First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0118

Heard on 30 January 2017
At Canterbury Magistrates Court
Promulgation Date 10th April 2017

ANTHONY ELSON

Appellant

And

THE INFORMATION COMMISSIONER

First Respondent

And

THE CHIEF CONSTABLE OF KENT POLICE

Second Respondent

Heard before
Michael Jones, Narendra Makanji and Judge Claire Taylor.

Decision
The appeal is upheld in part for the reasons set out below. We find that section 14 FOIA was not correctly relied upon. However, as regards Request 1, the information is not held for the purposes of FOIA and as regards Request 2, the information may not be disclosed on the basis of section 40(2). There are no steps to be taken by the Chief Constable of Kent Police ('Kent Police').

For the Appellant:	Mr Elson and Sir Roger Gale MP
For the Respondent:	Mr Talalay as Counsel and Mr Cacciacarro for Kent Police.

REASONS

Background

1. The Appellant is the stepfather of Marc Dunk. On 22 February 2010, Marc Dunk, a cyclist, died after a road collision with a lorry. This appeal concerns a toxicologist report of 10 March 2010 relating to the lorry driver's blood sample received on 23 February 2010.

The Request

2. On 22 April 2015, the Appellant requested from Kent Police as a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA' or 'the Act'):

> "Due to recent revelations. I would like to know why the above driver's blood test results were not submitted by Kent Police to the Coroner, [name redacted] for evidence in regard to [name redacted] Inquest held on 19/10/2010? Also:
>
> Over the past 5 years I have made numerous requests to Kent Police to know if any substances were found to be in the driver's system, on the day of the fatal accident. The responses varied from "no alcohol" – "no alcohol, or substances" – "no substances". I have these email responses from various Kent Police Employees to substantiate this. I know that the driver had codeine in his system, which is classified as a controlled substance for all LGV drivers. Why was this fact kept from the Coroner and myself?[1]
>
> I once again have asked for a copy of these blood test results[2], if this is still made unavailable to me, I will have no alternative but to seek a court order to obtain this."
>
> *(Emphasis added – see page 61 of the Bundle).*

3. On the 21 May 2015, Kent Police replied that the questions asked did not relate to recorded information such that Kent Police was not under a duty to respond. It stated that previous requests attracted reliance on section 14 and against that background future requests would not receive a response because of reliance on section 14.

4. The Appellant progressed the matter with a complaint to the Information Commissioner's ('Commissioner'), without Kent Police having held an internal review. At this point, Kent Police apparently indicated that its position was that if the Appellant's questions were regarded as a request for recorded information, it would refuse to comply with it under section 14(1).

5. The Commissioner's Decision Notice *(Ref. FS50587467)* of 19 April 2016, found in favour of Kent Police. Reasons included the following:

[1] This is referred to below as Request 1.
[2] This is referred to below as Request 2.

a. Whilst sympathetic and "*having no difficulty in understanding their persistence in pursuing their issue with Kent Police*", it nonetheless considered the request vexatious.

b. All appropriate processes had been exhausted and the [Appellant] would continue to make complaints in the unrealistic belief that they will reach the outcome they sought:

   i. The Coroner's verdict was of accidental death.

   ii. Kent Police and the CPS had reviewed the matter and decided not to bring any charges.

   iii. The Traffic Commissioner's public hearing had confirmed that no action should be taken against either the driver or their employer.

   iv. The SCR[3] indicated certain shortcomings in the investigation which were insufficient to alter the investigation and the conclusions had been shared with the family. They subsequently said that they were considering taking civil action against the Kent Police.

   v. Numerous complaints had been made to Kent Police's Professional Standards Department, the IPCC and the Police and Crime Commissioner. None had been upheld and the opportunities to raise complaints had been exhausted.

   vi. Eight information requests had been made in two years, all related to the police investigation.

c. Kent Police considered that the Appellant was seeking to reopen matters that have already been addressed and resolved. The Commissioner reasoned that if a public authority's experience of dealing with previous requests indicated that a complainant will not be satisfied with any response provided and will tend to continue to submit further correspondence and further information requests, this could strengthen any argument that responding to the current request will impose a disproportionate burden on the authority. This was a case where the public authority was entitled to say "enough is enough".

d. The FOIA was not the appropriate route for the Appellant to pursue his concerns, particularly where seeking access to third party sensitive personal data as disclosing this information under the FOIA would put it into the public domain. It had disclosed information to the Appellant outside the scope of the FOIA and stated that such disclosure has tended to generate further FOIA requests. The complaints demonstrated 'unreasonable persistence'. The Appellant would be unlikely to be satisfied short of a reinvestigation of an incident that appeared to have been thoroughly considered. Instead of the disclosure resolving concerns, it was reasonable to suspect that it would be more likely to perpetuate them.

The Task of the Tribunal

[3] The Appellant had previously alleged that the police investigation failed to adhere to the Association of Chief Police Officers' Road Death Investigation Manual (since superseded by 'Authorised Professional Practice on Investigating Road Deaths' published by the College of Policing). This had resulted in an SCR.

6. The Appellant now appeals the Commissioner's decision. The task of this Tribunal is to consider whether the decision made by the Commissioner is in accordance with the law, or, where the decision involved exercising discretion, whether it should have been exercised differently. This is the extent of the Tribunal's remit as set out in s.58 FOIA. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact.

7. We have received substantial submissions and documents. We have also benefited from hearing from the Appellant and his representative and Kent Police in person. We have considered all papers before us, even where not specifically referred to below.

Preliminary matters addressed at the hearing and further directions

8. A summary of matters dealt with at the beginning of the hearing are set out at the end of this Decision, under 'Other'. The panel held a closed session with Kent Police to enable a thorough testing of the veracity of Kent Police's arguments with specific reference to the disputed information.

9. A gist of what was stated in the closed part of the hearing was explained in the open session. This included:

    a. That the Appellant had been misinformed that the legal limit for drugs in the system whilst driving was 80 milligrams per 100 mili-litres of blood. That limit instead applied to alcohol.

    b. Kent Police was directed to explain the legal limit for drugs. Submissions made after the hearing clarified that at the relevant time in February 2010, the legal limit was not specified in regulations. Under *The Drug Driving (Specified Limits) (England and Wales) Regulations 2014* (SI/2014/2868), the specified limits for morphine were 80 micrograms per litre of blood.

    c. Kent Police opted to confirm to the Appellant the amount of codeine in the driver's system shown in the toxicology report and that this was considered within the 'therapeutic range' and well below the limit set out in SI/2014/2868.

The Issues

10. Kent Police now relies on information on section 14 to claim that both Requests 1 and 2 are vexatious. In relation to Request 1, it also relies on the information not being 'held' for the purpose of section 1 FOIA, and information within Request 2 being sensitive personal data for the purposes of section 40 FOIA.

11. Accordingly, the Issues for the Tribunal are:

    a. **Issue 1: Vexatious Requests (s.14 FOIA**) - Was section 14 properly relied on for Requests 1 and 2? If not, it is necessary to consider Issues 2 and 3.

b. **Issue 2: Held (s.1 FOIA)** - If not, is the information in relation to Request 1 'held'?

c. **Issue 3: Sensitive Personal Data (s.40 FOIA)** - Is section 40(2) properly relied on in relation to Requests 2?

The Law

12. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless the Act provides otherwise.

Section 14: Vexatious request

13. Section 14 FOIA provides that a public authority is not obliged to comply with a request that is vexatious. It provides: *"(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."*

14. We have the benefit of higher court decisions to instruct us in how to apply this section.[4] These inform us that a request is vexatious if, having taken into account all the material circumstances of the case, it demonstrates a '*manifestly unjustified, inappropriate or improper use'* of the FOIA procedure.[5] An important aspect of the balancing exercise may involve whether or not there is an adequate or proper justification for the request, and whether or not it lacks proportionality, having borne in mind the context of a statute designed to ensure greater public access to official information and to increase accountability and transparency.

15. L.J. Arden stated in the Dransfield CA case:

> "I consider … that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word, which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred..." (Dransfield CA, para. 68.)
>
> "I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights

[4] This is known as case law.

[5] See the Upper Tribunal decision in *Information Commissioner v Devon County Council and Dransfield [2012] UKUT 440 (AAC) ('Dransfield'), para.43.* This approach was upheld by the Court of Appeal in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 545 ('Dransfield CA').

> conferred by FOIA have, as Lord Sumption indicated in Kennedy (para. 2 above), been carefully calibrated." (Dransfield CA, para. 72.)

16. In the Upper Tribunal consideration of Dransfield, Judge Wikeley stated*:*

> "… It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list..." [6]

17. As regards the burden on the public authority and its staff, Judge Wikeley explained in the Craven case: [7]

> "… if the public authority's principal reason (and especially where it is the sole reason) for wishing to reject the request concerns the projected costs of compliance, then as a matter of good practice, serious consideration should be given to applying section 12 rather than section 14 in the FOIA context. Unnecessary resort to section 14 can be guaranteed to raise the temperature in FOIA disputes. In principle, however, there is no reason why excessive compliance costs alone should not be a reason for invoking section 14, just as may be done under regulation 12(4)(b), and in either case whether it is a "one-off" request or one made as part of a course of dealings." *(See Craven, para. 31. – Emphasis Added.)*

Section 40: Sensitive Personal Data

18. Section 40(2) provides an exemption from disclosure for information that is the personal data of an individual under certain circumstances. So far as is relevant here, it states:

> "40(2) Any information to which a request for information relates is also exempt information if-
> (a) it constitutes personal data which do not fall within subsection (1), and
> (b) ..the first .. condition below is satisfied"
>
> *(Emphasis added.)*

19. The first condition is:

> '(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene -
> (i) any of the data protection principles…'
>
> *(See s.40(2) and (3) - Emphasis added.)*

20. Personal data is defined in section 1(1) as meaning

> "data which relate to a living individual who can be identified -
> (a) from those data, or

[6] Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC), at para. 28.
[7] Craven v Information Commissioner and Department for Energy and Climate Change [2012] UKUT 442 (AAC) ('Craven').

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".

21. Sensitive personal data is defined in section 2 of the Data Protection Act 1998 ('DPA') as meaning, insofar as is relevant, personal data consisting of information as to:

"(e) his physical or mental health or condition." □

22. So far as relevant here for sensitive personal data, the first 'data protection principle' set out in the DPA states that personal data shall be disclosed 'fairly and lawfully' and shall not be disclosed unless, at least one of the conditions of Schedule 2 DPA is met, and, in addition, at least one of the conditions of Schedule 3 DPA is also met.[8] In Schedule 3, only conditions 6 and 7 have been cited as potentially relevant in this case:

"6. The processing - □
(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), □
(b) is necessary for the purpose of obtaining legal advice, … □

7. (1) The processing is necessary -□
(a) for the administration of justice,
(aa)□(for the exercise of any functions of either House of Parliament,
b) for the exercise of any functions conferred on any person by or under an enactment, or□
(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department." (Emphasis added.)

Issue 1: Was section 14 properly relied on for Requests 1 and 2?

Chronology of Events[9]

23. We consider the somewhat lengthy chronology of events to be relevant context to consider this issue. It is as follows:

a. 18 June 2010, the CPS told Mrs Elson that there was insufficient evidence to prosecute the lorry driver.

b. On 19 October 2010, an inquest was held. It concluded a verdict of accidental death. It relayed Mr Dunk's toxicology test results, but not the driver's. A post mortem was never ordered.

c. Mr Dunk's family subsequently made a number of complaints.

d. On 2 September 2011, the Traffic Commissioner investigated concerns raised as regards the owner and operator of the lorry. It decided not to take action. (The CPS had by then informed the

[8] See Part 1 of Schedule 1 of DPA. The DPA uses the word 'processed', which for our purposes means 'disclosed'. The list of conditions in Schedule 3 includes those set out in the Data Protection (Processing of Sensitive Personal Data) Order 2000. (*See condition 10 of Schedule 3.)* None of these supplementary conditions have been identified as of relevance here either by the parties or the Tribunal.
[9] Insufficient information was provided in the Bundle provided to the Court for the hearing. A more complete chronology of events was provided by Kent Police after the hearing, following directions made by the Tribunal at the hearing. However, most of the documents connected to events within the chronology were not provided including copies of the previous FOI requests.

police that a prosecution relating to the operator's licence would be out of time.)

e. In November 2011, the Appellant was allowed to view the CCTV footage. On 27 January 2012, Kent Police provided the Appellant with a copy of the police report to the Traffic Commissioner's public inquiry.

f. On 3 February 2012, the family complained about the senior investigating officer ('SIO'), (PC Miller), and that the investigation had not adhered to protocol. Inspector Stevens did not uphold the complaint.

g. On 11 June 2012, the family complained to the Independent Police Complaints Commission ('IPCC'). On 17 January 2013, this concluded that the complaint was not proven, save for that incorrect information had been provided to the family. Kent Police stated:

    i. Regarding the driver's toxicology test results not being read out at the inquest:

        "There was no evidence of alcohol or drugs in [the lorry driver's] blood and therefore his blood results were not subject to evidence… This will always be a matter for HM Coroner to decide what she wanted to hear ..."

    ii. It was always for the coroner to decide whether to have a post mortem. Given the severity of injuries, it was highly likely that she had taken the view that the cause of death was beyond doubt.

    iii. The Traffic Commissioner had determined that no offences had been committed by the driver or owner of the truck. (This Tribunal was not provided with the relevant determination in the bundle. However, we note that the Appellant stated that the Traffic Commissioner had instead found that the vehicle had been legally sub-contracted to the driver; but that the driver was in breach of the operating licence because the lorry had been driven from home and the Freight Transport Association log had not been correctly updated.)

h. On 14 July 2012, the Appellant made the first FOI request. He stated that he was making an FOI request where he had been trying to obtain the SIO Policy File and Action Log for the previous 7 months. He explained that he had found it difficult to accept the police's version of events of what took place when his stepson had been killed, and was concerned by what had been experienced at the inquest. He stated that he had not received satisfactory responses to his complaints and had involved a solicitor and his MP who had advised he contact the Chief Constable.

i. In November 2012, the family were provided with certain witness statements subsequent to consent having been given by the

witnesses. On 24 January 2013, Kent Police made a response to the first FOI request.

j. On 25 January and 7 July 2013 the Appellant made further complaints related to the investigating officer and forensic collision investigator. A complaint was upheld ordering PSE Giles to receive "management action regarding timeliness of vehicle examinations".

k. In May 2013, a second FOI request was made, requesting the SIO Collision Investigation Report by PC Miller to the CPS. By letter of 5 June 2013, the request was refused, stating that there were two reports which had been sent to the coroner such that they would be reasonably accessible to the Appellant by other means.

l. On 9 December 2013, the Appellant made an FOI request asking how many fatal RTAs had been conducted by Kent Police without a post mortem in the previous 5 years and for the timescale within the protocol for the seizure and inspection of the LGV. Kent Police did not seem to fully respond to this. On 11 January 2014, the Appellant seems to have asked for a more specific response to his request.

m. On 10 April 2014, the Appellant asked for the reason given by the coroner for not ordering a post mortem. Kent Police replied that it did not hold this information.

n. Between 22 May and 4 June 2014, three further requests were made (again not included in the bundle) which illustrated the Appellant's dissatisfaction with the investigation. For instance, he asserted contradictions in witness statements and that the coroner had stated that no police officer had discussed or requested a post mortem. Kent Police relied on section 14 ('vexatious request') FOIA so as to refuse to respond to the requests claiming that this was not the appropriate forum. It stated that the chief inspector in charge of the road-policing unit would visit the family to try to answer some of the concerns.

o. In September 2014, a Serious Case Review ('SCR') was commissioned. On 7 April 2015, the outcome of this was discussed with the family. The undated SCR stated:

    i. "The investigation appears to have been approached as the fairly straightforward fatal road crash. That may be the case, but until all the lines of enquiry have been followed such a conclusion should not have been reached…

    ii. It is not clear why by the 8th April only 2 of 4 statements from key witnesses had been taken. Good practice would be to get all these statements as soon as possible and certainly before a suspect's interview…

    iii. … the IO was new in post. He received little guidance from the SIO… there is no evidence in the paperwork of any supervision by an officer of sergeant or inspector rank… a Family Liaison Officer was appointed… his early exit from the investigation did

contribute to the breakdown of relationships between the family and the investigation team…

iv. The investigation has been conducted with integrity and degree of objectivity. It does seem that an early hypothesis has been considered in enquiries have been focused on proving that hypothesis… the hypothesis is the most likely and was correct… there were additional actions that could have been completed and there should have been a post-mortem examination but any additional actions were unlikely to have changed conclusions or cause any inquest verdict to be varied….

v. *[As regards the family liaison support]* This was lacking... The SIO was aware of this but did not increase his contact to compensate for it…

vi. *[As regards the lack of post mortem]* this was a one-off scenario never heard of before following a road death. It appears the coroner did consult the police investigation team before reaching a decision. It is unclear what the response from the police was however there appears to be a lack of knowledge of what a post-mortem examination could have added to the investigation. This has now been addressed and the situation would not happen again.

vii. *[As regards the examination of the lorry being delayed over 7weeks]* this cannot be explained. It is standard practice to request a medical examination… In a crash of this type before the end of the day's duty... Nothing appears to have been lost in the delay as the vehicle had not been used on a road…

viii. Every fatal road crash victim should be subject to a post-mortem examination which can give more than just the cause of death. It is possible in some cases to establish the order in which the injuries are caused and the point of first impact. Post-mortem examinations are crucial and identifying cause of death and can give other forensic evidence surrounding the sequence of events in road deaths…

ix. It is my view, as Reviewing Officer, and that although there were some opportunities missed, … with regards to lines of enquiry it is unlikely that they would have yielded any further evidence that would or could result in action being taken against any person involved in this tragic case.

x. DC Robinson reviewed the interview and all there in parts they could have been more thorough and robust in general terms it was sufficient and of an acceptable standard. There is now no realistic opportunity to continue any further enquiries that are likely to yield any additional useful evidence…"

xi. "[The lorry driver's] consumption of codeine and its effects on him were also not examined during his interview. However as [the lorry driver] has stated that he saw Mr Dunk ahead of him it is unlikely that the levels of codeine that were within the therapeutic range would have had any effect."

p. Kent Police then met with the family to discuss the SCR.

q. On 22 January 2016 a complaint was not upheld against two officers, but upheld against PSE Giles where he was "*to receive management action"* to ensure he avoided the perception of impartiality in future. It was explained that PSE Giles had sat and conversed with the driver and his legal representative throughout the coronial proceedings.

r. On 17 March 2016, the Appellant received an email from the Coroner's Office stating:

"… Post mortem…

i. The decision as to whether a post mortem is held is ultimately a matter for the Coroner and no other person or agency although the Coroner may take into account the views of other interested persons. There is a handwritten notation from the Coroner... that in light of there being a statement from an attending doctor as to the cause of the death, the Coroner was considering not holding a post mortem but the Coroner's officer should ask the police whether they would seek a Home Office post mortem. An email was sent to the police, but there is no evidence of a reply having been received.

ii. I am unable to determine why Miss Cobb, the Coroner who conducted your son's inquest did not order a post mortem as the reasons for these decisions are not usually recorded and were not recorded at the time in this case. There is however an explanation contained within a letter from the Coroner's clerk to yourselves dated 15th April 2014 some considerable time after the inquest was held. It would not be appropriate for me to comment on whether not holding a post mortem was the right or wrong course or if I would have made the same decision, but I am able to state as a general principle that many coroners would not hold an invasive post mortem if the cause of death could be stated by other means, such as a statement from a doctor, or if a post mortem was unlikely to provide further information as to how the death occurred. In 2012 for example 13% of inquests in the United Kingdom took place without a post mortem.

Toxicology from the driver involved in the collision:

iii. A blood sample was taken from the driver involved in the collision with your son. It is evident from the documentation that Miss Cobb was aware in advance of the inquest being heard that there had been toxicology undertaken and that a blood test was negative for alcohol. This information was contained within the report from the police. I can however find no evidence that she was in possession of a toxicology report at the time the inquest was held or was aware that the toxicology revealed that codeine had been found when the sample was analysed. I am not able to determine whether the police were in possession of the toxicologist's report at the time that the police report was sent to the Coroner as it is not annexed to the police report whereas all the other relevant statements appear to be annexed.

Disclosure of documents:

iv. The position in relation to disclosure of documents (and information) to next of kin at the time your son died was more restrictive than it is today. Under the new legislation the Coroner must normally disclose (or allow inspection of) copies of relevant documents that have been provided to

the Coroner for the purpose of the investigation/inquest where a request for disclosure has been made. A Coroner may refuse to disclose a document where there is a statutory or legal prohibition on disclosure, the consent of the copyright owner or author cannot reasonably be obtained, the document relates to contemplated or commenced criminal proceedings or the Coroner considers the document irrelevant to the investigation.

v. It is clear from the documentation that I have seen that there has been a great deal of correspondence between you and Miss Cobb and her officers and also between you and the police. In 2015 a toxicology report relating to the case came into the possession of the acting Senior Coroner in connection with such correspondence. I am unable to provide you with a copy of that report as it only came into the Coroner's possession after the inquest had concluded and therefore does not [fall] within the disclosure provisions that the legislation allowed at the time or under the current provisions. If you wish sight of this document then you will have to request it from the police who are likely to refer the matter back to me to request my consent. For the avoidance of doubt I have no objection to the disclosure of that document to you and if the matter should arise you may provide my details to the person dealing with the request and I will confirm my position to the police in writing, but I must stress it is a decision for the police and I cannot interfere with their decision.

vi. Although I am unable to provide you with the report I can see no legal prohibition from informing you of the nature of the document or its content and therefore it may assist you to know that the report is from a forensic toxicologist who analysed the sample of blood taken from the driver for the presence of drugs and alcohol. The sample was found to contain no alcohol. It was also found on a screen to be negative for amphetamines and methylamphetamines including ecstacy, cannabinoids, cocaine and its breakdown products and methadone. The initial screen indicated the possible presence of benzodiazepines and opiates and therefore the sample was further tested for those substances. Benzodiazepines were not present. The only substance that was found was codeine at a concentration of [X[10]] milligrams per litre within the therapeutic range.

i. Further Investigation:

vii. Where an inquest has been concluded, a Coroner is prevented in law from further investigating the matter as an inquest cannot be reopened...

viii. If new evidence comes to light after the inquest has concluded an application can be made to the High Court for the inquisition to be quashed and a new inquest held. Such an application can be made by next of kin or sometimes the Coroner if the Coroner was of the view that the new evidence was likely to change the findings and conclusion reached at the original inquest. I am not of the view that the evidence of presence of codeine would bring about a different result to that arrived at in the original inquest…" (Emphasis added).

ix. An Investigating Officer Report by DC Khattoare of Kent Police's Professional Standards Department 22 May 2016 states:

i. "The statement of Gavin Trotter provides evidence that there was no alcohol in [the driver's] blood. The blood was then checked for drugs and

[10] The precise number was provided but has been redacted for the purpose of this decision.

*opiates (codeine) [was] found in the blood at a concentration of [X*11*], the legal limit for driving is 80 milligrams per 100 mili-litres. The level of codeine is within the therapeutic range so no offences.*

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24. Further evidence and submissions from the Appellant included the following:

    a. An email of 4 July 2014 from Alan Clayton, an independent crash investigator stating:

        i. The evidence suggested that Mr Dunk may have been walking with his bike rather than riding it at the time of the collision.

        ii. He had never encountered '*such a short and un-searching*' interview of the driver.

        iii. The loss of the file which would have contained the SIO log (detailing decisions and actions and the progress of the enquiry) was astonishing.

    b. The police admitted many shortfalls regarding their investigation. The SCR revealed errors and negligence including that the lorry driver's blood test results were not made public knowledge at the inquest, or disclosed to the CPS and IPCC. It proved the driver was in fact 'drug driving'. By law, the toxicology results should have been revealed to the coroner at the inquest. These should have also been made available to the CPS, IPCC and Traffic Commissioner.

    c. In April 2015, it was revealed at a SCR that the driver had had codeine (of a therapeutic amount), in his blood/toxicology results. The Appellant questioned how much, but Kent police refused to disclose the amount. For the purposes of operating an LGV, codeine is a controlled substance. There is no therapeutic amount and nil tolerance of opiates. Driving on drugs is a serious case and even more so if it results in killing someone whilst under the influence.

    d. The toxicology results had been deliberately withheld and perverted the course of justice.

    e. It is Kent police who have been manifestly vexatious, inappropriate and improper in this case by cruelly denying Mr Dunk's family the full circumstances that resulted in the unlawful death, causing untold distress and continuing heartbreak. For 5 years they have covered up illegal substances would have shown up in his toxicology results.

25. In submissions made on 11 February 2017, the Appellant states his understanding, (having been 'involved in transport' in 2010), that the rules for driving an LGV differ from a motor vehicle. The opiate codeine is classed as a restricted controlled substance. If prescribed this drug, an LGV driver would need (a) a doctor's letter to establish capacity to drive, due to

[11] The precise figure was provided but has been redacted for the purpose of this decision.

the drowsiness that this drug can cause; and (b) to inform their employer, as it could invalidate the insurance.

26. He also asserts that there is contradictory evidence as to whether the driver was administered relevant medicine before the blood test was taken. (The relevant material the Appellant refers to was provided by Kent Police after the hearing, such that we were unable to ask questions about it. We do not consider we have sufficient information to make a finding on this, but importantly, we do not think we need to for the purposes of deciding this appeal.) Likewise, he asserts contradictions as to whether relevant people were provided with the driver's toxicology results including the coroner. He contends that it had been the SIO's role to request a post-mortem, and that Kent Police allegedly had replied to the Coroner's office regarding this.

27. At the hearing, we were told that the Appellant was keen to know how his stepson died, why and whether the driver had been responsible. His concern was that from the outset, an assumption had been made about how the accident occurred, and this had limited the scope of the investigation. For instance, the bicycle had not been examined and there should have been serious damage to it on the police's version of what had happened. The FOI requests illustrated the sense of frustration with the protracted process and the police having leaped to a conclusion and then withheld information unnecessarily. If the matters had been comprehensibly addressed and information provided in a timely matter, the matter would not have progressed to this appeal.

28. Kent Police's submissions include the following:

    a. **Sensitive:** A disclosure under the FOIA is one where information is deemed to enter the public domain.

    b. **Context:** Extensive efforts have been made to address the concerns raised by the Appellant in respect of the investigation into his stepson's death. Complaints have been made to various bodies and matters have been examined by the CPS, the Coroner and the Traffic Commissioner. An SCR was undertaken which revealed certain shortcomings in the original investigation insufficient to affect its outcome. The conclusions were shared in person by a senior officer of Kent Police but failed to satisfy the Appellant despite initial indications to the contrary.

    c. **Burden on Resources:**

        i. The extensive history of this matter is illustrated by the Appellant alluding to wrong doing of Kent Police for over five years.

        ii. Dealing with his complaints and numerous requests for information, whether under the FOIA or not, over a number of years has required a disproportionate use of Kent Police's resources.

        iii. The Appellant has made eight requests for information under the FOIA in two years and there is no indication that the disclosure of material sought by this latest request will stem the flow of further requests. The pattern of the Appellant's behaviour is to bombard Kent Police and other public bodies with requests in short succession.

iv. The Appellant has demonstrated a degree of persistence by means of complaint or making further information requests which may be understandable in the circumstances but which has imposed an unreasonable burden on Kent Police.

v. It is a feature of the Appellant's interactions with Kent Police that, notwithstanding information disclosures made outside the provisions of the FOIA, the Act is invoked in seeking further information, even in the case of sensitive personal data.

vi. While it is accepted that complying with the request in isolation would not cause a disproportionate or unjustified level of disruption, it is submitted that when the background and history of the request are taken into account together with all the four broad themes to be considered, the request was a manifestly unjustified and improper use of the FOIA such as to be vexatious for the purpose of section 14(1).

d. **Motive/Serious Purpose or Value:**

i. The Appellant's motive is a factor to consider in deciding whether a request is vexatious, but it is not determinative. It is reasonable to conclude that the Appellant refuses to accept the outcome of the police investigation and seeks to overcome the inquest verdict by finding fault with Kent Police.

ii. The Appellant's objective in challenging the investigation must be to have the matter re-investigated and the official outcome re-visited. To this end, he will regard the FOIA request as having a serious purpose and value.

iii. In the light of the findings by all of the bodies that examined this issue and of the SCR commissioned by Kent Police, there is no prospect of the Appellant achieving his objective. His use of the FOIA to do so is misconceived since, viewed objectively, his request lacks a serious purpose or value.

iv. The Appellant challenges to the integrity of Kent Police without evidence. He continues a course of conduct which can reasonably be described as obsessive and offensive in light of the Kent Police mission and values and seeks to reopen matters that have been determined by an independent and appropriate authority. The Coroner's office had explained their view that the evidence of the presence of codeine did not make any difference to the case.

29. The Commissioner's submissions included:

a. **Burden on Resources:**

i. There is a need not to overburden public authorities inappropriately. As stated in the First-tier Tribunal in *Havercroft v Information Commissioner* (EA/2012/0262) at para. 30:

> "*Public bodies are responsible for the delivery of vital services and the use of large sums of public money: they are under a duty to deliver those services effectively and use their resources economically and efficiently. In carrying out their roles they must be publicly accountable and the FOIA regime is intended to enhance*

that accountability. However there are many aspects to accountability, and FOIA is not the sole means, nor can it substitute for the others. The primary function of public bodies is the delivery of services and if management time and resources are disproportionately spent in dealing with FOIA requests then those services, and the decision-making around the delivery of services, may suffer to the detriment of the public."

ii. Whilst in isolation, responding to the request would not represent a significant burden to Kent Police, when considering the entirety of the background, a burden has been placed on Kent Police in dealing with the Appellant's FOIA requests. This is disproportionate given the other more appropriate means of redress available.

b. **Motive/Serious Purpose or Value:**

i. The purpose of the request is to obtain information that may prompt a review of the investigation and the rulings of the Coroner, CPS and Traffic Commissioner. However the SCR conducted by had already reviewed the investigation and confirmed that whilst there were failings during the investigation these were not sufficient to warrant a change in the outcome of the investigation.

ii. There are on-going complaints, which have been raised with the IPCC and Kent Police regarding the non-disclosure of the blood test results. The lack of disclosure of the blood test results to the world at large does not appear to have inhibited the progress of these complaints and these are the appropriate forums for dealing with this matter, together with any recourse to the CPS and Coroner on the basis of the findings of the SCR. This is particularly given that the blood test results are sensitive personal data relating to a third party.

iii. With regards to whether the blood test results should have been read out at the inquest this is a matter for the Coroner to address. The discussions and decisions which took place during the Coroner's inquest are not within the Commissioner's knowledge. The Appellant has not referred to any legislation or case law demonstrating that it would have been mandatory for the Coroner to have disclosed the blood test results to the public.

Our Finding

30. It is our view that on the facts of this case, the request for information is not vexatious. With reference to paragraphs 14 to 16 above, the request is not without reasonable foundation and is not manifestly unjustified, inappropriate or an improper use of public funds or the FOIA process. We do not consider the request would have placed an unreasonable burden on staff; the motive is proper and has a value or serious purpose both for the request and society; and there is no allegation of harassment or distress of or to staff.

Burden on Resources

31. It does not seem fitting to us to find that compliance with the request presents an unreasonable burden. (This takes into account the burden of the request within the context of the other requests made and resources previously incurred with dealing with the Appellant).

32. The Respondents have not provided a detailed account as to why complying with the request would present a burden on it that is disproportionate. However, it is clear that there is a need not to overburden public authorities inappropriately. Kent Police (and other authorities) have already reviewed their actions, investigated the family's complaints, visited the family, given access for viewing CCTV footage and responded to information requests. In particular, the SCR seems to have been thoroughly investigated, and its statement that '*There is now no realistic opportunity to continue any further enquiries that are likely to yield any additional useful evidence…*' seems to us highly plausible.

33. The Appellant has clearly gone to considerable efforts to ascertain the events surrounding his stepson's death, where he felt the authorities responsible for addressing the matter had not acted adequately. This will have presented a burden on resources where the matter has been particularly intricate and complex.

34. Notwithstanding paragraphs 32 and 33, given the chronology outlined above, it seems unreasonable to suggest to the Appellant that, because of the public nature of disclosures, the FOIA is not the appropriate route to pursue his concerns. This is because the Appellant seems to have appropriately tried other avenues first. Whilst the Appellant's complaints are likely to have caused a significant burden, more transparency and a better approach at an earlier stage may have reduced that burden. Of note in particular:

    a. The Appellant had shown how he had been sent in circles when trying to procure certain evidence, and many months later some of this key evidence was lost before it could be provided. It seems he had been asked to pay (albeit a nominal sum) for provisions of some statements.

    b. The Coroner's office has informed the Appellant that legislative changes now mean that it would be transparent in disclosing documents to the family than it was at the time.

    c. It was only after complaints and FOI requests that the SCR was performed, and it was only at that stage that their concerns seem to have been properly vindicated. However, even at that point, issues persisted to cause concern for the family such that the Appellant's request was understandable. First, he was not provided with the full SCR[12]. Second, whilst the SCR was clearly thorough, we can understand that certain conclusions without further reasoning would not feel satisfactory to the deceased's family. *(See for example, para. 23(o)(ix) above).* In hindsight, there will nearly always be things to find that could have been done better.

[12] (In our view, consequent to this hearing he has now been provided with all that might be properly provided.)

However, the SCR acknowledges a number of problems with the investigation that did not seem insignificant. For instance, the apparently late interviewing of witnesses; delays in examining the lorry; concerns as to liaisons with the family and supervision of the investigating officer; the lack of post mortem and failure to understand its potential; the narrow focus of the investigation; and that the interview with the driver could have been more thorough including as regards consumption of codeine.

d. Further, it seems to us that without the Appellant's persistence, the matters ascertained by the SCR and elsewhere would never have come to light. Whilst we can envisage that there will in every case be a point at which persistence and persistent requests can become vexatious, we do not think it has been reached here.

e. Whilst the Appellant has made previous requests, based on the limited material provided to us, they do not seem to have been unreasonable or disproportionate to the underlying devastating event.

f. We accept the detail explained by the Appellant at the hearing that showed that the family appears to have been given inaccurate or conflicting information regarding the test results. It is therefore understandable that they would want to see the original document and find out the truth of the matter which they understandably considered important. The matter was still not fully clear by the time for the hearing. *(See paragraph 9 above.)*

Motive

35. It seems clear to us that the Appellant lost his stepson and wishes to understand the circumstances in which this happened. There were some aspects of the investigation and other consequential events that were not fully satisfactory, as outlined in the chronology above. We do not consider his to be a motive lacking serious purpose. On the contrary, it seems to fall squarely into what is in the public interest.

36. The Respondents' suggested motive includes that the Appellant seeks to reopen investigations. We are not persuaded by this. The SCR concluded that was no realistic opportunity to continue any further enquiries that are likely to yield any additional useful evidence. This may be so. However, this does not mean that the Appellant should not be allowed to understand what material is held and satisfy himself that he has sought so far as possible to have a clear picture of what happened during the event and afterwards. In view of those of the various consequential events that were not fully satisfactory, as outlined in the chronology above, the comments made by the Coroner's office[13] and in the SCR itself, we do not think it unreasonable for the Appellant to seek to see for himself whether there is evidence that may be key to his understanding. In his submissions of 11 February, the Appellant states that "*Disclosure of this toxicology report would bring to us the closure of this case that we so desperately require, so we can then move forward with our lives*."

[13] See para. 23(r) above.

37. The Commissioner questions the need to view the blood results asserting that other investigations did not consider a need. We do not know that this is correct. Even if it is, in view of the number of aspects that the Appellant's experience appears not to have been fully satisfactory, for something as important and visceral as investigating the cause of a son's death, it is understandable for the Appellant not to wish to leave the matter to the trust of others, even if experts in these matters.

38. We would note that from the information before us, we were not persuaded the Appellant's arguments that Kent Police were deliberately acting to pervert the course of justice. We also accept the Coroner's office's view that the evidence as to codeine did not alter the case. Nonetheless, we recognise the importance to the Appellant of seeing the material for himself should not be seen as vexatious.

Issue 2: Request 1: Information Not Held

39. As regards request 1, the Appellant asserted that he knew that codeine had been in the driver's system and asked why this was kept from the Coroner and him. At the hearing, his representative asserted that it would be extraordinary for the information not to exist.

40. Kent Police's Mr Cacciacarro gave a witness statement which included:

    a. After the hearing on 30 January, he conducted searches of the paper and electronic records relating to the investigation into the fatal road traffic collision to ascertain whether any recorded information was held which might provide an explanation as to why the witness statement of a forensic toxicologist was not provided to the Coroner, Miss Cobb in time for the inquest, if such premise was correct. No such information was located.

    b. On 31 January 2017, DC Khattoare[14] told Mr Cacciacarro that he had not been able to determine whether the toxicologist statement had been provided in time for the inquest. In the context of an appeal to the IPCC, he had ascertained that coronial staff had reviewed the file in 2015 and at that point it had contained the relevant statement.

Our Finding

41. For the purposes of the FOIA, a public authority is not required to create new information to respond to a request. Request 1 constitutes a question. Kent Police cannot be required to provide an answer to the extent that material is not already 'held' by it. Whilst the Appellant contests parts of Mr Cacciacarro's statement, he has provided no compelling reasons to doubt whether Kent Police holds information that specifically answers his Request 1. Whilst it may have been better practice to clearly record such matters and properly keep them, we are not persuaded that this in fact happened. Mr Cacciacarro has carried out a search of the files held. On the balance of probabilities, we find that the information relating to Request 1 requested is

[14] Who had conducted an investigation reporting the forensic toxicologist's statement was in the coronial files when he attended the Coroner's office in Maidstone on 3 May 2016. - see above.

not held by Kent Police. Mr Cacciacarro's testimony does not refer to reasons why the test results were not provided to the Appellant (as opposed to why they were not provided to the Coroner). However, we have no reason to believe the answer would be any different.

Issue 3: Personal Data

42. Kent Police submits that the information sought under Request 2 is exempt because:

    a. The toxicology report plainly constitute the driver's sensitive personal data under s.2(e) DPA as being information relating to his "physical or mental health or condition".

    b. Disclosure would breach first data protection principle, because none of the conditions in Schedule 3 DPA is met.

    c. It inappropriate to disclose information of this nature where a disclosure under the FOIA is considered to be disclosure to the general public.

43. The Appellant submits:

    a) The information is not personal data, but rather public sector information and vital evidence in his stepson's death

    b) He claims that release of this evidence would not cause disproportionate or unjustified disruption. It would prove that the SIO deliberately perverted the course of justice taking place. The public and Mr Dunk's family should have been afforded the results as their human right. The information would satisfy concerns as to the reasons of Mr Dunk's death and close a chapter. The new evidence could be presented to the CPS for their consideration. The CPS and Coroner were not aware of these toxicology reports resulting in perverting the course of justice. There is an on-going case with the IPCC on this matter.

    c) At the hearing the Appellant's representative explained the material was necessary for the purposes of legal proceedings as the Appellant had instructed a solicitor and would have been able to make the information available.

    d) It was also necessary for the administration of justice because the Appellant was trying to get a sense of justice and closure. Had the Coroner had the information at the time of the inquest, she would have decided whether to put it into the public domain.

Our Finding

44. Having carefully reviewed the contents of the requested information, we consider it to be the driver's sensitive personal data for the purposes of s.2(e) DPA in its entirety. We find that disclosure would breach the first data protection principle because there are no conditions in Schedule 3 that have been met. The burden is on the Appellant to show why the conditions apply, and we do not think he has achieved this.

45. In particular, for condition 6 of Schedule 3 DPA, we have found no reason to consider disclosure ***necessary*** for the purpose of, or in connection with, any current or prospective legal proceedings or for obtaining legal advice. Even if there were such proceedings or intentions to obtain legal advice, we can see nothing that could be gained from disclosure of the particular information.

46. In any event, it is noted that the on 17 March 2016, the Coroner's office informed the Appellant as to the test results and that they were not of the view that the evidence of presence of codeine would bring about a different result to that arrived at in the original inquest. This communication post-dated the request but still shows that disclosure under FOIA (which for our purposes constitutes a disclosure to the world at large) was not necessary where what we consider the key information was available elsewhere.

47. We were not persuaded by the Appellant's construction of the term 'administration of justice' for condition 7 of Schedule 3 DPA, because it would be particularly wide and subjective such that it would not fit within the reading of the broader Act. We find no definition of "administration of justice" in the DPA, but in the absence of further reasoning from the parties, we consider the word "administration" in this particular context is far more likely to refer to functions of a public nature such as an actual process of justice such as the administration and procedure of litigation, (such as regulating the procedures for court cases). Based on our understanding on the meaning of this condition, we have not seen a compelling reason why it applies to the circumstances appeal.

48. We recognise the importance of 'closure' that might be achieved by seeing the material. However, we emphasise the need to have regard to the provisions of the Act, whereby information may disclosed if section 40(2) applies. We hope that the confirmations from the Coroner's office and from Kent Police during the hearing may have been of some help.

Other

49. On the morning of the hearing, Kent Police produced a skeleton argument. In relation to Request 2, it introduced a new set of arguments relying on the exemption to disclosure set out in section 40(2) FOIA, which it had not relied on previously. The Tribunal made clear that such late submissions introducing a new argument was not in accordance with the Tribunal Guidance or rule 2(4)[15]. This was particularly late given that the hearing had previously been postponed at late notice in October 2016. In any event, since the Tribunal is obligated to consider section 40(2) before ordering disclosure of information, and Sir Roger Gale MP helpfully confirmed readiness to address the arguments, the hearing proceeded.

50. In relation to Request 2, Kent Police provided very little argument at all, such that the Appellant and were unable panel to address the matter in any

[15] See The Tribunal's '*Hearing Bundles – Good Practice Guide 2015*' and Rule 2(4) of *The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 S.I. 2009 No. 1976 (L. 20) ('the Rules').* The bundles were also not fully indexed or paginated. For instance, it missed a full chronology, copies of the Appellant's requests, copies of the investigation reports, and the disputed information. The parties may have considered that a fully comprehensive bundle would have required presenting a large amount of material but certain parts were clearly key.

meaningful way. The Tribunal could not see how it could effectively order material to be disclosed if it is not held, such that we found it preferable to require further submissions on the point after the hearing, with the opportunity for the Appellant to make further responses. This caused extra work for all parties and delays where the panel needed to reconvene.

51. During the hearing, the Tribunal noted that key documents were missing that it would have expected to see in the Bundle.[16] Where Kent Police were relying on an argument that there had already been a number of investigations on the matter, they did not provide all the reports produced by these. Where Kent Police relied on the argument that the Appellant had already made a number of complaints and FOI requests, the complete correspondence was not provided - although Kent Police's responses that copied out the requests and provided a list of such correspondence. The Appellant had provided the part of the SCR that he had been given and the transcript of the Traffic Commissioner's hearing.

52. The Tribunal ordered for the requested information that was held in relation to Request 2 to be provided as a document for a 'Closed Bundle' (to be kept in confidence) [17]. This was provided at the hearing and a closed session was held to consider this.

53. The Tribunal also ordered for the complete SCR to be provided to it. Since this was initially provided in confidence (parts had been withheld from the Appellant), we directed for Kent Police to make a 'rule 14 application' to explain why it considered this material should properly be regarded as confidential.[18] Save for Appendix 1, Kent Police subsequently disclosed to the Appellant the full SCR accepting that it did not need to be kept closed. Having carefully reviewed Appendix 1, we accept that this was properly kept confidential because it constituted the training record of an officer and was his/her personal data.

54. Finally, we note the Appellant drew our attention to a press article from August 2000 allegedly concerning the conviction of the driver for a certain offence. On balance, we were not persuaded of its relevance to any matter we were concerned with above.

55. Our Decision is unanimous.

Judge Taylor

5 April 2017

[16] Again, the missing documents and submissions did not comply with rule 2(4) of the Rules and necessitated delays.
[17] It was noted that material being provided as part of the 'closed' bundle and part of the hearing being held in 'closed' session was consistent with Tribunal practice and explained in the Guidance provided to the parties. This is a necessary aspect of the Information Rights jurisdiction where disclosing such material during the proceedings would undermine the purpose of the appeal process.
[18] See rule 14 of the Rules.