

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 February 2020

**Public Authority:** Chief Constable of Devon and Cornwall Police

**Address:** Police Headquarters

Middlemoor

Exeter

Devon

EX2 7HQ

### **Decision (including any steps ordered)**

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1. The complainant has requested from Devon and Cornwall Police ("D&CP") information about the death of a man with mental health issues, who had been restrained with an emergency response belt while in police custody.
2. D&CP referred the complainant to some information in the public domain, said that some of the information described in the request was not held and said that the remainder was exempt from disclosure under section 30(1) (investigations and proceedings), section 38(1) (health and safety) and section 40(2) (personal information) of the FOIA. The complainant challenged the application of the exemptions to withhold information.
3. During the Commissioner's investigation, D&CP withdrew reliance on section 30(1) and applied section 31(1) (law enforcement) of the FOIA instead.
4. The Commissioner's decision is that D&CP was entitled to rely on sections 31, 38 and 40 to withhold the remaining information.
5. The Commissioner requires no steps.

## Background

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6. The individual identified in the request suffered a cardiac arrest and brain damage after being restrained with an emergency response belt ("ERB") while in police custody. He was transported to hospital where he subsequently died.
7. Criminal charges were brought against several staff who dealt with the deceased while he was in custody. At trial, they were acquitted of manslaughter by gross negligence. However, D&CP admitted health and safety breaches in connection with the incident and it was fined a significant amount. Further proceedings with regard to the death, and a coroner's inquest, may take place over the coming months.
8. Media reports about the various, formal investigations into the death are widely available online.

## Request and response

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9. On 3 May 2019, the complainant wrote to D&CP and requested information in the following terms:  
  

*"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 time of the victim's death.*
  - 5. Disclose how much you have paid in legal fees for this killing."*
10. Having informed the complainant, on 5 June 2019, that it needed further time to consider the balance of the public interest (as it was entitled to do under section 17(2) of the FOIA), D&CP responded on 5 July 2019. It refused to provide the requested information, citing section 30(1) (investigations and proceedings), section 38(1) (health and safety) and section 40(2) (personal information) of the FOIA as its basis for doing so.
11. The complainant requested an internal review on 5 July 2019. D&CP sent the complainant the outcome of its internal review on 14 August 2019. For point (3) of the request, it referred him to a policy document which was available online and to which it provided a hyperlink. For point (5), it explained that a legal fee had not yet been determined. It

said that once the legal fee had been calculated, this information might be disclosable in response to a future FOIA request. It maintained its original position in respect of points (1), (2) and (4) of the request.

## Scope of the case

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12. The complainant contacted the Commissioner on 17 August 2019 to complain about the way his request for information had been handled.
13. He disagreed with D&CP's application of sections 30(1), 38(1) and 40(2) of the FOIA to refuse to provide the information requested at points (1), (2) and (4) of the request.
14. During the course of the Commissioner's investigation, D&CP withdrew reliance on section 30(1) and substituted section 31(1)(a), (b), (c) and (g) (by way of subsection (2)(b)) (law enforcement) of the FOIA. This late revision has not been put to the complainant, to forego any further delay in the investigation.
15. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
16. The analysis below considers whether D&CP was entitled to rely on sections 31(1), 38(1) and 40(2) of the FOIA to withhold the information specified at points (1), (2) and (4) of the request.

## Reasons for decision

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### Section 31 – law enforcement

17. D&CP said that it was applying section 31(1)(a), (b), (c) and (g) (by way of subsection (2)(b)) to withhold the information requested at point (2) of the request.

18. Section 31(1) of the FOIA states that:

*"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)".*

19. Section 31(2) provides that –

*"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".*

20. Section 31 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, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

21. In order to be engaged, the following criteria must be met:

- 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 (in this case, the prevention or detection of crime and the apprehension or prosecution of offenders);
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

22. The withheld information in this case consists of the custody record for the deceased on the day he was arrested.

23. PACE Code C (2012)<sup>1</sup>, which applied at the time of the deceased's arrest, sets out requirements for the detention, treatment and

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<sup>1</sup> Police and Criminal Evidence Act 1984 (PACE) Code C - Code of practice for the detention, treatment and questioning of persons by police officers

questioning of suspects in police custody by police officers, including the maintenance of a custody record. It is clear from the Code that the custody record should have recorded on it, as a matter of course, information about the person's reason for arrest and detention and whether they have been notified of their rights, as well as information detailing their handling while in custody. It would be a key piece of evidence in any investigation into the deceased's death.

### *The applicable interests*

24. The first point for the Commissioner to consider is whether the arguments provided by D&CP relate to the relevant applicable interests, namely the prevention or detection of crime, the apprehension or prosecution of offenders and the ascertaining of whether any person is responsible for improper conduct.
25. D&CP explained that the custody record formed part of the evidence considered in the criminal investigation conducted by the Independent Office for Police Conduct (IOPC), which followed the death, although it was concluded prior to the request being made. However, at the time of the request, the IOPC was still conducting a misconduct investigation. Furthermore, D&CP expects that there will be a coroner's inquest shortly, and that further proceedings may follow after that.
26. In its submission to the Commissioner, D&CP provided arguments in support of its view that disclosure would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice and the ascertaining of whether any person is responsible for any conduct which is improper.
27. The Commissioner is satisfied that the arguments provided by D&CP (which are expanded on below) do relate to the applicable interests stated, so the first limb of the three part test outlined above, is met.

### *The nature of the prejudice*

28. The Commissioner next considered whether D&CP demonstrated a causal relationship between the disclosure of the requested information and the prejudice that sections 31(1)(a), (b), (c) and (g) (by way of subsection (2)(b)) are designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.

29. D&CP explained to the Commissioner that the death was the subject of a mandatory referral to the IOPC, which immediately commenced criminal, and later, misconduct, investigations into the matter.
30. D&CP applied section 31(1)(a), (b) and (c) to withhold the custody record as it pertained to the criminal investigations into the deceased's death. These investigations had concluded by the time the request was submitted. D&CP argued that:

*"Any disclosure of information relating to an investigation into criminal proceedings would set a precedent for similar disclosures in the future. To set such a precedent could lead people to believe that information they provide to the police would be disclosed, identifying those who provided it. The harm that such a precedent would do to the flow of information to the police would lead to public authorities being unable to investigate and assist in the prosecution of offenders effectively."*

31. D&CP said the custody record was also exempt under section 31(1)(g) (by way of subsection (2)(b)) as its disclosure would be likely to prejudice the misconduct investigation which was underway at the time of the request. It said that the disclosure of evidence which was material to that investigation had the ability to undermine it, and to prejudice its outcome.
32. D&CP added that disclosing the requested information would be likely to prejudice the coroner's inquest and any further proceedings which might flow from that. It referred the Commissioner to a decision by the IOPC to refrain from publishing its reports on the death until all such proceedings had concluded.
33. D&CP concluded:

*"This matter remains sub judice and to release information into the public domain which could be classed as evidence in those proceedings had [sic] the potential to undermine the judicial process, misconduct proceedings or civil proceedings brought against the Force and prejudice the outcome of those proceedings."*

#### *Likelihood of prejudice*

30. D&CP confirmed to the Commissioner that it considered that prejudice "would be likely to" occur as a result of disclosure.

#### *Is the exemption engaged?*

31. In a case such as this, it is not sufficient for the information to merely relate to an interest protected by section 31(1)(a), (b), (c) and (g) (by way of subsection (2)(b)). Its disclosure must also at least be likely to

prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.

32. The Commissioner is satisfied that the prejudice envisaged by D&CP is real and of substance, and that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.
33. The Commissioner considers that the disclosure of evidence being considered in an ongoing misconduct investigation clearly has the potential to affect the investigation's outcome and would almost certainly negatively affect public perceptions of its integrity. She is therefore satisfied that section 31(1)(g) (by way of section 31(2)(b)) is engaged.
34. The Commissioner also considers that, with a coroner's inquest and possible proceedings against D&CP still outstanding, the disclosure into the public domain of a piece of evidence which would undoubtedly form a key part of any such proceedings, would be likely to similarly prejudice their integrity and fairness. She notes that the IOPC has delayed publication of its reports on the death until such proceedings have concluded, apparently in recognition of this point.
35. The Commissioner further recognises that the premature disclosure of key evidence, to the world at large under the FOIA, risks undermining public confidence in the integrity and fairness of police investigations and that this could jeopardise D&CP's ability to conduct future investigations. Where enquiries are ongoing, she considers it vital that, where appropriate, confidentiality can be guaranteed. If the credibility of such guarantees is undermined, the Commissioner considers the perception that information about engagement with the police may be disclosed to the world at large may deter people from cooperating with enquiries, or from volunteering information. This would be likely to disrupt the flow of information and intelligence to D&CP and there would be an inevitable impact on its ability to conduct efficient and well evidenced investigations.
36. For the above reasons, the Commissioner is satisfied that section 31(1)(a), (b) and (c) are also engaged.

### **Public interest test**

37. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions at sections 31(1)(a),(b), (c) and (g) (by way of subsection 2(b)) of the FOIA outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosing the information*

38. The complainant has not explained why he thinks that the disclosure of the information would be in the public interest. Nevertheless, the Commissioner considers that there is a general public interest in public authorities being open and transparent with regard to the information they hold, and that disclosure would serve that particular interest.
39. D&CP offered the following arguments:

*“Release of this Custody Record to the public may assist awareness regarding the death of [the deceased] and may assist the public in forming a view as to whether the criminal and police disciplinary outcomes are properly supported by evidence.*

*There is a public interest in knowing whether public Authorities are conducting their investigative duties effectively and disclosure of the investigation material would allow the public to debate this.”*

*Public interest arguments in favour of maintaining the exemption*

40. D&CP recognised that the death was a tragic incident that had had a devastating impact on the deceased’s family. It said that its own officers were also left distressed by the incident. It said that it was in the public interest that investigations aimed at establishing what had happened, whether anyone was at fault and what lessons could be learned, be allowed to proceed unimpeded by external interference.
41. It also said that it would clearly not be in the public interest for its investigatory abilities to be harmed as a result of people being deterred from cooperating with its investigations, due to perceptions that their evidence may be disclosed into the public domain, under the FOIA.

*Balance of the public interest*

42. When balancing the opposing public interests in a case, the Commissioner must decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
43. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
44. The Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law.

Public confidence will be increased by openness and transparency with regard to actions taken by the police, and this may involve permitting public access to information about controversial cases. In this case, a vulnerable person died shortly after being restrained while in police custody. The Commissioner considers that there is a clear public interest in the independent scrutiny of the events which led up to the death.

45. On that point, the Commissioner notes that a significant amount of information about the time the deceased spent in police custody prior to being found unconscious is already in the public domain, including a broad timeline of events from his arrest to the point he was transported to hospital, and still photographs and CCTV footage from inside the police station (including footage of the ERB being used). This information has been placed in the public domain following several criminal prosecutions, and investigations by the IOPC. The Commissioner considers that this information and the proceedings and the IOPC's investigations, go some considerable way towards satisfying the public interest in scrutinising D&CP with regard to its handling of the deceased.
46. The Commissioner considers the prejudice to the misconduct investigation, which was still ongoing at the time the request was made, to be a significant argument in favour of maintaining the exemption. The Commissioner considers it to be counter to the public interest in such investigations being conducted fairly and efficiently, that evidence should be accessible under the FOIA while the investigation remains underway. Investigating bodies require a safe space to conduct enquiries and to deliberate on findings, and it is not in the public interest that this be undermined or impeded by external interference.
47. Similarly, it is anticipated that there will be further proceedings in respect of the death; it is expected that a coroner's inquest will be held, and further proceedings may follow from that. The custody record will continue to form a key piece of the evidence considered in any such proceedings. Its disclosure under the FOIA, prior to those proceedings being concluded, could prejudice their outcome, which would be counter to the public interest in justice, and could undermine public confidence in their eventual findings.
48. The Commissioner considers these to be arguments in favour of maintaining the exemption of considerable strength.
49. The Commissioner also considers that the impact on D&CP's future investigations, if people are deterred from cooperating with it, would be likely to adversely affect efficient law enforcement, which would not be in the public interest.

50. Having given due consideration to all the arguments set out above, the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure, and therefore that sections 31(1)(a), (b), (c) and (g) (by way of subsection (2)(b)) of the FOIA have all been applied appropriately in this case.

### **Section 38 – Health and safety**

51. D&CP has cited section 38(1)(a) to withhold the information requested at part (1) of the request, namely, photographic and video images of the deceased while in police custody, up to the point he was transported to hospital.
52. Section 38(1)(a) of the FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, endanger the physical or mental health of any individual.
53. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. 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.
54. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of the disclosure of the information in question is "real, actual and of substance", rather than trivial or insignificant. As part of this she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
55. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that it is envisaged would, or would be likely to, occur, must relate to the applicable interests described in the exemption. Secondly, there must be a causal relationship between the potential disclosure of the withheld information and the endangerment that the exemption is designed to protect against. Thirdly, there must be a real risk of the endangerment arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure "would be likely" to result in endangerment or disclosure "would" result in endangerment (with "would" imposing a stronger evidential burden than the lower threshold of "would be likely").
56. D&CP acknowledged that some images have already been disclosed into the public domain, in a controlled fashion, as a result of the criminal trials and investigations which have taken place following the deceased's death. It said that further images were held which had not been made public and that the disclosure of these images to the world at large

would undoubtedly cause significant upset and distress to the deceased's family and friends. It believed their emotional and psychological wellbeing would be adversely affected by the disclosure of images, which had hitherto not been made public, to the world at large.

57. The Commissioner considers an individual's mental wellbeing to fall within the scope of section 38. In this, she includes emotional and psychological wellbeing, and the likelihood of disclosure causing significant upset or distress. The Commissioner is therefore satisfied that the harm D&CP envisages relates to the applicable interest cited.
58. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by D&CP. In her guidance on the prejudice test, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice would or would be likely to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.
59. The Commissioner acknowledges that the physical or mental health of family members, and other members of the public, needs to be considered when disclosure "to the world at large" is being made under the FOIA. In this case, the Commissioner believes it to be self-evident that the consequences of the disclosure of previously unreleased footage of the deceased into the public domain are such that it would be likely to cause significant distress and upset to the deceased's surviving family members and friends.
60. In the Commissioner's view, were family members to discover that footage of their deceased loved one had been released into the public domain without their knowledge or consent, this would have a significant impact on their mental health. Not least, because the footage shows the period leading up to him being transported to hospital, where he subsequently passed away. His family are still pursuing their own lines of enquiry regarding his death, which may result in further proceedings. The Commissioner also has no difficulty accepting that they would have a natural desire to preserve and protect their loved one's dignity after death, and thus that the uncontrolled circulation of new images of him in custody would cause them additional mental anguish.
61. The Commissioner is therefore satisfied that section 38(1)(a) of the FOIA is engaged in relation to the requested information.

## Public interest test

62. As section 38 is a qualified exemption, the Commissioner also needs to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### *Public interest arguments in favour of disclosing the information*

63. As before, the complainant did not offer any arguments as to why disclosure was in the public interest.
64. D&CP also did not offer any arguments as to why disclosure would be in the public interest.
65. The Commissioner considers there is a clear public interest in the police being open and transparent with regard to information about individuals (and particularly, vulnerable individuals, which the deceased appears to have been) who have died in, or shortly after, being held in police custody.

### *Public interest arguments in favour of maintaining the exemption*

66. D&CP referred the Commissioner to public interest arguments featured in a previous (unconnected) decision notice<sup>2</sup>. These emphasised the distress and upset that disclosure would cause to family members of a deceased person, to the point of mental endangerment. D&CP felt that the same considerations applied in this case.

### *Balance of the public interest*

67. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.
68. The complainant has not offered any reason for requiring the footage to be disclosed, although the Commissioner recognises that there is considerable public debate about the circumstances surrounding the deceased's death. Nevertheless, the deceased's family continue to pursue his treatment with D&CP through formal channels and a coroner's inquest is expected. The incident remains a live matter and

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2012/735786/fs\\_50431011.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2012/735786/fs_50431011.pdf)

further proceedings may follow. It is not the case that disclosure would lead to a fresh look at a matter which had otherwise been forgotten about.

69. Whilst the Commissioner recognises that allowing interested parties access to the withheld information may give some important insight into the circumstances surrounding the deceased's death, she does not consider that an unfettered disclosure, to the world at large, via the FOIA, would be an appropriate action to take. When a person dies in such tragic circumstances, it is understandable that their family will experience significant mental anguish and distress, which would be exacerbated by uncontrolled disclosures of information about the circumstances of their loved one's death. As mentioned above, the Commissioner again notes that some images have already been disclosed to the public, in a managed fashion, which goes a considerable way to meeting the public interest in this matter.
70. The Commissioner has been unable to identify public interest arguments of any significant weight which favour disclosure, beyond the general public interest in public authorities being open and transparent. She therefore considers that the arguments for disclosure in this case are heavily outweighed by the public interest in maintaining the exemption in order to safeguard the mental health of the deceased's surviving family. Therefore, taking into account all the circumstances of the case, the Commissioner has decided that the balance of the public interest favours maintaining the exemption at section 38(1)(a) in respect of the information requested at point (1) of the request.

#### **Section 40 – personal information**

71. D&CP has applied section 40(2) to refuse to disclose information requested at point (4) of the request, for details of the training and education of those who used the ERB.
72. Section 40(2) of 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.
73. In this case, the relevant condition is contained in section 40(3A)(a)<sup>3</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

processing of personal data set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').

74. 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 FOIA cannot apply.
75. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

*Is the information personal data?*

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

*"any information relating to an identified or identifiable living individual".*

77. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
78. 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.
79. 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.
80. The request asks for information about "*those who applied the ERB*". The Commissioner notes that the individuals specified in the request were prosecuted. A basic internet search returns media reports about their trial, in which they are named. The Commissioner is therefore satisfied that, although not named in the request, these individuals are *identifiable* from information which is in the public domain. Their education and training with regard to ERB use is information about these individuals. The Commissioner is therefore satisfied that the withheld information *relates* to these individuals and that it therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
81. 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 data protection principles.

82. The most relevant data protection principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

83. 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".*

84. In the case of an FOI 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.

85. 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*

86. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing 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.

87. The Commissioner considers that the lawful basis most applicable is basis (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"<sup>4</sup>.*

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<sup>4</sup> 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".*

88. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.
89. 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*

90. 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.
91. 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 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.
92. As noted previously, the complainant has offered no explanation as to why the information should be disclosed.
93. However, the Commissioner recognises that there has been significant public debate about the case and about whether or not the use of the ERB might have contributed to the death of the deceased. It would clearly be relevant to that debate to know the extent to which the individuals who used the ERB were trained in its use and in related matters, such as first aid. Disclosure would therefore inform public debate on this matter. The Commissioner therefore considers that there is a legitimate interest which would be furthered by the request.

*Is disclosure necessary?*

94. '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

FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

95. The Commissioner has considered whether disclosure of the requested information is necessary to meet the wider legitimate interests identified in paragraph 93. D&CP referred the Commissioner to the fact that the death was referred to the IOPC:

*"There is a mandatory referral to the IOPC when there is a death or serious injury case and the IOPC then decide whether to conduct an independent investigation; to oversee the Force and allow it to conduct its own investigation; or to allow the Force to investigate without oversight."*

96. The Commissioner notes that the IOPC has investigated the death, and that a report of its findings has been compiled, although it has not, as yet, been made public.
97. Since she has concluded that disclosure under the FOIA would inform public debate on a serious matter, she is satisfied that it would be necessary to meet the legitimate interests identified above.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

98. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
99. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
100. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

101. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

102. D&CP confirmed that the data subjects have not given consent to the disclosure in response to this request. It told the Commissioner:

*"There is likely to be an inquest in the future and there may be civil proceedings brought against the Force in due course. It is therefore considered that the balance lies in favour of non-disclosure as this could prejudice any future outcome(s)."*

103. The requested information in this case will already have been examined in the court cases and investigations which have taken place, which resulted in the data subjects being acquitted of all criminal charges, and in misconduct charges against them being withdrawn. To allow the uncontrolled circulation of information which would have been pertinent to both those decisions would effectively re-open for public debate matters which have been concluded. The Commissioner considers that the data subjects in this case would have a reasonably held expectation that the withheld information would not be disclosed more widely, and for purposes not directly to do with any further, formal investigation into the incident. The Commissioner considers that disclosure in this context would be unfair, in that, having been acquitted of the charges against them, the individuals would have a reasonable expectation of being able to move on with their lives (subject to their cooperation with any other ongoing, formal enquiries into the incident). She has no difficulty accepting that the data subjects would find it highly distressing to have the requested information disclosed to the world at large and that it may leave them open to personal attacks from members of the public who disagreed with the verdict of the courts and the IOPC.

104. Ultimately, while the Commissioner accepts that there is considerable public debate about the incident, and that such debate is legitimate, she considers that the level and adequacy of officer training with regard to ERB use is something which a formal investigation, with full access to the full facts of the matter and an in-depth knowledge of processes, is the appropriate forum for such a determination, as opposed to a less informed evaluation by the general public.

105. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information would not be lawful.

106. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

**The Commissioner's view**

107. The Commissioner has therefore decided that D&CP was entitled to withhold the information requested at point (4) of the request, under section 40(2), by way of section 40(3A)(a) of the FOIA.

## Right of appeal

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108. 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: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

109. 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.

110. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**