IN THE FIRST-TIER TRIBUNAL **Case No. EA/2009/0081**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS501183238
Dated: 25 August 2009

Appellant:	**Chief Constable of Surrey Police**
Respondent:	**Information Commissioner**
On the papers	
Date of decision:	**8 July 2010**

Before

David Marks QC
Judge

and

Marion Saunders

Henry Fitzhugh

Represented by: Ewan West of Counsel for the Information Commissioner

Akhlaq Choudhury of Counsel for the Appellant

Subject matter: Section 36(2) of FOIA 2000

Cases: Office of Communication v Information Commissioner [2010] UKSC3

Lord Baker v Information Commissioner & DCLG (EA/2006/0043)

McIntyre v Information Commissioner (EA/2007/0068)

University of Central Lancashire v Information Commissioner (EA/2009/0034)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Decision of the Information Commissioner in his Decision Notice dated 25 August 2009 under Reference No. FS50183238.

REASONS FOR DECISION

General

1. This appeal concerns various exchanges between the Appellant Chief Constable (the Appellant) and the Association of Chief Police Officers (ACPO). The basis of the appeal is the application or otherwise of exemptions set out in section 36(2) of the Freedom of Information Act 2000 (FOIA). That section deals as a whole with prejudice to the effective conduct of public affairs. The precise provisions will be set out in detail below. Although it is important to stress that the Tribunal is concerned only with the applicability of the exemption or exemptions insofar as it or they relate to the disputed information which is under consideration in the appeal, the fact remains that this appeal has been

conducted in part by the parties and in particular by the Appellant with at least one eye inclined towards the interests of ACPO. The appeal was argued in part on the basis that it raised issues which in turn prompted consideration of general importance in relation to the way in which ACPO conducts its affairs and engages in its exchanges with Chief Constables and senior police officers in the carrying out of its functions and responsibilities.

2. In the light of the matters set out in the previous paragraph at the conclusion of this appeal the Tribunal granted permission to ACPO, if so advised, to file evidence or submissions with regard to the issues raised in and by the appeal. ACPO is not a public authority. Nonetheless it took advantage of this opportunity and reference will be made to its evidence below. More particularly the Tribunal was provided with evidence from a senior police officer a Mr John Stoddart said to have been given in his personal capacity albeit as head of an ACPO Working Group dealing with issues relating to homicide. The Tribunal is very grateful to ACPO and to Mr Stoddart for having taken up the Tribunal's invitation but it is also grateful to the parties as a whole and to their representatives for the careful and detailed way in which their arguments were deployed.

3. Section 36 of FOIA in relevant part provides as follows, namely:

> "(2) information to which this section applies is exempt information if, in the recent opinion of a qualified person, disclosure of the information under this Act -
>
> ***
>
> (b) would, or would be likely to, inhibit -
>
> (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation …"

4. The appeal raises a secondary or subsidiary question whether on the facts of this case the exemptions set out in section 36(b)(i) and (ii) respectively are engaged on the basis that it is arguable that one or both did not form part of the reasonable opinion of the qualified person in this particular case. This issue formed the subject of a separate written submission put in after the conclusion of the appeal by the Commissioner, again in the wake of directions to that effect by the Tribunal. Moreover, the question in other words is whether the qualified person's reasonable opinion at the time it was formed prior to the request being refused, engaged the exemptions in question.

Background

5. The facts and matters which gave rise to the present appeal concern the highly publicised series of tragic events at the Princess Royal Army Barracks at Deepcut in Hampshire between 1995 and 2002. There is a need to set out some of the background in detail before turning to the request which has been made in this case. Those events concern the death of four soldiers. The death of the fourth soldier in 2002 was the subject of an investigation by the Appellant and officers in his force. This prompted further investigations by the same force in respect of the earlier deaths. These investigations are now concluded but only in the sense that they have been completed. They are not in any sense "closed" in the sense that although they neither uncovered nor suggested that there was any third party involvement, there remains a possibility however slight or theoretical that criminal proceedings or indeed any other formal claims or proceedings might still follow.

6. All the above investigations were subsequently the subject of a review carried out by the Devon and Cornwall Police (DCP). The terms of the

DCP review will need to be considered in further detail below so far as the same is publicised or otherwise in the public domain. The DCP review was undertaken to consider and determine whether the earlier investigations carried out by the Appellant and his officers had been adequate, impartial and free from outside influences. The DCP review bore the formal title "Operation Stanza". The Stanza Report was delivered in August 2005. The Tribunal has not been charged with the responsibility of reading the Stanza Report in its entirety. Indeed it does not regard that exercise as being in any way material to a determination of this appeal. It is entirely happy to accept the contentions put forward by both parties to the effect that the Stanza Report found no evidence to suggest that the integrity of the earlier investigations had been compromised or otherwise adversely affected. It also found that there was no real evidence available to suggest that the Appellant's forces previous conclusions were in some way at fault. However, some criticism was levelled at what has been called in relation to the facts underlying this appeal the "mindset" of some of the officers who had conducted the earlier investigations.

7. After the DCP review, the Government commissioned a further independent review into the circumstances surrounding the four deaths. This review was conducted by Nicolas Blake QC as he then was, now Mr Justice Blake. His published Report was dated March 2006. Again the Tribunal has not read the Blake Report for the same reasons it has not read the Stanza Report in full. The Tribunal is again entirely content to accept the parties' contentions that the Blake Report found nothing to cast doubt on the conclusions of the DCP review both as to the integrity of the Appellant's investigations carried out into the four deaths and as to the absence of any evidence which might point to or suggest that there was third party involvement in the deaths. The Blake Report concluded that there was no necessity to convene or hold a public inquiry into any greater consideration of the issues arising from the four deaths and the investigations up to that point.

8. Quite apart from the above Reports and reviews there have been numerous other investigations and reports into the soldiers' deaths. An important example is a review conducted by the Independent Police Complaints Commission (IPCC) which the Tribunal has neither been provided with a copy of nor read. This Independent Police Complaints Commission review it appears concluded that there was in the words of the grounds of appeal at paragraph 8 "no coherent evidence of any presupposition of the outcome by the Appellant's officers, "and that there was" no persuasive evidence that there was an attempt to steer the reinvestigations towards the conclusion of suicide and away from other hypotheses".

ACPO

9. ACPO and by way of an echo of the description in the grounds of appeal is described as a voluntary association of Chief Police Officers bringing together their experience and expertise to help achieve on behalf of the public as well as on behalf of the police itself the delivery of effective policing at local, regional and national levels. ACPO is described as being wholly accountable to chief officers who in turn are each accountable to the people they serve and to police authorities at a force level.

10. ACPO comprises in part a number of working groups each dealing with a wide variety of police-issues. One such group at the relevant time was a Homicide Working Group (HWG). Its title speaks for itself. As in the case of other such Groups the HWG had a "lead", ie a Chief Constable from one of the forces in England and Wales charged with overseeing the activities of the Group. A Lead was expected to and did in fact exchange views with officers of other forces. At the heart of this appeal is the Appellant's concern and indeed that of ACPO that any such exchanges as are in question in this appeal should remain immune from disclosure and also the general concern that the public

interest dictates that such exchanges and provisional advice contained in such exchanges also remain undisclosed.

The request

11. On 17 November 2005 the then Chief Constable of Surrey Police attended a meeting with members of the Surrey Police Authority. At that meeting he gave members an update on developments in relation to the Deepcut Inquiry which had been conducted by the Surrey Police. It can be seen from the brief chronology set out above that this meeting took place after the delivery of the Stanza Report.

12. The minutes of the meeting contained the following passage reflecting an exchange put forward by the Chief Constable in the following terms, namely:

"There was a fundamental disagreement between the Forces on the approach adopted by Surrey Police and this had been referred to the service's professional advisers for clarification."

13. It was agreed by the parties that reference to "the Forces" indicated both the Appellant's force as well as the "DCP". Reference to "the service's professional advisers" can only be a reference to ACPO and in particular to the HWG Lead and the same represented common ground between the parties.

14. By email dated 31 May 2007 Mr Tony Green of The Surrey Advertiser made a request to receive "any correspondence Surrey Police has received from the Service's professional advisers regarding clarification in this matter".

15. The Appellant confirmed that it did hold information contained in the report but refused to disclose the information in question. Reliance was placed by the Appellant on three exemptions set out in FOIA, namely section 36, as mentioned above, section 30 which deals with information held for the purposes of an investigation and section 40 which deals with personal data. A subsequent internal review upheld the Appellant's original decision. It can be said at this point that the arguments in this appeal have turned predominantly if not exclusively around the applicability of section 36 but for the sake of completeness the Tribunal will revisit a very short point arising out of section 30.

Events following the request and prior to the Decision Notice

16. Before turning to the events that followed upon the request in more detail and mindful of the secondary issue which has been outlined above the Tribunal believes that it is important to review the Appellant's responses to the request in some detail.

17. In a letter sent by the then Chief Constable of Surrey Police, Robert Quick Esq, on or about 31 July 2007, reliance was placed on section 36 in the following terms to be found on the first page of the letter, namely:

"Section 36 [there having been a reference to both section 36(2)(b) and 36(2)(c)] is a unique exemption in that it can only be applied in exceptional cases and then only with the express permission of a chief officer of the area concerned".

18. The letter then turned to assess various factors which favoured disclosure and non disclosure respectively and then proceeded to apply an appropriate balancing test resulting in a decision not to disclose the information requested. No reference was made to the statutory regime that the opinion of a qualified person be provided.

19. Mr Green then contacted the Commissioner's office. The Commissioner in turn contacted the Appellant by letter dated 16 February 2009 to the effect that in the Appellant's response reference had been made in the following terms to issues concerning section 36, namely:

"Some explanation relevant to why sections 36(2)(b)(i) and (ii) were believed to be engaged was given … the public interest was addressed in a general fashion, rather than in connection with each exemption individually".

20. Later in his letter the Commissioner expressly asked for confirmation that the Appellant had given an opinion "on the citing" of section 36 (there being no further reference to any subsection) when any such opinion was given and what the said opinion was based on asking further whether the Chief Constable viewed the information in question when giving his opinion, and whether he took any other information into account such as a submission outlining the issues surrounding the request. Other related questions were also set out in the said letter. In a subsequent letter dated 24 April 2009 to the Commissioner, the Appellant stated the following, namely:

"7. Confirm that the Chief Constable gave an opinion on the citing of this exemption.

Yes he did.

8. State when this opinion was given.

July 2007

9. State what this opinion was based on, for example, did the Chief Constable view the information in question when giving the opinion? Did the Chief Constable take any other information into account, for example a submission outlining the issues surrounding the request?

The information was provided by the Homicide working Group Chair CC Stoddart, DCC Moore. This was then discussed with CC Quick and D/Supt O'Sullivan who was at that time the most senior detective involved in the Deepcut Inquiry who still worked for Surrey Police. All decisions regarding the use of section 36 were taken by Mr Quick having had full access to the information.

10. If a submission was prepared and used in forming the opinion, please provide a copy of this to this Advice.

A draft response letter was prepared following those discussions and the then the letter was once again amended by the DCC prior to it being signed by the Chief Constable.

11. The Chief Constable specifies subsections 36(2)(b)(i) & (ii) and 36(2)(c). In connection with subsection 36(2)(b)(i) and (ii), explain why and the reason or the opinion that the Chief Constable disclosure would or would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, being specific as to whether the opinion of the Chief Constable was that inhibition would result, or it was that inhibition would be likely to result.

The following two paragraphs are recorded in our records. While the source is not identifiable, the first person references mean that it is likely to be CC Quick.

Individual *- if the contents of this letter were disclosed I would be concerned that it may stifle the access to free and frank advice and may cause Chief Officers to communicate in ways which leave little or no audit trail. In effect this may remove the support network the Chief Officers have around them. The chair of the Homicide Working Group has provided advice to DCC Moore some of which is strongly reliant on opinion …*

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Community *- the ability to communicate with their peers ensures that Chief officers have the ability to make decisions based on the best available advice if and when they need to call on it. The loss of the confidence to be able to do this will have a knock on effect to the community.*

12. In connection with the citing to section 36(2)(c), explain how in the opinion of the Chief Constable disclosure would, or would be likely, to otherwise prejudice the effective conduct of public affairs. Alternatively if your stance now is that the opinion of the Chief Constable was, in fact, only that sections 36(2)(b)(i) & (ii) were engaged rather than also section 36(2)(c) please confirm this.

Section 36(2)(c) is no longer applicable."

21. The Tribunal assumes that the answer cited at length above refers to the original response sent by the Appellant on or about 31 July 2007 referred to above . As was seen, no evidence was provided in that response as to the initial request to the opinion of the qualified person or to the provision of any such opinion.

22. It follows from the lengthy passage quoted above that according to the letter of 31 July 2007 at least, the then Chief Constable, Mr Quick, had

been involved in discussions about the applicability of section 36. However, there had been no formal opinion by him as a duly qualified person according to the terms of paragraphs 11 and 12 of the quoted passage.

23. It was confirmed by oral evidence given during the hearing of the appeal that this letter of 24 April 2009 contained the only explanation and explicit record relating to a qualified person's opinion. As part of the secondary issue highlighted above is the Commissioner's contention that neither paragraphs 10 nor 11 identified the specific exemption here sought to be relied on ie, section 36(2)(b)(ii), nor do those paragraphs mention the free and frank exchange of views with a view to a deliberation in relation to that exemption. More importantly, the Commissioner maintains that the absence of any specific reference to the free and frank exchange of views for the purposes of deliberation within the meaning of the particular subparagraph necessarily means that it cannot be said that Mr Quick as the qualified person applied his mind to the applicability in the exemption set out in section 36(2)(b)(ii) as distinct from that contained in the subsubsubsection which deals with the provision of advice. It necessarily follows that the Commissioner's contention is that section 36(2)(b)(ii) is not engaged. This argument will be revisited below at paragraph 54.

24. In a subsequent exchange by way of email dated 4 June 2009 sent on behalf of the Appellant to the Commissioner, the Appellant dealt further with the material referred to in the body of the request which in turn mirrored the minutes of a meeting. The email stated that:-

"The disagreement referred to, was about How Surrey Police carried out the re-investigation into the death of four soldiers at Deepcut Barracks. D&C Constabulary in their review (OP Stanza) were of the opinion that Surrey should have started out with the "Think Murder" principle which forms part of the Murder Investigation Manual (MIM).

Surrey, as can be seen, disagree with this and believe that the investigation method adopted by the force, was appropriate in the circumstances. Surrey's then DCC Brian Moore wrote to the "Services Professional Advisors" who on this occasion was the ACPO Lead on the ACPO Homicide Working Group, Jon Stoddart. The MIM is owned by the HWG and that is why the force believed it was vital to seek its advice on the differences of opinion."

25. In subsequent exchanges in May and June 2009, it was confirmed that the information requested was contained in two letters. The Appellant was asked to consider the precise context and extent of those exchanges and whether they would both fall within the scope of the request. Subsequently, the Appellant agreed that not all of the contents of the two letters were relevant. For the purposes of this appeal, there is only one letter in issue, being one dated in October 2005 sent by the ACPO 'lead', Mr Stoddart, to the Appellant.

26. The Tribunal feels it is important to add that in the letter dated 24 April 2009 referred to above there appears at the end of the letter a so called "enquiry action log" which records relevant activities and actions taken with regard to the overall request. Nothing is said to enlighten or further explain the matters quoted at length above at paragraph 20 . However, in an entry bearing the relevant date, namely 31 July 2007 it is said that there was a "draft reply" seen by DCC Moore "and amendments made". It was then said that the letter in question "will now go to the Chief in relation for a decision around sec 36 exemption". A further entry bearing the same date, ie 31 July 2007 states as follows, namely:

"File closed copy of letter to go into file one sent by Staff Office and have sent a copy of the draft response to the Press office. Pres [sic] office will forward a copy of the final response from the Chief for the file when sent …"

The Decision Notice

27. The Decision Notice is dated 25 August 2009 and bears the reference FS50183238. At paragraph 10 of the Notice reference is made to the "enquiry action log" mentioned above. Mention is also made of the subsequent letter sent on or about 30 July 2007. It was maintained and contended in the Decision Notice that the Appellant had "cited no argument of relevance to section 36(2)(b)(ii)". The same paragraph goes on to comment by the letter of 24 April 2009 that the Appellant:

"… addressed the public interest as it was at the time of that letter … rather than as it was at the time of the request and refusal, and stated that it believed that any public interest in disclosure would by now have lessened through the passage of time to the point when the public interest in avoiding inhibition to advise provided by chief police officers to each other would outweigh the public interest in disclosure…."

28. At paragraph 26 of the Decision Notice the Commissioner pointed out that in relation to the requirement regarding the need for the opinion of a qualified person, not only was no date provided as to when the Chief Constable as the qualified person had given his opinion but also there appeared to have been "flaws" in relation to the "process of applying" section 36. As referred to above , the evidence indicates that the opinion was sought on 31 July 2007 being the very same date on which the refusal notice was issued. That, according to the Commissioner "called into question how thorough a process was undertaken by the Chief Constable when forming his opinion". However, at paragraph 30 of the Notice the Commissioner noted that no record of the opinion appears to have been kept nor any record of what was taken into account when the opinion was formed. Nonetheless the Commissioner accepted the Appellant's contention that advice provided from one senior officer, namely the ACPO Lead to another was "highly sensitive" though accepting that any opinion as to

the applicability of section 36(2)(b)(i) was and is "reasonable in substance" unlike any opinion as to section 36(2)(b)(ii). These findings reflect the matters underlying the subsidiary issue.

29. Turning to the competing public interests, the Commissioner though accepting that an issue with the same profile and sensitivity as that which was the subject of the advice in this case was "likely to be rare" (see paragraph 40) found that:

(1) the frequency of inhibition was and is not likely to be as high in every case where advice was provided between senior officers;

(2) the only prejudice that could properly be taken into account was therefore such prejudice as was likely to result through inhibition to the free and frank provisional advice between senior officers (see paragraphs 41 and 42);

(3) given the seriousness of the failings established in relation to the deaths at Deepcut there was and is "a strong public interest in full disclosure of all information" relating to those events (see paragraph 43); and

(4) further there was "controversy" about the various police investigations into the deaths at Deepcut and this controversy was ongoing at the time of the request, part of some of the controversy being about what the Commissioner called "the quality of the investigations carried out by the public authority was justified including whether the public authority had adopted direct approach or "mind set" at the outset of those investigations and that any information requested went "directly" to that issue resulting in a consequential public interest factor favouring disclosure;

(5) reliance on the number and perhaps the scale of the other inquiries was not decisive, first because the fact that the Government had stated in the wake of the Blake Report that no further public inquiry would be held meant the public interest remained high and secondly, the suspicion remained that "the full facts and causes of the Deepcut deaths have not been disclosed".

30. These issues here resurfaced at varying length at the hearing of the appeal. Although the Commissioner also went on to address issues regarding section 40 of FOIA he rejected the Appellant's arguments in that regard and finally determined that disclosure should take place.

Evidence

31. The Tribunal received oral evidence from Detective Superintendent Peter O'Sullivan whose name has been mentioned above. He is currently Head of Public Protection of the Surrey Police. Superintendent O'Sullivan had previously provided the sole witness statement in relation to the appeal prior to the hearing of the appeal. As indicated above, the Tribunal has since been in receipt of evidence from ACPO provided by Chief Constable John Stoddart whose name also appears above.

32. In his evidence Superintendent O'Sullivan confirmed that in 2002 he had been a member of the investigating team of detectives which had looked into two of the 1995 deaths. There was a separate force investigation into the other two deaths. By September 2003 the two investigations had in effect become one although four reports were eventually submitted to the Surrey Coroner. He confirmed that in September 2003 the DCP was contacted by the Surrey Police to conduct a "peer review" with regard to certain aspects of the latter force's investigations into the four deaths. In his witness statement

Superintendent O'Sullivan described this as "a well established and recognised practice in the investigation of major crime". The purpose being "to quality assure the investigation and to identify any good practice/lesson learned that can be used locally and nationally to enhance criminal investigations".

33. In a short passage at the end of his witness statement Superintendent O'Sullivan deals with the question of "communications with ACPO". He maintains that the parties to all such exchanges expect such exchanges to be "frank and candid … without the expectation that they would routinely be made available publicly". The Tribunal pauses here to note that self evidently and despite the observations made above there has been no suggestion in relation to this appeal that what is at stake in any way would lead to disclosure that could be said to be "routine". The point, however, is made on two separate occasions by Superintendent O'Sullivan in his statement. However, in fairness to his evidence as a whole the Tribunal notes that he is somewhat more explicit in paragraph 20 of his statement which reads as follows, namely:

"Using Public Protection as an example I am frequently in receipt of documents from the ACPO leads seeking the views of me and my staff as subject matter experts. On occasions the proposals made are deliberately radical in nature, purely to generate and identify other solutions. This type of communication, when ideas are at an embryonic stage, will only be effective if conducted in the knowledge that it is in confidence allowing professionals the freedom to express views and ideas without any concerns but the nature of the debate might be misconstrued or otherwise taken out of context."

34. In oral evidence and in cross examination Detective Superintendent O'Sullivan was asked how the Stanza Report would assist the Surrey Police which he answered that as yet he did not know. However, he

stressed on more than one occasion that disclosure of the information requested had the potential to change the nature of further exchanges between ACPO and forces such as the Surrey force. He adopted a phrase which is commonly used in relation to anticipated consequences of disclosure in cases such as the present, namely that there would be a chilling effect were disclosure to be ordered.

35. As indicated above the Tribunal has had the benefit of a witness statement from Chief Constable Stoddart. This witness statement is marked "restricted". Nonetheless there are portions which are clearly not susceptible to any form of confidentiality. The statement confirmed that on "some occasions" advice imparted from a Lead will be between chief officers of different forces. This necessitated, it was stated, an ability to exchange views and advise "openly and candidly without fear of unrestricted disclosure" and without any prejudice to the relationship existing between senior officers so as to ensure clear and pragmatic advice and guidance. In an echo of the evidence given by Superintendent O'Sullivan, Chief Constable Stoddart went on to assert that on some occasions the discussions themselves, if disclosed, would have an impact upon policing and specific investigations or on the wider knowledge of police tactics "which might hinder specific investigations or policing in the future."

36. Chief Constable Stoddart was the author of the letter dated October 2005 to which reference is made above and which constitutes the information sought to be disclosed. That letter has been partly redacted to reflect the alleged reliance upon the exemptions in question. However, in his witness statement Chief Constable Stoddart says that he had agreed to consider provision of inter alia:

"Comment upon the views raised by the Operation Stanza team with regard to perceived "bias" which the authors of the report consider may affect the mind of an investigator. In particular views as to whether the

assertions made by the Operation Stanza team are "relevant to or suitable for" national guidance."

37. The Tribunal finds the reasoning and meaning of the above passage quoted somewhat elusive but the sense is plain enough. The relationship between the Stanza Report and the primary investigations has been amply described above. That description is enough to show and confirm that whilst the original Surrey led inquiry reflected a wide ranging inquiry going well beyond the bounds of a normal murder inquiry the DCP review took issue with this approach regarding the inquiry as inherently inimical to the proper gathering of information and evidence. The Tribunal regards the contents of the quoted section above in the Chief Constable's statement as perhaps in some way no more than a statement of the obvious given the content of the minutes which prompted the initial request in this case.

38. It follows in the Tribunal's judgment and view that only the existence of the variance in view between the two forces was in question. The critical question is whether disclosure of that information could be said to be in substance trespassing upon the true concerns expressed by both Superintendent O'Sullivan and ACPO, namely the risk of revealing unduly sensitive information which went to the heart of the way in which police officers communicated with each other at the very highest level.

39. Understanding the request in that context accordingly enables the proper issues in this appeal to be addressed.

The principal issues

40. The Appellant's submissions reflect the principal arguments already alluded to in the parties' exchanges as well as in the Decision Notice.

They find reflection in large part in the grounds of appeal. They can be summarised in the Tribunal's view in the following way.

41. First, it is claimed that contrary to the Commissioner's findings both as to section 36(2)(b)(i) as well as with regard to the subsequent subsubsubsection, namely (b)(ii) of FOIA, both exemptions are presently engaged. In particular it is claimed that there was in fact an exchange of views and not simply the provision of advice since ACPO's role was not simply that of an advisor. However, it follows from what has already been said above that should the subsidiary issue regarding the due provision of the opinion of a qualified person be defective as contended for by the Commissioner then this argument would fall away.

42. Secondly, the Commissioner it is said made an error with regard to the competing public interests. In particular it is said he understated the degree of inhibition that would result from disclosure. In particular it is said that chief officers will generally act on behalf of their junior officers and secondly, even if the advice were intended for lower ranking officers the information would be channelled through senior officers and therefore disclosure would inhibit the provision of advice throughout all, if not certainly the senior ranks.

43. Thirdly, given the fact that the Deepcut deaths raised issues of particularly unusual sensitivity the provision of candid advice remained a constant requirement irrespective of the nature of the enquiry.

44. Fourth, the Commissioner failed to take an aggregated approach to public interest factors in accordance with principles recently dealt with in case law which had started in Tribunal and gone to the Supreme Court. The Tribunal refers in particular to the Supreme Court's decision in *Office of Communication v Information Commissioner* [2010] UKSC 3. However, as is well known and accepted by the

parties the Supreme Court has concluded it could not rule on the correct approach to be adopted with regard to aggregation but needed to make a reference to the European Court of Justice reference which remains pending. On the findings made by the Tribunal however there is no question of aggregation: only one exemption is in play.

45. Fifth, although this is an echo of the third argument it is claimed that the Commissioner relied on "unsupported assertions and assumptions" in overruling the public interest in disclosure. In particular the Commissioner it is said should have asked himself and duly failed to consider whether the particular information requested would add to the public's understanding of the issues to any marked extent. If not the Appellant claimed it was difficult to infer the existence of any or any strong public interest in disclosure. The Tribunal pauses here to observe that it is now well established in the Tribunal's case law that the fact that information is already in the public domain is but one element in the overall equation and indeed may often be ignored. The real issue in this appeal is more accurately one which addresses as stated above the differing degrees of emphasis placed by the two forces as to the "mindset" supplied by the Surrey force in relation to its investigations as a whole. That issue would not necessarily trespass upon and/or reveal any issues which might have been addressed by the Blake Inquiry and similar inquiries into the precise causes of death, and the circumstances surrounding the deaths.

46. Sixth, reliance is placed on the overall effect of the numerous public and other inquiries and investigations into the deaths at Deepcut. In particular strong emphasis is placed on the Commissioner's alleged failure to analyse what, if any, material or substantial increase in public understanding of the "issues" would be achieved by the disclosure of the requested information. This is coupled with what is said to be a misplaced reliance on some remaining form of "suspicion" that the full facts and causes of the Deepcut deaths have not, even as yet, been

fully satisfied or allayed. The Tribunal regards this as being a revisiting in effect of the fourth and fifth arguments set out above. Even on the face of the request what is sought is not a further probing into the underlying causes of death or circumstances surrounding the Deepcut events but what precisely constituted the different views between the two separate police forces.

47. The first issue will be dealt with in relation to what has been called the secondary issue in this appeal. The second issue raises the Appellant's concerns about the future inhibition on the provision of advice. The Commissioner has replied by having regard to what he calls the "very limited information" retained by the Appellant as to the reasoning and basis of the qualified person's opinion in this case. The Tribunal respectfully agrees. The relevant material which has been set out at length in the earlier part of this judgment can justifiably be read as being restricted to the exceptional facts of this case although it is clear that a somewhat broader agenda may have been involved. At the very least the suggested inhibition was said to have been held in relation to so called sensitive cases.

48. In the Tribunal's judgment, during the appeal and indeed afterwards, the Appellant has failed to identify the specific ingredients of the particular public interest or interests attributable to the exemption in section 36(2)(b)(i). In those circumstances, it is difficult, if not impossible, for the Tribunal to come to any considered decision as to whether, and if so, to what extent, the relevant passages in the Decision Notice are flawed. It is trite law in the Tribunal's view that arguments for and against the applicability and weight of public interest issues must reflect and in a clear way be anchored in the exemption or exemptions which are in issue. In addition, those public interest issues must specifically relate to the facts which are under consideration.

49. However, the facts and matters alluded to at the end of paragraph 45 remain at the core of this appeal in the Tribunal's view. Revelation of comments made by ACPO on the difference of views cannot on any sensible basis be said to trespass upon what might be called state secrets usually deployed by ACPO in its dealings between senior officers. This case is what could be familiarly called a "one-off". The said view is enough in the Tribunal's view to dispose of the third argument detailed above.

50. As to the fifth argument, the Tribunal endorses the view of the Commissioner to the effect that where disputed information is not in the public domain the fact that other information of the same nature is in the public domain is in general irrelevant, see eg *Lord Baker v Information Commissioner & DCLG* EA/2006/0043 especially at paragraph 24. However, for reasons which have already been sufficiently articulated above the Tribunal regards both this argument and the response as unnecessary and even misplaced in the context of this appeal.

51. In relation to the sixth argument the Tribunal rejects any suggestion that the Commissioner failed to consider the public interest in disclosure of the requested information given the number and range of earlier reports and inquiries. However, for the same reasons alluded to above, the Tribunal finds both the argument and the Commissioner's response not central to a proper consideration of the issues in this appeal. It is therefore not necessary to consider whether, and if so to what extent, the Commissioner properly addressed or supported his finding that there perhaps remains a perception that information about the deaths was and is incomplete and susceptible to some form of query.

52. Finally, as indicated above the Appellant contended, at least in writing, that there had been an infringement of section 30 of FOIA which deals

with exempt information if the information in question "has at any time been held by the authority for the purpose of -

(a) any investigation which the public authority has a duty to consider with a view to it being ascertained -

(i) whether a person should be charged with an offence …".

53. Although the Appellant's force's report was headed on its title page "Final Report" it seems clear that further evidence might still come to light. The Tribunal is entirely satisfied that albeit perhaps more in theory than in reality an investigation or investigations into the Deepcut deaths may still be reactivated thereby prompting a reopening of the investigations. Information cannot be held for the purpose of an investigation where as here the information is complete and by definition given the terms of the request the information is generated later. There is simply no ground for any justified reliance on section 30.

The subsidiary issue: qualified person

54. A few general propositions can usefully be made at the outset of this part of the judgment. First, section 36 of FOIA clearly shows that by its own express terms the opinion of a qualified person is a highly important element in the applicability of the exemption or exemptions in that section. It is not every exemption in FOIA which contains this requirement. Secondly, ideally it is critical if not at least best practice for the public authority to maintain a documentary record clearly and unequivocally affecting the opinion of a qualified person referring specifically to the particular exemption considered and relied on and ideally showing how that opinion was reached. If the Commissioner is to second guess the qualified person then those reasons are self evidently very important. In the absence of any of the above materials the Commissioner is simply not in a position to consider whether the

opinion was reasonable. See eg *University of Central Lancashire v Information Commissioner* EA/2009/0034 especially at paragraph 56.

55. Thirdly, if the evidence referred to in the said two above propositions is slight, if not minimal, it can only be taken at face value. The Commissioner is entitled to assume that a sufficiently formal process was undertaken, finding adequate and proper expression in the final opinion. He is not in general justified, in the Tribunal's view, and should not be compelled to infer that a particular exemption has been considered to apply without the language being used by the qualified person clearly demonstrating as much. In particular if there is no material which in any way suggests that a particular exemption was considered or alluded to, let alone thought fit to apply, then the Commissioner is entitled to assume that an exemption which is raised later and which might otherwise apply is not the subject of a qualified person's opinion as contemplated by the legislation.

56. In the present case the Tribunal upholds the Commissioner's finding in his Notice, (see in particular paragraph 33) that the exemption in section 36(2)(b)(ii) was not engaged dealing as it does with the free and frank exchange of views for the purposes of deliberation. This is because no explanation was provided by the Appellant in this connection. The Appellant's letter of 24 April 2009 referred to above fails specifically to identify that exemption nor is there any reference to the notion or existence of the free and frank exchange of views for the purposes of deliberation. It necessarily follows that the subsubsubsection is not engaged.

57. In the written submissions provided in the wake of the appeal by the Commissioner reference is made to two prior decisions of the Tribunal. The first is the *University of Central Lancashire* case already referred to above. The Tribunal agrees with what was said at paragraph 58 of that decision to the effect that it is not for the Commissioner to "look

around" and deduce the qualified person's opinion from other material. In the second decision referred to, namely *Roberts v Information Commissioner* (EA/2009/0035) the Tribunal there stressed that the focus on the state of affairs that existed as at the time the request was made was critical and was not to be confused with a focus upon what views, if any, were formulated later. From that it follows that an opinion formed by the qualified person after the public authority has otherwise clearly concluded that the request should not be granted, cannot properly be considered by the Commissioner. The latter position is to be contrasted with one where an exemption is relied upon after the date of the original decision which itself may have been based on another exemption. This is not to say that any flaw which might be thought to have occurred or may indeed have actually occurred in the original opinion making process cannot later be corrected and cannot be addressed but then the same should happen only before the public authority has come to a formal and final decision about disclosure, eg prior to an internal review, see eg *McIntyre v Information Commissioner* (EA/2007/0068). It is true that in this case some argument about the existence of a flaw is raised but the Tribunal does not regard that as being a proper argument on the facts of this case given the timing that has occurred. There is, however, in this particular case no question of an opinion being changed either before or after the internal review.

58. Admittedly, there is a reference in the letter sent in July 2007 (see eg paragraph 17) to the free and frank exchange of views: see the said letter at its second paragraph. As has been pointed out above the refusal of the Appellant to disclose the information sought appears to have occurred on the same day or very close to the same day on which the qualified person reached his reasonable opinion. Moreover, the qualified person is here the Appellant himself. Although the Tribunal accepted that the Appellant would have applied his mind clearly to that letter and thus expressed himself in the way he intended, what tilts the

Tribunal's view in favour of its confirming the Commissioner's proposition that section 36(2)(b)(ii) is not engaged is the absence of any relevant record of a reasonable opinion in the subsequent letter of 24 April 2009.

59. The Tribunal endorses in particular an approach put forward by the Commissioner in his final written submissions which is no more than a reference to the basic principle listed above at paragraphs 54 and 55. The Commissioner should be expected to be entitled and be able to rely solely on the explanation provided to him as to the formulation and recording of the qualified person's reasonable opinion. The process is a formal one rendered in statutory form. As long as there is some comprehensible form of considered opinion by a qualified person which either explicitly refers to or clearly reflects the statutory formula, it is unlikely that any formulation stopping short of those requirements will satisfy the necessary criteria. The Commissioner otherwise would have to seek out and/or take into account other documents and other materials in evidence to which his attention would not otherwise have been drawn to establish on his own account when and how the reasonable opinion was reached and recorded. That approach is in the Tribunal's view quite at odds with the sense and purpose of the legislation.

Events in the wake of an Appeal

60. At the conclusion of the appeal, the Tribunal provided ACPO via the Appellant with the opportunity to put in written submissions as to its own particular position with regard to the issues arising in the appeal. ACPO duly availed itself of this opportunity in the form of a witness statement by the current Chief Constable of Durham, Mr John Stoddart. He was the relevant Lead in relation to notices arising on this appeal: see paragraph 24 above. As already indicated, the written statement is marked Restricted and therefore will not be referred to in

detail. However, much if not most of it, is a revisiting of two matters which were argued on the appeal. First, he addresses the process by which exchanges are made between a senior officer in a particular police force on the one hand, and a Lead on the other on behalf of ACPO. Secondly, he readdresses the chronology applicable to this case. However, at the end of his witness statement, Chief Constable Stoddart expresses his clear view that:

> "Restriction of disclosure or publication of communication (sic) between police officers would apply in a minority of cases. These instances will usually concern issues which are particularly sensitive either in terms of investigation or tactics. It is not about protecting colleagues from criticism, it is about effective policing."

It is, however, fair to say that Mr Stoddart in passages occurring prior to this passage quoted above, does purport to address the contents of the specific information sought to be disclosed. However, the Tribunal remains somewhat unclear as to the sense and implication of Mr Stoddart's comments in this regard. He appears to refer to what he perceives as an adverse effect of disclosure on what he calls "coronial court proceedings and IPCC investigations". The Tribunal's confusion in this respect is compounded by the fact as it sees it, that the only portions of the as yet undisclosed information which relate purely to these two areas, or subject matters, delineated by Mr Stoddart comprise documentary material and/or information which is/are <u>not</u> the subject of the initial request.

61. On receipt of this witness statement, the Commissioner formally indicated that although he did not wish or intend to cross-examine Mr Stoddart on his witness statement, he wished to file written submissions in response to it. As a preliminary point and by way of a procedural observation, the Tribunal pauses here to note that it agrees with the Commissioner that although the Chief Constable's statement

did not constitute submissions in the way intended by the Tribunal's earlier direction, it could, by virtue of the discretion reflected and embodied in the First-tier Tribunal Rules 2009, in particular Rule 15, on this occasion at least, treat the statement as if it did in fact constitute a set of submissions. This observation and finding is made in relation to this case and entirely without prejudice to any handling of witness evidence in further hearings or appeals which might arise in the same way.

62. The Tribunal is very grateful to the Commissioner for his written response to the Chief Constable's statement. It agrees with the Commissioner's contentions which can be summarised as follows, namely:

(1) there is an inconsistency between a contention made by the Chief Constable that in the case of a Lead providing advice, there is at least an expectation that no public disclosure will arise on the one hand, and on the other, an inevitable appreciation by ACPO and in particular by its various Leads that the advice as disclosed will be held by a public authority and thus by definition be subject to FOIA; and

(2) equally, there is an inconsistency between the Chief Constable's comment that non disclosure will only apply in a minority of cases and what is called the whole thrust of the early part of the Chief Constable's statement that discussions between police officers must remain confidential, thereby erecting in effect the qualified exemption in section 36 into something of a general absolute exemption: as the Commissioner expresses it in his written reply at paragraph 18:

"There can clearly be no general absolute exemption for communications between police officers (whether under the

aegis of ACPO or otherwise) as no such provision is contained in FOIA. The default position is therefore that such communications should be disclosed where they come into the hands of a public authority to which the provision of FOIA apply, save where a relevant exemption can be pleaded";

(3) in praying in aid in exemption such as section 36 in this case, it is insufficient to point to what, in the Commissioner's words, is called "a generally chilling effect of disclosure"; the Tribunal respectfully agrees that there needs to be a precise link identified between the specific disclosure that is at the heart of the request , and the harm that is claimed; the Tribunal agrees that no such link has been made out in the present case either by the Appellant or by ACPO.

Redactions and further hearing

63. It is appropriate at this point to describe in more detail the information that is requested. It consists of a ten page letter from the ACPO Lead, namely Mr Stoddart, to DCC Moore of Surrey Police. Of the ten pages in question, only some 25% or so in very rough terms is agreed by the Commissioner and by the Appellant as being strictly the subject of the request. The remainder of the letter is therefore not the subject of any consideration by the Commissioner or by the Tribunal.

64. The Tribunal invited the parties to consider whether of the 25% in issue, any portion or portions thereof could be disclosed. The Appellant has responded by indicating that only a small amount of information within that 25% should be released. This information on any view is purely factual. The Commissioner has not provided any further submissions in response to the Tribunal's invitation in this regard.

65. The Tribunal is confident that it has given the parties, and in particular, the Appellant every opportunity to specify in detail why, and if so to what extent, it is not in the public interest for specific passages within the 25% of the letter of advice to be disclosed. It has been addressed as to the applicability of generalised contentions said to be appropriate, e.g. the possible application of a chilling effect in the wake of disclosure. The Tribunal has not, however, been persuaded that there are any specific grounds reflecting public interest considerations attributable to the information in question which militate against disclosure. There has to be finality in an appeal process of this sort. The Tribunal has applied its mind carefully to whether any advantage would be served by a reconstituted hearing. It has come to the clear conclusion that given the numerous occasions on which the Appellant has been able to, and indeed, been invited to formulate the type of arguments just referred to, not least via ACPO in the shape of Mr Stoddart's witness statement, no use would be served by extending the already lengthy period of deliberation in this appeal. It takes the view, therefore, that no point would be served by a reconstituted hearing.

66. As to the proposed redactions, or indeed any proposed redactions, the Tribunal has very carefully considered the latest submissions by the Appellant. The latest suggested redactions do no more than seek to justify the non-discloseability of the relevant opinion or opinions expressed by ACPO, namely the very information which the request targeted and which the Tribunal has concluded is or are now subject to sufficient public interest considerations militating in favour of disclosure.

Conclusion

67. For all the above reasons the Tribunal dismisses the Appellant's appeal and upholds the Decision Notice in this case.

Signed:

David Marks QC
Judge

Dated: 8 July 2010