Neutral Citation number: [2023] UKFTT 898 (GRC)

Appeal Number: EA/2023/0171

Decision Given on: 26 October 2023

First-Tier Tribunal

(General Regulatory Chamber)

Information Rights

Between:

EDWARD WILLIAMS

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE

Second Respondent:

Before: Brian Kennedy KC, Emma Yates and Miriam Scott.

Hearing: On 17 October 2023 on GRC CVP.

For the Appellant: as a Litigant in person in writing of the Grounds of Appeal dated 23 March 2023 and his oral submission at hearing.

For the First Respondent: , Eric Metcalf of Counsel by way of written Response to the Grounds of Appeal, dated 24 July 2023.

For the Second Respondent: Jessica Denby-Hollis, in house Solicitor by way of written Response to the Grounds of Appeal, dated 23 August 2023, together with oral and Outline Written submissions from Alex Ustych of Counsel dated 17 October 2023.

Decision: The appeal is dismissed in relation to the substantive application of exemptions s31 and s38 which apply to Parts 1 and 2 to the Freedom of Information request made by the Appellant. The hearing on further unresolved issues pertaining to Part 3 of the request is hereby Adjourned (see Reasons below).

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 23 March 2023 (reference IC-199493-M8L4), which is a matter of public record. *(References to the Open Bundle herein* = "OB"*).*

Factual Background to this Appeal:

2. The appeal concerns the Appellant's request for information on 13 July 2022, wherein the Appellant made a three-part request to South Yorkshire Police ('SYP') as follows:

   "Disclose:
   (1) The police disciplinary/personal investigatory record of PC [redacted]. This includes but is not limited to punishments or censure or other disciplinary matters.
   (2) All complaints made against PC [redacted]. This includes but is not limited to child abuse and sexual matters.
   (3) All IPCC/IOPC and police reports relating to misconduct, wrongdoing, etc. by PC [redacted]."

3. On 22 September 2022, SYP replied to the Appellant, refusing to disclose the requested information on the basis that it was exempt under s31(1)(g) (law enforcement) and s38 (health and safety) FOIA and that the balance of the public interest favoured the maintenance of these exemptions. On the same day the Appellant asked SYP to undertake an internal review of its refusal to

disclose the requested information. On 25 October 2022, SYP notified the Appellant that it had completed its internal review and concluded that it was appropriate to maintain its previous refusal. On 26 October 2022, the Appellant complained to the Commissioner concerning SYP's handling of his request.

4. On 23 March 2023, the Commissioner issued DN in which he concluded materially as follows:

(i) the SYP's power to hold misconduct hearings under Schedule 2 to the Police (Conduct) Regulations 2012 was a relevant function within the scope of s31(1)(g) and 31(2)(b) FOIA, which was specifically entrusted to SYP as a police force to fulfil (DN, paragraph 18);

(ii) despite the conclusion of Operation Linden, the disclosure of this type of information might undermine future misconduct enquiries and could lead to the public being reluctant to report matters to the police. There was, therefore, a causal link between the disclosure of the requested information and the prejudice envisaged (DN, paras 23-24);

(iii) in this case, the question was whether the disclosure of the requested information "would be likely" to prejudice law enforcement (DN, para 26);

(iv) in relation to the public interest factors in favour of disclosure, the Appellant did not offer any arguments as to why he thought the information should be disclosed. The Commissioner, however, accepted SYP's submission that disclosure would demonstrate the Force's openness and transparency concerning officers' misconduct and disciplinary records, increasing public confidence in the Force and creating a better public understanding of the circumstances surrounding police complaints and the use of public funds to investigate such allegations (DN, paras 27-28);

(v) there was a "very strong" public interest in protecting the law enforcement capabilities of a police force and avoiding prejudice to the purpose of ascertaining whether any person is responsible for any conduct which is improper. It was not in the public interest to disclose information that may compromise the police's ability to accomplish its core function of law enforcement. Nor was it in the public interest to reduce the willingness of individuals to volunteer information to the police (DN, paras 31-32);

(vi) To the extent that there was a public interest in the Operation Linden investigation, this was met by the publishing of its findings and outcome and the extensive media reporting on the issue. There was, by contrast, little public interest in the disclosure of one officer's discipline/conduct record, particularly given he was deceased. Nor could the complainant have any expectation that their complaint would now be placed into the public domain. There was no plausible suspicion of any lack of probity in relation to the wider Operation Linden investigation (paras 33-35);

(vii) In the circumstances, the public interest in maintaining the exemption outweighed that in the disclosure of the requested information. SYP was entitled to rely on s31(1)(g) and (2)(b) FOIA in this case (para 36);

(viii) In light of the Commissioner's findings on s31, it was unnecessary to consider SYP's further reliance on s38 FOIA.

The Grounds of Appeal:

5. On 23 March 2023 the Appellant appealed to the Tribunal against the DN. In his grounds of appeal, the Appellant argues that the Commissioner erred in:

"(i) concluding that the SYP's power to hold misconduct hearings was a relevant function within the scope of s31(1)(g) and (2)(b) FOIA;

(ii) concluding that the disclosure of the requested information would be likely to prejudice SYP's function of ascertaining whether any improper conduct has
occurred;

(iii) taking account of the *"policing system as a whole"* since it did not relate to s31(2)(b) FOIA;

(iv) attaching insufficient weight to the public interest in disclosure; and

(v) attaching undue weight to the prospect of prejudice being caused to any person in relation the record of a deceased officer."

The Commissioner's Response:

6. The Commissioner opposes the Appellant's appeal for the following reasons:

"Ground (i) – whether the SYP was exercising a function within s31(1)(g). The Appellant complains that the Commissioner erred in concluding that SYP's power to hold misconduct hearings under Schedule 2 to the Police (Conduct) Regulations 2012 was a "function" within the meaning of s31(1)(g) for the purpose of ascertaining whether any person is responsible for any conduct which is improper under s31(2)(b). The Appellant argues that the Schedule merely identifies standards, rather than a function which he describes as "powers and duties entrusted to a PA by Parliament". The Appellant is correct that, by itself, Schedule 2 does no more than identify the applicable standards by which improper conduct is to be ascertained. The Appellant, however, misses the wood for the trees. The entire framework of the 2012 Regulations is devoted to the investigation of misconduct and the holding of misconduct proceedings.

Specifically:

(i) The Regulations apply whenever "an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct" (Regulation 5);

(ii) Regulation 12(1) requires the authority to assess the conduct in question, including whether to take "management action against the officer concerned" (Reg 12(2)(b)) or, where a misconduct hearing may be held, to appoint an investigator (Reg 12(3)(a));

(iii) Regulations 13 and 14 set out the procedure to be followed for the appointment of an investigator and the purpose of such investigations; and

(iv) Regulation 19 et seq govern the procedure that the authority must follow in referring a case to misconduct proceedings. There is, in light of the above, no substance to the Appellant's complaint. The Commissioner correctly identified the 2012 Regulations as the source of SYP's function to identify misconduct.

Ground (ii) – whether the Commissioner identified how disclosure would prejudice the SYP's functions. The Appellant argues that the Commissioner failed to adequately explain how the release of the requested information would be likely to prejudice SYP's function of ascertaining whether any improper conduct occurred. The Appellant overlooks, however, those parts of the DN where the Commissioner precisely addressed these points:

(i) At paragraph 23 of his DN, the Commissioner set out SYP's arguments that disclosure of the requested information could:

i. "make people more reluctant to come forward and report information to the police in the future. Under-reporting leads to an increase in undetected crime where this has occurred, which has an adverse effect on the community and South Yorkshire Police's ability to enforce the law"; and

ii. "compromise the right for an individual's [sic] to have a fair hearing and more importantly the rights of a complainant for a resolution".

(ii) At paragraph 24 of his DN, the Commissioner accepted that the disclosure of this type of information "might undermine misconduct enquiries, and that it could lead to the public being reluctant to report matters to the police". At paragraph 34 of his DN, the Commissioner stated that he recognised that "if disclosure of the withheld information is likely to cause prejudice to the policing system by inducing a potential reluctance to voluntarily provide information, upon which the effective running of the policing system relies, this would not be in the public interest";

(iii) At paragraph 34, moreover, the Commissioner noted that "any individual who has lodged a complaint against [the deceased PC] at any point will have been updated regarding their complaint and will have no expectation that this could now be placed into the public domain, thereby undermining their trust in the complaints system".

It is clear from the above that the Commissioner properly addressed himself as to the likelihood of prejudice arising from the disclosure of the requested information in this case and his assessment cannot be faulted.
Ground (iii) – whether the Commissioner was entitled to take into account 'policing as a whole'.

The "policing system as a whole" since it did not relate to s31(2)(b) FOIA. This is denied. The Commissioner's reference to the "policing system as a whole" was not made in relation to whether the exemption under s31 FOIA was engaged but instead formed part of his assessment of the balance of the public interest under s2(2)(b). It was, therefore, entirely appropriate that the Commissioner took account of broader factors and not just the narrow operation of the system for identifying misconduct by police officers.

Grounds (iv) and (v) – whether the Commissioner attached the correct weight to different factors when assessing the balance of the public interest:

The Appellant takes issue with the Commissioner's assessment of the balance of the public interest, complaining on the one hand that the Commissioner attached insufficient weight to the public interest in disclosure, while, on the other hand, arguing that he attached undue weight to the prospect of prejudice being caused to any person in relation the record of a deceased officer. Both complaints are misconceived. First, in relation to the media report relied on by the Appellant, the Commissioner correctly noted that there had been widespread media interest and, indeed, took this into account in assessing the extent to which the disclosure of the requested information would further the public interest. In this case, however, the Commissioner found that there was "little public interest" in the disclosure of the particulars of the investigation into the deceased officer (DN, para 34), particularly as there could be no resolution of the matter.

Nor did the Commissioner attach undue weight to the prospect of disclosure causing prejudice to living individuals. The Appellant has submitted that he sees "no prejudice or other harm being caused to any person in releasing the record of a deceased officer" but the Commissioner was plainly entitled to find that the complainant had "no expectation of their complaint being placed into the public domain, thereby undermining their trust in the complaints system" DN, para 34)."

The Second Respondents' Response:

7. The Second Respondent adopts and supports the Commissioners' submissions.

Legal Framework:

Section 31 – law enforcement provides:

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— …

…

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2) -

(2) The purposes referred to in subsection (1)(g) to (i) are—

…

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.

8. The term "law enforcement" has been interpreted broadly. In William Thomas Stevenson v The ICO and North Lancashire Teaching Primary Care Trust [2013] UKUT 0181 (AAC), the Upper Tribunal commented:

" - *it is plain from reading the activities listed in section 31(1) and the purposes specified in s31(2) that they include activities that go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings. They include a wide variety of activities that can be regarded as in aid of or related to the enforcement of the criminal law…"*

9. In order to come within this exemption, the disclosure of the information must be likely to cause real and harm and there must be a causal link between the harm caused and the disclosure *(Hogan and Oxford City Council v ICO [2010] 1 Info LR 588 at para 30).*

The Hearing of the Appeal:

10. The Oral hearing took place on the GRC – C V Platform on 17 October 2023. The Appellant attended personally throughout and participated by way of telephone communication and Alex Ustych of Counsel appeared on behalf of the South Yorkshire Police ("SYP").

11. The Appellant made further submissions in addition to his previous arguments as set out above. First and foremost, he argues that the SYP should have confirmed or denied whether or not it held *"Police Reports".* The *SYP* argue that this is not and has never been part of the appeal. All issues in the appeal were presented and comprehensively canvassed by both sides. The Tribunal wishes to acknowledge their appreciation to the parties' representatives at the hearing of the appeal for their conscientious and thorough presentation on the important issues herein. We now set these out in detail as follows.

12. The SYP confirm that s. 38 (1) (a) FOIA health and safety continues to be relied on, in the alternative, if its primary s. 31 (1) (g) FOIA exemption position is not upheld.

13. The Operation Linden was the collective name for series of investigations by IOPC into South Yorkshire Police's handling of reports of non-recent child sexual abuse and exploitation in Rotherham. It comprised of over 90 individual investigations OB [D76]. IOPC published its findings regarding Operation Linden on 22 June 2022. The report is in the public domain. The investigation eventually found that eight officers had cases to answer for misconduct, and 6 for gross misconduct. In one case, a referral was made to the Crown Prosecution Service regarding a potential criminal offence. The Tribunal was referred to OB [D76] where the Commissioner asked SYP "--is it publicly known that none of the complaints against the officer were substantiated?" In response, SYP confirmed that the Operation Linden report was anonymised and did not allow for identification/jigsaw identification (including of this officer, who was unable to be spoken to, and as such, was unable to offer any mitigation/explanation, etc, as to the allegation reported against him). The IOPC only said that the officer is 'is connected to Operation Linden' OB [D76]. IOPC adopted a Neither Confirm nor Deny stance in respect of same request by this Appellant, made on 13th July 2022 OB [D76]. (<u>This becomes an issue in relation to Part 3 of the request in this appeal</u>) *(our emphasis).*

14. In relation to part 3 of the Request, SYP's response to Part 3 was OB [C53]:

> *"Q3 - Any information the requester wants from the IOPC has to be submitted to them. Please direct this to the IPPC/IOPC FOI Team who are better placed to provide such information. Their contact details are IOPC. - - - -"* The Appellant's complaint to the Commissioner OB **[D64-65]** focused on issues of prejudice and stated in this respect *"no reasons given, no confirm or deny if information held*".

15. The DN, in respect of part 3, the SYP argue stated only:

"(par. 7) It [SYP] advised him to contact the IOPC directly for part (3) of the request. OB [A2]
(par 12 (under 'Scope of the case') The Commissioner will consider the application of exemptions to parts (1) and (2) of the request below. No further comment was made by the complainant regarding part (3), so this will not be further considered. OB [A7]
(par. 7) It [SYP] advised him to contact the IOPC directly for part (3) of the request. OB [A2] (par 12 (under 'Scope of the case')) Commissioner will consider the application of exemptions to parts (1) and (2) of the request below. No further comment was made by the complainant regarding part (3), so this will not be further considered OB [A7]. The DN, in respect of part 3, stated only: Appellant's Notice of Appeal ***[A10-11]*** *advances several specific grounds, but none of them relate to the above paragraphs of the DN or Part 3 of the FOIA request."* On behalf of the SYP it is argued: *"The Commissioner's Response did not address Part 3 of the FOIA request—which is unsurprising given that the preceding complaint/appeal documents suggested it was outside the scope of this appeal, with only Parts 1 and 2 being challenged. Part 3 was therefore first raised at today's hearing; the Appellant should have raised it much earlier, which would have enabled enquiries to have been made by the Commissioner and SYP. The practical effect is that SYP only had a very limited time to address the matter, creating significant prejudice."*

16. SYP's primary position on the Appellant's attempt to advance a new Ground of Appeal today in respect of Part 3 is that:

a. The Part 3 issue is outside the scope of this appeal—it is not a Ground of appeal within the Notice of Appeal. No prior application was made to amend/expand the scope of the appeal;

b. In any event, the late reliance on a new ground of appeal is subject to the Tribunal's case management powers (applying the overriding objective under Rule 2), which should be exercised against allowing a significant new issue on the day of the hearing, where there is:

   1. significant prejudice to SYP;
   2. no reason given for the lateness. The Appellant had since 22 September 2022 (the date of SYP's decision) to raise the point, including in a Reply in accordance with the case management directions in this appeal. Permitting reliance on a completely new ground would make Case Management meaningless.

17. The SYP argue that in the event that the Tribunal chooses to consider the substance of the Appellant's case on Part 3 of the request, SYP addresses the *'IOPC reports'* and *'police reports'* elements of Part 3 of the request separately.

IOPC reports request:

18. Insofar as Part 3 requests IOPC reports, SYP directing the Appellant to the IOPC (as SYP has done) is consistent with the FOIA Code of Practice:

"2.12 In most cases where a public authority does not hold the information, but thinks that another public authority does, they should respond to the applicant to inform them that the requested information is not held by them, and that it may be held by another public authority. The public authority should, as best practice where they can, provide the contact details for the public authority they believe holds the requested information."

19. SYP, submit they hold no information about any other IOPC reports involving the officer, apart from the Operation Linden report. That report would have in any event been exempt under s. 21 FOIA (information accessible to applicant

by other means) as it was available online. Even though SYP's response did not indicate whether any IOPC reports were held by SYP, they argue any appeal in this respect is therefore academic and issuing a substitute DN would be disproportionate, a waste of court/parties' resources and contrary to Rule 2 of the Tribunal rules.

20. Accordingly, SYP argue any appeal in respect of that element of Part 3 should be dismissed in any event.

Request for police reports:

21. The SYP submit Part 3 of the request included a request for *'police reports'*, SYP accept that the response should have confirmed whether they were held or not pursuant to s. 1 FOIA. Based on enquiries carried out today (17 October 2023) on behalf of the SYP, if a fuller response had been provided to Part 3 at that time (22 September 2022) it would have been *'information not held'* in respect of police reports concerning the officer. This the SYP submit is because:

> *"Insofar as any such police reports may have existed before 2014, they have been 'weeded out' and so not held. The officer sadly died in early 2015;*
>
> *Any other 'police reports' (i.e. any misconduct papers to do with the officer, whether relevant to Operation Linden or otherwise) have been handed over to the IOPC for the investigation and are not (and were not at the time of the request/response) held by SYP. "*

22. If the Appellant had properly raised this ground at any earlier stage of the ICO complaint or appeal, it could have been dealt with at that time. However, bearing in mind the duty of parties to co-operate in Rule 2, counsel for the SYP suggested the following (*if* the Tribunal is minded entertaining this new ground at all):

(i) "Given the information now provided, the Appellant discontinues any appeal in respect of Part 3—as he has the confirmation he sought at the start of the hearing;

(ii) If the Appellant does not wish to accept option (a) because he wants more formal confirmation, then SYP will support his request to adjourn that aspect of the appeal only. During the adjournment, written confirmation can be provided (whether by way of witness statement or otherwise) and—bearing in mind Rule 2—the parties can try to resolve the matter to avoid holding an adjourned hearing;
(iii) Only if (a) and (b) are not deemed suitable, then a substituted DN on the narrow issue of 'police reports' within Part 3 of the request be issued by the Tribunal."

23. The Parties have agreed to adjourn this element of the appeal relating to Part 3 of the request in an attempt to resolve the issues by way of a consent order and the Tribunal has approved this approach in the interests of saving costs, time and proportionality as envisaged under Rule 2 of The Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009.

s. 31 (1) (g) law enforcement exemption
Whether SYP was exercising function within s. 31 (1) (g)

24. The DN found that SYP's power to hold misconduct hearings under Schedule 2 to the Police (Conduct) Regulations 2012 was a relevant function within the scope of s31(1)(g) and 31(2)(b) FOIA, on which was specifically entrusted to SYP as a police force to fulfil (DN, paragraph 18).

25. The Appellant's Grounds of Appeal argue that IC was wrong to conclude that SYP's power to hold misconduct hearings was a relevant function within scope of 31 (1) (g) and (31 (2) (b). This point the SYP submit is unarguable.

26. In the Commissioners Response at part 12 OB [A21] he makes the point that *'law enforcement'* for s. 31 purposes is broadly defined—see *William Thomas Stevenson* Upper Tribunal—the purposes in 31 (2) go beyond taking criminal or regulatory proceedings, to include activities *'in aid of'* law enforcement. It is plain he argues, that ensuring officers' compliance with police standards—

where there has been an allegation of improper conduct—is within the scope of s. 31. - - - s31 (2) (b) *"the purpose of ascertaining whether any person is responsible for any conduct which is improper"*—SYP argue this could hardly be more on point than here, where the material sought relates to disciplinary allegations and investigations.

27. The SYP relies on IC's submissions at par 17-19 OB [A22-23] of his Response—namely that by Appellant saying that Schedule 2 of the Police (Conduct) Regulations 2012 identifies police standards rather than a function—*"misses the wood for the trees"*.

28. The 2012 Regulations are in tab G, OB [G125-165]:

a. *The entire framework—as the name suggests—is about investigating misconduct allegations and holding misconduct proceedings.*

b. *(i) The Regulations apply whenever "an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct" (Regulation 5); OB [G130]*

c. *(ii) Regulation 12(1) OB [G133] requires the authority to assess the conduct in question, including whether to take "management action against the officer concerned" (Reg 12(2)(b)) or, where a misconduct hearing may be held, to appoint an investigator (Reg 12(3)(a));*

d. *Regulations 13 and 14 OB [G134] set out the procedure to be followed for the appointment of an investigator and the purpose of such investigations; and*

e. *Regulation 19 OB [G137] et seq govern the procedure that the authority must follow in referring a case to misconduct proceedings.*

f. *Schedule 2—Standards of Professional Behaviour OB[G163] are the substantive framework which underpins the investigation/hearing process in the 2012 Regulations. OB [G129] The Standards of Professional behaviour are those in Schedule 2. Regulation 15 (1) (a) sets out how the whole investigation process starts out with the*

investigator providing a notice of how the allegation is alleged to fall below the Schedule 2 standards OB [G135].

g. *They are indivisible from the functions set out in the Regulations, which are clearly a function for "purpose of ascertaining whether any person is responsible for any conduct which is improper". Trying to salami-slice the Regulations by saying that Schedule 2 is not a function but standards, is a completely artificial exercise which takes Appellant nowhere.*

Whether disclosure of information 'would be likely' to prejudice law enforcement:

29. On the lower threshold of *'would be likely'*, there must be chance of prejudice occurring which is more than hypothetical—but a real and significant risk (see DN par. 20).

30. The SYP submit that this threshold is amply met—its submission in this respect is reproduced in par. 23 of DN - OB [A5]. In summary:

a. *This type of disclosure would undermine ability to conduct misconduct investigations in future. Evidence/data collected as part of misconduct processes is always handled sensitively to maintain confidence of the public and officers in the process.*

b. *Even after the death of the officer complained about, such disclosure may affect perception and confidence in the process. It would make people more reluctant to come forward, to report information in future.*

c. *Under reporting leads to increase in undetected crime and misconduct, which plainly prejudices law enforcement;*

d. *Releasing such information would undermine SYP's commitment to protecting information submitted to it for misconduct purposes—i.e. using it only for the relevant purpose;*

e. *Disclosure of information may undermine misconduct enquiries—rights of individual for a fair hearing and rights of complainants for resolution.*

31. The Appellant's oral submission was that no s.31 prejudice could be made out where some information is already known about the officer (that complaints against him were considered by Operation Linden). The availability of such limited, general information is quite distinct from releasing to the world of particulars of *all* disciplinary complaints, records etc., about *any* matter (not just those covered by Operation Linden), which is what the request seeks. The SYP argue there will clearly be a prejudicial effect of such release on public confidence in the confidentiality of police complaints (and knock-on effects on willingness to make such reports), which does not arise from the controlled and appropriately timed (i.e. at the time of IOPC investigation) release of general information.

32. The Appellant further suggests that some generic documents which may fall within the scope of the request, such as a record about late attendance, may be released without prejudice. The Tribunal has sight of the Withheld Information, which is based on the terms of the Appellant's request—so focuses complaints/allegations against the officer by third parties. The SYP argue disclosure of any such material would have the prejudicial effect which the s. 31 exemption aims to prevent.

33. The Appellant submitted that the fact that this officer is deceased eliminates any prejudice. SYP/Commissioner were aware of that feature of this request, but the prejudice identified concerns the adverse impact on the functioning of the complaints system—whereby complainants would likely be discouraged from cooperating/reporting if the confidentiality of the system could not be trusted. This, the SYP argue is a type of prejudice not impacted by the officer's death.

34. **Ground 2** of the appeal deals with prejudice. Appellant says that the Commissioner failed to adequately explain how release of the information would likely prejudice the function of ascertaining whether any improper conduct occurred.

35. SYP again adopts what Commissioner said in his response about this—par 20-22 OB [A23-24]. It is important to note at the outset that the wording of s. 31 (2) (b)---the purpose of ascertaining whether any person is responsible for any conduct which is improper—is broader than just an impact on an individual investigation. It must –and does—protect against prejudice to the function more widely, i.e., loss of confidence in system, loss of future co-operation etc.

36. Paragraph 21 of Commissioner's Response—the Commissioner sets out parts of DN dealing with this issue. Paragraph 21 (iii)—the Commissioner makes the point that the complainants against this officer had their complaints finalised by IOPC, so would have no expectation of the complaints being placed in public.

37. The Commissioner took steps to find out more about Operation Linden report from SYP. As explained in ICO/SYP communications about Operation Linden OB (D76), the report itself was anonymised and did not allow for jigsaw identification. Of course, those protections may well be undermined if complaint information enters the public domain. The Commissioner carried out an appropriate and robust analysis of prejudice and s. 31 application—the appeal identifies no arguments to contrary. The Commissioner carried out an appropriate and robust analysis of prejudice and s. 31 application—the appeal identifies no arguments to contrary.

38. **Ground 3** suggests that Commissioner erred in taking into account 'policing as a whole', as it doesn't relate to s. 31 (2) (b). The Appellant's point is not persuasive, as it is clear from the DN (par. 32—in the Conclusions section) -

OB **[A7]** that this is cited in the context of public interest balancing. It is therefore perfectly proper to have regard to broader factors in that assessment.

Public interest balancing:

39. At the point of the DN, Appellant hasn't identified any public interest factors favouring disclosure, but SYP properly acknowledged the generic public interest in openness/transparency about officers' conduct and better public understanding of the system. See: par 27-28 of DN - OB [A6]

40. SYP's public interest submission in favour of maintaining exemption set out in par 29 of DN- OB [A6]. In summary:

> *"Disclosure would make people more reluctant to report misconduct, which would limit its ability to respond or deal with issues*
>
> *Under reporting leads to undetected crime, which impacts the community".*

41. In the DN's analysis at par 30-36 – OB [A7]:

a. Public interest inherent in exemption—clearly in public interest to avoid prejudice to law enforcement;

b. 'very strong public interest' in protecting law enforcement capabilities—not in public interest to compromise capabilities

c. Stronger public interest in ensuring effectiveness of the misconduct regime, by avoiding reluctance for people to come forward with information.

d. Op Linden already attracted considerable attention, contributing to transparency and accountability (par 33)—those ends have been met by IOPC's work;

e. Par 34—little public interest in disclosing the particulars of a late officer's complaint history, where there can be no follow-up disciplinary investigation. Individuals who lodged complaints have had final updates from IOPC so placing in public domain would undermine confidence in system;

f. Par 35—no plausible suspicion of lack of probity in IOPC investigation.

42. To this, the SYP argue three further points can be added:

a. *IOPC would have had access to disciplinary records. Any material or evidence from that source—which was probative to IOPC's Operation Linden work—would have been incorporated into that investigation. This is not the case where this disclosure is the exclusive means by which public interest material can be considered.*

b. *The two articles—from the Guardian and Irish Times—put forward by Appellant as indicators of public interest--are now historic, they are from 2015. Of course, interest of the public is not the same as public interest in any event.*

c. *Appellant is asking for all disciplinary records, not just items related to the child sexual exploitation investigation—any other records are not relevant to the public interest in respect of child sexual exploitation issues which is the public interest basis of the request. This is more consistent with a 'fishing expedition' attracting minimal public interest. OB [D70].*

43. The 4th and 5th Grounds of Appeal challenge the balancing of public interest factors by the Commissioner. Dealt with by par. 25-27 of Commissioner's Response – OB [A24-A25] and both points are dealt with in the DN.

44. The SYP submit that with compelling and case-specific public interest factors in favour of maintaining exemption, versus generic public interest factors against the exemption, the Commissioner was clearly correct in his conclusion that public interest for the exemption prevails. On this basis the SYP argues. s38 (1) (a) FOIA 'health and safety' exemption be considered in the event that its reliance on the s. 31 exemption is not upheld. Section 38 states that:

(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.

45. ICO Guidance's states on this exemption states;

"- - someone who has died (and is therefore not covered by the personal information exemption) where disclosure might endanger the mental health of surviving relatives, particularly if they had been unaware of it;

…

The use of the phrase "any individual" in section 38 includes any specific individuals, any member of the public, or groups within society…

The effect cannot be trivial or insignificant. In the context of section 38, even if the risk falls short of being more probable than not, it needs to be such that there may very well be endangerment.

There needed to be "'a very significant and weighty chance'", a "'real risk'" was not enough.

…Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it must have a greater impact than causing upset and distress.

46. SYP's submissions on s.38 are addressed in detail within SYP's initial response 22 September 2022 – OB [C51]. In respect of engagement of the exemption, SYP submits that;

a. *At least the lower 'would be likely to' standard is engaged;*
b. *Disclosure here is to the world, likely to attract media attention;*
c. *Releasing information about disciplinary record now—some years since he was the focus of reporting—would likely endanger health of friends, family. Both mental and physical health—more than just distress [C51]*
d. *Those suffering from complex grief or post trauma issues will often avoid anything associated with the death. Disclosure and related reporting create very significant risk that re-exposure will result in deterioration in mental health [C52];*
e. *Similar impact on any complainants against officer, if disclosure prompts renewed and more detailed reporting after a gap of years. The context is that complainants of child sexual abuse have suffered psychological harm. As noted in IC's DN on the law enforcement exemption, the complainants would have no expectation of complaints being placed in public domain years later;*
f. *[C52]—impact on driver prosecuted for officer's death. Tried for causing death by careless driving and acquitted. Very significant and weighty chance of risk to his health if story reemerges after 7 years.*

47. In respect of the public interest balancing for s. 38, SYP submits that:

a. *There are risks of 'mosaic effect identification' of victims and family;*
b. *Duty of care to complainants and families—complainants identifying themselves from records published, suffering adverse effects;*
c. *Police place significant weight on its duty to safeguards individuals from risks to their mental and physical health, especially where the harm would likely be due to release of information held by police;*
d. *SYP adopts IC analysis of public interest here—'little public interest' in disclosure of particulars of allegations/investigations, after Operation Linden already dealt with it.*
e. *Significant weight in protecting individuals from risk of injury, versus a comparatively low level of public interest in disclosure.*

Conclusions:

48. The Tribunal have heard the appeal afresh and address the three parts of the request commencing with Part 3. In relation to Part 3 of the Request – The IOPC report was not held – this was accepted by Mr Williams at the hearing pending receipt of written confirmation of the same. The matter is to be adjourned on point 3 of the Request pending receipt of such written evidence following which it is anticipated that the parties will agree a consent order (for the approval of the Tribunal) with regard to point 3 of the Request having properly acknowledged the impact on Rule 2 of the Tribunal Rules. If such a consent order cannot be established, the Tribunal will resume the hearing for further material evidence and submissions on part 3 of the request with a view to making a definitive finding on the submissions pertaining to the arguments raised by the Appellant at the outset of this hearing.

49. Having considered all the evidence and the above submissions before us we unanimously find in relation to Requests Part 1 and Part 2 – s.31 and s.38 apply.

Application of s.31(1)(g) :

50. We find the 2012 Regulations do fall under the definition of *"functions for the purpose of ascertaining whether a person is responsible for improper conduct"* (s.31(1)(g)). See Regulations 5 and 15a to support this. Both Regulations refer to Schedule 2.

Prejudice:

51. The DN refers to the general view that prejudice could occur in that publishing of information on an ad hoc basis could impact the willingness of witnesses or victims to make complaints to the police for fear of the issue being made public. This we find is not a matter which redaction would be able to address or mitigate. The prejudice could impact the wider ability of the police to investigate such complaints in creating anxiety amongst potential complainants around the privacy of their complaint. In circumstances such as these where there is a potential for an abuse of power, we consider that there is a real risk that this anxiety could be a result of disclosure. We find the fact that the data subject is deceased has little bearing on this as the issues are of a significant and material general prejudice to investigations in future.

52. We find that there is limited public interest in sharing information which could cause a detriment to the investigative powers of the police by creating a chilling effect on the reporting of issues such as these we are persuaded would occur on the facts of this case. There is no evidence presented to us to the contrary and in any event the Panel have judicial notice much more collective and specialist experience in this area.

53. Further, on the evidence before us, we find little or no public benefit in causing harm to victims where information is shared at a later date despite a matter being closed (and potentially people involved being deceased).

Application of s.38:

54. The exemption refers to situations where disclosure would or would be likely to endanger the physical or mental health of any individual. Therefore, we find the Appellant is incorrect in his assertion that a '*specific individual'* must be envisaged. We find it is sufficient for a general assessment to be made and the conclusion drawn that it is possible that disclosure would be likely to endanger the health of any individual.

55. In this case, the Tribunal recognises that the release of additional information around such matters, effectively reopening the issues in play in the public domain, could cause significant distress and mental harm to connected individuals such as the family and friends of the deceased officer concerned together with any individuals who made complaints about him. There is also potential for other complainants impacted by Operation Linden to be harmed at the prospect that the matter is coming to the public's attention once more.

56. The Tribunal finds that disclosure would have the capability of leading to a deterioration in the mental health of individuals closely associated with the Officer and with Operation Linden, particularly given the sensitive nature of the investigations. Again, the Panel have Judicial Notice and specialist collective experience in these issues.

Public Interest:

57. There is a general public interest in the increase of confidence in policing through transparency. The Appellant did not put forward any further arguments relating to the public interest in disclosure.

58. There has been significant press coverage on this matter including associating the data subject with Operation Linden therefore the public interest has potentially been met by this information already available to the public. We find that there is low public interest in the specific information requested.

59. The risk of harm to particular individuals by the release of this information is a significant factor in considering the public interest against disclosure as there is a real public interest benefit in ensuring that the mental health of individuals associated with complaints made to the police and the wider police investigations (and their friends and families) are not harmed or caused to significantly deteriorate (See also above our findings on Prejudice which runs contrary to disclosure being in the public interest).

60. Considering all the evidence and on hearing the above detailed legal submissions before us afresh, the Tribunal finds that the public interest in disclosure does not outweigh the public interest in maintaining the exemption.

61. For all the above reasons we dismiss the appeal in relation to Parts 1 and 2 of the Grounds of appeal.

Generally:

62. Further, the Tribunal will briefly comment on those parts of the DN that we independently accept and adopt.

63. In order for the exemption to be engaged, the following criteria must be met:

(i) first, the actual harm which SYP alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the purpose of ascertaining whether any person is responsible for any conduct which is improper);

(ii) - secondly, SYP must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

(iii) - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by SYP is met – i.e. disclosure *'would be likely'* to result in prejudice or disclosure *'would'* result in prejudice.

64. Going beyond our own assessment as set out above, we have carefully considered the DN and accept and adopt the Commissioner's findings and reasoning in Paragraphs 20 – 37 therein.

65. It follows also therefore that we do not find an error of Law or an error in the exercise of his discretion in the Commissioners' DN in the findings on Prejudice and Public Interest and in that regard also we dismiss the appeal on Parts 1 & 2 of the Appeal. Our decision on Part 3 of the request remains adjourned.

Brian Kennedy KC 23 October 2023.