting Mr Williams a second time would not have changed the decision and would have caused delay.

Section 31

23. The custody record is not a public document.

24. The Commissioner upheld s 31(1)(g) by way of s 31(2)(b) because
- 24.1. there was a live Independent Office for Police Conduct (IOPC) misconduct investigation and disclosure to the world at large had the clear potential to prejudice the investigation and negatively affect public confidence in the investigation;
 - 24.2. further proceedings were reasonably in prospect and the custody record would be central evidence in those proceedings. The IOPC delay publication of their conclusions until after an inquest for the same reason;
 - 24.3. Mr Williams has not explained the basis of his belief that the custody record was referred to in open court or exactly what he alleges has been read from the custody record. The fact that Mr Williams seeks to access it under the FOIA, rather than the Civil Procedure Rules (CPR) suggests that it has not been referred to in open court.
25. In relation to s 31(1)(b) and (c) the police submitted that to release the information would indicate to those providing information that it was likely to become public and this would deter information sharing in other cases. In any event any inquest is likely to be a jury inquest. The relevant interests are likely to be prejudiced if the custody record is prematurely made public to the world at large prior to the relevant inquest proceedings.
26. There is a clear causal relationship between the disclosure of the custody record and the prejudice to those interests.
27. The public interest in maintaining the s 31 exemptions outweighs the public interest in disclosing the custody record.
28. The Commissioner no longer pursues s 31(1)(a)

Section 38(1) Health and safety

29. This exemption relates to photographic and video images of the deceased while in police custody, up to the point he was transported to hospital. Some images have already been released in to the public domain as a result of the criminal trials and investigations. Disclosure of further images would undoubtedly cause significant upset and distress to the deceased's family and friends.
30. Mental wellbeing is within the scope of s 38. The mental wellbeing of the deceased's family and friends would be caused by disclosure. There is no control over the information once released to the world at large. Family and friends are likely to feel that it is undignified and violating to broadcast the deceased's final moments to the world. The exemption applies.
31. The public interest in maintaining the exemption outweighs the public interest in disclosing the information. There is a public interest in transparency and in relation to understanding what happens to individuals in police control. This information

helps the public to understand the actions of the police and take action to hold them to account.

32. In favour of maintaining the exemption:

- 32.1. The likely level of distress to family and friends is high;
- 32.2. The fact that some highly distressing images have already been published is not a reason to enable those media outlets to perpetrate the same harm again with new images;
- 32.3. Even if video was shown to the jury, there is a difference between showing a video in controlled, albeit public, conditions in Court. The request is not confined to the CCTV shown in court;
- 32.4. Other individuals who did not know the deceased may be distressed by the images;
- 32.5. It is not necessary to see the images in order to understand the content of the acts leading to the death;
- 32.6. The issue of transparency is already addressed through two concluded judicial processes and an IOPC investigation and is likely to be addressed in further judicial processes, processes which are better placed to weigh and contextualise the information in the images versus disclosure to the world at large.

Section 40(2) Personal information

33. This exemption relates to details of the training and education of those who used the ERB.

34. The information is personal data. It would include the content of the training materials but would be connected to a confirmation that it is training material delivered to particular living individuals because that is the scope of the request. The individuals are identifiable from information in the public domain. There is no distinct category of 'professional data'.

35. It is not in dispute that there is a legitimate interest in being able to understand how the Police operated in this case and used the ERB. The Commissioner has accepted that disclosure would inform public debate and that serious matter and is necessary to meet the legitimate interest.

36. The data subjects did not consent to disclosure. A reasonable expectation that the public could know the content of training programmes generally is different from an expectation by an individual police officer that all information relating to their training would be disclosed. Staff members would not have expected tailored information as to their training to be later released.

37. This is heightened where:

- 37.1. The data subjects have already faced the highest level of scrutiny and been acquitted;
- 37.2. Those accused of crimes must be allowed to move on with their lives;
- 37.3. They faced IOPC investigation in 2019 with no action taken;
- 37.4. Release of the data would cause the matter to resurface with an intense focus on the individuals and their training rather than processes in general at the Police.

38. There is significant information about the relevant matters already in the public domain and the benefit added would be marginal. Weighed against that is the significant further incursion into the lives of the data subjects who have been criminally acquitted. The Police have accepted culpability in civil proceedings and paid a significant fine. The correct balance was struck by the Commissioner in determining that public interest favoured maintaining the exemption.

Legal framework

Law enforcement

39. S 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

S 31 Law enforcement

- (1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
 - (a) the prevention and detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - ...
 - (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) ... are -
 - ...
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.

40. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice.

41. S 31 is a qualified exemption, and so the tribunal must go on to consider if the public interest in maintaining the exemption outweighs the public interest in disclosure.

S 40 - personal data

42. The relevant parts of s 40 of FOIA provide:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (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) either the first, second or the third condition below is satisfied.
- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
 - (a) would contravene any of the data protection principles, or..

43. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

Any information relating to an identified or identifiable living individual

44. The data protection principles are set out Article 5(1) of the GDPR and s 34(1) DPA. Article 5(1)(a) GDPR provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) GDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

45. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

46. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

47. S 40(3A) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.

S 38 – health and safety

48. S 38 FOIA provides that information is exempt information if its disclosure would or would be likely to:

- (a) Endanger the physical or mental health of any individual, or
- (b) Endanger the safety of any individual.

49. S 38 is a qualified exemption and so the tribunal must go on to consider if the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Task of the Tribunal

50. The tribunal's remit is governed by s 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

51. The issues we have to determine are:

Section 31 - law enforcement

- 51.1. Whether disclosure would or would be likely to prejudice the apprehension or prosecution of offenders, the administration of justice, or the exercise by any public authority of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper. This entails:
 - 51.1.1. Identifying the applicable interest within the exemption.
 - 51.1.2. Considering the nature of the prejudice (identifying a causal relationship and that it passes a de minimis threshold)
 - 51.1.3. Determining the likelihood of prejudice (more probable than not or a real and significant risk of prejudice)
- 51.2. In all the circumstances of the case, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This includes:
 - 51.2.1. Identifying what actual harm or prejudice the proposed disclosure would or would be likely to cause, focussing on the public interests expressed in the particular exemption in issue.
 - 51.2.2. Identifying what actual benefits the proposed disclosure would or would be likely to cause.

Personal data

- 51.3. Does the information relate to an identified or identifiable living individual?
- 51.4. Is the data controller or a third party pursuing a legitimate interest or interests?
- 51.5. Is the processing involved necessary for the purposes of those interests?
- 51.6. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

S 38 – health and safety

- 51.7. Whether disclosure would be likely to endanger the physical or mental health of any individual. This entails:
 - 51.7.1. Identifying the applicable interest within the exemption.
 - 51.7.2. Considering the nature of the danger (identifying a causal relationship and that it passes a de minimis threshold)
 - 51.7.3. Determining the likelihood of danger (more probable than not or a real and significant risk of endangerment)
- 51.8. In all the circumstances of the case, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This includes:
 - 51.8.1. Identifying what actual harm or prejudice the proposed disclosure would or would be likely to cause, focussing on the public interests expressed in the particular exemption in issue.
 - 51.8.2. Identifying what actual benefits the proposed disclosure would or would be likely to cause.

Evidence

- 52. We have read a bundle of documents, which we have taken account of where relevant. Although the bundle is labelled ‘closed’, the tribunal notes that this is shorthand for the fact that it is subject to a rule 14 order dated 12 February 2021 which provides, in essence, that the bundle is not to be disclosed by Mr. Williams to a third party.

Discussion and conclusions

Lack of consultation

- 53. The tribunal reaches a decision de novo and the claimant has had the opportunity to make submissions on all exemptions now relied upon, which we will take into account. Even if a procedural error has been made, errors such as a failure to invite submissions on a particular point can be cured by the tribunal exercising its full merits jurisdiction.

Section 31 – law enforcement

- 54. This section is said to apply to the custody record.
- 55. We consider firstly s 31(1)(g) taken with 31(2)(b).

Is the exemption engaged?

- 56. The question for the tribunal is whether disclosure would or would be likely to prejudice the exercise by any public authority of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper.

57. The applicable interest is clear on the face of the sections: it is to protect a public authority's ability to exercise its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
58. The outcome of the internal review was communicated to Mr. Williams on 14 August 2019. At that date the IOPC investigation was ongoing. It concluded in October 2019. Although IOPC directed disciplinary proceedings in relation to the police officers concluded in July 2019, disciplinary proceedings against two detention officers remained live and the IOPC did not withdraw its decision to direct misconduct proceedings until October 2019. A decision on publishing the IOPC reports was to be made once all proceedings had concluded, including a potential inquest. We accept the evidence by that Police that an inquest was 'likely' to be held in 2021, particularly in the light of that fact that the Police state that the 2021 date had been confirmed with the local coroner with the officer in charge.
59. None of the parties have raised the issue of whether an inquest or IOPC directed disciplinary proceedings involve the exercise by a public authority of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper. Taking into account the potential outcomes of those proceedings, we accept that all those proceedings involve a public authority exercising its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
60. The nature of the prejudice identified by the Police is that disclosure of the custody record had the potential to undermine and prejudice the outcome of the misconduct proceedings and the inquest. We accept that this prejudice is related to the applicable interest, and that there is a causal relationship between the release of the custody record, a document likely to be central evidence in those proceedings, and the identified prejudice.
61. We have considered whether there is a real and significant risk of that prejudice. Although the custody record is open to inspection by certain individuals it is not a public document. We note that Mr. Williams believes that the custody record has been referred to in open court, although we do not know what this belief is based on and there is no evidence before us to support a finding that the custody record, whether all or in part, has been already made public in the criminal proceedings.
62. We accept that there is a real and significant risk that the release of a central part of evidence out of context and not as part of a reasoned judgment while misconduct proceedings are ongoing and before an inquest has started is likely to undermine confidence in those proceedings. There is a real and significant risk of the public forming a view on the basis of the partial release of evidence out of context, undermining the public's confidence in any process which reaches a different conclusion.

63. Further, any inquest would be likely to be a jury inquest. We note that the IOPC decided to delay the publishing of their reports until after the inquest was concluded. We conclude that releasing a central piece of evidence which risks the public reaching a premature view on partial evidence taken out of context, carries the same risks in relation to the members of the jury. We accept therefore that there is also a real and significant risk of undermining the proper operation of the inquest.
64. On this basis we conclude that the exemption is engaged.

Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

65. We accept that there is an extremely strong public interest in public scrutiny of the actions of the Police where a vulnerable individual has died in police custody in the particular circumstances of this case. However we find that there is limited public interest in disclosure for this purpose while disciplinary proceedings are in progress and before an inquest has taken place. We place significant weight on the risk of undermining public confidence in IOPC directed misconduct proceedings and in the inquest proceedings. Further, we place very significant weight on the risk that the inquest proceedings could be undermined in the manner set out above. There is a clear public interest on the facts of this case in ensuring that the inquest can operate properly.
66. We conclude that at a point in time where IOPC directed misconduct proceedings and an inquest are not yet concluded, the public interest strongly favours withholding the custody record and maintaining the exemption.
67. We conclude that the Police were entitled to withhold the custody record under s 31(1)(g) taken together with s 31(2)(b).
68. Having reached that conclusion we do not need to consider the other subsections of s 31.

Personal data

Does the information relate to an identified or identifiable living individual?

69. The relevant part of the request asks for 'all data relating to the training, education etc. that those who applied the ERB had undertaken at time of the victim's death.'
70. The individuals involved are identifiable via a basic internet search. Even if the information does not contain their names, the request itself links those individuals to that information. On that basis we find that the scope of the request will only catch information which relates to those individuals, and that they are identifiable

when the information is combined with other information readily available to and reasonably likely to be used by the 'motivated intruder'.

71. There is no separate category of 'professional data' although the specific nature of the personal data may be a relevant factor at other stages in the consideration of s 40(2).

Is the data controller or a third party pursuing a legitimate interest or interests?

72. We accept that Mr. Williams is pursuing a legitimate interest of scrutiny of the actions of the police in relation to this incident and in particular in relation to scrutinising the use of the ERB.

Is the processing involved necessary for the purposes of those interests?

73. "Necessary" should be given its ordinary meaning: more than desirable but less than indispensable or absolute necessity. Accordingly the test is one of "reasonable necessity", reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term. The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question (Goldsmith International Business School v Information Commissioner and the Home Office [2014] UKUT 563).

74. We do not agree with the Commissioner that disclosure of this personal data is reasonably necessary for the purposes of those legitimate interests. There are other measures which can achieve those aims. The actions of the individuals on the day in question have been or will be subject to scrutiny by the criminal courts, by the IOPC, in misconduct proceedings and in the proposed inquest. The training programmes or education or relevant processes and procedures on ERB operated by the Police could be effectively scrutinised without the release of personal data relating to these particular individuals. It is unclear to the tribunal how it is reasonably necessary for the purposes of the legitimate aim pursued by Mr. Williams for the public to see the training data *related to those individuals*, given the past and future scrutiny already applied to the actions of those individuals through other processes.

Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

75. We have gone on, in any event, to consider what our conclusion would have been if we had concluded that disclosure was reasonably necessary for the purposes of that legitimate interest.

76. Mr. Williams states that this information ‘may well’ have been released in open court and that it is for the Commissioner to prove that this information has not been released in open court. The tribunal disagrees. There is no evidence before us to support a finding that this information is already in the public domain, and there is no presumption that operates to place a burden on the Commissioner to disprove this.
77. There has been no consent to disclosure by the individuals. We find that there would not be a reasonable expectation that an individual’s training records, as opposed to the general content of police training programmes, would be made public. We take account of the fact that this personal data relates to work rather than home life, but in this particular case the data relates to matters which had and will have a particular impact on these individuals’ lives. They had faced criminal proceedings and had been acquitted. Some of them were subject at the relevant time to ongoing disciplinary proceedings. The context of the data would therefore make release highly distressing to the data subjects.
78. Even if we had concluded that disclosure was reasonably necessary, the factors that we refer to above would have been highly relevant to whether or not the fundamental rights and freedoms of the data subject override the legitimate interests relied on. Only very marginal, if any, benefit would be added by the release of this particular information, given the other processes that had already been completed, were in process, or were still to come and the limited additional value of information about the particular training of these individuals compared to information on general police training on the use of ERB.
79. Taking into account all the above we would have concluded that the legitimate interests were overridden by the interests or fundamental rights and freedoms of the data subjects.

S 38 - Health and safety

80. This exemption relates to part 1 of the request i.e. images held of the deceased on the day he died. The applicable interest in the exemption is the protection of physical or mental health.
81. The Police relies on the distressing impact that these images would have on the friends and family of the deceased. We accept, as a matter of common sense, that viewing images of a friend or family member on the day that he died in these particular circumstances has a causal relationship with endangering that family member or friend’s mental health through distress.
82. When considering whether there is a real and significant risk of danger to mental health we have taken account of the fact that we do not have any evidence from the deceased’s family and friends on the impact of the release of these images. Mr. Williams has drawn the tribunal’s attention to an article in the Guardian on 24

October 2019 in which there was a quote from the deceased's family in relation to the decision by the IPOC to withdraw its decision to direct misconduct proceedings in October 2019:

[redacted]'s family said: "We are completely unable to comprehend how people who were charged with manslaughter can now be allowed to face absolutely no scrutiny for their work practices in relation to [redacted]'s death.

This decision feels outrageously and ethically wrong to our family; we have been let down by the IOPC." The family have long said achieving justice for [redacted] may take many years and will now work towards an inquest. " We call upon the coroner to examine the circumstances surrounding [redacted]'s death publicly, openly, honestly and constructively," they said.

83. We do not accept that this article is evidence that the mental health of the deceased's family and friends would not be endangered by the release of the images in question. The fact that his family have called for an inquest to examine the circumstances 'publicly openly, honestly and constructively' does not mean that they would not be distressed by the release of the requested images.
84. In the absence of any direct evidence of the effect of the release of the requested images on friends and family, we have taken a common sense approach to the likely impact. We take account of the fact that the images would be placed in the public domain and their use would be outside the control of the family, friends or any other body (such as the court, the coroner or the IOPC in other proceedings). The release of the images would be outside the ongoing processes and not at a time when the family and friends are expecting the images to be released, or at a time that they can control. Taking all this into account we conclude that there is a real and significant risk of danger to mental health by releasing the images. We conclude that s 38 is therefore engaged.
85. Mr. Williams asserts in his grounds of appeal that the Commissioner was wrong to conclude that he was not entitled to any of the requested image information, because some of it was already in the public domain at the time of the request. In the tribunal's view, there is a real and significant risk that releasing these images to the public in response to a freedom of information request would still lead to those images coming to the attention of friends or family members in an uncontrolled and unexpected manner, which carries the same risk of distress, even if they had seen those images before. The tribunal concludes that the exemption is engaged in relation to all images held by the police within the scope of the request, even those that have already been released.
86. Mr. Williams is correct to assert that there are times when the public interest demands that difficult or distressing images should be released. Section 38 is not an absolute exemption, and we must consider if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

87. In relation to images that are already in the public domain, we find that there is very limited public interest in releasing them again in response to this request, and this is clearly outweighed by the public interest in maintaining the exemption.
88. In relation to additional images held by the police, we consider that there is some public interest in disclosure. There is a general public interest in disclosure of information held by public authorities. Further, it is possible that seeing the images might encourage the public to engage in public debate on this issue. However we conclude that the release of new images in an uncontrolled manner to the public, while proceedings were still ongoing and further proceedings were likely to take place, is unlikely to significantly add to public debate or assist in effective scrutiny of the police's actions. We agree with the Commissioner's observation in paragraph 53 (f) of their response to the Grounds of Appeal that it is not necessary to see the images to understand the actions that lead to the death of the individual involved. Further the public interest in scrutiny and transparency in relation to the police's actions is served to a large extent by those ongoing or future processes.
89. The public interest in maintaining the exemption is largely already reflected in our discussions as to why the exemption is engaged. We agree with the Commissioner that the level of distress of seeing the images is likely to be high partly because of the nature of the images and partly because of the lack of control over the dissemination of images.
90. Taking into account all the above, we conclude that the public interest favours maintaining the exemption.
91. For the reasons set out above this appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 23 July 2021

Promulgated: 23 July 2021