NCN: [2023] UKFTT 00595 (GRC)

Case Reference: EA/2022/0258

First-tier Tribunal

General Regulatory Chamber

Information Rights

Determined, by consent, on written evidence and submissions.

Considered on the papers on 15 May 2023.

Decision given on: 10 July 2023

Before

TRIBUNAL JUDGE Stephen Cragg KC

TRIBUNAL MEMBER Susan Wolf

TRIBUNAL MEMBER Jo Murphy

Between

JON AUSTIN

Appellant

And

INFORMATION COMMISSIONER (1)

COMMISSIONER OF POLICE OF THE METROPOLIS (2)

Respondents

Decision: The appeal is Allowed

Substituted Decision Notice: A substituted decision notice is made as described in paragraph 66 below.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

2. The Tribunal considered an agreed open bundle of evidence of 417 pages and closed bundle.

BACKGROUND

3. The Appellant made the following information request to the Commissioner of the Metropolitan Police (CMP) on 8 April 2021:

> "Please see this misconduct outcome - https://www.met.police.uk/foi-ai/metropolitan-police/misconductoutcomes/ 2021/march/PC-[name redacted]/ while hearings are being held in private during the coronavirus pandemic (with press unable to attend) such as this one, the MPS opted to publish summaries going into the reasoning behind the decisions. However none had been published for this case and I am told it is not going to be.
>
> 1.Please provide the summary under the FOIA. If it is not provided then at least outline which of the allegations the officer faced were found proven as misconduct and which were not with a brief explanation as to why."

4. On 18 June 2021 the MPS responded and refused the request by virtue of section 40(2) FOIA (personal information). However, the CPM supplied the Appellant with a DOI Notice of Outcome and said that this was provided to him in good faith. On 12 August 2021 the Appellant asked the CPM for an internal review. On 24 August 2021 the CPM provided the Appellant with its internal review response. This said that it should have stated within the refusal notice that the Appellant was being provided with a partial disclosure.

5. The Appellant contacted the Information Commissioner on 24 August 2021 to complain about the way his request for information had been handled.

6. This is a case where some more background is required to understand the nature of the request and the refusal.

7. The Appellant's request was in relation to information about the outcome of misconduct proceedings which were conducted under the Police (Conduct) Regulations 2012 (the 2012 Regs). The misconduct hearing in this case, which took place in February 2021, was chaired by a legally qualified chair (LQC), who exercised his discretion under reg 31 of the 2012 Regs to hold the hearing in private. The LQC drafted a Notice of Outcome under reg 36 of the 2012 Regs, which recorded the decisions of the hearing, notes on legal arguments, and findings of fact. A summary, which set out the decisions of the hearing, and named the officer, was published for 28 days on the MPS's website in accordance with its policy. We understand that the LQC decided that only this summary and not the full Notice of Outcome would appear on the website.

8. The MPS also provided the summary which had previously appeared on the website, under cover of a letter to the Appellant on 14 June 2022 (this time the name of the officer was not included, but of course the Appellant had this information already). That letter is exhibited to this decision.

9. In summary the document disclosed sets out the 'Decisions of the Hearing' in a tabular form in relation to findings about allegations against an unnamed officer.

10. First of all it is said that there is a 'factual matrix' which is recorded to be 'partially proven' but no further details of the factual matrix or the decision-making process is provided.

11. There are then a list of allegations with redactions of names and places which are listed as 'proven' or 'not proven'. These are as follows:-

    (a) Having in your possession, in your backpack, items to be used for theft.
    (b) On the 22 December 2009 on or about 19:45 hours at***** ******, Hemel Hempstead going equipped for theft.
    (c) When stopped by PC **** dishonesty *[sic]* stated that you didn't have a backpack on your person
    (d) Leading members of the public to conclude you were intending to break into still *[sic]* from their vehicle and/or other vehicles
    (e) Failing to stop when requested to do so by PC****
    (f) Absconding from ***** ***** when requested to stop by PC****
    (g) Attempting to hide your backpack to prevent police officers discovering its contents.
    (h) Failing to cooperate with a police investigation

12. Items (c), (e), (f), (g) and (h) were all found to be 'Proven' and a final written warning issued to the officer. The other items were found to be 'Not Proven'.

13. Those matters said to be 'proven' appear to describe a situation where a police officer, in Hemel Hempstead, attempted to hide a backpack, lied about this to a police officer, failed to stop when asked, then absconded and failed to co-operate with a police investigation. Nevertheless the decisions end by saying it was decided that it was 'Not Proven' that 'As a result of that stated herein, if proven, your conduct singularly or in its totality amounts to gross misconduct'.

14. As noted above, as we understand it, all of this information would have been published on the MPS website for 28 days after the decisions had been made, and that the officer to whom the decisions were made would have been named. The Appellant knows the name of the officer by way of that publication. We can see this from documents in the bundle: the email of 23 March 2021 at [164] for example, shortly before the request was made.

15. The Appellant says that the MPS opted to publish summaries going into the reasoning behind decisions such as this during the pandemic. He notes that none has been published for this case, and that is what his request relates to. The approach of the MPS is set out in an email dated 18 March 2021 [165] to the effect that:-

> Essentially the MPS … makes submissions that a suitable redacted copy of the outcome should be published to maintain public confidence where the matter is heard in private due to covid. Most Chairs adopt this approach, some do not depending on the circumstances of the case and having considered any submissions made by the defence.

16. The MPS has filed a witness statement from Scott Didham who is an Inspector the Directorate of Professional Standards' Misconduct Hearings Unit (MHU). Inspector Didham says that the views of the LQC were obtained in relation to further disclosure. That appears to have happened in March 2021, before the current request was made (see the email at [164]). Inspector Didham reports:-

> ….the LQC's view on further disclosure, namely that further detail of this case should not be disclosed at this time on the basis that it may adversely impact on the private life of the officer concerned and/or others in this case. The LQC had directed in February 2021 that these misconduct hearings were held in private and has directed what information would be given to the public after proceedings concluded, which is the information in the previously published summary (i.e. the decision) that was further disclosed to the Appellant.

17. This was further explained to the Appellant in a letter from a Ms Taylor on 24 August 2021 which states:-

> However having considered views from all parties, the LQC decided that personal information not directly related to the allegations of misconduct that were found proven should be redacted. Having made this decision, the LQC was of the view that the outcome rationale would have needed to be entirely rewritten as otherwise it would not have made sense to any reader. However the LQC noted that they did not have to publish a full rationale under the 2012 Police Conduct Regulations and so opted to publish a notice that mirrored the pre-hearing notice that was published on the MPS website.'

LEGAL FRAMEWORK

Police misconduct

18. As referred to above, the Police (Conduct) Regulations 2012 as they were amended at the time of the decisions made in this case (the 2012 Regulations), are relevant.

19. The outcome notice was in respect of a misconduct hearing governed by the 2012 Regulations. By reg 31 of the 2012 Regulations, misconduct hearings are by default in public, but the LQC has the power to exclude any (or all) people from the hearing under reg 31(6). This can, in effect, mean that hearings are conducted in private (as happened in this case).

20. By reg 36 of the 2012 Regulations:-

> 36.– Notification of outcome
>
> (1) The officer concerned shall be informed of—
>
> (a) the finding of the person or persons conducting the misconduct proceedings; […] as soon as practicable and in any event shall be provided with written notice of the relevant matter or matters and the reasons before the end of 5 working days beginning with the first working day after the conclusion of the misconduct proceedings. […]
>
> …
>
> (6) In relation to a misconduct hearing… the person chairing the hearing may require the appropriate authority to publish a notice during the notification period containing information relating to one

> or more of the matters set out in paragraph (9) in the manner set out in paragraph (10). […]
>
> (8) In this regulation, the notification period is the period of 5 working days beginning 7 working days after the day on which the misconduct hearing… is concluded.
>
> (9) A notice published in accordance with paragraph (6) or (7) may contain information relating to—
>
> (a) the name of the officer concerned;
>
> (b) the conduct that was the subject matter of the case and how that conduct was alleged to amount to misconduct or gross misconduct as the case may be, as set out in the notice given in accordance with regulation 21(1)(a)(ii);
>
> (c) the finding of the person or persons conducting the misconduct hearing; and
>
> (d) any disciplinary action imposed.
>
> (10) Where the appropriate authority publishes a notice in accordance with paragraph (6) or (7), it shall publish the notice on its website for a period of no less than 28 days. […]

21. In its response to this appeal the MPS notes that:-

> The MPS practice, where required to publish a notice under regulation 36, was to publish it for 28 days (subject to any other indication or direction from the LQC). After that point, it is removed from the MPS website. In this case, the Summary was what the MPS was required to, and did, publish on its website for 28 days.

22. It is uncontroversial for us to say that within the withheld information is a sentence that states that the panel ordered publication pursuant to regulation 36, but nothing else is recorded in relation to that issue.

23. Thus, reg 36 gives the LQC two powers relevant to our consideration. The first is to exclude people from the hearing (which may have the effect that the hearing is in private). The second is to require the publication of a notice and to specify the matters that should be covered in the notice from the list in reg 36(9). Thus the default position is that the hearing should be in public. Interestingly, other than stating the matters which should be included in the notice, the LQC does not seem to have further powers to

specify the format of the notice, although of course no doubt the MPS will follow any guidance provided by the LQC at the hearing.

24. As explained above, as we understand it, in this case the LQC directed that a short summary only be published even though this would cover all the matters in reg 36(9).

Freedom of information

25. The Appellant is entitled (1) by s1(1)(a) FOIA to be informed in writing by the MPS whether it holds the requested information; and (2) by s.1(1)(b) to have the requested information communicated to him, subject to the exemptions in Part 2 of FOIA.

26. In particular, s 2(2) and (3) FOIA materially provide:-

> **2.— Effect of the exemptions in Part II.**
>
> **…**
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> > (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> >
> > (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
>
> …
>
> > (fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied […]

27. The relevant FOIA exemption is s40(2) FOIA in relation to the first condition set out in s.40(3A) FOIA:-

> **40.— Personal information.**
>
> …
>
> (2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which does not fall within subsection (1) [relating to personal data of which the applicant is the data subject], and

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

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a) would contravene any of the data protection principles, or

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

…

(7) In this section—

"the data protection principles" means the principles set out in—

(a) Article 5(1) of the UK GDPR …

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

28. Article 10 of the UK GDPR defines criminal offence data as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:-

(a) The alleged commission of offences by the data subject; or

(b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

29. The Commissioner's Guidance says the following about what constitutes 'criminal offence data:-

> **What is 'criminal offence data'?**
>
> The UK GDPR gives extra protection to 'personal data relating to criminal convictions and offences or related security measures'. This covers information about offenders or suspected offenders in the context of criminal activity, allegations, investigations and proceedings.
>
> In this guidance, we refer to this data collectively as 'criminal offence data', although this is not a term used in the UK GDPR.
>
> It includes not just data which is obviously about a specific criminal conviction or trial, but also any other personal data 'relating to' criminal convictions and offences. For example, it can also cover suspicion or allegations of criminal activity.
>
> 'Relating to' should be interpreted broadly. It covers any personal data which is linked to criminal offences, or which is specifically used to learn something about an individual's criminal record or behaviour. This is consistent with the broad interpretation of 'relates to' in other UK GDPR and DPA 2018 provisions, such as the definition of personal data.

30. The restrictions on disclosing such information are rigorous. Both the MPS and the Commissioner agree, and as supported by the ICO Guidance on section 40 (at p17) that in the context of disclosure under FOIA, the only possible conditions that could be met are those in paragraphs 29 and 32 of Schedule 1:-

> 29 This condition is met if the data subject has given consent to the processing.
>
> …
>
> 32 This condition is met if the processing relates to personal data which is manifestly made public by the data subject.

31. However, the Appellant has relied on paragraph 13 of Schedule 1, which reads:-

13 Journalism etc in connection with unlawful acts and dishonesty etc

(1) This condition is met if—

(a) the processing consists of the disclosure of personal data for the special purposes,

(b) it is carried out in connection with a matter described in sub-paragraph (2),

(c) it is necessary for reasons of substantial public interest,

(d) it is carried out with a view to the publication of the personal data by any person, and

(e) the controller reasonably believes that publication of the personal data would be in the public interest.

(2) The matters mentioned in sub-paragraph (1)(b) are any of the following (whether alleged or established)—

(a) the commission of an unlawful act by a person;

(b) dishonesty, malpractice or other seriously improper conduct of a person;

(c) unfitness or incompetence of a person;

(d) mismanagement in the administration of a body or association;

(e) a failure in services provided by a body or association.

(3) The condition in sub-paragraph (1) is met even if, when the processing is carried out, the controller does not have an appropriate policy document in place (see paragraph 5 of this Schedule).

(4) In this paragraph—

"act" includes a failure to act;

"the special purposes" means—

(a) the purposes of journalism;

(b) academic purposes;

(c) artistic purposes;

(d) literary purposes.

32. When considering personal data other than special category/criminal offence data, disclosure under FOIA can be lawful under UK GDPR where either there is consent (therefore meeting Art 6(1)(a) UK GDPR) or where it is 'necessary for the purposes of legitimate interests …, except

where such interests are overridden by the interests or fundamental rights and freedoms of the data subject' (meeting Art 6(1)(f) UK GDPR).

33. This imports a balancing exercise: if it does not favour disclosure, then disclosure would not be lawful, would contravene the data protection principles, and would be prevented by s.40(2) read with s.40(3A) FOIA. The Article 6(1)(f) balancing exercise requires consideration of the three questions set by Baroness Hale DPSC in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 (with minor updates in square brackets to reflect the shift from the Data Protection Act 1998 to the current data protection regime):

    (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 o

    f those interests?

    (iii) Is the processing unwarranted in this case [because it is overridden by the interests of fundamental rights and freedoms of the data subject which require protection of personal data]?

34. The second question refers to whether the processing is reasonably necessary for the purposes of the legitimate interest in question: South Lanarkshire at §27.

THE DECISION NOTICE

35. The decision notice is dated 19 August 2022. Having considered the withheld information, the Commissioner said that he was satisfied that the information both relates to and identifies the individual concerned and therefore the information therefore falls within the definition of 'personal data' in section 3(2) DPA. The Commissioner records that:-

    25. The complainant confirmed that he would like "the police to provide the summary outcome report (redacted if necessary) or at the

very least detail what each allegation was and which ones were found proven."

26. The MPS was therefore asked if some of the information could be suitably redacted to prevent identification of the officer(s) concerned. It said that it provided as much information as it could, and added "for completeness our Directorate of Professional Standards contacted the Legally Qualified Chair in order to seek his views on disclosure of the outcome report and/or further detail in this case, as he is the author of the outcome document." MPS further explained that the Legally Qualified Chair's view regarding further disclose in this matter was that further details of this case should not be disclosed. He believed this may adversely impact on the private life of the officer concerned and/or others in this case.

36. The Commissioner then considered whether the information amounted to criminal offence data. The Commissioner says:-

27. Information relating to criminal convictions and offences is given special status in the UK GDPR.

28. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

(a) The alleged commission of offences by the data subject; or

(b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

29. Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. The summary outcome report, clearly relates to a named identifiable individual linked to an investigation of allegations of crime and police misconduct matters.

30. The MPS stated the outcome report relates to and identifies the data subject. It does not believe disclosure would be fair as none of the conditions have been met for Schedule 1, parts 1 to 3 conditions. MPS said it had not approached the data subject as it would be inappropriate and impractical in the circumstances. It explained that the data subject would have no expectation of the information being

placed in the public domain again, which MPS said, would cause them distress.

…

33. When considering the disclosure of criminal offence data under FOIA, information can only be disclosed if either the individual whose data it is has given their explicit consent for the information to be disclosed or, if they have manifestly made the information public themselves.

34. Whilst it is noted that details regarding some of the officers concerned are still in the public domain by way of the media, the Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to an FOIA request or that they have deliberately made this data public.

35. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data in order to disclose it under the FOIA would therefore breach principle (a).

37. The Commissioner goes on to consider the position if the withheld information is not criminal offence data:-

37. With regards to the information requested, the Commissioner considers that the complainant is pursuing a legitimate interest, and that disclosure of information relating to the allegations of an officer and misconduct outcomes, is, to some degree, necessary to meet that legitimate interest.

38. However, the Commissioner considers the MPS has a strong and reasonable expectation that in its role as a data controller, it will not disclose information about the named police officer and it will respect their confidentiality. Furthermore, the MPS has expressed concern that the data subject would have no expectation of the information being placed again in the public domain. The MPS said that disclosure would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the officer concerned.

39. The Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the MPS. Therefore, he considers there is no legal basis for the MPS to disclose this information and to do so would be in breach of principle (a).

THE APPEAL AND THE RESPONSE

38. The Appellant's appeal is dated 16 September 2022. He notes that outcome summaries have regularly been published in misconduct cases, especially during the pandemic when hearings took place in private. He notes that the Commissioner does not appear to have recognised that the officer's name has been disclosed, with brief reference to the misconduct allegations and is in the public domain.

39. The Appellant raises public interest matters around:-

> …the Parliamentary and Diplomatic Command, wider cultural issues in the MPS that have been in the public domain in recent years, particularly this year as they led to the resignation of Commissioner Cressida Dick and also the Daniel Morgan report findings of last year which concluded the MPS was institutionally corrupt when it came to acknowledging its own failings and even willing to cover them up.

40. The Appellant points out that the default position for misconduct proceedings is that they should be in public. The Appellant states that the Commissioner placed too much emphasis on the LQC's view. The Appellant suggests that the Notice of Outcome document can be disclosed with appropriate redactions of personal information 'such as medical details etc'.

41. The MPS response points out that the Appellant has not contested that some of the withheld information is criminal offence data (although of course the Appellant has not seen the information). The MPS says that the information 'contains substantial further personal data about alleged criminal offences' but does not explain further.

42. The MPS accepts that the Appellant is pursuing a legitimate interest in the transparency of police misconduct outcomes. The MPS disagrees with the Commissioner that disclosure of the Notice of Outcome 'is, to some degree, necessary to meet that legitimate interest' in circumstances where the Alternative Requested Information has been disclosed. The

test is whether the disclosure is reasonably necessary for those purposes. Although the hearing was held in private by virtue of a direction of the LQC, the Summary was published, and subsequently further information disclosed. The MPS says that met any legitimate interest in the transparency of police misconduct outcomes.

43. If that is wrong then the MPS says that 'the officer would have a reasonable expectation that material above and beyond the Summary directed by the LQC would not be published into the public domain, and that the MPS as their (quasi-)employer would not disclose information about them into the public domain in perpetuity. That expectation is reinforced by the LQC's own view that it would not be appropriate to disclose additional information'.

44. The MPS argues that 'While the officer concerned may not have had a reasonable expectation of privacy in the immediate period after the misconduct hearing, when there was requirement to publish the Summary, they would not reasonably have expected that disclosure to be indefinite and enduring to the world at large'.

45. In relation to paragraph 13 of Schedule 1 of the DPA which authorises the processing of criminal offence data for journalistic purposes (relied upon by the Appellant) by the MPS. The MPS argue that this is not relevant for 'motive-blind' disclosure to the 'world at large' for the purposes of FOIA, and in any event, paragraph 13(1)(e) of Schedule 1 of the DPA refers to the reasonable belief of the data controller that publication would be in the public interest. That is part of the condition within paragraph 13(1) that must be met for the processing to be lawful. The MPS points out that the data controller in this case is the MPS and that the MPS does not believe that publication would be in the public interest. As such, the condition in paragraph 13(1) is not met.

46. The Commissioner's response repeats in general the contents of the decision notice. Although the Commissioner repeats that the withheld information is said to contain criminal offence data but this is not

explained. The Commissioner has chosen not to address at all the Appellant's point that the decision notice does not appear to recognise that the officer's name is already in the public domain. The Commissioner confirms that it was not decided necessary to view the Notice of Outcome before reaching conclusions in the decision notice.

DISCUSSION

47. In this case we start from the position that the Appellant knows the identity of the officer concerned because his name, together with the summary of information set out above (and in the appendix) was published on the MPS website for 28 days. The Appellant has seen this and is interested in obtaining more information about the case and the officer concerned (who he has referred to by name in correspondence). We bear in mind, therefore, that the Appellant (or anybody else) could publish and publicise the name of the officer and the summary outcome of the misconduct proceedings. Indeed, a simple Google search reveals that that has happened. Although the Commissioner does not explicitly refer to the Appellant having been named, he appears to accept that this is the case in para 34 of the decision notice where it is stated that 'it is noted that details regarding some of the officers concerned are still in the public domain by way of the media'.
48. An important issue in this case is whether some or all of the personal information requested amounts to criminal offence data, as the restrictions on the disclosure of this information are onerous. However, this issue is not explored fully in the decision notice nor in the submissions from the parties. We remind ourselves that the decision notice says:-

> Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. The summary outcome report, clearly relates to a named identifiable individual linked to an investigation of allegations of crime and police misconduct matters.

49. We note a number of matters here:-

(a) As referred to above, the misconduct panel said in terms of its Notice of Outcome that 'they were concerned with matters of misconduct rather than criminal charges'.

(b) In our view 'allegations of…police misconduct matters' would not come under the definition of criminal offence data.

(c) The Commissioner did not view the Notice of Outcome.

(d) There is nothing in the 'wording of the request' which indicates that the information sought is criminal offence data:

(e) In making partial disclosure as part of the FOIA process to the Appellant in August 2022, the MPS must have concluded that that information disclosed was not criminal offence data.

(f) The Commissioner has not engaged with the fact that the MPS has made 'partial disclosure' and has disclosed information under FOIA which was not, at the time of the request, available on the MPS website.

50. We remind ourselves that ICO guidance states that criminal offence data involves 'offenders or suspected offenders in the context of criminal activity, allegations, investigations and proceedings'. As the misconduct panel was only concerned with misconduct matters it does not seem to us that this case comes within that criminal 'context' as described by the ICO, and the special protection given to criminal offence data does not apply in relation to this request.

51. For completeness, if we are wrong about this, for the reasons set out by the Commissioner and the MPS, paragraph 13 of Sch 1 to the DPA could not be applied to make the information disclosable to the Appellant.

52. Having concluded that the information is not criminal offence data, the Tribunal needs to consider the appeal on the basis that the information sought still consists of personal information. Applying the legal framework set out above, the Tribunal agrees with the Commissioner (see paragraph 37 of the decision notice) that the Appellant is pursuing a

legitimate interest, and that disclosure of information relating to the allegations of an officer and misconduct outcomes, is necessary to meet that legitimate interest. The Appellant is seeking the reasoning behind the decisions made and not just the findings themselves, in the context of what he says are ongoing concerns about police misconduct. On that basis we disagree with the MPS argument that the summary is sufficient to meet the Appellant's legitimate interests.

53. Having reached that conclusion, the question for the Tribunal to consider is whether the legitimate interests stated outweigh the fundamental rights and interests of the officer concerned.

54. On this issue, rather oddly (paragraph 38) the Commissioner couches his views in terms of considering that 'the MPS has a strong and reasonable expectation that in its role as a data controller, it will not disclose information about the named police officer and it will respect their confidentiality'. We note that the reasonable expectations of the MPS are not at issue at this stage of the process. However, the Commissioner does go on to describe the MPS concern that the officer 'would have no expectation of the information being placed again in the public domain' and that this would be 'an intrusion of privacy' and could 'potentially cause unnecessary and unjustified distress to the officer concerned.' Without saying more, the Commissioner concludes 'there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the MPS'. Other than the inclusion of the word 'again' there is no consideration as to the significance of the data subject's identity and the summary of the information already being in the public domain.

55. Before the Tribunal considers this issue for itself, it is necessary to consider the relevance of the initial direction we are told (there is no documentary evidence) was made by the LQC to the effect that the Notice of Outcome should not be published and his later view prior to the formal request for information (again only described in an MPS statement) that disclosure of further detail of this case should not be

disclosed at this time on the basis that it may adversely impact on the private life of the officer concerned and/or others in this case.

56. Inspector Didham's statement describes the approach of the MPS in relation to the views put forward by the LQC as follows:-

> 9. The LQC is entitled under Reg 31 of the 2012 Regs to make a direction on whether a hearing should be partially or wholly in private. In this case he exercised his discretion, having considered the impact on the private life of the subject and others involved in the case, to the effect that only the outcome of the hearing should be made public.
>
> 10. In addition to the fact that the LQC has made his determination having regard to the rights of the subject and the interests of the public, as a responsible public authority it would be inappropriate for the MPS to disobey the direction of a LQC, who sits in a judicial or quasi-judicial role on a misconduct panel constituted under the law. The LQC has made it clear that his direction still stands and it would fundamentally undermine the misconduct system if individuals could use the Freedom of Information Act 2000 to circumvent directions lawfully made in the course of hearings. The MPS would no more disobey a direction or order that has ongoing effect, whether it is made by a LQC, a judge or a tribunal, even if the MPS did not agree with it and opposed its making at the time. A lawfully made order or direction must be obeyed by those to whom it applies. Where they are lawfully applying their discretion under the Regs, the fact that other LQCs or even the same one may make different directions or manage cases differently in different proceedings is irrelevant.
>
> 11. It would also undermine the reasonable expectation of privacy of those involved in proceedings which stems from the judicial decision of the LQC as to what should be in the public domain. In this case, while the fact of proceedings against the officer concerned, and the outcome of those proceedings, was placed into the public domain as a result of the LQC's decision on privacy and on publication, the additional detail sought by the Appellant was not. I therefore believe that the officer concerned would reasonably have expected that further details would therefore remain private.

57. In our view, Inspector Didham misdescribes the LQC's powers. As described above the LQC has the power to exclude people from the misconduct hearing, and also to require certain matters to be published in relation to the misconduct proceedings.

58. As already said, if the LQC in fact expresses views as to the way in which the matters in reg 36(9) of the 2012 regulations should be disclosed, then the MPS is clearly sensible to comply with those views.

59. However, it seems to us that, given the limited powers in reg 36, any views expressed by the LQC do not exclude the possibility of the Commissioner or this Tribunal ordering disclosure if that is what FOIA, properly applied, requires. Ultimately, it is for the Commissioner and now the Tribunal to decide whether the legitimate interests of the Appellant outweigh the fundamental rights and freedoms of the data subject. That appears to be the approach that the Commissioner has taken in the decision notice.

60. We note, for example, that from the reports we have of the LQC's views, that although he has expressed a view about the reasons for non-disclosure, he does not appear to have considered the strength of the legitimate interest *in favour* of disclosure, which is a matter which the Commissioner and the Tribunal must consider.

61. In reaching its decision it seems to us that the Tribunal should certainly give considerable weight to the LQC's views about the possible effect on the officer's private life, as the LQC has had close involvement in the case. We also think that Inspector Didham is correct that the officer would have at least some reasonable expectation that nothing further would be disclosed once the LQC had made his views known (although he could have been advised that the Commissioner and/or the Tribunal might reach a different conclusion). Certainly the disclosure of the Notice of Outcome has the real potential of drawing more unwelcome exposure to the officer, and we will consider that in our decision making process.

62. Finally, we should also consider the LQC's view that the Notice of Outcome cannot be easily redacted. We are surprised that the Commissioner decided to agree with this conclusion without viewing the relevant document.

63. However, we note, having seen the withheld information, that it could be effectively redacted by removing a handful of names of officers and one member of the public (possibly the names of two legal representatives) and one place name. The officer's name could also be redacted although of course the Appellant and others know who he is, and we must assume that he could be identified as the subject of the Notice of Outcome.

64. Having taken all these matters into account we are just persuaded that the withheld material should be disclosed. We recognise the very strong legitimate interest in understanding how decisions are made as to whether officers have committed gross misconduct, especially in a case which appears as unusual as this one from the facts and matters disclosed in the Summary. In our view the Notice of Outcome provides important illumination as to how the conclusions have been reached in this case that the conduct examined did not justify dismissal. We do give weight to what the LQC thought should be disclosed and it does seem to us that the officer had a reasonable expectation that with the disclosure of the summary and his name, and the views expressed by the LQC, that would be the end of the matter. However, the further interference with the officer's right to respect to private life, must be limited because his name and the outline of the case against him are already in the public domain. In addition, the LQC does not appear to have considered the countervailing strength of the legitimate interest in disclosure. We do have to take that into consideration and reach the view that it outweighs the officer's fundamental rights and freedoms on the particular facts of this case.

65. As referred to above, for the purposes of s40(2) FOIA the names of all police officers and the member of the public referred to in the withheld material should be redacted, along with specific street name referred to twice on page 3.

CONCLUSION

66. On the basis of the above, the Tribunal allows the appeal. Thus, the Tribunal by way of a substituted decision notice, requires the MPS to take the following steps to ensure compliance with the legislation:-

- **Disclose to the Appellant the requested information that has been withheld subject to the redactions referred to above.**

- **The MPS must take these steps within 35 calendar days of the date of this decision.**

67. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules[1] and may be dealt with as a contempt of court.

Stephen Cragg KC

Judge of the First-tier Tribunal

Date: 10 July 2023

Date Promulgated: 10 July 2023

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006547/consolidated-ftt-grc-rules-21072021.pdf