



NCN: [2023] UKFTT 447 (GRC)

Case Reference: EA/2022/0291

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: by CVP
Heard on: 9 May 2023
Deliberations on 12 May 2023
Decision given on: 26 May 2023

Before

TRIBUNAL JUDGE BUCKLEY

TRIBUNAL MEMBER PIETER DE WAAL

TRIBUNAL MEMBER SUZANNE COSGRAVE

Between

NOEL TITHERADGE

and

(1) THE INFORMATION COMMISSIONER
(2) BRITISH TRANSPORT POLICE

Appellant

Respondent

Representation:

For the Appellant: Ms Wisson (Counsel)

For the First Respondent: Mr. Davidson (Counsel)

For the Second Respondent: Mr. Hopkins (Counsel)

Decision: The appeal is dismissed.

REASONS

Introduction

1. This appeal was heard together with EA/2022/0279. Separate decisions have been issued.
2. This is an appeal against the Commissioner's decision notice IC-146114-X4T3 of 6 September 2022 which held that The Chief Constable for British Transport Police ('the British Transport Police') was entitled to rely on section 40(2) of the Freedom of Information Act 2000 (FOIA) to withhold the requested Body Worn Video (BWV) footage. The Commissioner did not require the British Transport Police to take any steps.

Factual background to the appeal

3. Mr. Titheradge is a senior investigative reporter who has worked for the BBC for 13 years. He has a particular interest and expertise in reporting on policing and criminal justice matters.
4. On 4 February 2021 Police Constable Anderson was dismissed from the British Transport Police following a public hearing after an independent panel found that, inter alia, his conduct in filling a detained person's shoes with water on 11 March 2020 and turning off the BWV camera of another officer on 4 March 2020 amounted to gross misconduct.
5. The British Transport Police issued the following statement about the decision:

"PC Anderson was on duty on 4 March 2020 at Finsbury Park station when he turned off the body worn video of another officer and intentionally damaged the mobile phone a detained person. On 11 March 2020 PC Anderson was also found to have subjected a detained person to degrading treatment, whereby he filled their shoes with water."

6. The request is for any BWV footage of Police Constable Anderson turning off the BWV of a fellow officer.
7. The British Transport Police has provided a detailed open description of the footage which it says falls within the scope of the request as follows:

"Incident on 4th March 2020

This piece of footage is 11:29 long.

It opens with the officer filming in an interview room which appears to be in a police station. Officers are dealing with a female and trying to confirm her details. The female does not appear to speak much English so most of the time is spent trying to confirm her name/identity. The primary data subject is the female, who is seen on camera, her name and date of birth is confirmed and ID documents can be seen on camera. The officer tries to radio for a PNC check, but not does not receive a reply and is having trouble doing a check on her mobile device. The female shows officers her mobile phone and unlocks it for them on request. The officers discuss spelling of the name and the phone screen is seen on the footage. The camera is primarily capturing the female, who is sitting on a chair in the corner of the room and appears to be crying. As well as the officer filming, another officer (who I believe to be PC Anderson) is occasionally partially captured and can be heard also questioning the female. PC Anderson can be heard leaving the room at 07:50 on the recording leaving the other officer alone. He states "You alright, you've got your camera on?" Another officer comes in at 09:15 and starts speaking to the officer about identity. They again look at a photo on the female's phone. He asks questions about how long the female has been in the country and she says 10 days. The officer asks "how long have you been doing this on the train? Tissue begging?" but she says she doesn't understand. She states she speaks Italian. Someone in the background can be heard saying "Italian speaker" and another officer who appears to speak Italian enters and leans between the camera and the female and speaks to the female. At 11:15 PC Anderson follows the Italian-speaking officer back into the room. The other officer who had entered leaves and the filming officer says "thank you" to him and laughs. PC Anderson says "Oh, sorry". The filming officer says ". The two officers are standing watching the Italian-speaking officer speak to the female. PC Anderson looks over at the filming officer and then moves towards her with his arm out. The coverage then cuts out.

Incident on 13th March 2020

This piece of footage is exactly 1 minute long. The audio starts at 00:30 as is always the case on this system. The scene is outside at night, there are a number of police officers seen and a number of young males. As the audio comes in someone can be heard in the background saying "Do not interfere with my colleague". The filming officer announces "putting my camera on for the purposes of the search". I note that it is mandatory for a BWV camera to be on when conducting a stop search. A young male is in front of the camera and the officer gives her name and number and states that the object of the search is a search for drugs. Another officer can initially be seen behind the male who has been stopped that I believe may be PC Anderson. He moves away to the officer's right. A hand then appears over the screen and the footage ends."

Requests, decision notice and appeal

The request

8. This appeal concerns the following request made on 6 July 2021 by Mr Titheradge:

All body worn video recorded by officers showing PC Tim Anderson turning off body worn video of a fellow officer as recorded here:

<https://www.mylondon.news/news/north-london-news/london-police-officer-dismissed-filling-19966126>

The response

9. On 15 October 2021 the British Transport Police responded to the request and withheld the information relying on section 40(2). In his request for an internal review Mr Titheradge indicated that he was happy for the face of the officer not to be shown. The British Transport Police upheld its position on internal review on 2 December 2021.
10. Mr. Titheradge referred the matter to the Information Commissioner on 14 December 2021.

The Decision Notice

11. The Commissioner was satisfied that the withheld information related to and identified the individuals concerned and fell within the definition of personal data in section 40(1) of the Data Protection Act 2018 (DPA).
12. The Commissioner accepted that there was a legitimate interest in police officer misconduct, specifically when resulting in police officers being dismissed from the force. The Commissioner stated that promoting transparency, accountability and openness with regard to details of a dismissal case was also an important aspect.
13. The Commissioner was satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there were no less intrusive means of achieving these aims.
14. The Commissioner considered that the individuals captured on the video footage had a strong and reasonable expectation that the content would not be released into the public domain. The Commissioner determined that there was insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals who provided statements. The Commissioner therefore considered that there was no Article 6 basis for processing and so the disclosure of the information would not be lawful.
15. The Commissioner concluded that the British Transport Police was entitled to rely on section 40(2) to withhold the information.

Notice of Appeal

16. The grounds of appeal are:

Ground One

The Commissioner proceeded on an incorrect factual basis regarding the scope of the request which was limited by its express terms, namely to the BWV which captured the relevant police officer “turning off [BWV] of a fellow officer”. The Commissioner’s references to the BWV capturing multiple “incidents” involving multiple “data subjects” are misplaced and infected the Commissioner’s application of the balancing test under Article 6(1)(f) UK GDPR.

Ground Two

The Commissioner erred in finding that the relevant data subjects held a “strong and reasonable expectation” that the relevant BWV would not be disclosed in circumstances where:

(i) The relevant “data subjects” are limited to those captured in a temporally limited extract of BWV, namely: (i) the police officers who were the subject of the gross misconduct proceedings and/or directly involved in the incident; and (ii) other individual(s) (if any) shown in the footage (it being understood by the Appellant that other individuals were not necessarily captured in this temporally limited extract of BWV);

(ii) Proceedings for “gross misconduct” are conducted in public both generally and in this particular case, such that allegations regarding the requested BWV footage were made in public (cf, proceedings for “misconduct”, which occur in private, such that the data subjects would have a reasonable expectation of non-disclosure); and

(iii) The British Transport Police’s Privacy Notice expressly recognises that it “may disclose personal data to a wide variety of recipients in any part of the world” including where required to do so pursuant to legislation or to the media.

Ground Three

The fundamental rights and freedoms of the relevant data subjects are outweighed by the legitimate interests pursued by the appellant and/or the pressing social need for disclosure of such information in circumstances of gross police misconduct, including in the use of BWV, and a fortiori where this leads to dismissal from the force.

The Commissioner’s response

Ground 1

17. If the scope of the request is limited temporally to an 'extract' of the BWV capturing PC Anderson turning off the camera:
 - 17.1. The scope of the request is unclear. There is no suggestion as to when the relevant clip would begin.
 - 17.2. This does not appear to be Mr Titheradge's understanding of the request. In his request for an internal review, he did not object to the British Transport Police's description of the footage.
 - 17.3. Disclosure of the extract is not necessary for the purposes of the legitimate interests which have been met by the public misconduct hearing and the fact of deactivation being in the public domain.
18. The Commissioner agrees with the basis on which the British Transport Police approached the request i.e. the entirety of the footage of the two incidents in which PC Anderson switched off the BWV camera.

Ground 2

19. It is possible that even short extracts might contain the personal data of others. The Commissioner reserved this point until he had viewed the footage.
20. Simply because gross misconduct hearings are in public does not mean that the data subjects would not have a reasonable expectation that footage played in a hearing would not be disclosed by way of a FOIA request.
21. The Commissioner accepts the British Transport Police's position that:
 - 21.1. Whilst police officers do not have a substantial expectation of privacy in respect of the footage, they would not expect disclosure unless it was truly necessary and any benefit outweighed their own privacy rights which they do not in this case.
 - 21.2. The two members of the public are the primary focus of the footage and neither would have an expectation that the footage would be released.
 - 21.3. It would not be practical or appropriate to seek their consent.
 - 21.4. Disclosure of personal data is likely to cause distress to members of the public and officers other than PC Anderson.
22. For those reasons the Commissioner submits that the fundamental rights and freedoms of the data subjects outweigh the legitimate interests in disclosure and disclosure would be unfair.

The response of the British Transport Police

23. The response describes the content of the two sets of footage in detail at paragraphs 8 and 9 as follows:

“8. The footage of Incident 1 is 11 minutes and 29 seconds long and takes place within a police station. It includes police officers questioning an arrested person (“X”), in particular in order to establish and verify her identity. X is visible for much of the footage. She repeatedly states her name and confirms her date of birth. She shows police officers documents on her phone, with her screen visible on the footage. Given X’s apparently limited English, another officer appears who is then heard conversing with X in Italian. PC Anderson is briefly visible moving towards the filming officer shortly before the footage stops.

9. The footage of Incident 2 is one minute long. The scene is outdoors at night. The footage shows a number of police officers and a number of young members of the public, one of whom (“Y”) is shown prominently on the footage. An officer is heard explaining inter alia that the individuals have been stopped for the purposes of a search for drugs. PC Anderson is again briefly visible moving towards the filming officer shortly before the footage stops.”

24. The British Transport Police submits that the footage contains personal data, in the form of visual and audio information about (i) members of the public who were being detained, questioned and/or searched by police officers, (ii) police officers other than PC Anderson, and (iii) PC Anderson. All of these individuals would be identifiable to at least some members of the public. Mr Titheradge does not dispute that the footage comprises personal data.
25. As regards X and Y, the British Transport Police submits that the footage contains ‘personal data relating to criminal...offences’. Alternatively it is nonetheless of acute sensitivity for X and Y.
26. The British Transport Police notes that there is no presumption in favour of the disclosure of personal data under FOIA: **Common Services Agency v Scottish IC** [2008] UKHL 47 at paragraph 7. Such disclosure requires justification in accordance with the UK GDPR and DPA.
27. It is submitted that disclosure would contravene Article 5(1)(a) UK GDPR:
 - 27.1. Disclosure would be unfair, in that it would contravene the reasonable expectations of the data subjects and would be likely to cause them (or some of them) damage and distress without adequate justification.
 - 27.2. Disclosure would be unlawful in that:
 - 27.2.1. Disclosure to a member of the public otherwise than under FOIA would contravene the privacy rights of X and Y in particular and police officers other than PC Anderson;

- 27.2.2. No lawful processing condition under Article 6(1) UK GDPR would be met. There is no legitimate interest in the personal data of X and Y. There is limited legitimate interest in the personal data of police officers other than PC Anderson, but such disclosure is unnecessary for and disproportionate to that interest, and the interests of the data subject override the interest in disclosure. There is a legitimate interest in disclosure of the personal data about PC Anderson, but such disclosure is unnecessary for and disproportionate to that interest, which has already been met by the British Transport Police's press release. If footage were to be confined only to PC Anderson turning off the BWV cameras, the footage would be so limited as to be meaningless and would add nothing of substance to the British Transport Police's press release.
- 27.3. To the extent that footage comprises criminal offence data, the British Transport Police submits that no lawful processing condition from Schedule 1 DPA would be met on the facts of this case.
28. In relation to the grounds of appeal, the British Transport Police agrees with the Commissioner's response:
- 28.1. The Commissioner correctly notes that (i) the British Transport Police's interpretation of the request was made clear to Mr Titheradge, who did not take issue with that point in his request for internal review, and (ii) the withheld footage cannot realistically be confined to showing only PC Anderson turning off the body worn cameras without thereby being so minimal as to be meaningless.
- 28.2. As to reasonable expectations of privacy, the Commissioner is correct that neither the fact of a public misconduct hearing nor the terms of the British Transport Police's privacy notice remove or materially weaken those expectations.
- 28.3. As to the balance of competing interests, the British Transport Police maintains that the Commissioner reached the correct conclusion.

Evidence

29. We read an open and a closed bundle and viewed closed BWV footage.
30. It is necessary to withhold the above closed information from Mr. Titheradge because it refers to the content of the withheld information, and to do otherwise would defeat the purpose of the proceedings.
31. We held a short closed session. The following is a gist of the closed session. A copy was provided to Mr Titheradge during the hearing.

“Mr Hopkins said he had nothing to add in closed to what he said in open. Mr Davidson said that, on that basis, there was nothing he wished to add either.

Mr De Waal asked about the relationship between the two incidents referred to in the BTP's press release about PC Anderson's dismissal and the two incidents featured on the withheld BWV footage. Mr Hopkins explained that the first of the incidents referred to in the press release (4 March 2020) relates to Incident 1, ie the longer of the two sets of footage. The second of the incidents in the press release (11 March) did not relate to BWV footage. The footage of Incident 2 was held by the panel that heard the misconduct proceedings against PC Anderson, but not referred to in the press release about PC Anderson's dismissal.”

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Legal framework

Personal data

32. The relevant parts of section 40 of FOIA provide:

- (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 –
 - (a) It constitutes personal data which does not fall within subsection (1), and
 - (b) either the first, second or the 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...
- ...

33. Personal data is defined in section 3 of the Data Protection Act 2018 (DPA):

- (2) ‘Personal data’ means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (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, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

34. This is in line with the definitions in the UK General Data Protection Regulation (UK GDPR). The tribunal takes the view that the recitals to the GDPR 2016/679 are a useful guide to the interpretation of the UK GDPR. Recital 26 to the GDPR is relevant, because it refers to identifiability and to the means to be taken into account:

(26) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

35. The definition of "personal data" consists of two limbs:

- i) Whether the data in question "relate to" a living individual and
- ii) Whether the individual is identified or identifiable, directly or indirectly, from those data.

36. The tribunal is assisted in identifying 'personal data' by the cases of **Ittadieh v Cheyne Gardens Ltd** [2017] EWCA Civ 121; *Durant v FSA* [2003] EWCA Civ 1746 and **Edem v Information Commissioner** [2014] EWCA Civ 92. Although these relate to the previous iteration of the DPA, we conclude the following principles are still of assistance.

37. In **Durant**, Auld LJ, giving the leading judgment said at [28]:

Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated.

38. In **Edem** Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about

the individual, approving the following statement in the Information Commissioner's Guidance:

It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

39. The High Court in **R (Kelway) v The Upper Tribunal (Administrative Appeals Chamber) & Northumbria Police** [2013] EWHC 2575 held, whilst acknowledging the Durant test, that a Court should also consider:

(2) Does the data "relate" to an individual in the sense that it is "about" that individual because of its:

- (i) "Content" in referring to the identity, characteristics or behaviour of the individual?
 - (ii) "Purpose" in being used to determine or influence the way in which the individual is treated or evaluated?
 - (iii) "Result" in being likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case (the WPO test)?
- (3) Are any of the 8 questions provided by the TGN are applicable?

These questions are as follows:

- (i) Can a living individual be identified from the data or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
 - (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, or business or profession?
 - (iii) Is the data 'obviously about' a particular individual?
 - (iv) Is the data 'linked to' an individual so that it provides particular information about that individual?
 - (v) Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
 - (vi) Does the data have any biographical significance in relation to the individual?
 - (vii) Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
 - (viii) Does the data impact or have potential impact on an individual, whether in a personal or family or business or professional capacity (the TGN test)?
- (4) Does the data "relate" to the individual including whether it includes an expression of opinion about the individual and/or an indication of the intention of the data controller or any other person in respect of that individual. (the DPA section 1(1) test)?

40. The data protection principles are set out Article 5(1) of the UK GDPR. Article 5(1)(a) UK GDPR provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) UK GDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

41. The only potentially relevant basis here is article 6(1)(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 requires protection of personal data, in particular where the data subject is a child.

42. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

43. Lady Hale said the following in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421 about article 6(f)'s slightly differently worded predecessor:

27. ... It is well established in community law that, at least in the context of justification rather than derogation, 'necessary' means 'reasonably' rather than absolutely or strictly necessary The proposition advanced by Advocate General Póitares Maduro in *Huber* is uncontroversial: necessity is well established in community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. ...

44. Article 10 UK GDPR provides:

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

45. Section 11(2) DPA provides:

In Article 10 of the GDPR and section 10, references to personal data relating to criminal convictions and offences or related security measures include 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.

46. Section 10 DPA provides:

10 Special categories of personal data and criminal convictions etc data

(1) Subsections (2) and (3) make provision about the processing of personal data described in Article 9(1) of the UK GDPR (prohibition on processing of special categories of personal data) in reliance on an exception in one of the following points of Article 9(2) –

- (a) point (b) (employment, social security and social protection);
- (b) point (g) (substantial public interest);
- (c) point (h) (health and social care);
- (d) point (i) (public health);
- (e) point (j) (archiving, research and statistics).

(2) The processing meets the requirement in point (b), (h), (i) or (j) of Article 9(2) of the UK GDPR for authorisation by, or a basis in, the law of the United Kingdom or a part of the United Kingdom only if it meets a condition in Part 1 of Schedule 1.

(3) The processing meets the requirement in point (g) of Article 9(2) of the UK GDPR for a basis in the law of the United Kingdom or a part of the United Kingdom only if it meets a condition in Part 2 of Schedule 1.

(4) Subsection (5) makes provision about the processing of personal data relating to criminal convictions and offences or related security measures that is not carried out under the control of official authority.

(5) The processing meets the requirement in Article 10 of the UK GDPR for authorisation by the law of the United Kingdom or a part of the United Kingdom only if it meets a condition in Part 1, 2 or 3 of Schedule 1.

47. Schedule 1, Part 3, Paragraph 36 DPA provides:

Extension of conditions in Part 2 of this Schedule referring to substantial public interest

This condition is met if the processing would meet a condition in Part 2 of this Schedule but for an express requirement for the processing to be necessary for reasons of substantial public interest.

48. Schedule 1, Part 2, Paragraph 13 DPA provides:

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 subparagraph (2),

(c) ...

(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.

...

- (4) In this paragraph-
...
“the special purposes” means-
(a) the purposes of journalism;
...

49. Section 40(2) is an absolute exemption and therefore the separate public interest balancing test under FOIA does not apply.

The role of the tribunal

50. The tribunal’s remit is governed by section.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

51. The issues for the tribunal to determine are:

- 51.1. What is the scope of the request?
- 51.2. Does the information relate to an identified or identifiable living individual?
- 51.3. Is any or all of the requested information criminal offence data in that it relates to criminal offences or alleged criminal offences by the data subject(s)?
- 51.4. In relation to any criminal offence data:
 - 51.4.1. Would disclosure be for the purposes of journalism?
 - 51.4.2. Would disclosure be carried out in connection with the alleged or established commission of an unlawful act by a person?
 - 51.4.3. Would disclosure be carried out with a view to the publication of the personal data by any person?
 - 51.4.4. Does the controller reasonably believe that publication of the personal data would be in the public interest?
- 51.5. In relation to personal data which is not criminal offence data:
 - 51.5.1. Is the data controller or a third party pursuing a legitimate interest or interests?
 - 51.5.2. Is the processing involved necessary for the purposes of those interests?
 - 51.5.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

Discussion and conclusions

Scope

52. The request asks for ‘all body worn video recorded by officers showing PC Tim Anderson turning off body worn video of a fellow officer as recorded here:

<https://www.mylondon.news/news/north-london-news/london-police-officer-dismissed-filling-19966126>

53. The linked article refers to one occasion on which PC Tim Anderson turned off the BWV camera of a fellow officer. This is captured in the footage of incident 1.
54. In our view much of the footage in the closed bundle is outside the scope of the request. We find that the British Transport Police gave the request too wide a construction. Looking at the clear wording of the request, objectively construed in the light of all the surrounding circumstances, we find that the request means what it says and is limited to footage 'showing PC Tim Anderson turning off body worn video of a fellow officer'. It does not include all the BWV footage that was taken on the occasions when that happened.
55. We are not persuaded that the scope of the request is broader than this by the fact that Mr Titheradge failed to take issue with the British Transport Police's interpretation of the scope of the request in his internal review. The British Transport Police state in their response to the request (at page D1/PDF 253 of the open bundle) that:

"...the footage captured includes two incidents, one where a detained female is being processed and one where a male is being subject to a stop search process. The footage captures images and audio relating to these data subjects, as well as other police officers who are also captured."
56. This is not, in our view, a clear statement of the British Transport Police's interpretation of the scope of the request, particularly when read without the benefit of having seen the footage. We find that a failure to object at this stage does not assist with an objective interpretation of what is a clearly worded request.
57. The assertion by the Commissioner and the British Transport Police that the requested footage would, on these particular facts, be 'meaningless', if limited to footage showing the camera being switched off, does not, in our view, assist in interpreting the request.
58. On these facts and having viewed the BWV footage, they may be right that the requested footage is meaningless. This is relevant to our discussions below. Mr Titheradge drafted his request without the benefit of having seen the footage. It is easy to imagine footage which showed a police officer switching off BWV that would not be meaningless, because for example, it also showed the beginning of the actions that the officer was trying to conceal or contained dialogue relating to the switching off. The fact that in a particular case a clearly worded request does not, in the light of closed information, capture meaningful information cannot be used to artificially broaden the request.

59. Mr Titheradge has indicated that his request includes 'only the footage of the moment of deactivation with contextual surrounding BWV footage relevant to that deactivation' (paragraph 24 of the Mr Titheradge's witness statement at p B22).
60. Mr Titheradge did not ask for 'contextual surrounding BWV footage' in his request. In any event, having viewed the footage, in our view there is no other footage 'relevant to the deactivation' additional to that which we have found falls within the scope of the request. This can be seen from the detailed description of the closed footage provided in open by the British Transport Police and set out in our discussions below. Therefore whilst in some cases a request that included 'contextual surrounding BWV footage relevant to [the] deactivation' might have increased the amount of video footage that was within the scope of the request, on these facts it would not have done so.
61. Having determined the scope of the request, we have considered which sections of the BWV footage fall within in the scope of the request. We find that the sections of footage which show PC Tim Anderson turning off body worn video of a fellow officer are:
- 61.1. In relation to incident 1: from 11:26-11.29 (when the footage ends) i.e. 3 seconds.
- 61.2. In relation to incident 2: from the point in 0:56 when PC Anderson's arm is first seen in front of the camera until 1:00 (when the footage ends) i.e. just under 4 seconds.
62. We find that the rest of the footage cannot be said to be footage showing PC Anderson turning off the BWV of a fellow officer and therefore we find that it falls outside the scope of the request.

Personal data

63. The question for us to determine is whether the withheld information in scope of the request is the personal data of an identifiable living individual or individuals.
64. In the BWV footage in relation to incident 1, PC Anderson is clearly visible and identifiable as a result of information in the public domain. In the BWV footage in relation to incident 2, only PC Anderson's arm is visible turning the camera off. Given the terms of the request, we find that PC Anderson is identifiable even though his face is not visible.
65. In relation to both incidents the footage shows PC Anderson switching off a colleague's BWV camera. This data clearly relates to him, has biographical significance for him, and has an impact on him in a professional capacity. Switching off a colleague's BWV camera contributed to the decision to dismiss him for gross misconduct. We find that it is his personal data.

66. Given the terms of the request, obscuring PC Anderson's face would not have the effect of making him unidentifiable, and therefore there is no need for us to consider whether we have the power to order the British Transport Police to, for example, blur his features.

Is all or part of the requested information criminal offence data?

67. As the footage in scope does not contain the data of any individuals other than PC Anderson, we find that it does not contain criminal offence data.

Legitimate interests etc.

68. Mr. Titheradge asserts that disclosure of the footage will contribute to public understanding of how BWV is being mis-used. He asserts that the footage will reveal the precise context of the decisions to deactivate the BWV – including, for example, whether on each occasion this action was undertaken openly or whether PC Anderson sought to turn the camera off clandestinely. He asserts that it will also illustrate the degree to which PC Anderson acted independently or discussed his plan with a colleague. He asserts that it could show the precise actions that he was seeking to conceal.

69. Mr. Titheradge is interested in the multiple perspectives recorded by different officers and the context of any misconduct prior to and (when available) following the BWV camera(s) being switched off. He states that the BWV footage is being sought to assist his investigation into BWV misconduct and, ultimately, with a view to publication. He submits that the footage is important to his investigation and is essential in providing the public with an insight into officer misconduct, and to exploring the extent to which the issue (turning off BWV cameras) is systemic across policing in England and Wales.

70. Mr Titherdege submits that each "incident" involves BWV deactivation, in which the public have an interest in understanding the circumstances of and the nature of the decision to misuse police powers by turning off BWV. In addition, he submits that the public have a separate interest in knowing to what extent each "incident" also involved other misuses of police power either preceding and/or following the BWV deactivation – e.g. verbal abuse of a suspect, physical assault of a suspect, destruction of the suspect's property and/or inappropriate questioning of a suspect.

71. We accept that there is a legitimate interest in increasing public understanding of how BWV is being mis-used and in understanding the circumstances and the nature of the decision to misuse police powers by turning off BWV. Further we accept that there is a legitimate interest in transparency in relation to other misuses of police power.

72. In our view disclosure of the requested footage is not reasonably necessary for the purposes of those interests.

73. The British Transport Police has been very clear on what is contained in the footage. A detailed description of the entire footage of both incidents appears in the open bundle and is reproduced under 'Factual Background to the appeal' above.
74. Having reviewed the footage we confirm that that is a very detailed and accurate description of both sets of footage, which omits nothing material. The footage that we have determined falls within the scope of the request in relation to the first incident is the section where PC Anderson looks over at the filming officer and then moves towards her with his arm out and the coverage cuts out. In relation to the second incident it is the section where a hand appears over the screen and the footage ends.
75. We find that this footage does not assist the public to any material extent in increasing their understanding of why PC Anderson decided to turn off the BWV footage.
76. In relation to incident 1, the fact that PC Anderson later damaged a mobile phone is public knowledge and is not apparent from the footage. The footage does not assist in increasing the public's understanding of the circumstances of and the nature of the decision to misuse police powers by turning off BWV or of how BWV is being misused. It provides less insight into that decision than the already public information on what happened next.
77. The footage of incident 1 does not reveal the precise context of the decision to deactivate the BWV. We accept that to the extent that it shows that 'PC Anderson looks over at the filming officer and then moves towards her with his arm out' it can be inferred that the action was undertaken openly rather than clandestinely. We accept that the video, as can be seen from the description above, does not record any discussion about switching off the BWV. We accept that this could be seen as potentially contributing to increasing the public's understanding of the context of this decision to deactivate, but we find, if at all, any contribution would be minimal.
78. In relation to incident 1, there are no multiple perspectives or any recorded misconduct prior to the BWV being turned off. There is no footage following the BWV being turned off.
79. In relation to incident 2, the British Transport Police stated in their response that the footage captured a male being subject to a stop and search process. That provides as much insight into why PC Anderson might have decided to turn off the BWV as the footage itself. Nothing else relevant to his motivation is apparent from the footage. The footage does not assist in increasing the public's understanding of the circumstances of and the nature of the decision to misuse police powers by turning off BWV or of how BWV is being misused.

80. The footage of incident 2 does not reveal the precise context of the decision to deactivate the BWV. It is not apparent from the footage whether the action was undertaken openly rather than clandestinely. We accept that the video, as can be seen from the description above, does not record any discussion about switching off the BWV. We accept that this could be seen as potentially contributing to increasing the public's understanding of the context of this decision to deactivate, but we find, if at all, any contribution would be minimal.
81. In relation to incident 2, there are no multiple perspectives or any recorded misconduct prior to the BWV being turned off. There is no footage following the BWV being turned off.
82. As we have construed the request narrowly, we do not need to consider whether the rest of the footage would serve those purposes. However, if we had needed to, we would have concluded in relation to both incidents that it was not necessary to disclose the rest of the footage for the purposes of the legitimate interest identified by Mr. Titheradge. The rest of the footage contains nothing relevant to the decision to turn off the BWV footage other than the broad context, already publicly stated by the British Transport Police, i.e. that it took place during the questioning of a suspect or in relation to a male being subject to a stop and search process.
83. Looked at as a whole, the extremely limited insight offered by both sets of footage in scope means, in our view, that it adds no more than minimally, if at all, to public understanding of this issue and we conclude that its disclosure would not be reasonably necessary for the purposes of those legitimate interests.
84. In addition, in considering whether or not disclosure is reasonably necessary, we must consider if there are any less intrusive means of achieving the legitimate aims. In our view, the detailed description of the footage provided to Mr Titheradge is an example of a less intrusive means of achieving the legitimate aims pursued.
85. Further, disclosure is not reasonably necessary for the more general public interest in transparency and accountability in police misconduct, which is served by the public gross misconduct proceedings and the information, including the press release, made public by the British Transport Police.
86. We do accept that there is some value to a journalist and to the public in a journalist being able to illustrate a story with video, rather than with text. However, where the footage itself is of very limited, if any, assistance in increasing understanding, for the reasons set out above, we do not accept that it is *reasonably necessary* for the purposes of the identified legitimate interests for the video to be shown rather than a description of the events.
87. Even if we had construed the request more broadly we would have reached the same conclusion in relation the relevant legitimate interests. The rest of the footage

contains nothing relevant to the decision to deactivate or any police misconduct or abuse of power.

88. Having concluded that disclosure is not reasonably necessary for the purposes of the legitimate interests, it is not necessary for us to consider any other issues. There is no lawful basis for processing and the information is exempt under section 40(2).

Summary of decision

89. For the above reasons we conclude that the British Transport Police was entitled to withhold the requested information under section 40(2) FOIA because it contains personal data and it is not reasonably necessary to disclose it for the purposes of the identified legitimate interests.

Signed Sophie Buckley

Date: 26 May 2023

Judge of the First-tier Tribunal