



NCN: [2023] UKFTT 446 (GRC)

Case Reference: EA/2022/0279

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

THE INFORMATION COMMISSIONER

Appellant

Respondent

Representation:

For the Appellant: Ms Wisson (Counsel)

For the Respondent: Mr. Davidson (Counsel)

Decision: The appeal is dismissed.

REASONS

Introduction

1. This appeal was heard together with EA/2022/0291. Separate decisions have been issued.
2. This is an appeal against the Commissioner's decision notice IC-1030110-W5P3 of 25 August 2022 which held that The Chief Constable of Merseyside Police ('Merseyside Police') was entitled to rely on s 40(2) of the Freedom of Information Act 2000 (FOIA) to withhold the requested Body Worn Video (BWV) footage. The Commissioner held that Merseyside Police were in breach of section 21 FOIA and ordered them to direct Mr. Titheradge to any officially disclosed BWV footage.

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 19 June 2019 four police officers from Merseyside Police attended a home for a welfare check. During that visit Police Constable Darren McIntyre assaulted a member of the public. He was convicted of assault and perverting the course of justice and was sentenced to 19 months imprisonment. Constables Laura Grant and Lauren Buchanan-Lloyd switched off their BWV footage during the assault. Both those police officers, and the other officer present, were convicted of perverting the course of justice. Two officers were imprisoned for 15 months and one received a nine month sentence suspended for 18 months.
5. Merseyside Police said in a public statement in May 2021 that the officers faced fast-track gross misconduct proceedings for breaches of the standards of professional behaviour connected to a criminal conviction.
6. The request is for the footage of the incident.

Requests, decision notice and appeal

The request

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

All BWV recorded by an officer on June 19, 2019 at Mark Bamber's home on Cherry Road, Ainsdale. The incident is detailed here:

<https://www.liverpoolecho.co.uk/news/liverpool-news/girlfriend-manbattered-crooked-cop-20502176>

The response

8. On 29 July 2021 Merseyside Police responded to the request and withheld the information relying on section 40(2) and sections 30(1)(a) and (2)(a)(i) and (iii). The Merseyside Police upheld its position on internal review on 27 August 2021.
9. Mr. Titheradge referred the matter to the Information Commissioner on 17 September 2021.

The Decision Notice

10. The Commissioner decided that Merseyside Police should have directed Mr. Titheradge to the footage that had been released to the media by Merseyside Police and in failing to do so was in breach of section 21.
11. In relation to the remaining footage, the Commissioner concluded that footage used in court included criminal offence data and that none of the conditions required for processing criminal offence data were satisfied. He concluded that there was no legal basis for disclosure and the footage was exempt under section 40(2).
12. In relation to the remaining footage, which related to the property and events which occurred after the incident, the Commissioner concluded that disclosure was not reasonably necessary for the purposes of the legitimate interest identified by Mr. Titheradge because it did not relate to turning off the BWV cameras. The Commissioner identified a general public interest in seeing how the force dealt with the aftermath of the incident, but decided that disclosure was not reasonably necessary. Merseyside Police was accordingly entitled to withhold all of the information under section 40(2) FOIA.
13. The Commissioner did not consider the other exemptions cited.

Notice of Appeal

14. The grounds of appeal are:

Ground One

The Commissioner erred in finding that any personal data comprising criminal offence data did not satisfy any of the conditions for disclosure contained in Schedule 1 to the Data Protection Act 2018 (DPA). The condition contained at DPA Schedule 1 Part 2 paragraph 13 is satisfied.

Ground Two

The Commissioner erred in finding that in respect of the personal data not constituting criminal offence data, disclosure would contravene the requirement that such data is processed lawfully, fairly and in a transparent manner within the meaning of the UK General Data Protection Regulation (UK GDPR) Article 5(1)(a).

The Commissioner's response

Ground 1

15. In relation to the criminal offence data within the footage, the Commissioner accepts that the conditions in paragraph 13(1)(a), (b) and (d) would be met. The Commissioner does not accept that disclosure would be 'necessary for reasons of substantial public interest' or that any reasonable controller (and/or Merseyside Police) would believe that publication of the footage would be in the public interest. The Commissioner submits that neither of the conditions in paragraph 13(1)(a) or (c) are met.

Ground 2

16. The Commissioner accepts that there is some limited legitimate interest in the disclosure of the footage which does not amount to criminal offence data on the grounds that the incident was of some significance and thus observing how Merseyside Police dealt with its aftermath may be of some general interest to the public.

17. The Commissioner does not consider, subject to viewing the footage, that the disclosure of the footage is likely to serve the distinct aim of scrutinising police use of BWV.

18. The Commissioner accepts that disclosure would be reasonably necessary to serve the limited interest in relation to observing how Merseyside Police dealt with the aftermath of the relevant incident. To the extent that the footage relates to the incident itself or the relevant legitimate interest is the public scrutiny of the police use of BWV, the Commissioner does not consider that disclosure of this footage will be reasonably necessary to serve those interests.

19. The Commissioner further submits that disclosure would not be fair and that the interests and fundamental rights of those featured in the footage outweigh the legitimate interests pursued by the appellant.

Evidence

20. We read an open and a closed bundle and viewed closed BWV footage.

21. It is necessary to withhold the above 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.

22. We held a short closed session in which we heard closed submissions from Mr Davidson. The following gist of the closed session was provided to Mr Titheradge during the hearing.

“Mr Davidson made four points about the personal and private information which is caught in the footage, and the reasonable expectations of the various individuals involved in relation to that information.

In response to a question from the Tribunal, Mr Davidson clarified the way in which, and extent to which, individuals may be identifiable from the footage in conjunction with material in the public domain.

Ms Cosgrave queried whether part of the CLOSED bundle which appears to relate to OPEN material (namely, a statement on the Merseyside Police website) ought not to be shared with the Appellant. Mr Davidson agreed to take instructions.”

Evidence

23. We read an open and a closed bundle and viewed closed BWV footage.
24. 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. An extract from a document in the closed bundle was moved to the open bundle during the proceedings, as referred to in the gist below.
25. We held a short closed session in which we heard closed submissions from Mr. Davidson. The following is a gist of the closed session. A copy was provided to Mr Titheradge during the hearing.

“Mr Davidson made four points about the personal and private information which is caught in the footage, and the reasonable expectations of the various individuals involved in relation to that information.

In response to a question from the Tribunal, Mr Davidson clarified the way in which, and extent to which, individuals may be identifiable from the footage in conjunction with material in the public domain.

Ms Cosgrave queried whether part of the CLOSED bundle which appears to relate to OPEN material (namely, a statement on the Merseyside Police website) ought not to be shared with the Appellant. Mr Davidson agreed to take instructions.”

Legal framework

Personal data

26. The relevant parts of s 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......

27. Personal data is defined in s 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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)?

34. 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.

35. 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.

36. 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?

37. 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 Poiares 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. ...

38. 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.

39. 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.

40. 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.

41. 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.

42. 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;

...

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

The role of the tribunal

44. The tribunal’s remit is governed by s.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

45. The issues for the tribunal to determine are:

- 45.1. What is the scope of the request?
- 45.2. Does the information relate to an identified or identifiable living individual?
- 45.3. 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)?
- 45.4. In relation to any criminal offence data:
 - 45.4.1. Would disclosure be for the purposes of journalism?
 - 45.4.2. Would disclosure be carried out in connection with the alleged or established commission of an unlawful act by a person?
 - 45.4.3. Would disclosure be carried out with a view to the publication of the personal data by any person?
 - 45.4.4. Does the controller reasonably believe that publication of the personal data would be in the public interest?
- 45.5. In relation to personal data which is not criminal offence data:
 - 45.5.1. Is the data controller or a third party pursuing a legitimate interest or interests?
 - 45.5.2. Is the processing involved necessary for the purposes of those interests?
 - 45.5.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

Discussion and conclusions

Scope

46. The request asks for 'all body worn video recorded by an officer on June 19, 2019 at Mark Bamber's home on Cherry Road, Ainsdale. The incident is detailed here [link provided]'
47. Although that link no longer functions, it was established in the course of the hearing that the article is still available online at:
<https://www.liverpoolecho.co.uk/news/liverpool-news/girlfriend-man-battered-crooked-cop-20502176>
48. The article makes clear that the 'incident' referred to in the request is the assault on Mr. Bamber by Police Constable McIntyre and the switching off of the BWV cameras by the other officers.
49. We do not accept that the scope of the request is limited to that indicated in paragraph 24 of the witness statement of the appellant i.e. "the footage of the moment of deactivation with contextual surrounding BWV footage relevant to that deactivation". It is not possible to read the request in that way. It is not possible to

remedy any lack of clarity in the request by means of the witness statement in subsequent tribunal proceedings, as submitted at paragraph 17 of the appellant's skeleton argument. Although the tribunal takes a fairly liberal approach to interpretation and focusses on the substance of what is being requested, the scope of a request is construed objectively in the light of the surrounding circumstances at the time.

50. Objectively construed and looked at in the light of the article, we find that this was a widely drawn request for all the BWV footage taken in relation to the incident featured in the article. We accept that this includes all the footage in the closed bundle.
51. Although that is the scope of the request made at the time, we take account of Mr. Titheradge's indication that he is now seeking only the footage of the moment of deactivation with contextual surrounding BWV footage relevant to that deactivation.
52. A section of the BWV footage has already been released into the public domain. That information has already been provided to Mr. Titheradge.

Personal data

53. The question for us to determine is whether the withheld information is the personal data of an identifiable living individual or individuals.
54. Having viewed the BWV footage it includes the following individuals:
 - 54.1. Mr. Bamber;
 - 54.2. Mr. Bamber's partner;
 - 54.3. Paramedics;
 - 54.4. The police officers convicted of criminal offences
55. The police officers and Mr. Bamber are identifiable and remain identifiable even when their faces are obscured. This is because their names and role in the incident are, and were at the time of the request, widely available in the public domain.
56. Mr. Bamber's partner is also identifiable by at least a section of the public due to her association with Mr. Bamber and/or the property.
57. Where the faces of paramedics are visible, we find that they would be identifiable to at least a section of the public using contextual data in the video, i.e. their faces, their job, their employer and area.
58. The BWV also contains personal data of Mr. Bamber and his partner in the form of detailed footage of the inside of their house.

59. We find that the data in the video relates to those individuals. It is biographical in a significant sense to all those individuals, in that it goes beyond the recording of the individuals' involvement in a matter that has no personal connotations for them, particularly because the data records their involvement in the incident, its build up or aftermath.

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

60. We find that the footage of the immediate build up to the assault, the assault itself and the immediate aftermath, including any footage of BWV cameras being switched off is the personal data of the four police constables that were convicted of the offences of assault and perverting the course of justice. We find that this personal data relates to the commission or alleged commission of criminal offences by those four constables. It shows those offences being committed and was relied on as evidence in court in the proceedings in which the police officers were convicted.

61. It is unclear exactly how much of the BWV in scope of the request was played in court. On the basis of an email from Merseyside Police at page A9CB of the closed bundle, it appears that all the BWV footage provided to the tribunal may have been shown in court, although this is not consistent with what is said in the response to the request which states that most of the BWV was not considered necessary to be played to the court. In any event, in our view, only the section of footage described in the previous paragraph consists of personal data of the police constables that relates to the commission or alleged commission of a criminal offence or offences by the data subjects.

62. On this basis we find that the section of the BWV described above is criminal offence data within the meaning of Article 10 UK GDPR.

Would disclosure meet the conditions in paragraph 13 of Part 2 of Schedule 1 DPA (journalism etc. in connection with unlawful acts and dishonesty etc)?

63. Although the Commissioner argues that the requirement of substantial public interest is not met, this criteria is disapplied where the data is criminal offence data, as a result of paragraph 36 of Schedule 1 DPA.

64. The Commissioner agrees, and we accept, that disclosure would be for the purposes of journalism and would be carried out in connection with the alleged or established commission of an unlawful act by a person and with a view to the publication of the personal data by a person.

65. The final condition is that the controller reasonably believes that publication of the personal data would be in the public interest. The controller in this case is Merseyside Police. There are two elements to this condition: First, Merseyside Police must subjectively hold the relevant belief; Second, that belief must be

objectively reasonable (see NT1 & NT2 v Google LLC [208] EWHC 799 (QB) at paragraph 102).

66. There is no evidence before us on which we could properly make a finding that Merseyside Police believed that publication of this personal data, beyond that which they have already place in the public domain, would be in the public interest. There is positive evidence before us in the response to the request and in the internal review that Merseyside Police believed that disclosure of further footage of the incident, beyond that which they have already released into the public domain, would not be in the public interest.
67. Ms Wisson, on behalf of the appellant, accepted that the appellant could not submit that Merseyside Police subjectively believed that disclosure would be in the public interest. However she argued that where the provision was being considered under FOIA the burden was on the appellant to show that the condition in paragraph 13 was satisfied. In those circumstances it was appropriate for the tribunal to ask whether a reasonable controller would hold a reasonable belief that it would be in the public interest to disclose the information.
68. The tribunal does not accept that it is possible to read the clear words of paragraph 13 in that way. Nor is it appropriate for the same paragraph to be interpreted differently depending on whether or not the claim is brought under FOIA. This is supported by the fact that section 40 FOIA requires the tribunal to assess UK GDPR compliance 'otherwise than under this Act'. The tribunal is required to put FOIA from its mind and consider disclosure under the UK GDPR regime.
69. For those reasons we find that the portion of BWV containing the footage of the immediate build up to the assault, the assault itself and the immediate aftermath, including the footage of BWV cameras being switched off is exempt under section 40(2).
70. Although it appears unsatisfactory that a public body has the right to determine for itself, by reference to its own reasonable belief, that the publication of personal data would or would not be in the public interest, we find that this arises from the particular treatment of criminal offence data in the statutory data protection regime. Further, a body deliberately covering up wrongdoing is not left immune to challenge. The data protection regime would not prevent or hinder the investigative functions of external supervisory bodies, giving other avenues for people who wish to challenge a body's refusal to disclose.

Disclosure of the remaining footage

71. Although this information falls within the scope of the request, Mr. Titheradge has made clear that he is not interested in this part of the video footage. He is now

seeking only the footage of the moment of deactivation with contextual surrounding BWV footage relevant to that deactivation. None of the remaining footage could be classed as contextual footage relevant to the deactivation of the BWV cameras.

72. As Mr. Titheradge no longer wants this footage, it is not necessary for us to reach any conclusions on this section of the footage, but we have indicated in summary what our conclusions would have been for completeness.
73. We would have accepted that Mr. Titheradge was pursuing a legitimate interest as follows. He states that footage revealing the BWV being switched off was not released to the public and as such its disclosure under freedom of information legislation is the only route to provide scrutiny of how Merseyside Police handled that misconduct. He asserts that the video of the two officers turning off their cameras will reveal the extent to which the misconduct was orchestrated and could potentially provide a valuable insight into whether this behaviour appears spontaneous in nature or well-rehearsed and indicative of a 'cover-up'.
74. 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.
75. Mr Titheradge 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.
76. The remaining footage contains nothing that might conceivably serve these legitimate interests. For those reasons we would have concluded that disclosure of the remaining footage was not reasonably necessary for the purposes of those interests.
77. Given the nature of the incident, we agree with the Commissioner that there is some general legitimate interest in transparency in relation to how the police acted after this incident and its immediate aftermath. As none of this footage, or any other information on how this was handled by the police is in the public domain, we would have accepted that disclosure would be reasonably necessary for the purposes of that legitimate interest.

78. We would then have considered if the above interests were overridden by the interests or fundamental rights and freedoms of the data subjects.
79. The remaining footage contains, as well as the personal data of the police constables, the personal information of paramedics, Mr. Bamber and his partner, including detailed footage of the inside of their home. Mr. Bamber is present throughout. In relation to Mr. Bamber and his partner, we have found that they remain identifiable even if where their faces are not visible.
80. We accept that the paramedics are acting in a professional rather than a public capacity, and that they are in a public facing role. However, given that they had not committed any wrongdoing, we find that disclosure would not have been within their reasonable expectations. We accept for the reasons given in closed that they are likely to be caused distress by disclosure.
81. In relation to Mr. Bamber we accept Mr. Davidson's submissions that an individual engaged with the coercive power of the state is particularly vulnerable, and has a particular expectation that that interaction with the state will not be disclosed to the world at large. The footage contains intimate details of Mr. Bamber's home and shows his injuries. Even after the immediate aftermath of the incident the footage of Mr. Bamber, if released to the world, would be likely to cause him distress.
82. Taking all the above into account, we would have concluded in any event that the general legitimate interest in transparency was overridden by the interests or fundamental rights and freedoms of the individuals other than police officers present in the BWV.
83. As Mr. Bamber is present throughout this part of the recording and there is no way to render Mr. Bamber anonymous given the material already in the public domain:
- 83.1. It was not necessary for us to consider whether we have the power to order Merseyside Police to disclose a 'redacted' version of this part of the video with the faces of those other than police constables blurred out or otherwise concealed, because Mr. Bamber would have remained identifiable.
- 83.2. It was not necessary for us to consider whether the legitimate interests were or would have been outweighed by the interests or fundamental rights and freedoms of the police constables who had committed criminal offences in the course of their public duty.

Summary of decision

84. For the above reasons we conclude that Merseyside Police were entitled under section 40(2) to withhold the section of BWV, in so far as it is not already in the public domain, which includes the immediate build up to the assault, the assault

itself and the immediate aftermath, including any footage of BWV cameras being switched off, because it is criminal offence data and there is no evidence before us on which we could base a finding that Merseyside Police believed that disclosure of that part of the recording was in the public interest.

85. Although the remainder of the video is within the scope of the request it is no longer sought by Mr. Titheradge. For completeness we have set out what our conclusions would have been on this part of the video. We would have concluded that there was a legitimate interest in disclosure and that disclosure was reasonably necessary, but that the general legitimate interest in transparency was overridden by the interests or fundamental rights and freedoms of the individuals other than police officers present in the BWV.

86. We do not need to go on to consider any other exemptions. The appeal is dismissed.

Signed Sophie Buckley

Date: 26 May 2023

Judge of the First-tier Tribunal