



NCN: [2024] UKFTT 259 (GRC)

Case Reference: EA/2017/0100

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

**Heard by Cloud Video Platform  
Heard on: 20 February 2024  
Decision given on: 27 March 2024**

**Before**

**TRIBUNAL JUDGE HEALD  
TRIBUNAL MEMBER CHAFER  
TRIBUNAL MEMBER PEPPERELL**

**Between**

**CHRISTIAN HERMAN**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER**

**(2) CHIEF CONSTABLE OF KENT POLICE**

Respondents

**Representation:**

For the Appellant: Mr Herman in person

The 1<sup>st</sup> Respondent was not represented.

For the Second Respondent: Ms Hausdorff of Counsel.

**Decision:** The appeal is dismissed.

**REASONS**

1. Mr Herman appeals to the Tribunal by section 57 Freedom of Information Act 2000 ("FOIA")

2. The Appeal relates to a decision notice (“the Decision Notice”) issued by the Information Commissioner (“the Commissioner”) dated 20 April 2017. In it the Commissioner supported the view taken by The Chief Constable of Kent Police (“Kent Police”) that it was entitled to rely on sections 40(2) FOIA and 40(3)(a)(i) FOIA in refusing to provide certain information requested by Mr Herman.
3. Redactions are made in this Decision to avoid naming or otherwise identifying those who are the subject of Mr Herman's' FOIA Request.

### **Evidence**

4. Mr Herman represented himself and so we were also able to hear directly from him. Kent Police was represented by counsel. We thank both for the assistance they gave the Tribunal in setting out their respective positions.
5. The evidence for the Appeal was contained in an updated open bundle of about 260 pages that had been prepared for the 2017 hearing and updated by Mr Herman for this hearing. It included the Commissioner's Response dated 23 June 2017 and the Kent Police Response dated 14 July 2017. We also had a closed bundle as allowed by a Decision made pursuant to rule 14(6) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
6. Counsel provided an updated note and also referred to the skeleton argument originally prepared for the Appeal hearing in 2017.

### **Procedural Background from 2016**

7. In summary:-
  - 20 & 21 August 2016 Mr Herman makes three FOIA requests
  - 23 August 2016 Kent Police respond
  - 1 November 2016 Mr Herman's section 50 FOIA Complaint
  - 20 April 2017 Commissioner issues the Decision Notice (“DN”)
  - 8 May 2017 Mr Herman issues appeal by section 57 FOIA
  - 17 October 2017 Tribunal dismiss the 1<sup>st</sup> hearing of the Appeal
8. The Tribunal was told incorrectly at the Appeal hearing in 2017 that Mr Herman had not attended because he had refused to be brought from prison.(B83). He made an application for leave to appeal on 20 February 2022. It was refused on 31 August 2022 (B87). On 30 November 2022 the UT gave permission for Mr Herman to appeal (B89) and on 22 September 2023 allowed his appeal (B93). This case was then remitted back to the First-tier Tribunal to be heard again.

9. The Request and Decision Notice are dated 2016 and 2017. A question arose as to whether the Tribunal should consider the matter now (in 2024) on the basis of the law as it was in 2016/2017 or as it is in 2024.

10. In a supplementary note counsel for Kent Police indicated that it was their view that:-

*“Since this Appeal was brought there has been further legislation pertaining to data protection. It is not contended that the Tribunal should reach any assessment under legislation that was not in existence when this Appeal was brought, and of course the time of the Decision Notice which is under challenge, and that the Appeal should be determined in accordance with submissions on the 1998 Act.”*

11. We do not consider the reasoning provided by counsel is necessarily right and can also see arguments that the correct date is the date of the Request or the date of the refusal (as in *Montague v Information Commissioner & the Department of International Trade [2022] UKUT 104 (AAC) (para 89)*). However on all these bases the answer remains that the relevant law is the Data Protection Act 1998 and that which pre dates the relevant changes made by the Data Protection Act 2018.

### **Background**

12. Mr Herman came into contact with Kent Police in April 2013. He was arrested and went to trial on 31 March 2014. He was convicted of a number of offences and sentenced to a term of imprisonment. He told us that so far he has been unsuccessful in the appeal process and has not yet gained the support of the Criminal Cases Review Commission. He mentioned other legal processes he was also considering.

13. Mr Herman complained to the Independent Police Complaints Commission and raised issues about what he considered to have been the misconduct of certain police officers from Kent Police involved in his criminal proceedings. The IPCC referred this back to Kent Police to investigate and report. The undated Kent Police Professional Standards Report (“the Report”) is in the open bundle at pages C214 to C254. It did not uphold Mr Herman’s complaints about Police Misconduct but reached conclusions such as:-

- *“... it seems that [the CPS] was in fact provided with inaccurate information....This in turn seems to have led to the defence being provided with inaccurate information ...”*(C222)
- *“On face value it appears that [redacted officer] misled the CPS concerning the number of interviews [redacted officer] undertook (C244)”*
- *“... there has been a technical breach of...Criminal Procedure and Investigations Act....”*(C244)
- *“..the record of evidence given by [redacted officer] during the trial raises issues. There appears to be an inaccuracy regarding whether there was a second interview with [redacted] and [redacted] claims that there wasn't ....however it is clear there was a second recorded interview.....”*(C258)

- *“It is clear that the premature release of the CCTV system back to [ ] had the potential to undermine the investigation and has been fundamental to Mr Herman’s complaints and a perception of poor policing service by Kent Police” (C253)*
  - *“Had both [redacted officer] and [redacted officer] still been serving as Police Officers or retained in the employment of the Police Service then I would be taking performance recommendations in relation to CPIA.....As both officers have retired a referral is not applicable” (C253)*
14. It is not the role of the Tribunal to reach any conclusions about Mr Herman’s allegations regarding the 3 named police officers or the merits of his concerns about his conviction in 2014 and this Decision does not seek to do so.

### **The Request (A50-52)**

15. Mr Herman made three requests for information (“the Request”) pursuant to FOIA to Kent Police. Two of these were made on the 20 August 2016 and the third on 21 August 2016. Each was in respect of a different named Kent Police officer and in each case Mr Herman asked to be provided with their service records and/or their disciplinary records. All parties have treated these as one request.

### **Response (A53) and internal review (A57)**

16. On 23 August 2016 Kent Police responded to the Request. It refused to provide the information requested relying on the exemption in section 40(2) FOIA in conjunction with section 40(3)(a)(i) FOIA. It provided more detailed reasoning when maintaining its position on 23 September 2016 following an internal review requested by Mr Herman (A57).

### **Complaint (A60)**

17. On 1 November 2016 Mr Herman complained to the Commissioner by section 50 FOIA. He said:-

*“I write in relation to the above referenced FOI request .....As you will see my complaint is that not only were aspects of my complaint internal review ignored & unfairly so they(Kent Police) have failed to inform me of all options available to me in regards to the redacting of the information I requested.*

*You can see for yourselves that the response is evasive and does not conform to the release of information of the service &/or disciplinary records of staff (both current and formerly) of the Public body known as Kent Police.*

*I am requesting that you register this complaint & enforce the rights of access to records of the force & its former & present police officers service &/or disciplinary records even if this information has to be redacted first”*

### **The Decision Notice (DN) (A3-10)**

18. On 20 April 2017, the Commissioner issued the DN. In summary it says:-

- the withheld information relates to living individuals and it is therefore their personal data and redactions would not be effective
- disclosure *“in this case could lead to an intrusion into the private life of the individuals concerned and the consequences of any disclosure could cause damage and distress to those parties”*
- Mr Herman has not *“specified why he is requesting the information so his motives are not known to the Commissioner. She is therefore unable to take these into consideration as a potential legitimate interest.”*
- The Commissioner does *“generally acknowledge that the integrity of police officers is of genuine public interest” “Their actions need to be lawful and their individual conduct is of paramount importance to the maintenance of the public’s trust in the police service as a whole”*
- *“..were their conduct brought into question then there are official ways for this to be investigated.....”*
- *“disclosure of any such information into the world at large by way of a request under the FOIA is very unlikely to be appropriate – she is aware of no such justification in this case”*

19. The Commissioner concluded (A8-9) that:-

*“...in light of the nature of the information and the reasonable expectations of the individuals concerned ...confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject; she considers these arguments outweigh any legitimate interest in disclosure.”(A8)*

*“she has therefore concluded that disclosure in this case would breach the first data protection principle and therefore finds that the exemption at section 40(2) is engaged” (A9)*

### **The form of Response**

20. Kent Police and the Commissioner say that it may have been better for the Response to the Request to have been split between the Request for service records and separately for disciplinary records. For the avoidance of doubt the Tribunal did not consider this to be an issue that impacted this Decision.

### **Section 40(5) FOIA**

21. During the Commissioner’s investigation a suggestion was made that Kent Police had intended to utilise the exemption in section 40(5) FOIA (duty to confirm or deny) (A27). The Commissioner has invited the Tribunal to issue a substituted DN to refer to section 40(5) FOIA.

22. The DN was not issued on the basis of section 40(5). Counsel for Kent Police told us that they did not seek to rely on this exemption for the Appeal because the fact that the 3 police officers had a service and a disciplinary record was not in itself remarkable and that the existence of a disciplinary file did not necessarily indicate anything negative.

### **The Appeal (A11-19)**

23. Mr Herman seeks this outcome (A15):-

*"I only want to know the disciplinary record of these police officers [redact] due to the conduct they have displayed in my arrest, investigation and prosecution. It has called into question and [redacted] of them not only retired on [redacted] or the [redacted] before [redacted]. Bearing in mind my trial started on 31 March 2014! Another [redacted] has retired too [redacted]. I found out after complaining to Kent Police that disciplinary proceedings would have been held against [redacted] but due to their retirement they have escaped it. I am seeking their prosecution for perverting the course of Justice"*

24. Mr Herman told us he wanted to know the date the officers had retired because he suspected that a court had been misled about this point, that retirement had been to avoid disciplinary action and one of the police officers had been re hired as a civilian immediately after resigning as an officer.

25. Mr Herman's grounds of appeal are (A14):-

*"The necessity for disclosure of the information exists because I have complained about conduct of officers in my investigation and prosecution since 2014. I have proof of this corrupt practice which has been covered up by Kent Police. It seems that I may have neglected to articulate the legitimacy of my interests in the information being made available but Kent Police are fully aware of them, so they could have come to some type of agreement to assist in the transparency and accountability expected when the integrity of Police Officers (or ex officers) is clearly relevant and of the clearest concern. "*

*"In light of the serious failures of the officers conduct persistently throughout and the clear breaches of The Criminal Procedures Investigation Act 1996 as agreed by the Police themselves. Considering that new evidence has come to light that evidence was withheld in the investigation and trial from me and my defence team and the jury prosecution and even the trial Judge not only have I lodged an appeal with the CCRC which is due to commence end of May 2017 The Independent Police Complaints Commission (IPCC) has also opened and investigation as I have appealed against Kent Police investigating themselves. A lot has been explained as confusion & incompetence when it is cleanly perjury & perverting the course of justice/misconduct in public office.*

*"Grounds of Appeal"*

*1 I have an interest in the integrity of [redacted] which is clearly legitimate*

*2 There is a clear and compelling public interest for it disclosure*

3. *The “interests” are in the broad principles of accountability and transparency*
4. *The Disclosure is in the interests of justice & its non disclosure is in fact relevant directly to my Human Rights namely Article 6 – right to a fair trial adversely*
5. *The Officers conduct has displayed performance totality inconsistent with [redacted] service [redacted] and [redacted] years service [redacted] service to the public!”*

**Role of the Tribunal**

26. An appeal by section 57 FOIA is in respect of the DN. By section 58:-

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.*

**Legal Position (at the relevant date prior to 2018)**

27. 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).

28. These entitlements are subject to exemptions which can be absolute by section 2(2)(a) FOIA or qualified i.e. subject to the public interest balancing test 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.”*

29. Section 40(2) and 40(3)(a)(i) FOIA provided as follows:-

*(2) 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) either the first or the second condition below is satisfied.*

*(3) The first condition is –*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene*

*(i) any of the data protection principles*

30. If the exemption in section 40(2) and 40(3)(a)(i) FOIA is properly engaged it is an absolute exemption by section 2(3)(f) FOIA.

31. "personal data" was defined by reference in section 1(1) of the Data Protection Act 1998 (as in force at the relevant time) ("the DPA") as data:-

*"...which relate to a living individual who can be identified –*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;"*

32. The data protection principles are set out in Part 1 to schedule 1 of the DPA. Paragraph 1 of Part 1 provides that

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

33. Schedule 2 includes that:-

*6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*

34. 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?"*

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

36. In *Corporate officer of the House of Commons -v Information Commissioner* [2008]EWHC 1084 the Divisional 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..."*



37. Reference was also made to the explanation given by the court in *The Sunday Times v United Kingdom* (1979) 2 EHRR 245(paragraph 59):

*“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."*

38. 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 summarised as follows:-

2 the test for reasonable necessity comes before the consideration of the data subjects interests.

3 reasonable necessity means *“more than desirable but less than indispensable or absolute necessity.”*

5 *“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.”*

39. Section 2 of the DPA defines sensitive personal data as personal data consisting of information as to –

(a) *the racial or ethnic origin of the data subject,*

(b) *his political opinions,*

(c) *his religious beliefs or other beliefs of a similar nature,*

(d) *whether he is a member of a trade union....*

(e) *his physical or mental health or condition,*

(f) *his sexual life,*

(g) *the commission or alleged commission by him of any offence, or*

(h) *any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.”*

40. Sensitive personal data can only be processed if at least one of the conditions from schedule 3 of the DPA is met (Schedule 1 (1)(b) DPA). This includes such things as actual consent from a data subject, to protect the vital interests of a data subject where they cannot give consent, the data subject has already deliberately made the information public and to protect the vital interests of someone other than the data subject where the data subject has unreasonably withheld consent.

41. When considering the position of the data subjects concerned and whether the processing of their personal data is prejudicial and unwarranted, the recitals to the UK GDPR are relevant. Recital 1 provides:-

*"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."*

**Commissioner's response to the Appeal (A30- 41)**

42. The Commissioner opposes the Appeal. In the Commissioner's Response the Tribunal is asked to consider issuing a substituted decision notice to add reference to section 40(5) FOIA. For the reasons set out above we have concluded it would not be appropriate to do so. The Commissioner also says that:-

*"Otherwise the Commissioner maintains that she was correct to conclude that the Police were entitled to rely on section 40(2) to withhold the Officer's service records ....."*

43. In summary the Commissioner argues:-

- a. Mr Herman's Request names the 3 police officers. The information is their personal data. It identifies and relates to them.
- b. Some of the requested information is sensitive personal data and there is no schedule 3 reason applicable to enable processing.
- c. There is no presumption in favour of processing by disclosure.
- d. The reasonable expectations of the data subjects must be considered together with any consequences. It was reasonable for them to assume their former "employer" would not reveal "to the world" if they had been investigated or subject to disciplinary action.
- e. Mr Herman has a private interest in having the information. There is some public interest in ensuring those entrusted "*to police society are fit to do so*" (A39 para 36)
- f. Disclosure is not necessary because:-
  - i. Mr Herman (without this information) is pursuing complaints against Kent Police and to the IPCC and the CCRC and
  - ii. there are already ongoing appeals and complaints and other bodies involved which will be able to access the information he has requested by use of their own powers.
- g. Mr Herman's reference to his Article 6 rights to a fair trial is not relevant because:-
  - i. his criminal trial took place 2 years or so before the Request and so the refusal to provide the information in 2016 could not have impacted that right in 2014 and

- ii. his Article 6 rights are protected within the criminal trial procedures.

### **Kent Police Response (A44- 48)**

44. Kent Police explain that service records are held in a personnel computer system and if printed take the form of an “employee validation report”. The information includes salary, awards, job file, contact file, disabilities, emergency contact, next of kin, promotions, qualifications, training, career history, employee dates and absences. It is also explained that while this appears to be an “employee” record serving police officers are Crown Servants.
45. As regards disciplinary records they say that while the existence of such a record might in a different organisation be viewed adversely this is not the case for police officers who are subject to the Standards of Professional Conduct contained in Schedule 2 to the Police (Conduct) Regulations 2012 and the code of ethics. They say that police officers in the course of their duties will be subject to complaints and these have to be recorded. They say that the system records all complaints whether substantiated or not and irrespective of outcome. They also say that such records may contain sensitive personal data and that there is a strong expectation of privacy.
46. In summary in their Response to the Appeal they say that:-
  - a. Mr Herman appears to have abandoned his claim that the records sought are documents to which the public have a right of access.
  - b. Mr Herman does have some personal legitimate interest but he seeks to present that private interest as a public one.
  - c. (A39 para 37) disclosure could be legitimate where used to support any formal investigation into the conduct of the police officers connected to Mr Herman’s arrest and prosecution but say it is not necessary because for example any bodies carrying out a formal investigation would not need the material provided under FOIA as they will have their own powers.
  - d. He fails to have any or enough regard for the police officers’ legitimate expectation of privacy or the unwarranted intrusion into their personal lives and does not have enough or any regard for the fact that information provided after a FOIA request is published “to the world.”
  - e. There is insufficient public interest in the information to make disclosure necessary. Disclosure would be unfair.
  - f. Disclosure would breach of the first data protection principle .
  - g. The Article 6 ECHR argument has no merit for the reasons set out by the Commissioner.

### **Closed Hearing**

47. We held a closed hearing with counsel for Kent Police in attendance but in the absence of Mr Herman. The closed bundle contained the service record and disciplinary record of the three police officers referred to by Mr Herman in the Request.
48. The service records are akin to an employees detailed personnel file. We noted that they were designed to record amongst other things data about gender, marital status ethnicity, nationality, home address, private contact details, pay and the relevant national insurance number. Including personal health information.
49. The disciplinary records are structured to have the name of the officer then these headings -a reference, any allegation, the name of any complainant, date any allegation is recorded, date any allegation is finalised with the outcome and any action.
50. Mr Herman was provided with a note of the closed hearing by which he was informed that:-

*“The Tribunal considered the service records, and noted that those records contain personal data and sensitive personal data. The Tribunal made enquiry as to whether the retirement dates were contained in the closed bundle. It was noted that the retirement dates were not part of the original request, this issue hadn’t particularly been highlighted in the request.”*

*“The closed material was initially generated on 19 and 23 June 2017. The Tribunal looked at the material. As a matter of fact, the tribunal saw no information relating to retirement dates. The tribunal was not going to speculate as to why.*

*The Tribunal considered the disciplinary records, which contained personal data and potentially sensitive personal data. It is clear from each disciplinary record to which officer it relates, in its unredacted form.”*

### **Kent Police Submissions**

51. Counsel for Kent Police had prepared a skeleton for the Appeal in 2017. To this was added a supplemental note which:-
  - a. assisted with the issue of the change in law caused by the passage of time (see above) and
  - b. gave an update as regards one of the officers who in 2017 was still with Kent Police but has now moved to a different force.
52. The submissions of Kent Police in summary are:-
  - a. the disputed material is clearly Personal Data. None of the conditions set out in schedule 2 of the DPA are met.
  - b. any disclosure would have to be based on a legitimate public interest not just a private one and Mr Herman’s Appeal is based on a private interest only.

- c. Mr Herman *“appears to have abandoned his contention that service and disciplinary records are documents to which the public has a right of access, subject to redaction if necessary. The Decision Notice addresses the operation of the DPA in this respect.”*
- d. *“...disclosure of the Disputed Information would be unfair in light of the nature of the information and the reasonable expectations of the individual concerned and in light of the potential to cause unnecessary and unjustified distress to the data subject and would therefore also be in breach of the first Data Protection Principle.”*

53. The conclusion in the skeleton repeated by counsel at the Appeal is that *“it is not necessary to process the relevant personal data in order to meet any public or private legitimate interest.”*

### **Mr Herman’s position**

54. Mr Herman accepted at the hearing that he was not entitled to see personal sensitive information.

55. In the Request Mr Herman seeks the service and disciplinary records. In the Complaint he maintains the request for both but adds *“even if this information has to be redacted first.”* In his appeal it is suggested from the outcome sought section that his request is limited as follow:- *“I only want to know the disciplinary record of these police officers.”* However we continued to review both because he was particularly concerned to know the dates of retirement for officers and if that information was recorded it would more likely have been in the service records. He:-

- a. explained to us his concerns about the conduct of the officers as it impacted his criminal proceedings and provided us with information about his various appeals.
- b. set out his concerns about the way in which a police officer had not appeared at his trial because they had retired but then it appeared that person had been taken on as a civilian with the same force the next day.
- c. made a submission about why he considered getting the information he requested was in the wider public interest. He said that the public were interested in the conduct of the police especially where there were allegations that a court has been misled. He spoke of the public interest in these sort of things no longer being *“swept under the carpet”*. He said that by allowing retirement an officer’s conduct would go unchallenged. This he considered to be a manipulation of the system about which the public is very concerned because it is an issue of public safety.
- d. referred to the police having operated within a culture of secrecy with a lack of transparency which has had a negative effect and does more harm than good. He said that police officers need to be held to account and that the public have a right to know.

- e. highlighted the conviction of the former police officer Wayne Couzens and the widespread public interest in and reaction to that case.

56. Mr Herman in the Grounds of Appeal (para 34 A38) refers to his complaint to the IPCC and the Kent Police investigation that led to the Report. His grounds as set out above include that he says:-

- *I have an interest in the integrity of [redacted] which is clearly legitimate*
- *There is a clear and compelling public interest for its disclosure*
- *The “interests” are in the broad principles of accountability and transparency*

57. It is right to record that counsel, in reply to Mr Herman’s submissions, amongst other things stated on behalf of Kent Police that Mr Herman’s allegations against Kent Police and the three officers were rejected. These matters are not something for the Tribunal to determine.

### **Tribunal’s Review**

58. We have considered the Appeal based on the evidence provided in the open bundle, our review of the material in the closed bundle and the submissions of Mr Herman and counsel for Kent Police.

### **Personal Data**

59. We did not accept Mr Herman’s suggestion that information relating to a “police officer” in that capacity was not information about an “individual”. In our view the service record and the disciplinary record referred to in the Request is personal data and sensitive personal data.

### **Exemption**

60. Information is exempt information if it is personal data to which one of the two conditions in sections 40(2) and 40(3) FOIA apply. Kent Police say that the first condition, found in section 40(3)(a)(i) FOIA applies because disclosure would contravene one or more of the data protection principles.

### **The data protection principles**

61. Schedule 1 to the DPA provides that personal data must be processed fairly lawfully and shall not be processed unless:-

- a. as regards personal data at least one of the conditions in schedule 2 is met and
- b. as regards sensitive personal data at least one of the conditions of schedule 3 is met.

### **Sensitive personal data**

62. From our review of the closed material both the service records and disciplinary records contain sensitive personal data within the definition in section 2 of the DPA. In our view there is no relevant condition contained in Schedule 3 of the DPA that would justify the disclosure of such information in this case.

### **Schedule 2 DPA**

63. As regards personal data Article 6(1) provides that a relevant condition for disclosure is if *“processing is necessary for the purposes of legitimate interests pursued by the ....the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”*

64. The data protection principles thus require any disclosure of personal data to be fair and lawful which it will be only if shown to be reasonably necessary for the purposes of a legitimate interest.

### **Necessary legitimate interest**

65. Mr Herman has issues about aspects of the investigation which resulted in his conviction. He has not been successful in his attempts to appeal. He intends to carry on seeking to establish he was wrongly convicted.

66. For him then we can see that trying to establish what if anything was said about this matter to the officers at the time and recorded and whether any of them were subject to any relevant disciplinary process and the outcome of any such process is of interest to him. Mr Herman also argues that the Request has a legitimate public as well as private interest and as referred to earlier he gives examples including the importance of transparency without which public confidence in policing is undermined.

67. The Commissioner in the DN accepts that *“..the integrity of police officers is of genuine public interest”* *“Their actions need to be lawful and their individual conduct is of paramount importance to the maintenance of the public’s trust in the police service as a whole”* At para 36 of the Commissioner’s Response it is accepted that there is a public interest in ensuring that those entrusted to police society *“are fit to do so”*(A39). The Commissioner also says that police officers’ actions *“.. need to be lawful and their individual conduct is of paramount importance to the maintenance of the public’s trust in the police service as a whole”*

68. However the Commissioner says (A39-40) that there while there is some legitimacy in Mr Herman’s personal interest in seeking the service records and receiving confirmation or denial about the disciplinary records however disclosure of any personal data is not necessary to meet any public or private interest.

69. Having reviewed the closed bundle (and excluding any sensitive personal data) we take the view that:-

(1) there is some legitimate private but not public interest as regards the relevant service records and

(2) there is both a public as well as private interest in the disciplinary records especially in light of some of the comments made by the investigator in the Report referred to in this Decision such as that there may have been a breach of the Criminal Procedure and Investigations Act 1996 and that but for their retirement officers would have been given management advice or be subject to the unsatisfactory performance procedure.

70. Even where there is a legitimate interest, disclosure has to be shown to be reasonably necessary in the pursuit of that interest.
71. Having reviewed the records our view is that if there was a personal and (contrary to our conclusion) a wider interest in the service records we could not see it was reasonably necessary for them to be disclosed in the pursuit of the legitimate interest.
72. As regards the disciplinary records it appeared to us that much of what Mr Herman sought to have disclosed had already been reviewed by the investigator who had been able to access all available records in the investigation and contained within the Report.
73. Additionally we accept that should Mr Herman be successful in for example persuading the CCRC to review his case they will have their own powers to enable them to obtain information to investigate matters.
74. Mr Herman, when he appealed, indicated he wished to challenge the fact that Kent Police professional standards team had been the investigator of the complaint but it seems that nothing has come of that.
75. Based on the authorities referred to, in our view the legitimate public interest in the disciplinary records was satisfied by the investigation and the Report. It is not therefore reasonably necessary for the disciplinary records to be published "to the world" in response to this FOIA request to satisfy that interest.

### **The rights and freedoms/ legitimate interests of the data subject**

76. Even had we decided that disclosure was reasonably necessary we would have accepted the position of the Commissioner and Kent Police that disclosure would be unwarranted:-

*"...by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".*

77. Having seen the information and heard the submissions of the parties our view is that:-
- It would not be in the reasonable expectation of police officers that these records would be disclosed on the basis of a FOIA request.



- The service records contain the sort of information employers and employees expect to be kept private and used only for the purpose for which the data was collected namely the legal and financial relationship between and management of the working relationship between employer and employee (or Crown Servant).
  - Police officers generally and those reviewing their conduct would not, in our view, expect disciplinary records to be disclosed as part of a FOIA request. We do accept they might expect disclosure as part of any police disciplinary procedure where other Rules may apply and where those involved would be able to interpret the information disclosed. By way of example a general overview of such records may contain allegations which are unfounded or rejected but not yet concluded. They could involve trivial issues but also extremely serious allegations including up to and including criminality. Outcomes may be subject to challenge. Named complaining parties themselves may be subject to criminal investigation.
78. Disclosure in response to a FOIA request would be, in our view, an unjustified intrusion into the private life of these data subjects, unfair, potentially damaging and distressing.

#### **Article 6 European Convention on Human Rights**

79. In his Appeal Mr Herman says that *“The Disclosure is in the interests of justice & its non disclosure is in fact relevant directly to my Human Rights namely Article 6 – right to a fair trial adversely”*
80. The Commissioner (supported by Kent Police) says (A40 para 42)
- “The Commissioner notes that the Appellants trial took place some two years prior to his requests for information. As such the refusal to process the Officer’s personal data in 2016 could not effect his right to a fair trial in 2014. In any event the Appellants right to a fair trial was protected by other rules and procedure governing the conduct of criminal trials”*
81. We do not need to consider this ground any further than noting that as Mr Herman went to trial in 2014 the refusal to respond in 2016 could not on any basis have been a breach of his Article 6 rights at his criminal trial.

#### **Conclusion**

82. We considered whether information or some of it could be provided with redactions to remove the ability for any individual(s) to be identified. However Mr Herman knows who the officers/data subjects are and also because of the structure of the information we concluded that this was not possible.
83. In so far as the Requests involved sensitive personal data found in the service and disciplinary records we concluded that there is no reason based in schedule 3 to the DPA that would enable disclosure to be to be fair and lawful. Accordingly disclosure would contravene the data protection principles.

84. We concluded that there was no legitimate public as well as private interest in disclosure of the service record material (and we noted that the retirement date information sought by Mr Herman was in any event not present in what we saw). Had we thought otherwise our view would have been that disclosure was unwarranted when balancing the rights of the data subjects as set out in Article 6(1).
85. We concluded that Mr Herman was pursuing a legitimate private and public interest in seeking the disciplinary records. However disclosure “to the world “by a FOIA request was not necessary. Had we thought otherwise we would also have concluded that disclosure was unwarranted when balancing the rights of the data subjects as set out in Article 6(1).

### **Decision**

86. We did not agree with all the reasoning in the DN (for example on section 40(5) FOIA). However our Decision is that the DN was in accordance with the law and we did not conclude that the Commissioner should have exercised a discretion differently.
87. In light of the content of part of the Report we had some sympathy for the Appellant however Kent Police were entitled to rely on the exemption in sections 40(2) and 40(3)(a)(i) FOIA and so the Appeal is dismissed.

**Signed: Tribunal Judge Heald**

**Dated 26 March 2024.**

**Promulgated**

**Dated 27 March 2024.**