



NCN: [2024] UKFTT 001087 (GRC)

Case Reference: EA/2023/0269

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

**Heard by Cloud Video Platform  
Heard on: 10 October 2024  
Deliberations on: 19 November 2024  
Decision given on: 2 December 2024  
Amended pursuant to rule 40 on 12 December 2024**

**Before**

**TRIBUNAL JUDGE HEALD  
MEMBER SCOTT  
MEMBER MURPHY**

**Between**

**COMMISSIONER OF POLICE OF THE METROPOLIS**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER  
(2) FAISAL QURESHI**

Respondents

**Representation:**

For the Appellant: Robert Talalay of Counsel

For the 1st Respondent: no attendance

The 2nd Respondent appeared in person

**Decision:** The Appeal is Allowed

**Substituted Decision Notice:-**

Further disclosure has been made by the Appellant since the start of the Appeal. As regards the remaining disputed material seen in the closed bundle in this Appeal no steps are required to be taken by the Appellant because:-

(a) the exemption at section 38(1) Freedom of Information Act 2000 is engaged and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(b) in so far as it contains personal data the exemption at section 40(2) Freedom of Information Act 2000 applies to the disputed material because although the 2nd Respondent was pursuing a legitimate interest disclosure would not be in compliance with the data protection principles

(c) the exemption at section 31(1) Freedom of Information Act 2000 is engaged and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## REASONS

1. The Appellant brings this Appeal by section 57 Freedom of Information Act 2000. It is in respect of a decision notice dated 27 April 2023 issued by the Information Commissioner and concerns a request for information made by the 2nd Respondent to the Appellant on 22 November 2021.
2. The parties and their representatives and the Appellant's witness are thanked for their attendance and assistance to the Tribunal. What follows is a summary only of the submissions, evidence and our view of the law and does not seek to provide every step of our reasoning.
3. Reference to page numbers in this Decision are to the open bundle produced for the Appeal and in this Decision the following definitions are adopted:-

Freedom of Information Act 2000	FOIA
Faisal Qureshi	Mr Qureshi
the Information Commissioner	the IC
the Commissioner of Police for the Metropolis	MPS
the Grounds of Appeal	GoA
the Crown Prosecution Service	the CPS
Decision Notice dated 27 April 2023 ref IC-215925-Q5C3	the DN
John Kay (deceased)	Mr Kay
Harue Kay (deceased)	Mrs kay
the public interest balance test from section 2(2)	PIBT

(b) FOIA	
the Upper Tribunal	UT
Detective Constable Pearce	DC Pearce
Open Bundle provided for this Appeal	the Bundle
Appeal EA/2022/0220 brought by Mr Qureshi	Mr Qureshi's Appeal or the CPS Appeal

### **Summary of the background**

4. The background to this Appeal is the same as that for Mr Qureshi's Appeal. From documents in the Bundle and from what we were told at the Appeal we understand that Mr Kay was a journalist and for many years the Sun Newspaper's chief reporter. He died on 7 May 2021 aged 77. It is not in dispute that in 1977 he killed his wife Mrs Kay and was arrested and charged with her murder. He denied murder but pleaded guilty to and was subsequently convicted of manslaughter on the grounds of his diminished responsibility. He was detained for psychiatric treatment pursuant to the then relevant Mental Health Act. He later continued his career. His death was marked by a number of published obituaries.
5. Mr Qureshi's request was for the MPS file in relation to their investigation into the killing of Mrs kay. He confirmed at the Appeal he did not wish to have any photographs. By the time of the Appeal part of the MPS file had been disclosed as exhibited to the MPS witness statement. Part of the file was however not disclosed.
6. Mr Qureshi was not the Appellant in this Appeal but his position was evident both from his submissions and also as seen in the CPS Appeal. From this we noted that:-
  - (a) he was interested to know more about the investigation and how it had been conducted
  - (b) he wanted to know if Mr Kay had been inappropriately assisted for example by his employer

(c) he wanted to know why there had been so little media coverage of the case at the time, if the MPS file had newspaper clippings from the time and if not whether that was unusual

(d) he wanted to know about the involvement of a Mr Lamb

(e) he thought disclosure of the content of the file might usefully reveal improved attitudes towards domestic violence in police forces since the 1970s

(f) he said that *"It is only fair to say that given Harue Kay's status as an immigrant woman who had moved to the UK and the victim of her husband's violence that her case would have been treated differently than if she had been murdered by a stranger."*

(g) he drew attention to some published obituaries of Mr Kay saying (A40 in CPS Appeal):-

*"Even after John Kay died, many of his colleagues did not discuss Harue Kay's [sic] wife. For example, the 8th May 2021 obituary published in the Sun newspaper did not make any reference to this tragic event. It took a week for the following text to appear below it: "After speaking to our valued charity partners, we want to make clear that in 1977 John Kay pleaded guilty to the manslaughter of his wife, Harue, on the grounds of diminished responsibility."*

(h) he wanted to make sure that the victim, Mrs Kay did not become an *"anonymous footnote..."*

### **Connected Appeal**

7. This Appeal was originally connected to two others namely EA/2023/0233 (which had already been resolved) and Mr Qureshi's Appeal which arose following a request for information made by him to the CPS on 13 May 2021 and which also involved the killing of Mrs Kay and the manslaughter conviction of Mr Kay.
8. The Appeals, while not consolidated, have a common factual background and in part at least common legal considerations. On 6 July 2023 an Order was made for all 3 to be heard together and having consulted the views of all parties and considered rule 2(2) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 the remaining two were heard together on 10 October 2024 by rule 5(3)(b).

### **FOIA**

9. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1)(a) FOIA) and if that is the case to be provided with that information (section 1(1)(b) FOIA). These entitlements are subject to exemptions which can be absolute by section 2(2)(a) FOIA or qualified by the PIBT set out in section 2(2)(b) FOIA which is that *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*
10. MPS relied on four FOIA exemptions when responding to the request from Mr Qureshi (see 142) namely (as in the CPS Appeal) sections 38(1) and section 40(2) and then also sections 30(1) and 31(1). Section 30 was not a live issue at the Appeal.

### **Section 38(1) FOIA**

11. This is subject to the PIBT and provides:-

*1)Information is exempt information if its disclosure under this Act would, or would be likely to—*

*(a)endanger the physical or mental health of any individual, or*

*(b) endanger the safety of any individual.*

12. We agreed with the analysis of the applicable law as set out in the IC's Response (42-44).

### **Section 40(2) FOIA**

13. We also agreed with the IC's analysis of the applicable law (45- 53). Recitals 1 and 26 to the GDPR provide that:-

*"The protection of natural persons in relation to the processing of personal data is a fundamental right .....everyone has the right to the protection of personal data concerning him or her."*

*"The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to*

*identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes."*

14. In *Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland) [2008] UKHL 47* Lord Hope held:-

*"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data: see recital 2 of the preamble to, and article 1(1) of, the Directive. Recital 34 and article 8(1) recognise that some categories of data require particularly careful treatment. Section 2 DPA 1998, which defines the expression "sensitive personal data", must be understood in the light of this background."*

15. Section 40(2) FOIA provides that:-

*"Any information to which a request for information relates is also exempt information if*  
*(a) it constitutes personal data which do not fall within subsection (1), and*  
*(b) the first, second or third condition below is satisfied."*

16. Section 40(3A)(a) FOIA is the first of these three conditions by which personal data is exempt if *"disclosure of this information to a member of the public otherwise than under this Act (a) would contravene any of the data protection principles..."*

17. By Section 2(3)(fa) FOIA if the exemption used is in relation to this first condition it is an absolute exemption.

18. Section 3(4)(d) DPA defines processing as *"disclosure by transmission, dissemination or otherwise making available."* It includes publication pursuant to a FOIA request.

19. Personal data is defined in section 2 DPA as *“any information relating to an identified or identifiable living individual...”* Section 3(3) defines *“Identifiable living individual”* as

*“...a living individual who can be identified, directly or indirectly, in particular by reference to (a)an identifier such as a name, an identification number, location data or an online identifier, or (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.”*

20. In *Information Commissioner v Magherafelt District Council [2012] UKUT 263 (ACC)* the UT referred to the “motivated intruder” test which is a person:-

*“37...who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so. The question was then one of assessment by a public authority as to whether, taking account of the nature of the information, there would be likely to be a motivated intruder within the public at large who would be able to identify the individuals to whom the disclosed information relates.”*

21. The data protection principles are those set out in section 34(1) DPA. They include Article 5(1) GDPR which provides that personal data shall be processed *“lawfully, fairly and in a transparent manner as regards the data subject”*

22. Article 6(1) provides that the processing of personal data shall only be lawful if for example:-

*(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 require protection of personal data, in particular where the data subject is a child.*

23. As regards Article 6(1)(f) the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55 (29 July 2013)* set out these three questions at para 18:-

*(i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*

*(ii) Is the processing involved necessary for the purposes of those interests?*

*(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?”*

24. Interests to be legitimate have to be interests of more than just the requester (see the UT Decision in *Rodriquez Noza -v- the Information Commissioner & Nursing and Midwifery Council* [2015]UKUT 0499 (ACC) at para 24)

25. In *Corporate officer of the House of Commons -v Information Commissioner* [2008]EWHC 1084 the Court said at para 43:-

*"... "necessary" within schedule 2 para 6 of the DPA should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends..."*

26. In *The Sunday Times v United Kingdom* (1979) 2 EHRR 245(paragraph 59) it was held that:-

*"The court has noted that, while the adjective "necessary", within the meaning of article 10(2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."*

27. The UT in *Goldsmith International Business School -v- The Information Commissioner and the Home Office* [2014] UKUT 0563 (ACC) provided a number of relevant propositions including:-

(a) the test for reasonable necessity comes before the consideration of the data subjects interests.

(b) reasonable necessity means *"more than desirable but less than indispensable or absolute necessity."*

(c) *"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."*

28. If disclosure of personal data is necessary to further a legitimate interest it will not be lawful to process it (by Article 6(1)(f)) where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. In addition to being lawful processing must also be carried out in a fair and transparent manner as regards the data subject.

29. Article 9 GDPR relates to the processing of special categories of personal data. It says:-



*"Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.*

30. Article 10 GDPR provides:-

*"Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects."*

### **Section 31(1) FOIA**

31. This is also subject to the PIBT and provides:-

*(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,  
(b) the apprehension or prosecution of offenders,*

32. We agreed with the IC's analysis of the legal principles in its Response (40-42).

### **The PIBT**

33. As regards the PIBT we had regard for example to *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560* (para 149) and the guidance in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026&0030*

34. The relevant date for considering the PIBT is the date the public authority makes its decision on the request (*Montague v ICO and Department for Business and Trade [2022] UKUT 104 (AAC)*).

### **Section 30 FOIA**

35. MPS in its GoA confirmed that it did not seek to rely on section 30(1) FOIA (see footnote on page 27) and we were not required to consider this exemption.

### **Status of data subjects**

36. Neither Mr Kay, nor of course the victim Mrs Kay, are living. The background facts relate to events that took place over 40 years prior to the request being made. When considering whether a data subject was alive or dead and in the

absence of evidence as to this question we had regard to *Arthurs v Information Commissioner & TNA & MoD EA/2016/0060* and the decision of UT in *Sygulska v Information Commissioner & MoD [2019] UKUT 269 (ACC)* as follows:-

*"44. I am satisfied that there is no nefarious intent on the part of the MoD in adopting the position which it has. There is no skulduggery or a wish to suppress embarrassing or inconvenient revelations about the UK's relations with the Polish Communist government after the setting up of the Iron Curtain. The position is simply that, in the absence of proof of death and thus of a death certificate or an equivalent document, the MoD is entitled to ask for and receive a declaration of death from the relevant legal authorities before it will disclose the serviceman's record, unless 116 years have passed since his date of birth"*

### **Role of the Tribunal**

37. Section 58 FOIA provides that:-

- (1) If on an appeal under section 57 the Tribunal considers—*
- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
  - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

38. In *NHS England -v- Information Commissioner and Dean [2019] UKUT 145 (ACC)* the UT said:-

*"10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply..."*

39. We also had regard to *Peter Wilson -v- The Information Commissioner [2022] UKFTT 0149:-*

*"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."*

## **The Request, Response, Complaint, DN and Appeal**

40. On 22 November 2021 Mr Qureshi asked MPS for information as follows:-

*"I am looking for the case file of deceased Sun journalist John Kay who murdered his wife, Harue Kay (Nonaka), in 1977 whilst living at Alston Road, Barnet. A borough of North London. Given Kay's activities during his time as a reporter for the Sun, I believe the facts of this investigation are in the public interest. He died in May 2021. John Kay's obituary can be found here [hyperlink removed]"*

*John Kay was convicted of manslaughter for his wife's death at St Alban's court in December 1977. I presume that the files that I am looking for are from the period of 1977. I have been unable to locate any surviving family members of John Kay or Harue Kay"*

41. On 8 December 2022 MPS responded (142) and as well as confirming that the requested information was held said that it was not required to release the information by virtue of the four exemptions referred to above (143).

42. On 9 January 2023 (149) Mr Qureshi asked for an internal review as regards the use of sections 30, 31 and 38. He did not seek a review about section 40(2). The outcome remained as before as was reported to him on 7 February 2023 (151 -163).

43. Mr Qureshi complained to the IC (164- 167). The outcome of the IC's investigation included consideration of section 40(2) (see page 5). The DN was that (3):-

*"The Commissioner's decision is that sections 30, 31 and 38 are not engaged. He finds that section 40 is partially engaged."*

44. The steps required were:-

*"Disclose the withheld information with the exception of the following: statements of members of the public (this does not include the two statements where the parties have exceeded the age of 100); the names of all parties; private addresses; a Vehicle Registration Mark and some content in the letter at pages 38-39 of the file (this will be provided to the MPS in a confidential annex, for reference)"*

45. The DN was appealed by MPS on 23 May 2023 (16). They asked that the DN be set aside (20). MPS provided GoA (23- 31). The IC provided its response on 20 July 2023 (32- 53).

## **Scope**

46. In its GoA (see page 27) MPS indicated it did not rely on section 30(1) and conceded that the "historical records" provisions at sections 62 and 63(1) FOIA applied. In its Response (32 para 2) the IC indicated that it conceded the Appeal in part and resisted it in part. Their position was set out as follows:- (38)

*"In conclusion the Commissioner has amended his position such that he resists some aspects of the MPS's grounds of appeal concedes others, and amends his position. In conclusion the Commissioner's position, consistent with the position now adopted in the CPS appeal, is, in summary, that.*

*(a) Administrative correspondence and notes that do not contain substantive details regarding the incident can be redacted to the extent that they contain the names of individuals presumed to still be alive, and disclosed as this would be unlikely to prompt any endangerment of mental health, or prejudice any investigations.*

*(b) The witness statements of the police staff and those professionally connected to the investigation are capable of anonymisation particularly given the passage of time, and so with the redaction of the names of the individuals and any other relevant identifiers the remainder of the statements would not engage s.40(2) FOIA. However they would still be exempt under s.38(1) FOIA.*

*(c) The witness statements of the members of the public may be capable of anonymisation, albeit certain individuals may be more likely to be identifiable.*

*However s.31(1) FOIA is engaged as the Commissioner accepts that such individuals would not expect their statements to be released in this context after such a passage of time, and the public interest does not favour disclosure. Furthermore the statements would still be exempt under s.38(1) FOIA.*

*(d) The substantive facts and details relating to the manslaughter of Harue Kay are exempt under s.38(1) FOIA as their release would be likely to endanger the mental health of surviving relatives, and the public interest does not favour the release of this information."*

47. Accordingly:-

(a) it was agreed that section 38 FOIA was engaged and the issue was limited to the PIBT.

(b) section 40(2) remained in issue save as regards any personal data of Mr Kay and Mrs Kay who were known to be deceased and the personal data of two others where it was not known with certainty if they were still alive or not but who would be over 100 years old.

(c) as regards section 31 it was agreed in part (eg statements from members of the public) that this was engaged but not for all the disputed material (eg information that came from professionals involved in the investigation). However it is important to note (see MPS Final Open Written submissions para 17) that additional information was provided by way of disclosure after MPS had further considered the CPS Appeal and the IC's Response in this Appeal. The Tribunal only considered the material still not disclosed after this point.

### **Evidence and matters considered**

48. In addition to the statements of the parties' cases and the submissions referred to above we also had:-

(a) the Bundle of 271 pages

(b) the open witness statement of DS Paul Davis (with redactions) (191-302)

(c) copies of material (with redactions) from the MPS file (203-255) provided as an exhibit to Paul Davis' statement.

(c) a closed bundle held pursuant to rule 14(6) 2009 Rules of 261 pages which included the confidential annex and the unredacted version of the statement of Paul Davis.

(d) MPS' Closed Submissions dated 7 October 2024

(e) the final open submission of MPS and The National Police Chiefs' Council dated 28 September 2024 (also relevant to EA/2023/0233)

(f) the submissions made by the parties at the Appeal itself.

49. As regards the closed material this was reviewed by the Tribunal with those representing the MPS (and CPS) only. In accordance with the decision in *Barrett v The Information Commissioner & Financial Ombudsman Service [2024] UKUT 107 (AAC) (20 April 2024)* a gist of the submissions made and the content of the closed material was prepared by Counsel for MPS (and CPS) and provided to the IC and Mr Qureshi.

### **Witness evidence**

50. DS Davis, who had provided a statement, was not available to give evidence. DC Pearce attended the Appeal to give evidence in his place in the open and closed part of the hearing. He confirmed that he had read the statement and agreed with its content to the best of his information and belief. He explained that he had been in the Police Service for about 10 years.

51. He was asked questions by Mr Qureshi. Save as highlighted below this evidence did not, in our view, add much to that contained in the statement and elsewhere. This was because, in fairness to DC Pearce and as he said, he had not been involved with the case and had not been in the Police Service until many years later.

52. He was referred to para 19 (196) of the statement in which the evidence given was

*"In my opinion, release of the entire unredacted MPS case file would be likely to provide those accused of a homicide offence with a point of reference on how to successfully plead a diminished responsibility defence"*

53. He was asked to justify this in light of a publication by Steven Keogh a retired detective inspector from the Metropolitan Police and to an ITVX program about the investigation into the killing of Joanna Simpson. DC Pearce said he was not aware of the circumstance regarding such publications or programs. He was asked by the Tribunal if he knew of any restrictions in place in his "contract" that prevented publication or required authorisation such as might be seen for retired members of UK Special Forces. He was not.

54. He was asked about paragraph 25 (198) of the statement which states:-

*"The police service in the UK is already facing issues of public confidence, especially in relation to domestic violence, rape and violence against women. This case is one of extreme domestic violence, in which the victim, Harue Kay, was killed by her husband. If the MPS were to put this crime report permanently into the public domain, it would have a further chilling effect on the coming forward of not only victims of abuse, but also informants and witnesses, who would not be confident that their evidence would be put into the public domain in the years that follow their cooperation with the police"*

55. For clarification he said that he thought that this was intended to explain that witnesses and victims do not expect what they say to become public unless as part of a trial and if it was common practice for MPS to release material even years later that risked there being greater reluctance to come forward as a victim of crime or as a witness.

56. He was asked about his view on the change in attitudes about this sort of case since 1977 and about his experience of the attitude amongst older and retired officers towards domestic violence investigations in the Police Service. He said he had not, in his time with the Police, seen attitudes that were dismissive of such issues. When pressed he said that he recognised that there was a concern in the Police to ensure that there is continual improvement in the way

these issues are policed and that he believed there had been a change in attitude in dealing with such cases.

57. DC Pearce also gave evidence in the closed part of the Appeal.

**Section 38(1) FOIA**

58. When first responding to the request for information MPS said:- (143)

*"Sections 38 has been applied because of the nature of the investigation and the potential harm to surviving relatives or friends of the victim would be affected by the disclosure of the information requested."*

59. As with the CPS Appeal it was agreed by the parties that this exemption was engaged. We agree and thus the issue for the Tribunal related only to the PIBT.

60. The parties relied on the submissions in the CPS Appeal. As regards reasons for disclosure these included in summary:-

(a) to find out more about Mrs Kay not least as a balance to the things said about Mr Kay at the time of his death

(b) *"to learn how we as a society have moved on. How domestic violence should not be a footnote or a punchline as Harue Kay's death currently is"*

(c) because *"Harue Kay's life was so anonymous that John Kay got away with murdering her"* and *"Releasing the file will rectify this historical injustice"*

61. Arguments specifically additionally raised in this Appeal in favour of disclosure included:-

(a) by MPS (145)

*"There is a strong public interest in the community being made aware of all the facts relating to policing and release of the information requested may help to increase public awareness of law enforcement tactics employed by the MPS when investigating homicide offences. Disclosure would provide openness and transparency and better awareness into the intricacies of how operational policing is conducted. This may lead to increased public confidence in policing that would aid in the future prevention and detection of crime. It would also provide the public with the knowledge that the MPS is using public funds appropriately to carry out their duties."*

(b) by Mr Qureshi (149)

*"Many of the parties involved are now dead...to learn more about the case and to ask ourselves why the husband was not prosecuted for murder which it appears he committed"*

(c) MPS (158) after its internal review referred to *"the general public interest argument in ensuring transparency in the activities of public authorities"*

(d) in the GoA MPS said (30):-

*"...there is a public interest in transparency which would generally favour disclosure under the FoIA. The Appellant further acknowledges that in the instant case transparency may help with learning from Mr Kay's offending behaviour to improve measures to prevent and detect such criminal behaviour in the future."*

62. Arguments in favour of maintaining the exemption were referred to in the CPS Appeal such as:-

(a) *"there is a very strong public interest in not endangering the mental health and safety of even one member of the victim's family or connected third persons "*

(b) *"Release of this material after such a prolonged period of time would be likely to have the same endangering effect on the mental health of those individuals as releasing it for the first time"*

(c) *the existence in the information requested of "both graphic and distressing material which for the people involved in the case would cause significant distress including to the surviving family members of the victim and the defendant and/or others involved in the case."*

63. Submissions specifically in this Appeal included:-

(a) MPS in the GoA referred to these points (30):-

*"a. Any information disclosed under the FoIA is disclosure to the world at large. Disclosure under the FoIA is not a private transaction.*

*b. There is a strong public interest in not releasing information of the kind generally. As a matter of policy, the Appellant does not generally provide the information requested. To do so in this case would undermine that general policy.*

*c. There already exists information within the public domain concerning Mr Kay's conviction for manslaughter. Given the amount of information already publicly available through the Internet, the release of further information is of minimal public interest. In this regard, the Appellant notes that there is a distinction between 'the public interest' and that which the public may be interested in.*



*d. As outlined more fully below, the Appellant places significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision"*

(b) In its Response to the Appeal the IC said (37):-

*"The Commissioner has reviewed the appeals and, having done so, the Commissioner considers that any information within the MPS investigation file that touches upon the substantive facts and details relating to the manslaughter of Harue Kay would be likely to endanger the mental health of John and Harue Kay's surviving family members' lives for the reasons set out in the Commissioner's decision notice and response in the CPS appeal. The Commissioner considers that s.38 FOIA applies to the information setting out the circumstances leading up to, and including, the manslaughter, along with any associated sensitive details. This includes, for example, the witness statements, photographs, pathology report, and any summaries beyond that which was already in the public domain.*

*However, the Commissioner does not consider that all of the information contained within the investigation file would attract the s.38 FOIA exemption, indeed the CPS did not cite s.38 FOIA in respect of all of the prosecution file. The Commissioner does not consider the various information that is of a more administrative nature connected to the general progression of the investigation to engage s.38(1) FOIA given that it does not contain any substantive, or upsetting case details such as to endanger anyone's mental health, and it is unlikely to trigger further media coverage of the incident. Accordingly the Commissioner considers that such information can be anonymised so as to not engage s.40(2) FOIA and disclosed, as the CPS has done during the course of appeal EA/2022/0220"*

(c) DS Davis said in his statement (201):-

*"Certain information in the file would, if disclosed, would very likely endanger the mental health of living relatives of the victim. The material includes graphic descriptions of the crime scene that would be distressing to both those relatives who lived through the original trial and those who may come across it for the first time. Criminal trials of defendants, who have committed murder or manslaughter are extremely distressing to living friends and family.*

*To release this information into the public domain would likely be of harm those living relatives, who would already have had to endure intense media coverage at the time of the original trial. To re-traumatise those individuals after so many years would not only be harmful to their mental health. This is especially in light of the new media technology, which would mean the reach of any published documents would be worldwide and not simply those in the United Kingdom and those in*

*Japan with direct knowledge of the trial. Therefore, the graphic information within the material that details the victim and crime scene must be protected from disclosure"*

64. As regards the balance MPS said (146)

*"After weighing up the competing interests I have determined that release of the information requested would not be in the public interest. I consider that the benefit that would result from the information being disclosed does not outweigh the considerations favouring non-disclosure. This decision is based on the understanding that the public interest is not what interests the public, but what would be of greater good to the community as a whole."*

### **Tribunal's review of section 38(1) FOIA**

65. We reached the same conclusion as we had in the CPS Appeal. Having heard from the parties and the witness and considered the submissions and seen the open and closed material in our view the public interest tested at the date of the response is against disclosure. This is because on balance while we agree with much said in favour of disclosure:-

(a) we accept that protection of the people close to and also involved in the tragic events of 1977 (most of whom we assume are still alive) is more in the public interest than the additional general transparency of the MPS or the specific understanding about Mr Kay's case that would arise from the disclosure.

(b) while the events are from over 40 years ago they are not "historic" in the sense that they are not so old to have become of only academic rather than for some of a direct personal interest.

(c) we accept the evidence that while the passage of time might diminish the impact of disclosure it could on the other hand re-traumatise individuals which is against the public interest and we gave more weight to the latter argument.

(d) at times the content of the file (even with the photographs removed) is graphic.

(e) while we accept that Mr Qureshi believes that Mr Kay appears to have murdered his wife having reviewed the disputed material in closed we did not see material that bolsters that view.

(f) as regards the question of why his plea of manslaughter was accepted the material might assist with that but the public interest in disclosure still does

not, in our view, outweigh the public interest in preventing the harms referred to in section 38(1) FOIA.

### **Section 40(2) FOIA**

66. When first responding to the request for information MPS said (143):-

*"Section 40 has also been engaged as you are seeking access to information pertaining to third party personal data such as witnesses or others whose details will be contained within such an investigation of this nature"*

67. In its legal summary (146) MPS said that:-

*"Disclosure at this level of detail (name of individual police officers/staff and others on the document) would breach the 1st Data Protection Principle that requires personal data to be processed lawfully, fairly and in a transparent manner in relation to individuals. "*

68. When seeking an internal review Mr Qureshi did not refer to section 40 (149) but MPS included reference to it in their response in which they said (157/158)

*"Although the information you have requested relates to deceased persons who are not covered under the Data Protection Act 2018, the information you have requested is considered by the MPS to be personal to the family members of the deceased and those involved in the investigation of their deaths, that is witnesses/police officers and the like. The MPS believes that its release would be unfair, constituting unfair processing of personal data under principle one of the DPA 2018."*

*"The exemption has been applied as disclosure of the information you have requested could identify living individuals linked to a homicide investigation. This constitutes personal data which would, if released, would be in breach of the rights provided by the DPA."*

69. Mr Qureshi in his complaint did not refer to section 40 and in the DN the IC found section 40 to be partially engaged.

70. In their Appeal MPS said (31):-

*"The information held by the Appellant includes personal information which is exempt from disclosure. The Appellant acknowledges that s.40 does not apply in respect of the personal information of the deceased Mr Kay. However, the information also comprises the personal data of living individuals. The Information Commissioner was therefore correct to conclude that at least parts of the information is exempt from disclosure by reason of s.40(2)."*

71. In their Response the IC said (35):-

*"The Commissioner maintains that in respect of the presumed living individuals named in the investigation file the file contains their personal data, and that it is necessary to disclose that personal data for Mr Qureshi's legitimate interests."*

and (36)

*The Commissioner does not consider s.40(2) FOIA is engaged in respect of the administrative and case progression correspondence and notes contained within the file once the names and identifiers of individuals are removed such as to render them anonymised*

and in summary that

(a) parts of the file were capable of being made anonymous even from a motivated intruder by redactions

(b) the witness statement by members of the public might be capable of being made anonymous but might not and if not possible then section 40 would be engaged (and in any event the exemption at section 31 and 38 are engaged)

72. In his statement (195) DS Davis said that as a result of the IC's and Mr Qureshi's representations he had concluded that further information could be released and it was added to the open papers for this Appeal. However some he said could not be disclosed.

### **Tribunal's review - section 40(2) FOIA**

73. The exemption does not apply to the personal data of Mr Kay or Mrs Kay or anyone who is not known to be dead or alive but would now be over 100 years old. That apart and as for the CPS Appeal in our view (1) the disputed material does contain personal data and (2) Mr Qureshi was pursuing a legitimate interest.

74. However in our view disclosure of the personal data in the closed material was not necessary for the pursuit of that legitimate interest because for example in our view:-

(a) it does not provide any indication that Mr Kay was assisted inappropriately

(b) while Mr Qureshi may or may not be right the disputed material provides no evidence of there having been a newspaper establishment cover up to protect Mr Kay

(c) disclosure would not assist more than marginally with a better understanding of how domestic violence was dealt with (by the Police specifically or more generally) in the 1970's as opposed to now

(d) disclosure would not assist with Mr Qureshi's concern about whether justice was done when Mr Kay was convicted of manslaughter

(e) disclosure would not remedy an historic injustice or provide Mrs Kay with a more appropriate legacy.

75. Additionally as regards the balance between disclosure and the rights of the data subject our analysis and conclusions were broadly the same as for the PIBT for section 38 in this Appeal and as for the CPS Appeal. Accordingly in our view disclosure of the disputed material which contains personal data is not necessary for the pursuit of the Mr Qureshi's legitimate interest and in any event even if necessary we conclude that disclosure was overridden by the data rights of the relevant data subjects in the MPS file.

### **Section 31(1) FOIA**

76. In its response to Mr Qureshi's request MPS said (143):-

*"Section 31 has been engaged because the MPS believes that release of the requested information would provide invaluable intelligence to those with ill intent. We believe that this would prejudice the ability of the MPS to conduct similar investigations in the future"*

and as regards harm for sections 31 and 38 (145) said:-

*"You have requested files concerning John Kay who was convicted of the manslaughter of his wife in 1977 and, although information has been located, release into the public domain would cause distress to any living relatives or friends of the individuals concerned.*

*The MPS has a duty of care (both physical and psychological) to all individuals, including families of homicide victims, members of the public and police officers. We are required to act with caution as disclosure could easily cause extreme distress to families that have suffered a loss.*

*The MPS is aware of the difficulties that families face in coming to terms with reminders of their loved ones' tragic and untimely deaths on a daily basis and also through possible media appeals and police contact. To disclose the information requested would be inappropriate and insensitive to the needs of the families and friends and would detrimentally impact upon the trust and confidence that the general public place in the MPS.*

*The MPS is charged with enforcing the law and preventing and detecting crime and any information released under the Act which reveals information related to the gathering of evidence would prejudice law enforcement."*

77. The MPS submissions as regards the PIBT were as for section 38 (145). Mr Qureshi when seeking an internal review said (149):-

*"There has been no evidence presented to justify this claim. Worryingly it also treats all requesters as those having "ill intent" when requesting information. How a resolved 1970s murder case can impact on investigations now is not explained. I find this exemption to be without merit"*

78. MPS set out its response and reasons for reliance on section 31 in its response (161). For example (160):-

*"As part of the internal review, I have assessed whether Section 31 exemption has been applied appropriately.*

*In order for the exemption provided under Section 31(1) to be engaged in this case, the MPS must show that disclosure under the Act would, or would be likely to, prejudice law enforcement functions, namely Section 31(1)(a) the prevention and detection of crime.*

*The ICO guidance points to the fact this exemption is a two-stage test. Firstly, can a public authority establish that disclosure of the information would prejudice, or would be likely to prejudice, any of the areas of law enforcement listed in section 31 (i.e. prevention or detection of crime). Secondly, if so, is the public interest in favour of maintaining the exemption and therefore withholding the information."*

79. MPS said that it did not treat all requesters as those having "ill intent" when requesting information and asserted that:-

*"..The MPS strictly adheres the FOIA principles of openness and transparency. Everybody has a right to access official information. Disclosure of information is our default. Information is only withheld when there is a good reason and it is permitted by the Act"*

80. MPS also said (162):-

*"As explained in response to your previous internal review request, disclosure of information relevant to your request would technically be releasing sensitive operational information into the public domain, which would enable those with the time, capacity and inclination to try and map strategies used by the MPS.*

*The MPS is reliant upon these techniques during policing investigations and operations and the public release of the modus operandi employed during the enquiries would prejudice the ability of the MPS to conduct similar investigations. It is recognised that there are individuals / groups that have the necessary intent to utilise the type of information you have requested, to their advantage. It is recognised that criminal gangs 'data-mine' the internet for information when planning to commit crimes and / or to evade detection."*

and

*"As mentioned previously, disclosures under the Act are placed into the public domain and disclosures which appear harmless, pieced together with other information can be used in a 'mosaic effect' to give a fuller picture to those wishing to evade detection and commit crime.*

*Disclosing potentially sensitive information about an individual police investigation would be likely to undermine investigative processes and the MPS' ability to deliver effective law enforcement. Therefore, the review is satisfied that the use of Section 31 exemption is justified in this case."*

81. In the DN the IC referred to the use of both section 30 and section 31 and said (6):-

*18. The Commissioner considers that the MPS has had ample opportunity to set out its position regarding the request. Furthermore, he is of the view that it should be adequately conversant in the application of both of these exemptions, with them being relevant to much of the core business of policing. However, on this occasion it has failed to differentiate between the two and has simply applied them both to all of the file.*

*19. It is not for the Commissioner to speculate or 'fill in the gaps' for inadequate submissions and it is not the Commissioner's role to go through the withheld information in this case to consider whether section 30 or 31 is the most appropriate exemption to apply to the various pieces of information. Accordingly, the Commissioner has determined that neither exemption is properly engaged."*

82. In the GoA MPS said that disclosure (27):-

*"...would be likely to prejudice (i) the prevention or detection of crime; and / or (ii) the apprehension or prosecution of offenders. Section 31(1) applies to the whole of the case file."*

83. MPS said (28):-

*"24. The information is held by the Appellant as a result of its investigation into the death of Harue Kay and the subsequent prosecution of John Kay. The case file contains statements and other documents about Harue Kay's death and John Kay's conviction for manslaughter on the grounds of diminished responsibility. To disclose this information would be likely to prejudice the prevention or detection of crime and the apprehension or prosecution of offenders because it reveals the investigative techniques and strategies adopted by the investigating officers. It also contains in significant detail the nature of the defence relied upon by Mr Kay."*

*"26. Whilst the CPM acknowledges that much of the withheld information dates from the 1970s, the investigative techniques and strategies adopted by the investigating officers are much the same. The withheld information includes reflections by the senior investigating officer on the investigation. If the investigative techniques and strategies were placed into the public domain on their own or in combination with other information already in circulation, the prevention or detection of crime and the apprehension or prosecution of offenders would likely be prejudiced."*

*"27. In addition, the CPM considers that the disclosure of the withheld information would be likely to prejudice the prevention or detection of crime and the apprehension or prosecution of offenders, because witnesses, victims, police officers and others involved in the investigative process would in the future be less likely to cooperate with investigators if they knew that information provided by them would be disclosed in this way. Witnesses expect that statements or evidence provided by them as part of an investigation are to be treated with a degree of confidentiality and not placed in the public domain unless part of a trial process and even if the latter was the case: they would not expect the information to remain in the public domain indefinitely. Disclosure in this instance would be likely to result in law enforcement agencies receiving less cooperation in the future."*

84. As regards the PIBT and section 31 MPS in the GoA said (30) that in their view the public interest in maintaining the exemption outweighed disclosure because while they acknowledged that there was public interest in transparency generally and in the specific case and that there might be learning to be had from Mrs Kay's case this was balanced against a number of other considerations. These were (30):-

*a. Any information disclosed under the FoIA is disclosure to the world at large. Disclosure under the FoIA is not a private transaction.*

*b. There is a strong public interest in not releasing information of the kind generally. As a matter of policy, the Appellant does not generally provide the information requested. To do so in this case would undermine that general policy.*



*c. There already exists information within the public domain concerning Mr Kay's conviction for manslaughter. Given the amount of information already publicly available through the Internet, the release of further information is of minimal public interest. In this regard, the Appellant notes that there is a distinction between 'the public interest' and that which the public may be interested in*

*d. As outlined more fully below [in a reference to the submission on section 38], the Appellant places significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.*

85. The IC in its Response (33) indicated that it found the GoA on this exemption to lack an explanation as to how and why the prejudicial consequences were likely to arise. The IC said (34) that it was not clear:-

*"... how the disclosure of any of the information contained within the file would be likely to reveal investigative techniques and strategies, or reflections from the officers, that would be likely to prejudice the relevant interests."*

86. The IC was also not persuaded that *"...the disclosure of any information relating to the defence of Mr Kay would be likely to prejudice the relevant interests."*

87. As regards the risk to cooperation if disclosure were to be allowed the IC pointed out that it had not required disclosure of information that had come from members of the public but that (34):-

*"...he does not see how police officers and those professionally connected to an investigation would be dissuaded from co-operating with that investigation, or any other investigations, if any information within the investigation file were to be released, given their professional and employment duties. If the witness statements of the police staff and those professionally connected to the investigation in this matter were to be disclosed under FOIA the Commissioner does not see how any such staff would be dissuaded from co-operating with an investigation given their professional and employment duties. It is their duty and job to carry out the relevant tasks assigned to them and they, as a part of the natural criminal justice process, ought to expect that their statements and work will come to the public's attention. Accordingly the Commissioner is unpersuaded that there is a real and significant risk of such prejudice arising in respect of the police staff and professionals connected to the investigation, particularly if they are anonymised to avoid the disclosure of personal data..."*

88. It is important to note that MPS provided further disclosure from its file as a result of their review of this response and the approach seen in the CPS Appeal. DS Davis in his statement said (195):-

*"17...During the course of this appeal I have considered the representations and submissions made by the Information Commissioner and the Second Respondent. In light of those representations and submissions I have concluded that some further information can be disclosed: this is provided within the open papers in this appeal. However, I remain of the opinion that some information cannot be disclosed."*

and approximately 52 pages of such material (with certain redactions) was exhibited to the statement (203- 255).

### **Tribunal's review on section 31**

89. We reviewed the open version of the material and the disputed material in the closed session of the Appeal.

90. We considered first the submission that disclosure of the file might harm law enforcement because it would reveal in too much detail how the Police go about their work.

91. We noted the evidence about an apparent passive approach by MPS to the publication of a book by an ex-officer and the ITVX documentary. Even if this specific evidence fell before the date of response we ascribed some but little weight to it as we did not in fact know if MPS had been passive or if they had given actual or tacit permission and if so on what terms including as to editorial oversight.

92. As regards the MPS arguments about the integrity of the criminal justice system we gave very little weight to the assertion that disclosure of this MPS file from the late 1970s would reveal a great deal of valuable operational intelligence to anyone seeking to commit crime (or a crime of this sort) and avoid detection in more recent times. We also gave only little weight to the concern that disclosure would assist a person seeking to frame a diminished responsibility defence.

93. We also gave only minimal weight to the PIBT argument raised by MPS that non disclosure was "...a matter of policy..." because FOIA provides that a public authority should give disclosure unless an exemption applies and section 31 itself is subject to the PIBT.

94. However we did ascribe considerable weight to the concern expressed that disclosure of the remaining parts of the MPS file might risk dissuade victims

and/or witnesses of crime to come forward because the risk of this was clearly against the public interest.

95. As regards section 31 (and dealing only with the remaining disputed material) it was our conclusion that this exemption was engaged and the PIBT favoured maintenance of this exemption.

### **Decision**

96. It is therefore our Decision that having noted the additional disclosure given since the start of this Appeal and as regards the remaining disputed material seen in the closed bundle in this Appeal:-

(a) the exemption at section 38(1) FOIA is engaged and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(b) in so far as it contains personal data the exemption at section 40(2) FOIA applies because although Mr Qureshi was pursuing a legitimate interest disclosure would not have been in compliance with the data protection principles.

(c) the exemption at section 31(1) FOIA is engaged and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

97. Accordingly the DN was not in accordance with the law, the Appeal is allowed and a substituted Decision Notice provided.

**Signed: Tribunal Judge Heald**

**Date: 2 December 2024**

**Amended pursuant to rule 40 on 12 December 2024.**