



NCN: [2024] UKFTT 001086 (GRC)

Case Reference: EA/2022/0220

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard by: Cloud Video Platform
Heard on: 10 October 2024
Deliberations on: 19 November 2024
Decision given on: 2 December 2024
Amended by rule 40 on: 6 March 2025**

Before

**TRIBUNAL JUDGE HEALD
MEMBER SCOTT
MEMBER MURPHY**

Between

FAISAL A QURESHI

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE CROWN PROSECUTION SERVICE**

Respondents

Representation:

The Appellant appeared in person
The 1st Respondent: not represented
For the 2nd Respondent: Jennifer Thelen of Counsel

Decision: The Appeal is Dismissed

REASONS

1. Mr Qureshi brings this Appeal by section 57 Freedom of Information Act 2000. It is in respect of a decision notice dated 12 July 2022 issued by the Information Commissioner and concerns a request for information made to the Crown Prosecution Service on 13 May 2021.
2. What follows is a summary only of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning. The parties and their representatives and the witness for the 2nd Respondent are thanked for their attendance and assistance to the Tribunal.
3. Reference to page numbers in this Decision are to an open bundle produced for the Appeal and in this Decision the following definitions are adopted.

Freedom of Information Act 2000	FOIA
Data Protection Act 2018	DPA
General Data Protection Regulation	GDPR
Faisal A Qureshi	the Appellant
the Information Commissioner	the IC
the Crown Prosecution Service	the CPS
The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009	2009 Rules
Decision Notice dated 12 July 2022 ref IC-116624-F8K2	the DN
John Kay (deceased)	Mr Kay
Harue Kay (deceased)	Mrs Kay
the public interest balance test (section 2(2)(b) FOIA)	PIBT
the Upper Tribunal	UT
the Commissioner of Police of the Metropolis	MPS
FOIA appeal EA/2023/0269 brought by MPS	the MPS Appeal

Summary of the background

4. From documents in the Bundle (eg 109-119 and 232-330) and from what we were told in particular by the Appellant at the Appeal we understand that Mr Kay was a journalist and for many years the Sun Newspaper's chief reporter. He died on 7 May 2021 aged 77.
5. It is not in dispute that in 1977 he killed his wife, Mrs Kay, and was arrested and charged with her murder (C144/228). He denied murder but pleaded guilty to and was subsequently convicted of manslaughter on the grounds of his diminished responsibility. He was detained for psychiatric treatment pursuant to the then

relevant Mental Health Act. He subsequently continued his career. His death was marked by a number of published obituaries.

6. The Appellant's request was for the CPS file in relation to the criminal case in respect of Mr Kay save for photographs from the file. He was provided with some material (with some redactions) but not all.
7. The Appellant told us in summary in his submissions and at the Appeal that:-

(a) he was interested to understand more about the criminal case against Mr Kay and how it had been conducted and said (A57):-

"29....John Kay as a journalist worked for a tabloid newspaper that broke many stories that could be argued to be in the public interest but there were many other stories that were not. These stories involved phone hacking, delving into individual's private lives and exposing them for reasons that were more to do with voyeurism than any genuine public interest. The Appellant believes that the circumstances surrounding the death of Harue Kay need to be re-examined."

(b) he wanted to know if Mr Kay had been inappropriately assisted by his employer, by monetary support for legal fees (see A39 and A41)) or otherwise such as if his employer had promised him his job back and if there was evidence for that on the CPS' file (A39).

(c) he wanted to know why there had been so little coverage of the case at the time, if the CPS file had newspaper clipping from the time and if their absence was considered unusual (A40) saying (A41) *"The lack of coverage by other newspapers of the trial suggests this was a case where Fleet Street was protecting "one of their own".*

(d) he wanted to know about the involvement of a Mr Lamb. At the Appeal (and in his Response to the IC (A39)) he explained that (A39):-

"Confirmation of Larry Lamb's involvement in the John Kay's case appears in Peter Chippendale's and Peter Horrie's book, STICK IT UP YOUR PUNTER: THE RISE AND FALL OF THE SUN....where on page 59, the following is written:

Kay's father blamed the Sun for the tragedy, and [Larry] Lamb was sympathetic, agreeing it had been a mistake to place him under so much stress. When Kay was remanded in custody, charged with murder, the Sun hired John Mathew, one of the best QCs in the country, to defend him when the case came up at St Albans Crown Court in December.

Lamb sent a letter to the court that said the newspaper would take Kay back whenever he was fit enough and it was allowed. Kay, 33, pleaded not guilty to murder but guilty to manslaughter on the grounds of diminished responsibility; this was accepted by the court. He was sentenced to be admitted for treatment at Friern Barnet psychiatric hospital in north London.

The Sun continued to look after Kay's interests and he received regular visits from many members of staff. Lamb fulfilled his promise by taking him back on condition that he be confined to the office. The uxoricide officially became a taboo subject"

(e) he thought disclosure of the content of the file might usefully reveal improved attitudes towards domestic violence by the authorities including in police forces since the 1970s (A41). He said (C130):-

"The public interest in this story goes beyond protecting the feelings of John Kay's friends. During the 1970's, perpetrators of domestic abuse were used to receiving generous treatment from the courts. The stereotype of the henpecked husband who "broke" and killed their partner, an attitude that is still being heard in courts today. When the victim has been silenced, the perpetrator takes advantage of giving a one sided narrative that only benefits them. John Kay was exceptional because his employer thought he was worth protecting. Haraue [sic] Kay had no one."

"I ask that the files be released so that journalists can find out what happened that tragic day when Harue Kay's life was extinguished. Not for voyeurism but to learn how we as a society have moved on. How domestic violence should not be a footnote or a punchline as Harue Kay's death currently is. Harue Kay's life was so anonymous that John Kay got away with murdering her. Releasing the file will rectify this historical injustice."

(f) (A56) He said:-

"It is only fair to say that given Harue Kay's status as an immigrant woman who had moved to the UK and the victim of her husband's violence that her case would have been treated differently than if she had been murdered by a stranger."

(g) he was (see A41) concerned that that a failure to disclose the material requested meant the CPS was inadvertently "protecting a newspaper which had considerable political and domestic influence during the time this tragic event took place"

(h) he drew attention to some published obituaries of Mr Kay saying (A40):-

"Even after John Kay died, many of his colleagues did not discuss Harue Kay's [sic] wife. For example, the 8th May 2021 obituary published in the Sun newspaper did not make any reference to this tragic event. It took a week for the following text to appear below it: "After speaking to our valued charity partners, we want to make clear that in 1977 John Kay pleaded guilty to the manslaughter of his wife, Harue, on the grounds of diminished responsibility."

(i) he wanted to make sure that the victim, Mrs Kay did not become an "anonymous footnote..." (C130).

8. In a number of his submissions the Appellant referred to the killing of Mrs Kay by her husband as murder. Although in other submissions and at the Appeal he accepted that Mr Kay had not been convicted of murder (see for example A41) his submissions indicated that he had his doubts about the outcome of the criminal proceedings. This can be seen for example at page A41 of the bundle in which the Appellant indicated his doubts derived from some "...reliable information" about physical evidence on Mrs Kay's body.
9. We accept that the Appellant was raising serious issues and note that the CPS accepts he was pursuing a legitimate interest. However our role is limited to that

set out in section 58 FOIA. Importantly we note the outcome of the criminal process at the time. In the absence of relevant evidence it is not for us to consider whether "*John Kay got away with murdering her*" or not.

Connected Appeal

10. This Appeal was originally connected to two others namely EA/2023/0233 (which had already been resolved) and the MPS Appeal. The MPS Appeal arose following a request for information made to them by the Appellant (in this Appeal) on 22 November 2021 and which also involved the death of Mrs Kay and the manslaughter conviction of Mr Kay.
11. The two Appeals, while not consolidated, have a common factual background and in part at least common legal considerations. Having consulted the views of all parties and considered rule 2(2) 2009 Rules they were heard together on 10 October 2024 by rule 5(3)(b) 2009 Rules.

FOIA

12. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1)(a) FOIA) and if that is the case to be provided with that information (section 1(1)(b) FOIA). These entitlements are subject to exemptions which can be absolute by section 2(2)(a) FOIA or qualified by the PIBT set out in section 2(2)(b) FOIA which is that "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*"
13. In this Appeal two specific exemptions are relevant being those provided for by sections 38(1) and 40(2) FOIA.

Section 38(1) FOIA

14. Section 38 FOIA (which if engaged is subject to the PIBT) provides as follows:-

(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

15. We agreed with the IC in the DN (A27 -28) and the annex to its submissions (A77) as to the legal principles relevant for this exemption. As regards the PIBT we had regard for example to *All Party Group on Extraordinary Rendition v IC* [2013] UKUT

560 (para 149) and the guidance in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* EA/2005/0026&0030.

16. The relevant date for considering the PIBT is the date the public authority makes its decision on the request (*Montague v ICO and Department for Business and Trade* [2022] UKUT 104 (AAC)).

Section 40(2) FOIA

17. We agree with the ICs statement of the law as set out in the DN (A26-27) and in the annex to its submissions (A80). Recitals 1 and 26 to the GDPR provide that:-

"The protection of natural persons in relation to the processing of personal data is a fundamental righteveryone has the right to the protection of personal data concerning him or her."

"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."

18. Section 40(2) FOIA provides that:-

"Any information to which a request for information relates is also exempt information if
(a) it constitutes personal data which not fall within subsection (1), and
(b) the first, second or third condition below is satisfied."

19. Section 40(3A)(a) FOIA is the first of these three conditions by which personal data is exempt if *"disclosure of this information to a member of the public otherwise than under this Act (a) would contravene any of the data protection principles..."*
20. By Section 2(3)(fa) FOIA if the exemption used is in relation to this first condition it is an absolute exemption.
21. Section 3(4)(d) DPA defines processing as *"disclosure by transmission, dissemination or otherwise making available."* It includes publication pursuant to a FOIA request.

22. Personal data is defined in section 2 DPA as *"any information relating to an identified or identifiable living individual..."* Section 3(3) defines *"Identifiable living individual"* as
- "...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."*
23. In *Information Commissioner v Magherafelt District Council* [2012] UKUT 263 (ACC) the UT referred to the *"motivated intruder"* test which is a person:-
- "37....who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so. The question was then one of assessment by a public authority as to whether, taking account of the nature of the information, there would be likely to be a motivated intruder within the public at large who would be able to identify the individuals to whom the disclosed information relates."*
24. The data protection principles are those set out in section 34(1) DPA. They include Article 5(1) GDPR which provides that personal data shall be processed *"lawfully, fairly and in a transparent manner as regards the data subject"*
25. Article 6(1) provides for example that the processing of personal data shall only be lawful if:-
- (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 require protection of personal data, in particular where the data subject is a child.*
26. As regards Article 6(1)(f) the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 (29 July 2013) set out these three questions at para 18:-
- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*
- (ii) Is the processing involved necessary for the purposes of those interests?*
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"*
27. As regards necessity in *Corporate officer of the House of Commons -v Information Commissioner* [2008] EWHC 1084 the Divisional Court said at para 43:-
- "...."necessary" within schedule 2 para 6 of the DPA should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends..."*

28. In *The Sunday Times v United Kingdom* (1979) 2EHRR 245 (paragraph 59) it was held as follows:-

"The court has noted that, while the adjective "necessary", within the meaning of article 10(2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."

29. The UT in *Goldsmith International Business School -v- The Information Commissioner and the Home Office* [2014] UKUT 0563 (ACC) provided a number of relevant propositions including from para 36-

(a) the test for reasonable necessity comes before the consideration of the data subjects interests.

(b) reasonable necessity means *"more than desirable but less than indispensable or absolute necessity."*

"39. The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question."

30. If disclosure of personal data is necessary to further a legitimate interest it will not be lawful to process it (by Article 6(1)(f)) where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. In addition even if processing is lawful it must be carried out in a fair and transparent manner as regards the data subject.

31. Finally we noted Article 9 and 10 where:-

(a) Article 9 GDPR provides:-

"Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited."

(b) and Article 10 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."

Status of data subjects

32. Neither Mr Kay, nor of course the victim Mrs Kay, are living. The background facts relate to things that took place over 40 years prior to the request being made. Both

the CPS and the Appellant had taken steps to seek to establish on a person by person basis if they were definitely still alive or dead. For example in the CPS' witness statement we were told (E212):-

18. I have provided a list of individuals who are named in the Case File, with those details I have carried out google searches of their names and dates of birth if known. From those searches I have outlined whether we would presume them still living [exhibit KB/3]

33. This is also referred to again at para 53 (E218) and in the closed version and closed exhibit KB/3.

34. The Appellant says for example (A53)

"8. The Appellant understands the Second Respondents concerns but would like to point out, there are a variety of resources available that can help determine if someone is living or dead. Subscription services such as Ancestry or 192.com are often used in combination with other people search engine tools to quickly find specific individuals.

9. It is to the credit of the Second Respondent to have possibly found surviving witnesses to the case as the Appellant has been unable to track down any of John or Harure [Sic] Kay's immediate family but unfortunately, the Appellant is unable to measure how successful they are given the exhibits relating to this are closed for these proceedings."

35. The appropriate approach for the Tribunal was as set out by the UT in *Sygulska v Information Commissioner & MoD* [2019] UKUT 269 (ACC) as follows:-

"44. I am satisfied that there is no nefarious intent on the part of the MoD in adopting the position which it has. There is no skulduggery or a wish to suppress embarrassing or inconvenient revelations about the UK's relations with the Polish Communist government after the setting up of the Iron Curtain. The position is simply that, in the absence of proof of death and thus of a death certificate or an equivalent document, the MoD is entitled to ask for and receive a declaration of death from the relevant legal authorities before it will disclose the serviceman's record, unless 116 years have passed since his date of birth"

36. We were also referred to *Arthurs v Information Commissioner & TNA & MoD* EA/2016/0060

"64. It was standard government practice to assume that an individual was still alive if they would not yet have reached the age of 100. While several of the entries in the file made reference to the age of the individual being named, some did not. In these cases, the age of the individual was estimated and the '100-year rule' applied.

65. That principle, and its application to archival files, such as the one that was the subject of this Appeal, was explained at paragraph 4.1.5 of the Code of Practice for Archivists and Records Managers under Section 51(4) of the Data Protection Act 1998:

Given the large number of individuals commonly featuring in archive collections, archivists will not be in a position to ascertain whether they are still alive and hence protected by the Act. If it is not known whether a data subject is alive or dead, the following working assumptions can be used:

- Assume a lifespan of 100 years
- If the age of an adult data subject is not known, assume that he was 16 at the time of the records
- If the age of a child data subject is not known, assume he was less than 1 at the time of the records

37. In our view all but two of those listed on the table provided by the CPS in the closed bundle are not with certainty over the age of 100 and we will assume are alive.

Role of the Tribunal

38. Section 58 FOIA provides that:-

- (1) If on an appeal under section 57 the Tribunal considers –*
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

39. In *NHS England -v- Information Commissioner and Dean* [2019] UKUT 145 (ACC) the UT said:-

"10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply..."

40. We also had regard to *Peter Wilson -v- The Information Commissioner* [2022] UKFTT 0149:-

"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."

Scope

41. In this Appeal:-

- (a) the Appellant indicated that he did not dispute that the exemption at section 38 FOIA was engaged and that the Appeal was limited to a consideration of the PIBT.
- (b) the Appellant (as he said as early as 13 February 2023) (A57) indicated that he did not seek photographs from the CPS' file.

(c) as regards section 40(2) FOIA the Appellant indicated he sought the same outcome as that provided for by the IC in its decision notice in the MPS Appeal.

(d) as regards section 40(2) FOIA counsel for the CPS indicated that it was accepted by the CPS that the Appellant was pursuing a legitimate interest in the information being requested. It was their case that disclosure was not necessary for the pursuit of that interest and in any event (even if found to be necessary) the processing by disclosure (to the world) following a FOIA request was unwarranted in this case by reason of the prejudice to the rights and freedoms or legitimate interests of the data subjects.

The Request (118), Complaint (D174) and the DN (A1)

42. On 13 May 2021, shortly after Mr Kay died, the Appellant asked the CPS for information as follows:-

"I am looking for the prosecution case file of deceased Sun journalist John Kay who murdered his wife, Harue Kay (maiden name, Nonaka), in 1977. Given Kay's activities during this time was a reporter for the Sun, I believe the facts of this investigation are in the public interest.

John Kay's obituary can be found here..... John Kay was convicted of his wife's murder at St Alban's court. I assume that given this venue, Hertfordshire Police was the force that investigated this case."

43. The CPS sought to clarify the request (C121) and the Appellant on 18 May 2021 (C122) said:-

"I am looking for all documentation that was gathered that was deemed relevant for the potential prosecution and sentencing of John Kay for the murder of his wife Harue Kay. This can include witness statements, his own statement if any was given, character references, psychiatric reports, coroners [sic] report, press reports and the police investigation files. Essentially, the full case files. I understand that in cases such as these, the documentation would be quite slim for the period."

44. On 1 July 2021 (C125) the CPS responded to the request. It indicated that it held material within the scope of the request but refused to provide it on the basis of the exemptions found at sections 38(1) and 40(2) FOIA. It added its explanation of the exemptions including of the PIBT (C127). That remained its position after an internal review (C132).

45. The Appellant complained to the IC (D174) on 8 July 2021. The outcome of the IC's investigation as set out in the DN (A1) on 12 July 2022 was that:-

"The CPS was correct to withhold some of the requested information under section 40.

However, he also finds that section 40 is not engaged for information that relates to the defendant or the victim.

He also finds that the remaining information withheld only under section 40 is not personal data and so section 40 is not engaged.

The CPS must disclose the information as set out in the Confidential Annex issued only to the public authority.

Finally, the Commissioner finds that the CPS was correct to withhold the majority of the remaining information under section 38 of FOIA. However, there are some exceptions which the CPS must disclose, details of which are as set out in the Confidential Annex."

46. On 13 August 2022 the CPS wrote to the Appellant (C136) and said:-

"Following liaison with the ICO and on receipt of the ICO decision notice dated 12 July 2022, the commissioner outlined that the CPS was correct to withhold information held under section 38 and section 40 of the FOIA, however they outlined that information set out in the confidential annex which has been issued to the CPS should be disclosed. The further information for disclosure is contained in the attachment titled "Qureshi disclosure attachment".

47. This disclosure with its redactions is at pages C136-C146 of the Bundle. We note that later *"with a view to narrow the issues in the appeal"* on 28 April 2023 further disclosure was provided (C148-C173) again with redactions as explained in the covering email (C147).

The Appeal (A17)

48. On 13 August 2022 the Appellant commenced this Appeal. The outcome sought was (A22) *"I would like the CPS to release the case file to me so I can have further examination of its contents."* The Grounds of Appeal were (A21):-

"I am appealing on the basis of section 38 and section 40.

The subjects of interest in this case are deceased Sun journalist, John Kay and his victim, Harue Kay who he killed in September 1979 and for which he was sentenced for manslaughter under diminished responsibility.

When the ICO issued its decision notice, paragraph 13 and 14 are worth examining:

13. *In response to the Commissioner's investigation, the CPS submitted an 87 page sample of the withheld information (479 pages in total), together with an index setting out all the material held. The index details the document type (ie handwritten note, file record, correspondence etcetera), a description of the nature of the information, the relevant page number(s) within the withheld file and whether section 38, section 40 or both have been applied to that information.*

14. *Having reviewed the withheld information sample (which includes witness statements, photographs and court related information), and the accompanying index table, the Commissioner notes that the CPS has relied on section 40 for all the information held within the file. The CPS has additionally cited section 38 of FOIA for much of the withheld information. There is some information to which only section 40 has been applied.*

So the ICO did not examine the full case file of 479 pages but a 87 page extract and a confidential index. I believe this goes against my original request to the CPS made on the 13th May 2021 where I wrote:

"I am looking for the prosecution case file of deceased Sun journalist John Kay who murdered his wife, Harue Kay (maiden name, Nonaka), in 1977. Given Kay's activities during this time was a reporter for the Sun, I believe the facts of this investigation are in the public interest."

And when the CPS asked for further clarification, on the 18th May 2021 I sent the following:

"I am looking for all documentation that was gathered that was deemed relevant for the potential prosecution and sentencing of John Kay for the murder of his wife Harue Kay. This can include witness statements, his own statement if any was given, character references, psychiatric reports, coroners report, press reports and the police investigation files. Essentially, the full case files

I believe that the CPS has exercised its application of section 38 and 40 too harshly. I believe that the ICO should have had access to the entire case file of 479 pages, not an extract from which it appears the CPS released the 9 pages. I would argue to the panel that the full case file be reviewed and that I should have been given an opportunity to give information about other parties involved in the case who have also since passed away so as to have helped clarify a greater release of documents.

I believe there is a large public interest in the circumstances surrounding this case given John Kay's employment by the Sun newspaper and his employers support of his case despite having murdered his wife. It is notable that when John Kay passed away, several domestic violence charities requested that the laudible [sic] obituaries written about him should mention the killing of Harue Kay."

The Parties' cases

49. Since the Appeal was commenced:-

- (a) the IC provided its response on 7 September 2022 (A25-A36)
- (b) the Appellant replied to the IC on the 12 September 2022 (A37-A41)
- (c) the CPS provided its response on 13 September 2022 (A42-A51).
- (d) the Appellant responded on 13 February 2023 (A52-A57)
- (e) the Appellant provided submissions on 27 April 2023 (A58- A72)
- (f) the IC provided submissions dated 20 July 2023 (A73-A88)
- (g) the CPS provided submissions dated 17 August 2023 (A89- A91)
- (h) the CPS provided open and closed "final written submissions" (not in the bundle) on 28 September 2023.

Evidence and matters considered

50. In addition to the statements of the parties' positions and the submissions referred to above we also had:-
- (a) the Bundle of 330 pages
 - (b) the open witness statement of Kelly Byott (with redactions) of the CPS of 15 December 2022 (E210-E231) with exhibits KB1-KB4.
 - (c) closed submissions from the CPS dated 28 September 2023.
 - (d) a closed bundle held pursuant to rule 14(6) 2009 Rules including the unredacted version of the witness statement.
 - (e) the submissions put forward at the Appeal itself.
51. As regards the closed material this was reviewed by the Tribunal with those representing the CPS (and MPS) only. In accordance with the decision in *Barrett v The Information Commissioner & Financial Ombudsman Service* [2024] UKUT 107 (AAC) (20 April 2024) a gist of the submissions made and the content of the closed material was prepared by Counsel for the CPS (and MPS) and provided to the Appellant.

Witness evidence

52. Kelly Byott gave evidence at the Appeal in the open and closed parts of the hearing. She confirmed the truth of her statement of 15 December 2022 (E210-E210) making one correction namely that she had worked for the CPS as the Deputy Head of the Information Access Team since 2018 and not 2016 as stated.
53. In response to questions from the Appellant she explained in more detail about her role dealing with FOIA requests and that she does not deal with live prosecutions (although she had many years ago done so).
54. She was asked number of questions by the Appellant. In relation to the issues in this Appeal her evidence at the Appeal added little to the content of her statement.
55. We did note that she said that she did not know how many FOIA requests had been made in relation to Mr Kay's file and agreed that the Appellant might be the only one. She also said that she did not believe there were any newspaper clippings in the CPS file but could not say why (if that was right) that there had been limited press coverage of the case at the time.

Section 38(1) (PIBT)

56. The Appellant agreed that the exemption at section 38 was engaged. We agree and therefore this Decision relates only to the application of the PIBT. In their written submissions and at the Appeal the parties put forward a number of arguments for

the public interest balance to favour disclosure and the maintenance of the exemption.

57. Arguments in favour of disclosure from the Appellant, IC and CPS included:-

(a) that disclosure would increase accountability and transparency of CPS decision making (C127)

(b) the public interest in the investigation and prosecution (A49)

(c) *"...disclosure of the parts of the file withheld under section 38 would inform the public and add to a public record of significant interest."* (A14)

(d) to expose any wrong doing in the way the case was dealt with (see the Appellants response to the CPS) such as the Appellant's submission on whether (Mr Kay may have been supported improperly by his employer (C129):-

(e) to find out more about Mrs Kay not least as a balance to the things said about Mr Kay at the time of his death. The Appellant said for example:-

"The little facts that we know about this case doesn't justify withholding these documents. All it does is deny finding out about Harue Kay. It makes her safely anonymous whilst her dead husband is lauded. John Kay never showed any public regret for his actions after being released."

(f) because the Appellant has not been able to locate descendants of Mr or Mrs Kay. (C130)

(g) *"to learn how we as a society have moved on. How domestic violence should not be a footnote or a punchline as Harue Kay's death currently is"*

(h) because *"Harue Kay's life was so anonymous that John Kay got away with murdering her"* and *"Releasing the file will rectify this historical injustice"* (C130)

58. Arguments in favour of maintaining the exemption included:-

(a) the safety of all individuals in question (C127)

(b) maintaining the integrity of and effectiveness of the criminal justice system (C127)

(c) *Maintaining the exemption would also maintain the integrity and effectiveness of the criminal justice system, insofar as there is an expectation that case files with private and confidential information are treated appropriately.* (A49)

(d) (C127) *"The level of detail within the material within scope of FoI request ref 9829, pertaining to the case referenced, is not available in the public domain and release of this material would be likely to endanger the mental health of relatives of both the defendant and victim, who are presumed to be living".*

(e) the public interest in the protection of those who have a relationship to Mr and or Mrs Kay for example *"there is a very strong public interest in not endangering the mental health and safety of even one member of the victim's family or connected third persons "* (A49)

(f) section 38 should also apply, says the CPS (A12), to the third parties such as witnesses and experts that assisted in the investigation of the case who should also be allowed to freely assist in the case without fear of their involvement being widely known to the public domain, disclosure of their involvement would be likely to endanger their well-being.

(g) *"Release of this material after such a prolonged period of time would be likely to have the same endangering effect on the mental health of those individuals as releasing it for the first time"* (C128)

(h) the existence in the information requested of *"both graphic and distressing material which for the people involved in the case would cause significant distress including to the surviving family members of the victim and the defendant and/or others involved in the case."* (E220 para 64).

59. As appears in its response the request (C128) the CPS concluded that on balance:-

"..the public interest is best served by the maintaining of the exemption and the subsequent withholding of the information.

The relatives of both victim and defendant would not have knowledge that these details would be put in the public domain after such a significant amount of time. The CPS is satisfied that section 38 is engaged and that the public interest in not endangering the mental health of those individuals substantially outweighs the public interest in the disclosure of this information."

60. In the DN the IC said (A14)

"87. However, the Commissioner notes the difference between what the public may be interested in and what is in the best interests or greater good of the public.

88. In reaching a decision in this case the Commissioner must take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the world at large, without conditions. The wider public interest issues and the fairness to those parties involved must therefore be considered when deciding whether or not the information requested is suitable for disclosure.

90 The Commissioner accepts that the balance must (and always will) lie with protecting an individual's mental well-being. Any surviving relative of the victim or defendant will already have suffered as a result of their involvement or affiliation with such events and, for this reason, the passage of time since the event itself is not a significant factor in this instance.

91. *The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision. With this in mind, the Commissioner has determined that the public interest lies in maintaining the exemption."*

Tribunal's review of section 38(1)

61. We agree with many of the arguments put for and against the application of the PIBT. Having heard from the parties and the witness and considered the submissions and seen the open and closed material in our view in all the circumstances of the case the public interest (tested at the date of the response) in maintaining the exemption outweighs the public interest in disclosing the information. This is because on balance:-

(a) we accept that protection of the people close to and also involved in the tragic events of 1977 carries more weight than the additional general transparency of the CPS or the specific understanding about Mr Kay's case that would arise from the disclosure.

(b) we accept the witness evidence for example that (E215)

"34. The release of the Case File would be likely to endanger the mental health of the deceased's surviving family e.g., their siblings, or others involved in the case. Further, the release of the Case File after such a prolonged period of time would be likely to have the same endangering effect on the mental health of the surviving relatives as releasing it for the first time would"

36. In this case, having reviewed the Case File, the CPS believes it to be evident that the consequences of the disclosure of this information into the public domain, especially the likelihood of it being reported in the media, is such that it would cause significant distress to surviving family members of the victim and the defendant."

(c) we saw no evidence in the closed (or open) material that either Mr Kay's employer or anyone else had sought to be involved in, let alone improperly sought to influence the course of justice

(d) we saw no newspaper clipping on the file from the time of the criminal proceedings

(e) while the events are from over 40 years ago they are not "historic" in the sense that they are not so old to have become of only academic rather than, for some, of a direct personal interest

(f) we accept that the passage of time might have diminished the impact such a disclosure could have but on the other hand we also accept as said by the CPS' witness (E217 para 37)/38) that disclosure could "bring it all back" for those involved and impacted by it which is against the public interest. We gave more weight to the latter argument.

(g) we accept the evidence of the CPS' witness (E216 para 40 and 41) that:-

"40. It is obvious that when a person dies the family will be distressed for a considerable period of time. When that death is the result of a crime, the distress can be even more severe, and in some cases family members may never be able to come to terms with it.

41. Disclosing information now, which may not have been known by or shared with living relatives and/or others involved in the case, many years after the event, may be highly distressing to the living relatives and/or others involved in the case."

(h) at times the content (even with the photographs removed) is graphic in its written descriptions and potentially distressing and that risked "opening old wounds."

(i) while we accept that the Appellant believes that *"the circumstances surrounding the death of Harue Kay need to be re-examined."*(A57) we did not see in the disclosed or disputed material that would support that view.

62. As regards the argument by the CPS about the integrity of the criminal justice system we gave that very little weight on the basis that disclosure of a CPS file from the late 1970s was unlikely to provide much if any assistance to any person seeking to carry out criminal activity and escape detection or successful prosecution. This element did not alter our view on the balance being in favour of maintenance of the exemption.

Section 40(2) FOIA

63. The CPS accepts that in seeking the information the Appellant was pursuing a legitimate interest. The issues are therefore (1) if disclosure was necessary for the pursuit of that interest and if so (2) is disclosure overridden by the *"interests or fundamental rights and freedoms of the data subject which require protection of personal data."*

64. The Appellant at the Appeal said that he sought the same outcome as that set out by the IC in the MPS Appeal. This was (see page 3 of the MPS Appeal Bundle)

"Disclose the withheld information with the exception of the following: statements of members of the public (this does not include the two statements where the parties have exceeded the age of 100); the names of all parties; private addresses; a Vehicle Registration Mark and some content in the letter at pages 38-39 of the file (this will be provided to the MPS in a confidential annex, for reference)."

65. In the DN (page A8-9) the IC says:-

52. In this case, the offence took place in 1977 and Mr Kay, the defendant, was investigated, tried and convicted of his wife's manslaughter on the grounds of diminished responsibility, all of which is in the public domain. Although the defendant passed away in 2021 which may have brought details of his 1977 conviction back into the public conscience once again, the Commissioner's view is that the matter has been properly considered and has gone through the proper court and judicial channels, resulting in a sentence for the now deceased defendant.

53. The Commissioner notes that the complainant supplied a copy of the obituary for the defendant which appeared in The Times on 13 May 2021 which he said showed that there are no living relatives. The article stated that his second wife died in 2017 and that he had no children. The Commissioner appreciates that disclosure where there are no living relatives is less likely to cause harm and distress.

54. However, it is not known whether there are other living relatives, such as siblings, cousins etcetera, and certainly many of those involved in the investigation and named in the file, such as witnesses and police officers, are likely to still be living.

55. Whilst acknowledging the complainant's stated view of this case, the Commissioner does not deem it necessary for the content of the file caught by section 40 to be disclosed in order to meet his identified legitimate interest. The offence, which happened in 1977, has been investigated and considered in court. Further, both parties are deceased and release of the file would not serve to alter that fact or potentially remedy any outcome. In terms of the wider legitimate interest, the Commissioner considers that the matter was fully dealt with in 1977 and can find no requirement to disclose the file now, particularly bearing in mind that there will be living individuals who were both directly involved in, or closely connected to, this case.

66. The CPS (see A50) accepted that:-

"...there is a legitimate interest in understanding the circumstances of the death of Mrs Kay, and the legal proceedings which followed. The Appellant seeks to "rectify this historical injustice", and it is accepted that that goal is legitimate. The CPS also acknowledge that disclosure would provide more information around the handling of this particular case, and that that is a legitimate interest. "

67. However when making its submission on "necessity" the CPS indicated its agreement with the DN and said for example:- (A50)

"32.1 The offence took place in 1977 and Mr Kay was investigated, tried and convicted of his wife's manslaughter on the grounds of diminished responsibility. All of this information is in the public domain."

"32.3 Disclosure of the CPS File would not meet the Appellant's stated legitimate interest, to remedy a historic injustice. Here, the case has proceeded through the justice system. Mr Kay was convicted of his wife's manslaughter. Ultimately, as the Commissioner acknowledged the "matter was fully dealt with in 1977". [Decision Notice §55]"

68. The Appellant did not directly address this question in isolation but he was clear in our view that necessity was tied to his view on the public interest needs for disclosure. The CPS and Appellant in effect broadly adopted the same argument as presented for the PIBT and section 38 FOIA.

Tribunal's review on section 40(2) FOIA

69. In our view the data subjects in the disputed material (apart from Mr Kay and Mrs Kay and two others) are likely to be under 100 years old and therefore presumed to

be alive in the absence of positive evidence to the contrary. We also agree that the Appellant was pursuing a legitimate interest when making the request.

70. As regards necessity our view (having seen the closed material) is that disclosure of it to the world is not necessary because for example:-

(a) it does not provide any indication that Mr Kay was assisted inappropriately by the Sun or anyone else

(b) there is no letter from Mr Lamb as stated by the CPS witness at para 58 (E219)

(c) while the Appellant may or may not be right the file provides no evidence of there having been a newspaper establishment cover up to protect Mr Kay

(d) it would not in our view assist more than marginally with a better understanding of how domestic violence was dealt with then as opposed to now

(e) even without photos it reveals a tragic event in (at times) graphic intrusive and potentially upsetting detail

(f) it does not support the Appellant's concern about whether justice was done when Mr Kay was convicted of manslaughter not murder. In this regard we agree with the CPS witnesses' conclusion (E217 para 50) where she says:-

"48. The Appellant argues that there appears to have been an abuse in the process of how Harue Kay's death was dealt with by the legal system and the press [See e.g. Appellant's Response to CPS §27].

49. The case was proceeded through the then justice system in 1977. Mr Kay maintained his guilt throughout the investigation and criminal proceedings. Medical reports outline the mental status of Mr Kay during the offence.

50. Disclosure of the Case File would not meet the Appellant's stated legitimate interest, which is to remedy a historic injustice. I have reviewed the Case file and, I believe I can say in OPEN, consistent with the exemptions on which we rely, that there is no indication in the Case File that there was an injustice in the handling of the case. Of course, the Tribunal will be able to view the file at the time"

(g) we do not believe its disclosure would provide Mrs Kay with a more meaningful legacy in the manner suggested by the Appellant.

71. As regards the balance between disclosure and the rights of the data subject our analysis and conclusions was broadly the same as for the PIBT and section 38 FOIA.

72. Accordingly in our view disclosure of the disputed material is not necessary for the pursuit of the Appellant's legitimate interest and in any event even if necessary we would have concluded that disclosure was overridden by the data rights of the data subjects in the CPS file.

Further Redactions

73. Some material had been provided by the CPS to the Appellant both after the DN and after the commencement of the Appeal. Some had redactions. In the closed part of the Appeal we considered with counsel for the CPS whether further precise redactions could be made to ensure that section 38 FOIA material was removed. We also considered whether further redactions could be made to remove all personal data and the means for it to be identified by a "motivated intruder ". We concluded that to achieve this risked rendering what remained as mostly unintelligible and without value.

Medical report

74. At the end of the Appeal itself the Appellant indicated that he had already obtained a certain medical report having made a successful request to the Coroner's Court for that information. It is understood that this might be the same as a document held by the CPS and part of the disputed material in this Appeal. However we were not certain what this was, how it had been obtained and whether it may have been provided on an express or implied basis as to its use unlike a disclosure under FOIA which is "to the world".
75. In our view even if it is the identical document to one which forms part of the disputed material that did not mean that our conclusions on it needed to be reconsidered.

Decision

76. Accordingly it is therefore our decision as regards both the section 38(1) and 40(2) FOIA exemptions that the DN was in accordance with the law and the IC exercised its discretion properly.
77. The Appeal is dismissed.

Signed: Tribunal Judge Heald

Date: 2 December 2024.