

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 11 April 2024

Public Authority: Chief Constable of South Wales Police
Address: Cowbridge Road
Bridgend
Mid Glamorgan
CF31 3SU

Decision (including any steps ordered)

1. The complainant requested a copy of a final report produced by South Wales Police (SWP) that relates to Operation Dolomite.
2. SWP disclosed a redacted version of the document, citing a number of exemptions under FOIA; section 31(1) – law enforcement, section 38 – Health and Safety, section 40(2) – personal information and section 42(1) - legal professional privilege.
3. The Commissioner’s decision is that the exemptions cited are not applicable to all the withheld information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose the information identified in a confidential annex which has been provided solely to SWP.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. This case relates to a report produced by SWP after carrying out a review of a case commonly referred to as 'the Clydach murders' called Operation Dolomite. The original investigation was the biggest in Welsh policing history and resulted in the conviction of David Morris in 2002 and for a second time in 2006 following a retrial.
7. There has been a significant amount of speculation relating to the investigation and the Commissioner is aware of a number of historical cases where SWP had been accused of manufacturing evidence to secure convictions. Most notably, the Cardiff Three and the Darvell Brothers who were all wrongfully convicted.
8. It should be made clear at the outside that the Commissioner acknowledges the complexities involved in this case and has reviewed all the information in detail, line by line, before coming to his conclusion.
9. This complaint was brought to the Commissioner on 22 September 2023 following on from the decision notice IC-209640-X6N8¹ on 7 July 2023.
10. Following receipt of SWP's revised response of 8 August 2023, the complainant confirmed to the Commissioner that they remained dissatisfied with SWP's handling of their request, believing that the requested information should be disclosed.
11. On 17 November 2023, the Commissioner contacted SWP to request further details about its decision to refuse the request under sections 31, 40 and 42 of FOIA. The Commissioner asked SWP to provide its response by 1 December 2023.
12. SWP requested a one month extension for its response to the Commissioner's enquiries, and an extension until 15 December 2023 was subsequently granted. On 18 December 2023, SWP contacted the Commissioner apologising for the delay and advising a substantial amount of time had already been spent considering the request and the withheld information; however, further input was still required from officers within other departments, it stated that, given this, it was unable to give a definitive time as to when SWP would be in a position to respond to the Commissioner's enquiries.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025845/ic-209640-x6n8.pdf>

13. As a result of its non-response to the Commissioner's enquiries an Information Notice was served on 19 December 2023. SWP responded on 22 December supplying copies of the withheld information as requested.
14. The Commissioner sought further clarification from SWP on the exemptions it was relying on to ensure the information had not been unnecessarily redacted. He also advised that, in his opinion further information could be disclosed without causing the harm SWP was alluding to.
15. Following further chasers from the Commissioner SWP eventually responded on 13 February 2024 advising it would provide the complainant with a revised response and further information. However, SWP failed to do so, and the Commissioner was obliged to send further chasers. SWP finally provided its revised response to the complainant on 7 March 2024.

Confidential Annex

16. In order to preserve a meaningful right of appeal, the Commissioner has produced a confidential annex to this decision that will be provided to the public authority only.
17. The confidential annex specifies the information that the Commissioner has determined can be withheld and the information that should be disclosed. Necessarily this involves reference to the contents of the actual information being withheld.
18. All the Commissioner's reasoning is included in the published decision notice. No further analysis is included in the confidential annex.

Request and response

19. On 22 August 2023, the complainant wrote to the Commissioner as they remained dissatisfied with SWP's response to their original complaint referred to in paragraph 9 above, and said:

"I wish to lodge a complaint with the ICO concerning the latest decision from South Wales Police in relation to my request for a copy of their final report into Operation Dolomite, and the Clydach murders."
20. SWP provided its response on 8 August 2023, mirroring its original response of June 2022 advising that it was refusing the request under the following exemptions:

- section 30(1) – investigations and proceedings
- section 31(1) – law enforcement
- section 38(1) – health and safety
- section 40(2) – personal information
- section 42(1) – legal professional privilege

21. During the Commissioner's investigation and after a number of chasers SWP eventually provided its final response on 7 March 2024 disclosing a redacted report and relying on the following exemptions to withhold the remaining information:

- section 31(1)(c) – law enforcement
- section 38(1)(a) – health and safety
- section 40(2) – personal information
- section 42(1) – legal professional privilege

Scope of the case

22. In considering this case, the Commissioner is aware of a significant amount of information already in the public domain via several TV documentaries² and extensive media coverage³.

23. SWP applied section 42 to part 7 of the report in its entirety.

24. The complainant argued that: "It is difficult to know just how much legal professional privilege information is contained within the final report. That said, it should be possible to redact any such information as necessary."

25. The complainant also highlighted that: "South Wales Police has omitted 33 paragraphs – including their headings. It is therefore very difficult to arrive at a conclusion as to whether the information contained within those paragraphs is in the public interest, or not."

26. The Commissioner notes that the complainant is content for legal advice to be withheld but has questioned whether all that information is indeed covered by section 42. He also notes that SWP's further disclosure on 11 March 2024 provided the section headings, which had previously been withheld, including part 7 – The Crown Prosecution Service (CPS)

² Murder in the Valleys, Panorama, Beyond Reasonable Doubt, Cold Case Killers

³ The Clydach Murders book, <https://www.thesun.co.uk/news/17474286/clydach-murders-alison-lewis-mandy-power-david-morris/> <https://www.walesonline.co.uk/news/wales-news/husband-clydach-murders-victim-breaks-19135114>

Advice. On that basis he sees no reason to investigate this any further, suffice to confirm that part 7 is exempt under section 42.

27. The Commissioner would like to highlight that SWP has taken an extremely cautious approach when dealing with this request and acknowledges the reasons for doing so. However, the fact that SWP has not previously made information public does not prevent it from doing so when that information is in the public domain from other sources.
28. The scope of this case is therefore to determine whether SWP is entitled to rely on any of the other exemptions it has cited to withhold the requested information.

Reasons for decision

29. SWP has claimed that section 40 applies to whole sections of the withheld information, and in part throughout the report. If the Commissioner determines that section 40(2) does not apply to any part of that information, he will go on to consider if any other exemption cited is applicable.

Section 40 - personal information

30. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
31. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

34. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
38. In the circumstances of this case, the Commissioner is satisfied that the names are personal information. The majority of the names in the report are already in the public domain via TV programs and media reports, such as police officers, some witnesses, lawyers and forensic investigations. As the participants agreed to take part or be interviewed the Commissioner considers that these names are to be disclosed with the other information identified in the confidential annex.
39. However, there are several individuals that also fall into the above categories mentioned in the report whose names are not in the public domain. These names fall within the definition of ‘personal data’ in section 3(2) of the DPA.
40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

43. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
44. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

45. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“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”⁴.

46. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

47. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

49. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and

⁴ Article 6(1) goes on to state that:-

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

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

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

commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

50. The Commissioner acknowledges the complainant's own legitimate interest in the information as a journalist and member of the public.
51. There is also a broader legitimate interest in accountability and transparency around the investigation and the involvement of the police – however, the Commissioner does not consider that disclosing these particular names alone would assist wider public understanding of the report.

Is disclosure necessary?

52. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
53. In this case, the Commissioner has considered whether publication is necessary to meet the interest. In his view, it is not, as much of the information is already in the public domain, with the exception of those parts highlighted in the confidential annex.
54. Publication to the world at large is therefore not necessary because it is not the least intrusive means of achieving the complainant's legitimate interest.
55. As disclosure is not necessary, it would also be unlawful. Consequently, section 40(2) of FOIA applies to part of the withheld information.
56. The Commissioner notes other information that has been withheld under section 40(2) of FOIA and finds a significant amount is not personal data. Therefore section 40(2) does not apply and he has considered whether any of the other exemptions are applicable.
57. With regard to the information not in the public domain, the Commissioner has considered the same tests as above. He also acknowledges the legitimate interest outlined above and that disclosure is necessary to meet that legitimate interest.
58. However, the information relates to individuals private lives and as such, the necessity and legitimate interest must be balanced against the fundamental rights and freedoms of those individuals.

59. It is the Commissioner's view that disclosing this information would be likely to have a detrimental impact on those individuals by bringing them into the public eye when it is not necessary or relevant to outcome of Operation Dolomite.
60. The Commissioner finds that in this case, the fundamental rights and freedoms of those individuals to continue with their lives without fear of media intrusion outweighs the limited legitimate interest in disclosure.
61. Therefore, it is his decision that SWP is entitled to rely on section 40(2) to withhold the information listed in the confidential annex.

Section 31(1)(c) – law enforcement

62. SWP applied section 31(1)(c) along with section 40(2) to parts of the withheld information. Having determined that section 40(2) is not applicable to all the information the Commissioner has gone on to consider the application of section 31(1)(c).

Part 8 – forensic enquiries and Part 9 – the sock

63. Sections 31(1)(a)(b) and (c) of FOIA apply where disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders: and
 - (c) the administration of justice.
64. Although SWP cited section 31(a), (b) and (c), it has only presented arguments to support section 31(c). Therefore the Commissioner has not considered the other parts of the exemption.
65. Consideration of the exemption is a two-stage process: even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

66. It is necessary to consider whether the prejudice predicted by SWP is relevant to the law enforcement activities referred to in section 31(1)(c), that is, the administration of justice.

67. The Commissioner recognises in his published guidance on section 31⁵ that the guidance states that section 31(1)(c) "...will protect information if its disclosure would undermine particular proceedings."
68. The complainant has argued that: "The administration of justice has already been served (ie David Morris was convicted of the Clydach murders) and it is difficult to comprehend how releasing the final Operation Dolomite report would jeopardise this, unless of course there is information which casts doubt on the conviction of Mr Morris. In which case, it would very much favour the "administration of justice" for any such information to be released."
69. SWP stated that in *Hargrave v (1) Information Commissioner and (2) Commissioner of Police of the Metropolis* [2007] UKIT EA/2007/0041 the appellant requested information from a police investigation into an unsolved murder committed in 1954. At the time of the request, the information was held by The National Archives ("TNA"). TNA refused to disclose the information sought, relying on sections 31(1)(a), (b) and (c). Although the case was very old, evidence was produced by the Metropolitan Police Service that persuaded the Information Tribunal that there was a significant possibility that the killer could be identified and prosecuted in the future and that disclosure would be prejudicial to this. On this basis, the Tribunal found that the public interest favoured maintaining the exemptions claimed. Of particular note are the following:
- The Tribunal's comment in paragraph 23 of its ruling that "We accept that the nature of a murder investigation is not such that the file can be redacted or partially disclosed. In this case it is all or nothing." It is accepted that Hargrave concerned the whole murder investigation file, not a report in relation to discrete issues. In addition, it related an unsolved murder, where the present case concerns a concluded investigation which resulted in a conviction.
70. It is SWP's view that section 31 (especially section 31(1)(c)), is engaged in relation to information that is generated post-conviction where that information is generated for the purposes of investigating issues relating to the commission of the index event and/or the trial process (hereafter "post-conviction appeal material") – i.e. matters which may form the basis, in some cases, of an application to the CCRC or to the Court of Appeal (Criminal Division).

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/>

71. The reason is that the law has already established a well-developed and prescriptive regime which regulated when post-conviction appeal material should be disclosed, and when it need not be disclosed.
72. Thus, at the post-conviction stage, but before any case has reached the CCRC, the law is established by the decision of the Supreme Court in *R (Nunn) v Chief Constable of Suffolk Constabulary* [2015] AC 225. The important points in the present context are as follows:
73. Firstly, the case concerned whether there was a post-conviction common law duty of disclosure to the defendant – the Supreme Court held that there was not (save where material comes to light that might cast doubt upon the safety of the conviction – in such circumstances the prosecutor must consider disclosure of such material (that question has already been asked and answered in the present case)). SWP argued that as the information wasn't required to be disclosed, then its position must be stronger in the case of a request under FOIA made by a member of the public.
74. Secondly, the request made in *Nunn* was for access to the working papers of the forensic scientists who advised the Crown and/or gave evidence; and requests for re-testing or first-testing of various items of evidence recovered in the course of the investigation – this was not a request restricted to pre-conviction material.
75. Thirdly, important building blocks in the Supreme Court's decision were the limited formulation of the duty of disclosure in ss3 and 7A of the Criminal Procedure and Investigations Act 1996 and the role performed by the CCRC: "The safety net in the case of disputed requests for review lies in the CCRC. That body does not, and should not, make enquiries only when reasonable prospect of a conviction being quashed is already demonstrated. It can and does in appropriate cases make enquiry to see whether such prospect can be shown."
76. Fourthly, the impact of the existence of a duty of disclosure on the police service's effectiveness and efficiency was an important factor:

"The products of a major investigation are typically voluminous, far more so than the evidence adduced at trial, extensive though that often is ... Generally, materials will often be archived after the appeal process is exhausted. To make an informed or useful search of them requires them to be mastered. Police officers move on to other appointments, or retire; it cannot be assumed that the investigating officers will remain in the same place where they formerly were, or that they will continue to have regular access to the material. If the material is actively to be managed and re-considered, officers will have to be diverted to the task from other investigations. The evidence of the detective inspector in the

present case was, for example, that reviewing the stored evidence in order to deal with the claimant's subject access request under the Freedom of Information Act occupied approximately four man-days of police time. If there is demonstrated to be a good reason for this kind of review of a finished case, then the resource implications must be accepted. There is, however, a clear public interest that in the contest for the finite resources of the police current investigations should be prioritised over the re-investigation of concluded cases, unless such good reason is established."

77. At the post-conviction stage, but where a case has been taken up for investigation by the CCRC: ss17, 18 and 23 – 25 of the Criminal Appeals Act 1995 contain detailed provisions about the confidentiality of documents generated or obtained in the course of investigations undertaken by the CCRC. The CCRC commonly relies on section 44 of FOIA (i.e. disclosure is prohibited by an enactment – namely the Criminal Appeals Act 1995) in answer to requests made to it for disclosure of material generated or obtained in the course of its investigations.
78. Once a case has reached the Court of Appeal (Criminal Division), material disclosed in the course of those proceedings is widely recognised to be subject to an implied duty of confidentiality of the kind recognised by the House of Lords in *Harman v Secretary of State for the Home Department* [1983] AC 280.
79. These facts and matters provide a very strong basis for concluding that disclosure of information under FOIA, outside of the strictures imposed by statute and the common law, would be "likely to prejudice the administration of justice".
80. SWP argued that it is possible to conceive of public interest reasons favouring disclosure, namely:
 - the general point that disclosure of material gathered in the course of investigations undertaken by the police service may, through transparency, assist in ensuring accountability;
 - the significant media interest in this case, including the media reporting allegations that there has been a miscarriage of justice; and
 - SWP has already released information concerning the headline findings of Operation Dolomite – providing fuller information, through the disclosure of the Closing Report, would allow that information to be put in context, and to be tested.
81. However, SWP further argued that none of these reasons, when considered as part of the balancing test, is sufficient to justify

disclosure. This is because (i) the factors that point against disclosure – likely prejudice to the administration of justice - are so strong and (ii) SWP has already released the critical finding of Operation Dolomite – that new forensic evidence establishes a positive link between the sock (that it was widely accepted as being used by the murderer in the course of the murders) and David Morris.

82. The arguments provided by SWP against disclosure appear to be generic rather than specifically relating to this case. Although the Commissioner acknowledges that any future action the force may take in this case **could** be prejudiced he considers that, in this particular case, justice has already been served with the conviction of David Morris. There is absolutely no indication that there is any intention to investigate any further and so the prospect of any future prosecutions being made is so remote as to be irrelevant.
83. The Commissioner also notes that many of the arguments detailed above are related to the issue of disclosure to Mr Morris's defence team rather than to disclosure under FOIA. Although these arguments provide the Commissioner with an understanding of why SWP made its decision, he does not find them compelling in this particular case.
84. Having reviewed the information the Commissioner is not persuaded that all of the redactions applied under section 31(1)(c) are appropriate. In particular, SWP has claimed section 31 applies to the witness statement of a deceased individual and their name throughout the report, as section 40(2) cannot apply to deceased individuals. It has argued that disclosing the statements will deter individuals from coming forward in future if they think this information may be made public and consequently prejudice its law enforcement activities. The Commissioner would generally agree with this, however this is a unique case and needs to be considered on the specific circumstances involved. The Commissioner considers the likelihood of any future witnesses in other investigations being deterred from giving statements or evidence based on this specific disclosure is low.
85. Consequently he considers that, in this particular case, the prejudice claimed is unlikely to occur. Therefore section 31 is not engaged with regard to this specific information and should be disclosed along with the other information listed in the confidential annex.

Section 38 – health and safety

86. Under section 38(1) information is exempt information if its disclosure would or would be likely to a) endanger the physical or mental health of any individual or b) endanger the safety of any individual.

87. The Commissioner's guidance 'Health and Safety- section 38'⁶ states 'In section 38 the word "endanger" is used rather than the word "prejudice"' and 'The use of the phrase "any individual" in section 38 includes any specific individuals, any member of the public, or groups within society.'
88. In the Commissioner's view, three criteria must be met in order to engage section 38:
- Firstly, the actual harm which the public authority 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;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance; and,
 - Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment.
89. Consideration of the exemption at section 38 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

90. The public authority considers that the release of the requested information, would be likely to cause significant harm to the mental health of the families of the individuals involved that are referred to in the investigation and the witnesses who provided statements, should new information be published.

The nature of the endangerment

91. The Commissioner's guidance states 'Endangering mental health means it must have a greater impact than causing upset and distress.'

⁶ <https://ico.org.uk/for-organisations/foi-guidance/section-38-health-and-safety/>

92. The information withheld under section 38 covers details of the crime, the crime scene, forensic material and statements.
93. The Commissioner must now consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect.
94. The Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of this causal link, this is because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment; there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.
95. SWP explained that the disclosure of the requested information would be likely to cause significant harm to the mental health of the families of the individuals involved that are referred to in the investigation and the witnesses who provided statements. It also explained that given the passage of time it would be likely to open up old wounds and interfere with the long-drawn-out grieving process.
96. The complainant has argued that: "I believe the families of those involved, as well as witnesses, would want to know the truth about the Clydach murders. Any attempt to conceal information only adds to the considerable public distrust in South Wales Police which already exists.
97. I believe the public interest in publishing the report will not necessarily harm those involved. The truth is surely better than a vacuum of information, or worse still misinformation and conspiracy theories which also abound online."

Likelihood of endangerment

98. SWP confirmed to the Commissioner that it was relying on the lower threshold of endangerment 'would be likely to'. The Commissioner's guidance states 'this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.
99. The Commissioner accepts that the exemption is engaged at the lower threshold of endangerment. However, there may be a public interest in disclosing this information that outweighs the public interest in non-disclosure which he will now go on to consider.

Public interest test

Considerations favouring disclosure

100. SWP explained that: "Disclosure of the requested information would provide the public with greater knowledge and understanding about such incidents. This would increase the public confidence in SWP, particularly in their professional and empathetic manner towards the individuals deceased and families of the deceased."

Considerations against disclosure

101. SWP explained that: "The families would have the expectation that details of the incidents would only be disclosed where it is absolutely necessary. The police have a duty of care towards families in cases such as these and seek to prevent any invasion of their privacy or disclosure of information which would cause further and unnecessary distress or psychological harm."

102. It also argued that: "To release these details could cause further unnecessary and disproportionate media attention to the families involved. This would be very likely to cause them to re-live the original events. Disclosure of the information would cause undue pain and anxiety to the families involved and would make it difficult for them to move on with their lives."

103. Finally, SWP explained that: "The families have been constantly reminded of the tragic events in relation to the Clydach Murders repeatedly over the last 23 years through a variety of ways that keep bringing the murders back into the public domain, via media, books, documentaries, and Freedom of Information requests. It must now be considered that to continue to remind them again, some 23 years later would be unreasonable and would be highly likely to cause further distress and pain to those who have already suffered such a loss. They now have a right to privacy and protection from causing further unnecessary distress."

Balance of the public interest

104. The Commissioner notes that a four-part documentary was aired in 2022 (Murder in the Valleys – the Clydach Murders) which was filmed in 2021 when the case was under review as Operation Dolomite. He further notes that much of the information in the withheld report was discussed in that programme.

105. The Commissioner agrees that there is a public interest in how SWP investigate cases, and the safety of any convictions and subsequent investigations. He also agrees that if such information were to be released, it may cause mental and emotional distress to the families of those involved, as well as witnesses.

106. In coming to his conclusion on this exemption, the Commissioner has carefully reviewed all the information in the public domain and when that information was provided. Of most concern to him is the impact on the father of the two children, who appears to have only made one public statement in 2021.
107. In all the circumstances of this particular case, the Commissioner considers that the public interest favours disclosing the information withheld under section 38(1)(a) with the exception of those parts highlighted in the confidential annex. It is the Commissioner's view that the remaining withheld information is most likely to cause the harm outlined above but would like to confirm for peace of mind, that it does not relate to the children.
108. It is his view that by doing so, it may finally bring a close to the speculation and conspiracy theories surrounding the conviction of David Morris.
109. He acknowledges the distress that may be caused to the families of those involved in this case. Despite the passage of time he considers that it is unlikely these events are ever far from the minds of the victims' families and given the on-going levels of distress still experienced, the Commissioner does not consider this argument carries significant weight.

Section 42 – legal professional privilege – Sections 7 and 12

Part 7

110. The complainant argues that: "It is difficult to know just how much legal professional privilege information is contained within the final report. That said, it should be possible to redact any such information as necessary.

Some legal advice has already been disclosed by South Wales Police itself, ie the Crown Prosecution Service's claim that "no information has been provided which undermines the conviction of David Morris." That statement was released only in relation to the two "new witnesses", and does not address other matters raised in the BBC documentary; or the other matters which Operation Dolomite was set up to investigate.

Also, there is a very strong public interest in the public knowing how South Wales Police arrived at its decision-making; and the public needs to be reassured that the force is not solely releasing information which favours its own position."

111. The complainant also highlighted that: "South Wales Police has omitted 33 paragraphs – including their headings. It is therefore very difficult to

arrive at a conclusion as to whether the information contained within those paragraphs is in the public interest, or not.”

112. The Commissioner notes that the complainant is content for legal advice to be withheld but has questioned whether all that information is indeed covered by section 42. He also notes that in SWP's further disclosure on 11 March 2024 provided the section headings, which had previously been withheld, including part 7 – The Crown Prosecution Service (CPS) Advice.

113. The Commissioner has viewed the withheld information and is satisfied that part 7 of the report is subject to legal professional privilege, specifically advice privilege. On that basis he sees no reason to investigate this any further, suffice to confirm that part 7 is exempt under section 42.

Part 12

114. Section 42 of FOIA allows a public authority to withhold information that would be covered by legal professional privilege. There are two types of privilege: legal advice privilege and litigation privilege.

115. Privilege will apply to communications between a client and their legal adviser for the purpose of seeking and receiving professional legal advice.

116. SWP maintained that section 42 applied to part 12 of the report in its entirety along with other exemptions for parts of it.

117. The Commissioner has reviewed the information contained in part 12 of the report and notes it is correspondence between Mr Morris' legal representatives and the CCRC. The correspondence relates to submissions provided by the legal representatives as to why they consider the CCRC should refer the case to the Court of Appeal, and CCRC's responses to those submissions.

118. Although the correspondence is between two legal entities it is not between a client and their legal adviser and therefore section 42 of FOIA is not engaged.

119. As the exemption is not engaged it is not necessary to consider the public interest test.

Other matters

120. Although they do not form part of this decision notice, the Commissioner considers it to be appropriate to highlight the following matters of concern.
121. Not only did SWP take six months to provide its first response to the request, but there was also then a further delay of nine months before it provided its internal review response to the complainant; both these delays are significant.
122. SWP has also failed to provide information that the Commissioner requested within a reasonable time period resulting in the serving of an Information Notice compelling its response.
123. There are a number of administrative matters that have contributed to the difficulties and delay in reaching a conclusion in this case, for example, dates on correspondence missing, the lack of paragraph numbers in the original report. The Commissioner acknowledges the complexity of this case but is disappointed by the overall poor handling of this case. Consequently this has been recorded for compliance and monitoring purposes to inform any future actions that the Commissioner may take.

Right of appeal

124. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

125. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

126. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Duffy
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF