First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2021/0214

30 March 2022

Before

JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER KATE GRIMLEY EVANS
TRIBUNAL MEMBER DAN PALMER-DUNK

Between

MR JON AUSTIN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE COMMISSIONER OF POLICE OF THE METROPOLIS

Second Respondent

DECISION

The unanimous decision of the Tribunal is that:

(1) The Appellant's third ground of appeal (the only ground pursued) succeeds.
(2) Accordingly, the Tribunal substitutes for the First Respondent's Decision Notice of 12 July 2020 ('the Decision Notice') a notice in the following terms:

No later than 35 days from the date on which this Decision is promulgated, the Second Respondent shall deliver to the Appellant the information specified in the confidential annex to the Decision Notice including (with no redaction) the name(s) of any Legally Qualified Chair(s) identified in that information.

REASONS

Introduction

1. On 1 May 2020 the Appellant in this case, Mr Jon Austin, directed a request under the Freedom of Information Act 2000 ('FOIA') to the Metropolitan Police Service[1] for all officer misconduct hearing outcomes published on a specified hyperlink between 1 February and 31 March 2020. In his message he drew attention to the practice of removing notices of such outcomes after they had been made public on the link for 28 days.

2. The request was refused on the ground that the information requested was exempt under FOIA, s40(2) (personal information) and that stance was maintained following an internal review.

3. On 29 October 2020 Mr Austin complained to the Information Commissioner's Office.[2] A lengthy investigation followed.

4. On 12 July 2021 the ICO issued a decision (wrongly dated 2020) upholding the complaint in part, (a) directing the MPC to disclose the outcomes in five officer misconduct cases[3] subject to redaction of names and other identifying data, and (b) adding (without explanation) that the names of any Legally Qualified Chairs ('LQC') of the panels which sat in those cases could also be withheld because it would be "unfair" to disclose that information.[4]

5. By his notice of appeal dated 8 August 2021 Mr Austin challenged the ICO's decision. The parties were agreed that the appeal raised three grounds. The first two focused on the undisputed fact that the information requested had already been put into the public domain. The third was directed to the part of the decision concerned with the identification of the LQCs in the five relevant cases.

6. By a response dated 28 September 2021 the ICO resisted the appeal. On 9 October 2021 the MPC delivered her response, resisting the first two grounds of appeal but conceding that Mr Austin was entitled to succeed on the third.

7. On 15 October 2010 Mr Austin notified the Tribunal that he was withdrawing his first and second grounds of appeal, but wished to pursue the third.

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[1] The request should have been directed to the Commissioner of Police of the Metropolis, the Second Respondent.
[2] Since the Respondents both hold the title of Commissioner, we will refer to them as, respectively, the ICO and the MPC.
[3] It seems that there were 15 misconduct cases involving 14 officers during the relevant period.
[4] This holding is to be found at para 44 of the 'Reasons' section of the document, not in the 'Decision' section (paras 1-4). The wording is permissive: "[the name(s)] may be withheld".

8. Pursuant to directions issued by Registrar Bamawo, the parties then exchanged written submissions which resulted in their positions remaining unaltered on the third ground of appeal.

9. The appeal came before us for determination on the papers. We were satisfied that it was just and in accordance with the overriding objective to proceed in that way.

The Statutory Framework

The police misconduct provisions

10. The principal legislation covering the disciplining of police officers is to be found in the Police (Conduct) Regulations 2020 ('the 2020 Regulations'), which came into force on 1 February 2020, the first day of the period to which Mr Austin's request relates. They replaced the Police (Conduct) Regulations 2012 ('the 2012 Regulations'). Nothing turns here on the differences between the two regimes.

11. The more serious police discipline cases are chaired by LQCs, who are paid a fee out of central funds. An LQC must be a legal practitioner of sufficient seniority to be eligible for judicial appointment. He or she drafts the decision, which is always given in writing. Under the 2020 Regulations, reg 43(8), the relevant police force must publish relevant decisions on its website for no fewer than 28 days.[5] Typically, the names of the LQC and other panel members are shown on police discipline decisions. Sometimes, that of the LQC only appears.

The freedom of information legislation

12. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

'Information' means information "recorded in any form" (s84).

13. By s40 it is provided, so far as material, as follows:

> **(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.**
>
> **(2) Any information to which a request for information relates is also exempt information if—**

[5] The corresponding provision in the 2012 Regulations (as amended) was reg 36(10).

(a) it constitutes personal data which does not fall within subsection (1), 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 …

The language and concepts of the data protection legislation are translated into the section (subsection (7)). The exemptions under s40 are unqualified under FOIA and the familiar public interest test has no application. Rather, the reach of the exemptions is, in some circumstances, limited by the data protection provisions.

The data protection legislation

14. The new data protection regime under the Data Protection Act 2018 ('DPA 2018') and the General Data Protection Regulation ('GDPR') applies to this case.

15. DPA 2018, s3 includes:

(2) "Personal data" means any information relating to an identified or identifiable living individual ...

(3) "Identifiable living individual" means a living individual who can be identified, directly or indirectly, in particular by reference to —
(a) an identifier such as a name, an identification number, location data or an online identifier …

(4) "Processing", in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as —
…
(d) disclosure by transmission, dissemination or otherwise making available …

(5) "Data subject" means the identified or identifiable living individual to whom personal data relates.

16. GDPR, Article 5 sets out the data protection principles. It includes:

Personal data shall be:

1. processed lawfully, fairly and in a transparent manner in relation to the data subject …

17. Article 6, so far as material, provides:

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

…
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data

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

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Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

The Tribunal's powers

18. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(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.**

Case-law and guidance

19. The starting-point is that, where they intersect, privacy rights hold pride of place over information rights. In *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 HL, Lord Hope reviewed the legislation, including the EU Directive on which the domestic data protection legislation is founded. At para 7 he commented:

> **In my opinion there is no presumption in favour of release of personal data under the general obligation that FOISA[6] lays out. The references which that Act makes to provisions of [the Data Protection Act] 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data …**

This statement of principle is of equal application today, notwithstanding the fact that the Data Protection Act 1998 ('DPA 1998') has been superseded.

20. There is as yet very little authority on the new data protection regime. That said, case-law relating to condition 6(1) in DPA 1998, Sch 2, which was similarly worded to GDPR, Article 6(1)(f), if read with caution, provides useful guidance to interpreting the new law. Four points are noteworthy in the present context. First, 'necessity' is part of the proportionality test and requires

[6] The proceedings were brought under the Freedom of Information (Scotland) Act 2000, but its material provisions do not differ from those of FOIA.

the minimum interference with the privacy rights of the data subject needed to achieve the legitimate aim in question: *R (Ali & another) v Minister for the Cabinet Office & another* [2012] EWHC 1943 (Admin), para 76. Second, 'necessary' means reasonably necessary and not absolutely necessary: *South Lanarkshire Council v Scottish IC* [2013] UKSC 55. Third, public interest in the disclosure of official information can amount to a legitimate interest for the purposes of Article 6(1)(f): *Davis v IC and Olympic Delivery Authority* [2011] UKFTT EA_2011_0024 (GRC) (04 January 2011), para 31(d). Fourth, the concept of 'legitimate interest' is wider than 'public interest'. Thus, for example, a private commercial interest may be a legitimate interest: *Murray v Express Newspapers plc* [2007] EWHC 1908, para 76.

21. The stipulation in GDPR, Article 5.1 for personal data to be processed "fairly" is not elaborated in the legislation. We are, however, assisted by the Commissioner's *Guide to the GDPR*[7], which states[8] that this entails, among other things, ensuring that data are processed in accordance with data subjects' reasonable expectations and avoiding causing harm to data subjects except where justified.

The Rival Arguments

22. In her response on behalf of the ICO dated 28 September 2021 Ms Harini Iyengar, counsel, understandably gave limited attention to what has more recently become the only issue in dispute. She submitted that no case was made to the effect that processing the names of the LQCs was necessary and that the data subjects would have had no reasonable expectation that their identities would be discernible to the public after the 28-day publication period had expired. In short, the disclosure directed by the ICO had struck the right balance, placing in the public domain sufficient information about the relevant disciplinary outcomes without putting any data subject's privacy rights at risk.

23. In further submissions on behalf of the ICO it was acknowledged that there was an arguable legitimate interest in the disclosure of LQCs' names as a means of enhancing public confidence in the police discipline system. The appeal was nonetheless firmly resisted on the grounds that it was not shown that such disclosure was *necessary*. The principal argument here was that LQCs sit with others on panels and accordingly it is unlikely that studying outcomes of panels on which this or that LQC has sat is likely to yield no information of any value. Also, it was said, outcomes are often quite "light" (we take this to mean light on detail) and this too argues against the usefulness of knowing the identity of the LQC. Further and in any event, it was submitted that any legitimate interest in disclosure would be outweighed by potential prejudice to the data subject. In particular, this harm might result from selective analysis of

[7] The Commissioner's guidance does not have the force of law but is often, as here, persuasive.
[8] See the section entitled "Principle (a): lawfulness, fairness and transparency".

incomplete information (relating to, for example, the facts on which the particular disciplinary charge is based or the composition of the panel).

24. In his response on behalf of the MPC Mr John Goss, counsel, submitted that the balancing exercise, properly performed, favoured disclosure of the name(s) of the relevant LQC(s). He pointed out that police disciplinary panels perform an important statutory function of a quasi-judicial kind. Confidence in any judicial or quasi-judicial system is likely to be diminished if decision-makers are anonymous. Moreover, there is no reason for any LQC to apprehend stigma or prejudice on account of being identified in his or her role.

25. Further brief submissions on behalf of the MPC stressed the importance of public trust in the police discipline system and the need for transparency and openness in order to foster that trust. This imperative necessitates disclosure of the identities of those who make the disciplinary decisions.

26. Mr Austin adopted the submissions of Mr Goss. He also strongly contended that LQCs *would* (contrary to Ms Iyengar's submissions) have the expectation that their public duties would bring them into the public eye. In addition, he drew attention to the legitimate interest in scrutinising police discipline cases and considering whether patterns of decision-making emerged and, if so, whether they might be explained by the constitution of the disciplinary panel (specifically, the identity of the LQC).

Discussion and Conclusions

Scope of the case

27. We have noted the unusual form of the decision notice in so far as it relates to the identities of the LQCs. We have felt some doubt as to whether the only point now 'live' before us can properly be seen as a valid point of appeal. An appeal must challenge a *decision*. An appeal cannot be mounted against a court's or tribunal's *reasons*. Is what is presented as a brief permissive remark in para 44 of the ICO's reasons a decision? In the end we have decided to lay aside our misgivings and take the pragmatic course of reading the Decision Notice as a whole and treating para 44 as containing a definitive ruling that disclosure of the LQCs' names would amount to a breach of the data protection legislation and, as such, an integral part of the ICO's decision. To do otherwise would be unfair to the parties and contrary to the overriding objective. It would leave Mr Austin with no means of ventilating his grievance on a matter of evident importance. And it would leave the MPC in the invidious position of being forced to choose between suppressing material to which (in her view) Mr Austin is entitled and being seen to act in a manner judged unlawful by a statutory regulator.

28. In the analysis which follows we attempt to examine individually the factors which application of GDPR, Articles 5.1 and 6.1(f) require us to consider. In doing so, however, we are mindful that there is considerable overlap between them.

Lawful processing?

29. The first question posed by Article 6.1(f) is whether a legitimate interest is pursued by the data controller or a third party. We are in no doubt that the concession on behalf of the ICO on this element is correct. There is plainly a legitimate interest pursued by the MPC and Mr Austin in fostering openness and transparency in relation to police disciplinary proceedings. And that interest indubitably serves the fundamental public interest in ensuring that police officers are subject to fair but rigorous disciplinary standards which are enforced in such a way as to command public confidence.

30. Secondly, is processing of the LQCs' personal data (limited to their names) necessary for the purposes of the legitimate interest? In our judgment, it certainly is. Open decision-making in public life is an essential feature of a properly functioning democratic society. The need for our courts and tribunals (save in special cases) to deliver open justice in public is not, and cannot be, in question. A key feature of open justice is the requirement for the decision-maker(s) to be identified. This explains why the anonymous judge does not feature in our justice system. The LQCs perform a quasi-judicial role and decide cases of obvious public interest and importance. They operate within the framework of a statutory disciplinary scheme applicable to a vital public service. The scheme itself recognises the need for openness to the extent that it mandates publication of disciplinary decisions for a *minimum* of 28 days.[9] And we cannot treat the fact that *police discipline legislation* imposes on chief constables a time-limited obligation to publish outcomes as lending any support to the notion that, once the 28 days have passed, any necessity *under the data protection regime* for the identities of LQCs to be ascertainable disappears. The proposition needs only to be rehearsed to be seen for what it is. If processing is necessary *for the purposes of the data protection regime* on days 1-28, what is it about day 29 that makes it unnecessary? We have been offered no defensible answer to that question.

31. The third question is whether, even if the first two are answered in Mr Austin's favour, the data subjects' rights override those of the controller or third party. Here again, the answer is, we think, quite clear. There is no evidence to suggest that publication of the names of LQCs would, or could, jeopardise the privacy rights of police officers facing disciplinary charges. That argument is not advanced by the ICO and if was, and there was any mileage in it, no doubt the MPC would be putting a different case before us. As for the submission that LQCs would face personal prejudice by being identifiable (outside the 28-

[9] To state the obvious, there is no bar to longer, or even indefinite publication.

day period), again, we find no substance here. The MPC perceives no harm or risk of harm. There is no evidence of any concern to this effect having been raised by any LQC or any body speaking on behalf of LQCs. To us, this is anything but surprising. They are seasoned legal practitioners. They understand how the administration of justice works. We would have thought that a suggestion made to them that they might (outside the 28-day period) operate under conditions of anonymity would be likely to be met with bafflement or perhaps a rather stronger reaction.

32. Our reasoning so far leads us to the clear conclusion that, for the purposes of Article 6.1(f), disclosure of the names of the relevant LQCs would be lawful.

Fair processing?

33. The question of fairness brings us back to GDPR, Article 5.1. In our judgment, the processing for which Mr Austin contends would certainly be fair. The points already made in addressing the three Article 6.1(f) questions argue compellingly for that view.

34. The ICO's *Guide to the GDPR* to which we have referred above draws attention to two considerations likely to be of particular relevance to the question of fairness: the reasonable expectations of data subjects and the need to protect them from avoidable harm. These are, we think, covered by our answer to the third Article 6.1(f) question but, for the avoidance of doubt, we see no reason to think that LQCs had, or have, an expectation of anonymity and any such expectation would have been anything but reasonable, and disclosure of the names sought would entail no harm to the LQC(s) concerned.

Overall conclusion and postscript

35. We have reviewed our stage-by-stage reasoning and stepped back to consider it in the round against the language of GDPR Articles 5.1 and 6.1(f), the applicable data protection case-law and FOIA, s40. We have also reminded ourselves (again) that this case begins and ends with Mr Austin bearing the burden of showing a compelling reason why the constitutional priority of privacy rights over information rights should be displaced. For the reasons we have stated, we are quite satisfied that he has comfortably discharged the burden. Accordingly, to the limited extent that it was pursued, his appeal must be allowed and a fresh decision substituted in the form set out above.

36. Finally, we hope that the ICO will consider our observations at para 27 above about the need for clear demarcation between decisions and reasons.

Anthony Snelson
Judge of the First-tier Tribunal

Date: 4 April 2022