



**IN THE UPPER TRIBUNAL**  
GIA  
**ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2021-001188-**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

**Between:**

Edward Williams

Appellant

- v -

The Information Commissioner

Respondent

**Before: Upper Tribunal Judge Church**

Decided on consideration of the papers

**Representation:**

Appellant: Unrepresented

Respondent: Harry Gillow of counsel (written submissions)

**DECISION**

**The decision of the Upper Tribunal is to allow the appeal.**

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) made on 30 June 2021 under case reference number EA/2020/0051 was made in error of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a panel of the First-tier Tribunal (General Regulatory Chamber) in accordance with the following directions.

**Directions**

1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.

2. If any party has any further evidence to put before the First-tier Tribunal this should be sent to Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued.
3. The panel hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal.
4. A copy of this decision shall be added to the bundle to be placed before the panel of the First-tier Tribunal hearing the remitted appeal.
5. These Directions may be supplemented by later directions by a tribunal judge, registrar or caseworker in the General Regulatory Chamber of the First-tier Tribunal.

## REASONS FOR DECISION

### What this appeal is about

1. In 2012 a man who had been restrained using an emergency response belt while in the custody of Devon & Cornwall Police tragically suffered a heart attack and brain damage and later died. Following the incident, the Independent Office for Police Conduct (“**IOPC**”) conducted an investigation which resulted in criminal charges of gross negligence manslaughter being brought against certain employees of Devon & Cornwall Police. Each of the individuals charged was acquitted at trial. Devon & Cornwall Police was prosecuted by the Health & Safety Executive for safety breaches in connection with the incident. It entered a guilty plea and received a fine of over £230,000. The IOPC also commenced a misconduct investigation into the actions and omissions of Devon & Cornwall Police employees in connection with the incident.
2. In 2019 the Appellant made a Freedom of Information Act request to Devon & Cornwall Police for certain information relating to the circumstances of the death. The text of that request is set out in paragraph 9 below. Devon & Cornwall Police resisted releasing some of the information requested, relying on various qualified exemptions under the Freedom of Information Act 2000 (“**FOIA**”).
3. The Appellant complained to the Information Commissioner about Devon & Cornwall Police’s failure to provide him with all the information he had requested. The Information Commissioner carried out an investigation, but didn’t uphold the complaint and required no steps to be taken.
4. Dissatisfied with this outcome, the Appellant appealed the Information Commissioner’s Decision Notice to the First-tier Tribunal (General Regulatory Chamber) (Information Rights) (the “**First-tier Tribunal**”). The First-tier Tribunal dismissed his appeal and upheld the Information Commissioner’s Decision Notice (the “**FtT Decision**”).
5. This appeal is Mr Williams’s appeal against the FtT Decision. Its success or failure turns on whether the FtT Decision involved a material error of law.
6. The First-tier Tribunal will have made an error of law if it misapplied or misunderstood the law in some way, or if it otherwise managed its proceedings in a way which was unfair. Such an error will have been material if the outcome of the appeal might have been different had the error not been made.

### The principal questions of law raised by this appeal to the Upper Tribunal

7. This appeal gives rise to two principal questions of law:
- a. Do inquest proceedings involve “ascertaining whether any person is responsible for any conduct which is improper”, bringing them within the scope of the ‘law enforcement’ exemption in section 31(1)(g), read with section 31(2)(b), of FOIA?
  - b. Can a feared undermining of public confidence in the outcome of proceedings of itself amount to prejudice relating to the relevant applicable interest for the purposes of the ‘law enforcement’ exemption? In other words, does the undermining of public confidence in proceedings itself amount to undermining those proceedings for these purposes?

### **Summary of the Upper Tribunal’s decision on the principal questions of law**

8. I have decided that:
- a. inquest proceedings do not fall within the ‘law enforcement’ exemption in section 31(1)(g), read with section 31(2)(b) of FOIA, and it was an error of law for the First-tier Tribunal to find that the exemption was engaged in this respect, and
  - b. a risk that public confidence in proceedings will be undermined cannot by itself amount to prejudice to the applicable interest. The prejudice must be to the proceedings themselves or their ability to arrive at a fair outcome, rather than the way that the outcome of the proceedings is received by the public.

### **The information request, and Devon & Cornwall Police’s response**

9. The Appellant’s request, which was made to Devon & Cornwall Police on 19 May 2019, was as follows:

*“Background: [hyperlink to newspaper report on the incident, redacted]*

1. *Disclose all images held of your victim on the day he was killed.*
2. *Disclose the custody record.*
3. *Disclose your guidance, rules etc. for use of ERB.*
4. *Disclose all data relating to the training, education etc. that those who applied the ERB had undertaken at the time of the victim’s death.*
5. *Disclose how much you have paid in legal fees for this killing.”*

10. On 14 August 2019 Devon & Cornwall Police responded, stating that:
- a. it did not hold the information requested in paragraph 5 of the request;
  - b. the information requested in paragraph 3 of the request was publicly available (and it provided a hyperlink to access the information online); and
  - c. the information requested in paragraphs 1, 2 and 4 of the request was withheld.

11. Devon & Cornwall Police stated that it was entitled to withhold the information requested in paragraphs 1, 2 and 4 by sections 38(1) (‘health and safety’), 30(1)

(‘investigations and proceedings conducted by public authorities’) and 40(2) (‘personal information’) of FOIA, respectively.

12. During the course of the Information Commissioner’s investigation into the Appellant’s complaint, Devon & Cornwall Police withdrew its reliance on section 30(1) of FOIA, and placed reliance instead on subsections 31(1)(a), (b), (c) and (g) together with section 31(2)(b) of FOIA, each of which relates to a different aspect of ‘law enforcement’. It continued to rely on sections 38(1) and 40(2) of FOIA in respect of the information requested in paragraphs 1 and 4, respectively.

13. The Information Commissioner found that Devon & Cornwall Police was entitled to withhold the information requested on the basis claimed.

### **The First-tier Tribunal’s decision**

14. The First-tier Tribunal decided that all the proceedings relied upon by Devon & Cornwall Police involved a public authority exercising its functions for the purposes of determining whether any person was responsible for conduct which was improper (i.e. that section 31(1)(g) read with section 31(2)(b) applied). It decided that there was a real and significant risk that disclosure of the custody record could undermine:

- a. public confidence in IOPC investigations into the circumstances surrounding the death in custody (while the IOPC’s criminal investigation had been completed by the date of Devon & Cornwall Police’s response to the request, its misconduct investigation was ongoing);
- b. public confidence in the anticipated inquest process; and
- c. the inquest process itself, through its effect on potential jurors.

15. The First-tier Tribunal decided that, while there was a “very strong” public interest in scrutiny of the actions of the police in these circumstances, there was limited public interest in disclosure while disciplinary proceedings were ongoing and before an inquest had taken place. Consequently, it decided, the public interest in maintaining the exemption outweighed the public interest in disclosure and it upheld the Information Commissioner’s Decision Notice.

### **The permission stage**

16. Mr Williams was refused permission to appeal the FtT Decision by the First-tier Tribunal, but he renewed his application for permission to appeal to the Upper Tribunal. A judge of the Upper Tribunal refused his application on the papers, but Mr Williams then exercised his right to have the matter reconsidered at an oral hearing and the matter came before me.

17. Mr Williams had, until his oral hearing, pursued six different grounds of appeal, relating both to the request for the custody record (see paragraph 2 of the request) and the request for image information (see paragraph 4 of the request). However, at his oral hearing he restricted his application to grounds relating to the request for the custody records only.

18. His grounds of appeal were, in summary, that it was an error of law for the First-tier Tribunal to:

- a. hold that it was a function of a possible future inquest to ascertain whether any person is responsible for improper conduct, given that the

sole functions of an inquest are those set out in section 5 of the Coroners and Justice Act 2009 (see paragraph 32 below); and

- b. consider whether public confidence in the IOPC investigation and any possible inquest might be undermined by release of the custody record, as this was not a relevant consideration. He also argues that the First-tier Tribunal failed adequately to explain why it decided that there was a risk that if an inquest jury member were to see the custody record in isolation they would reach a premature view on partial evidence taken out of context, undermining the proper operation of the inquest.

19. I was persuaded by Mr Williams's first ground of appeal that it was appropriate to grant permission. In my decision notice I said:

"11. The First-tier Tribunal's reasons for deciding that the custody record was exempt from disclosure under Section 31(1)(g) taken with Section 31(2)(b) FOIA are set out in paragraphs 54 to 68 (inclusive) of the FtT Decision. Under the heading "*Is the exemption engaged?*" the First-tier Tribunal set out the issue it had to decide:

"56. The question for the tribunal is whether disclosure would or would be likely to prejudice the exercise by any public authority of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper.

57. The applicable interest is clear on the face of the sections: it is to protect a public authority's ability to exercise its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper."

12. The First-tier Tribunal says that none of the parties raised the issue of whether an inquest or IOPC directed disciplinary proceedings involve "the exercise by any public authority of its functions" for "the purpose of ascertaining whether any person is responsible for any conduct which is improper", but notwithstanding that that point wasn't put in issue by the parties the First-tier Tribunal clearly exercised its discretion in favour of considering the point. It decided that such proceedings did indeed involve such an exercise:

"Taking into account the potential outcomes of those proceedings, we accept that all those proceedings involve a public authority exercising its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper."

13. I am satisfied that it is arguable with a realistic (as opposed to fanciful) prospect of success that the First-tier Tribunal erred in law in this regard given the very narrow ambit of an inquest in terms of the determinations and findings that may be made..."

20. I granted permission to appeal and made directions. "

### **The parties' positions**

21. Mr Gillow, for the Respondent, made comprehensive written submissions on the appeal. In respect of the ground summarised in paragraph 18 a. above, Mr Gillow noted that the Information Commissioner's findings were not predicated on the

application of section 31(1)(g) of FOIA to the inquest process, but rather to the IOPC investigation only. He maintained, however, that there was a “strong argument” that that provision also applied to inquest proceedings (as the First-tier Tribunal had found).

22. Mr Gillow conceded that a coroner was not in all circumstances responsible for “ascertaining” whether any person was “responsible for any conduct which was improper” (per section 31(2)(b) of FOIA), but invited me to find that the exemption was engaged in this case because it involved a death following restraint while in police custody, and potential breaches of Articles 2 (right to life) and 3 (prohibition of torture) of Schedule 1 to the Human Rights Act 1998. As such, he argued, the coroner’s duty under section 5(2) of the Coroners and Justice Act 2005 to ascertain “in what circumstances the deceased came by his or her death”, would itself involve the determination of whether there had been unlawful or improper behaviour.

23. Mr Gillow argued, in the alternative, that section 31(1)(c) (which relates to “the administration of justice”) of FOIA was engaged, as inquests are part of the justice system and prejudice to the inquest process is therefore prejudice to the administration of justice.

24. In relation to Mr Williams’s argument that the First-tier Tribunal took into account an irrelevant consideration, namely the potential impact of disclosure of the custody record on public confidence in the IOPC investigation and any inquest, the Information Commissioner maintained that the First-tier Tribunal was entitled to find that the undermining of public confidence in the IOPC and inquest proceedings could materially prejudice the outcome of those proceedings and, consequently, the function of determining whether there had been unlawful or improper behaviour.

25. In terms of the reasons challenge, Mr Gillow argued that the First-tier Tribunal’s reasons comfortably met the requirement of adequacy, and it was not required to give a detailed explanation as to each element of its findings of fact.

26. Mr Williams made very brief written submissions on the appeal which related solely to his request for still and video images of the deceased while in custody. However, since Mr Williams had expressly limited his application for permission to appeal to his grounds relating to the custody record (see page 41 of the Upper Tribunal bundle), and permission was granted on that basis, I do not deal with those arguments here.

### **Why there was no oral hearing of this appeal**

27. Neither party asked for an oral hearing. I decided that, given the views of the parties, and given that the parties had provided clear written submissions on the appeal, no oral hearing was necessary. The interests of justice favoured this appeal being determined on the papers to avoid further delay.

### **The law**

28. Section 1(1) of FOIA provides for a general right of access to information held by public authorities:

#### **“1 General right of access to information held by public authorities**

- (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.”

29. The right of access to information is qualified, however, in that Part II of FOIA provides for several exemptions to the duty under section 1 of FOIA. Some of these exemptions are absolute, while others are qualified.

30. The FOIA exemption that Devon & Cornwall Police ultimately sought to rely upon, and which Mr Williams challenged, in respect of the request for the custody record, was that in section 31 of FOIA. Section 31 of FOIA is a prejudice-based exemption and is subject to the public interest test. This means that, not only does the information have to prejudice one of the purposes listed for it to apply, but the information requested can be withheld only if the public interest in maintaining the exemption outweighs the public interest in disclosure.

31. The provisions relied upon by the parties or the First-tier Tribunal, are set out below for convenience:

**“31 Law Enforcement**

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
  - (a) the prevention or detection of crime,
  - (b) the apprehension or prosecution of offenders,
  - (c) the administration of justice,
  - ...
  - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
  - ...
- (2) The purposes referred to in subsection (1)(g) to (i) are –
  - ...
  - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper...”

32. The purpose of an inquest and the powers and duties of the coroner and (if applicable) a jury in carrying out their respective functions are set out in the Coroners and Justice Act 2009. This provides, so far as relevant to the present case:

**“5 Matters to be ascertained**

- (1) The purpose of an investigation under this Part into a person’s death is to ascertain –
  - (a) who the deceased was;
  - (b) how, when and where the deceased came by his or her death;

- (c) the particulars (if any) required by the 1953 Act to be registered concerning the death.
- (2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c.42)), the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.
- (3) Neither the senior coroner conducting an investigation under this Part into a person's death nor the jury (if there is one) may express any opinion on any matter other than –
  - (a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);
  - (b) the particulars mentioned in subsection (1)(c). This is subject to paragraph 7 of Schedule 5.

...

#### **“10 Determinations and findings to be made**

- (1) After hearing the evidence at an inquest into a death, the senior coroner (if there is no jury) or the jury (if there is one) must –
  - (a) make a determination as to the questions mentioned in section 5(1)(a) and (b) (read with section 5(2) where applicable), and
  - (b) if particulars are required by the 1953 Act to be registered concerning the death, make a finding as to those particulars.
- (2) A determination under subsection (1)(a) may not be framed in such a way as to appear to determine any question of –
  - (a) criminal liability on the part of a named person, or
  - (b) civil liability.
- (3) In subsection (2) “criminal liability” includes liability in respect of a service offence.”

#### **“Schedule 5**

##### **7 Actions to prevent other deaths**

- (1) Where—
  - (a) a senior coroner has been conducting an investigation under this Part into a person's death,
  - (b) anything revealed by the investigation gives rise to a concern that circumstances creating a risk of other deaths will occur, or will continue to exist, in the future, and
  - (c) in the coroner's opinion, action should be taken to prevent the occurrence or continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances,



the coroner must report the matter to a person who the coroner believes may have power to take such action.

- (2) A person to whom a senior coroner makes a report under this paragraph must give the senior coroner a written response to it.
- (3) A copy of a report under this paragraph, and of the response to it, must be sent to the Chief Coroner.”

### **Why I have allowed this appeal**

33. The exemption provided for under section 31(1)(g), read with section 31(2)(b), of FOIA applies to information the disclosure of which would, or would be likely to, prejudice the exercise by a public authority of its functions for the purpose of ascertaining whether any person is responsible for conduct which is improper.

34. This gives rise to the question whether the purpose of “ascertaining whether any person was responsible for conduct which is improper” was one of the functions of the senior coroner or jury in the context of an inquest.

### **Ground 1 - Was the First-tier Tribunal entitled to find that the anticipated inquest proceedings fell within section 31(1)(g), read with section 31(2)(b) of FOIA?**

35. The Information Commissioner cited the Upper Tribunal’s decision in Stevenson v IC and North Lancashire PCR [2013] UKUT 181 (AAC) 181 in support of a broad interpretation of section 31(1)(g). In that case Judge Turnbull said at [75]:

“The words ‘law enforcement’ were in my judgment intended as a broad summary or indication of the scope of and reason for the exemptions in section 31. It is plain from reading the activities listed in s.31(1), and the purposes specified in s.31(2), that they include activities and purposes which go beyond actual law enforcement in the sense of taking civil or criminal or regulatory proceedings. They include a wide variety of activities which can be regarded as in aid of or related to the enforcement of (i) the criminal law, (ii) any regulatory regime established by statute, (iii) professional and other disciplinary codes, (iv) standards of fitness and competence for acting as a company director or other manager of a corporate body, (v) aspects of the law relating to charities and their property and (vi) standards of health and safety at work.”

36. I don’t disagree with anything that Judge Turnbull says, but nothing that he says really take things very far in the context of this case, because none of the activities or purposes which he describes quite captures the very particular characteristics of an inquest.

37. Section 31(2) of FOIA sets out (in paragraphs (a) to (j)) ten distinct purposes that may apply for the purposes of section 31(1)(g)-(i) (inclusive). As Judge Wikeley commented in DVLA v Information Commissioner and Williams (Section 31) [UKUT] 334 (AAC) at [59]:

“It is an important tenet of statutory interpretation that the legislative wording in issue must be read in its context. Here the context comprises ten specifically enumerated purposes. That level of statutory detail does not suggest that there is any warrant for giving each individual purpose an especially broad construction. Rather, the parliamentary intention would appear to be one of making some quite fine distinctions.”

38. I agree with Judge Wikeley that the statutory drafting of section 31(2) FOIA does not support a broad constructive approach. Sections 5 and 10 of the Coroners and Justice Act 2009 (see paragraph 27 above) define the purpose of an inquest and its findings in very narrow terms. Section 5 prohibits the expression of any opinion on any matter other than those expressly provided for in section 5(1) (subject to paragraph 7 of Schedule 5).

39. Section 10 sets out the determinations to be made after hearing the evidence at an inquest, and these are in correspondingly narrow and specific terms. Further, it is expressly stated that it is impermissible for a determination to be framed in such a way as to “appear to determine any question of” criminal liability on the part of a named person or civil liability.

40. Mr Gillow argued that, in all the circumstances of the present case, the inquest should be regarded as having the likely potential to determine “whether unlawful or improper conduct had taken place”, and that the exemption in section 31(1)(g) was therefore engaged. However, the exemption isn’t available where a public authority exercises its functions for the purpose of determining “whether unlawful or improper conduct had taken place”, but rather for the purpose of “ascertaining whether any person is responsible for any conduct which is improper” (my underlining).

41. The principal purposes of an inquest are to ascertain the identity of the deceased and how, when and where they came to die (section 5(1) of the Coroners and Justice Act 2009). Where necessary to avoid breach of any Convention rights, it also has the purpose of ascertaining “in what circumstances the deceased came by their death” (section 5(2) of the Coroners and Justice Act 2009). The coroner may draw concerns that they have about circumstances which may give rise to a risk of other deaths, and the need to take action to eliminate or reduce such risk, to the attention of a person whom they consider has power to take action (paragraph 7 of Schedule 5 to the Coroners and Justice Act 2009). However, it is clear from the drafting of the Coroners and Justice Act 2009 that an inquest is not about determining liability, whether criminal or civil, for the death: no determination may be framed in such a way as to appear to determine any question of criminal liability on the part of a named person. Similarly, no determination may be framed in such a way as to appear to determine any question of civil liability. As such, the coroner or jury is prohibited from exercising its functions for the purpose at which the exemption is directed, namely “ascertaining whether any person is responsible for any conduct which is improper” (my underlining again).

42. For these reasons I find that the First-tier Tribunal erred in law in finding that the exemption in section 31(1)(g) read with section 31(2)(b) of FOIA was engaged in respect of the inquest proceedings.

43. Mr Williams’ appeal raises a second issue with the First-tier Tribunal’s decision making on whether section 31(1)(g) read with section 31(2)(b) applied, namely that the First-tier Tribunal placed “significant weight” on the interest in maintaining public confidence in the IOPC and inquest process, which Mr Williams says it was not entitled to do.

**Ground 2 - Was concern about public confidence in the outcome of the IOPC and the inquest process a factor that the First-tier Tribunal was entitled to consider when assessing whether the exemption could be relied upon?**

44. The Information Commissioner says that the First-tier Tribunal's conclusion as to the balance of the public interests in favour of disclosure and in favour of exemption represent a finding of fact, and that the Upper Tribunal should be slow to interfere with its assessment, citing FCO v IC and Plowden [2013] UKUT 0275 (AAC) at [12]:

“The Upper Tribunal respects the fact-finding role of the First-tier Tribunal. It does so especially with regard to the specialist knowledge of members of the tribunal. In the case of information rights, the tribunal may contain specialist members. Their judgments on the issues that regularly arise in that jurisdiction will no doubt inform, if not dictate, the outcome of the appeal. Usually, the Upper Tribunal would be reluctant to interfere in the assessment of the public interest which was, as the tribunal said in this case, finely balanced.”

45. While of course I accept that the Upper Tribunal should always be slow to trespass on the First-tier Tribunal's fact-finding jurisdiction, it remains that the Upper Tribunal's role is to scrutinise decision-making to make sure that the proper tests are being applied, and being applied properly. If, as a matter of law, public confidence in the outcome of a process cannot of itself amount to prejudice to the exercise of the relevant law enforcement function, then even if the First-tier Tribunal finds as a fact that it is, the Upper Tribunal may still intervene because that finding of fact would not be open to it.

46. It helps to break down what the First-tier Tribunal had to ask itself when deciding whether the exemption was properly engaged:

- a. what is the applicable interest within the exemption relied upon?
- b. does the prejudice/likely prejudice relate to that applicable interest?
- c. has causality been demonstrated between disclosure of the custody record and the occurrence/likely occurrence of prejudice?
- d. Is the risk of prejudice in the event of disclosure “real and significant”?

47. In this case the First-tier Tribunal:

- a. identified the applicable interest as the exercise by the public authority of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper (see paragraph 57 of the FtT Decision),
- b. identified the prejudice/likely prejudice to be “the potential to undermine and prejudice the outcome of the misconduct proceedings and the inquest”, and held that the prejudice/likely prejudice identified did relate to the applicable interest (see paragraph 60 of the FtT Decision),
- c. decided that there was “a causal relationship between the release of the custody record, a document likely to be central evidence in those proceedings, and the identified prejudice” (see paragraph 60 of the FtT Decision), and
- d. found that the risk that disclosure of the custody record “out of context and not as part of a reasoned judgment while misconduct proceedings are ongoing and before an inquest has started is likely to undermine confidence in those proceedings” was “real and significant” (see paragraph 62 of the FtT Decision).

48. There is a subtle but important difference between the way the First-tier Tribunal articulated the prejudice/likely prejudice relied upon by Devon & Cornwall Police in paragraph 60 (“the potential to undermine and prejudice the outcome of the misconduct proceedings and the inquest”) and the way it described it in paragraph 62 when considering the degree of the risk (“a real and significant risk of the public forming a view on the basis of the partial release of evidence out of context, undermining the public’s confidence in any process which reaches a different conclusion”).

49. The exemptions provided for by section 31 of FOIA are designed to protect the integrity of a wide range of law enforcement activities with a view to avoiding such activities being jeopardised by information disclosure. The specific function for which an exemption was sought in this case is that of “ascertaining whether any person is responsible for any conduct which is improper”.

50. It is clear that anything that presents a real and significant risk to the carrying out of an investigation, such as information that would alert a person suspected of conduct which was improper to the identity of a whistleblower, or the location of a hidden camera which had been placed to collect evidence of such improper conduct, could be taken into account, because that would relate to the process of ascertaining whether any person was responsible for conduct which was improper. However, I am not at all persuaded that the purpose of “ascertaining” can be stretched so far as to cover the way that the output of a completed process of “ascertaining” (such as the outcome of an IOPC investigation or the verdict of a coroner or jury) is received by the public.

51. The undermining of public confidence in proceedings is not the same as undermining the proceedings themselves. Courts make decisions which large sections of the public disagree with every working day. Whether such a decision remains valid will depend upon whether it is successfully appealed, not whether it is lauded or deprecated in newspapers or on social media.

52. I am unclear as to what the First-tier Tribunal meant when it identified “the potential to undermine and prejudice the outcome of the misconduct proceedings and the inquest” (paragraph 60 of the FtT Decision, my underlining), but if it was seeking to identify in relation to the IOPC proceedings a prejudice to the process of ascertainment or to the ability of the IOPC to deliver a fair outcome, rather than how the outcome would be received, it was incumbent on it to explain that with more clarity, and I am satisfied that its failure to do so amounts to an inadequacy of reasons that itself amounts to an error of law.

53. Turning to its consideration of the inquest proceedings, the First-tier Tribunal based its findings on the risk of prejudice to an inquest on broadly the same reasoning it applied to the IOPC investigation (“We conclude that releasing a central piece of evidence which risks the public reaching a premature view on partial evidence taken out of context, carries the same risks in relation to the members of the jury”, see paragraph 63 of the FtT Decision). However, there is an important difference here because it identified a risk that members of the jury might be influenced (and not just members of the public), so its concerns touch on the process of ascertaining, rather than how the outcome would be received. It also found that there was “a real and significant risk of undermining the proper operation of the inquest”. It may well be that it should have explained these risks in greater depth, but I need not give a view on that given my finding that the First-tier Tribunal was not, in

any event, entitled to hold that the exemption in section 31(1)(g) read with 31(2)(b) applied to the expected inquest.

### **Were the First-tier Tribunal's errors material?**

54. Having concluded that the First-tier Tribunal erred in law in the ways I have explained, the next question for me to resolve is whether the errors it made were material. In other words, whether the outcome might have been different had the errors not been made.

55. Mr Gillow says that if he is wrong on Ground 1, any such error is not material because if the First-tier Tribunal hadn't made that error it could, and should, have upheld the Decision Notice on other grounds. He pointed out that the Information Commissioner's decision, insofar as it related to the exemption in section 31(1)(g) read with 31(2)(b) of FOIA, was based not on that provision's application both to the inquest proceedings and the IOPC investigation (as the FtT Decision was), but rather to the IOPC's misconduct investigation alone.

56. As such, had the First-tier Tribunal directed itself correctly as to the proper approach to section 31(1)(g) and 31(2)(b), it could still have found the exemption to apply. That is correct, but it doesn't quite get us there. Once the First-tier Tribunal had decided that the exemption was engaged it still had one further important task to carry out: the weighing of the competing public interests in disclosure and upholding the exemption. The First-tier Tribunal explained how it carried out that exercise in paragraphs [65]-[67]:

"65. We accept that there is an extremely strong public interest in public scrutiny of the actions of the Police where a vulnerable individual has died in police custody in the particular circumstances of this case. However we find that there is limited public interest in disclosure for this purpose while disciplinary proceedings are in progress and before an inquest has taken place. We place significant weight on the risk of undermining public confidence in IOPC directed misconduct proceedings and in the inquest proceedings. Further, we place very significant weight on the risk that the inquest proceedings could be undermined in the manner set out above. There is a clear public interest on the facts of this case in ensuring that the inquest can operate properly.

66. We conclude that at a point in time where IOPC directed misconduct proceedings and an inquest are not yet concluded, the public interest strongly favours withholding the custody record and maintaining the exemption.

67. We conclude that the Police were entitled to withhold the custody record under s 31(1)(g) taken together with s 31(2)(b)."

57. In weighing what it found to be the "extremely strong public interest in public scrutiny of the actions of the Police where a vulnerable individual has died in police custody" against the public interest in maintaining the exemption, the First-tier Tribunal clearly balanced against the public interest in disclosure both its concerns about prejudice in the context of the IOPC proceedings (which I have found not to be applicable, since the prejudice identified did not relate to the function of "ascertaining" but rather to how the public would receive the outcome), and its concerns about prejudice in the context of the inquest (which I have found do not engage the exemption). As such, it is by no means apparent how the First-tier Tribunal would have balanced the competing interests had it not erred in law.

58. I note that the Information Commissioner upheld Devon & Cornwall Police's withholding of the custody record not only in reliance on the exemption in section 31(1)(g) read with 31(2)(b), but also the exemptions in 31(1)(a), (b) and (c). However, the First-tier Tribunal made it clear in paragraph 68 of the FtT Decision that, having concluded that Devon & Cornwall Police was justified in withholding the information under section 31(1)(g) read with 31(2)(b), it didn't give any consideration to those other provisions, so we cannot know whether it would have agreed with what the Information Commissioner decided on them:

“Having reached that conclusion we do not need to consider the other subsections of s 31.”

59. For these reasons it cannot be said that the errors of law that the FtT Decision involved were not material.

### **Disposal**

60. Having concluded that the FtT Decision involves errors of law which were material I now need to decide how to exercise my discretion in terms of disposal.

61. Both parties have asked that if I allow the appeal the matter should be remitted to the First-tier Tribunal for re-hearing.

62. Because further facts need to be found and because the First-tier Tribunal, with its expert members, is best placed to find those facts, I am satisfied that the most appropriate course is to set aside the FtT Decision and to remit the matter to be re-heard by the First-tier Tribunal.

**Thomas Church**  
**Judge of the Upper Tribunal**  
Authorised for issue on 03 March 2023