

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 September 2024

Public Authority: Chief Constable of Surrey Police
Address: PO Box 101
Guildford
Surrey
GU1 9PE

Decision (including any steps ordered)

1. The complainant has requested an audio recording of an interview which Surrey Police conducted with Jimmy Savile in 2009. Surrey Police refused to disclose the audio recording, citing section 38(1) (Health and safety) and section 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that Surrey Police was entitled to rely on section 38(1) and section 40(2) to withhold the requested information.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. Surrey Police published a redacted transcript of the interview in 2013¹. In total, around 100 redactions were made for information which Surrey Police considered exempt under the following sections of FOIA:
 - Section 30(1)(a)(b) – Investigations and proceedings;

¹ <https://www.theguardian.com/media/interactive/2013/oct/16/jimmy-savile-police-interview-transcript>

- Section 38(1)(a) – Health and safety; and
- Section 40(2) – Personal information.

Request and response

5. On 11 October 2022, the complainant wrote to Surrey Police and requested information in the following terms:

“I would like to request a copy of the audio recording of the Jimmy Saville [sic] interview you conducted with him in 2009.”
6. Surrey Police’s response to that request was the subject of a complaint to the Commissioner, who upheld its application of section 14(1) (Vexatious request) of FOIA to refuse it². However, the First-tier Tribunal (EA/2023/0174) found against that decision and it ordered Surrey Police to issue a fresh response to the request, which did not rely on section 14.
7. On 4 December 2023, Surrey Police issued a fresh response to the request. It refused to disclose the audio recording, citing section 38(1) of FOIA. It invited the complainant to request an internal review if he disagreed with that decision.
8. On 4 December 2023, the complainant requested an internal review of that decision, but he heard nothing further.

Scope of the case

9. The complainant contacted the Commissioner on 29 March 2024 to complain about the fresh response to his request for information. Following the provision of further supporting information, his complaint was accepted for investigation on 1 May 2024.
10. Surrey Police cited section 38(1) when issuing the fresh response to the request. However, and as set out in paragraph 4, above, the published transcript of the interview also contained redactions for information that Surrey Police considered exempt under sections 30(1) and 40(2). In view of this, the Commissioner asked Surrey Police whether it

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024104/ic-206207-n0v0.pdf>

considered that those exemptions also applied to the corresponding information in the audio recording.

11. Surrey Police told the Commissioner that it has re-evaluated the material it redacted from the published transcript in light of the passage of time, and in light of material which is in the public domain. As a result, it has determined that the exemption at section 30(1) no longer applies to that information and it does not rely on it in this case.
12. Surrey Police told the Commissioner that it can publish a revised version of the transcript which reflects this change to its position on section 30(1), and it should now do so, ensuring that the complainant is provided with a copy.
13. However, Surrey Police confirmed to the Commissioner that it considered that section 40(2) still applied in respect of personal data relating to the people present at the interview and to one or more individuals who were discussed.
14. In light of the above, the analysis below considers the application of sections 38(1) and 40(2) to withhold the audio recording of the interview in its entirety. When considering these exemptions, the Commissioner is mindful that the complainant has told him:

“While I accept the need to redact personal information under Section 40(2), I request a complete, unredacted copy of the interview otherwise”.

Reasons for decision

15. The Commissioner has decided not to seek a copy of the withheld information (an audio recording of the interview) in this case. He has a copy of the interview transcript and is satisfied that it is proportionate to reach a decision based on that, together with submissions that Surrey Police has made regarding the particular impact of disclosing audio recordings as opposed to written transcripts.

Section 38 – Health and safety

16. Surrey Police applied this exemption to withhold all audio of Jimmy Savile speaking during the interview, which was held under caution, during which allegations about criminal offences were put to him. Surrey Police considered that the specific combination of Savile’s responses to the questions, delivered in his own voice, engaged the exemption.

17. Section 38 of FOIA allows a public authority to withhold information the disclosure of which would, or would be likely to, endanger the mental health of any individual.
18. In order to satisfy the Commissioner this exemption is engaged, the public authority must demonstrate that there is a causal link between endangerment and the disclosure of the information.
19. The public authority must also show either that disclosure would, or it would be likely to, endanger the health and safety of any individual. The effect cannot be trivial or insignificant. Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make existing mental illness, worse. This means that it must have a greater impact than causing upset and distress.

The complainant's position

20. While recognising that disclosing the audio recording might cause some distress to Savile's victims, the complainant felt this could be mitigated by them being given time to "prepare and receive support" prior to the disclosure of the audio, and being advised to avoid listening to it. He believed the audio recording could also be redacted to remove any potentially harmful or identifying information and be accompanied by appropriate warnings and support resources for survivors.
21. He also argued that the public is very familiar with Savile's voice and public persona, due to the number of interviews and recordings that are already in the public domain. He argued that:

"The existence of these readily accessible recordings casts doubt on Surrey Police's assertion that releasing the audio recording of the Savile interview would cause unique harm to survivors. If individuals are already exposed to Savile's voice through various television programs, it is difficult to justify withholding the interview recording on the grounds of potential harm".
22. He believed that any distress likely to be caused to victims could be justified by the overwhelming public interest in disclosure.

Surrey Police's position

23. Surrey Police's arguments focussed on the traumatic impact that releasing Savile's responses to the allegations against him, in his own voice, would be likely to have on victims and survivors. It said it is well recognised that childhood sexual abuse causes high levels of trauma to survivors throughout their lifetime, and the impact on a person's health and wellbeing and their lifestyle is immense. Many never fully recover from what has happened to them.

24. Estimates of the total number of Savile's victims range from hundreds to 1000. It said that hearing the words from the published transcript (which addressed allegations of abuse) voiced by Savile would be likely to retraumatise his victims, or at least some of them.
25. Once the audio was disclosed, Surrey Police said it would have no means of controlling its onward disclosure; in view of the ways in which information is disseminated through modern media, there is a real likelihood that one, or more, of Savile's victims would be exposed to excerpts from the recording, without prior warning. It said Savile's conduct is likely to have had significant and lasting consequences for his victims and Surrey Police had no basis for considering this may have diminished because of the passage of time. It concluded:

"In the circumstances, the Force is satisfied that the audio of Mr Savile from the interview is exempt from disclosure under Section 38 FOIA because disclosure would be likely to endanger (i.e put at risk or in danger) the mental health of at least some of Mr Savile's many victims, of whom there are hundreds. In arriving at that view the Force has considered the nature of Mr Savile's conduct and the known impact which such conduct has on victims, which is known to be long lasting for many victims. Those consequences often involve diagnosable psychiatric illness or exacerbations of existing psychiatric illnesses. The Force has also considered the scale of Mr Savile's conduct which involved hundreds of victims. Whilst individual's responses to disclosure may be variable, it is sufficient to engage the exemption if even a single victim's mental health is put at risk or in danger. The application of the test does not involve a putative victim of 'ordinary fortitude', or any similar presumed threshold of resilience. The exemption is not directed at the likelihood of actual harm. It is directed at the likelihood that any individual's mental health or safety will be endangered i.e put at risk."

26. Surrey Police said it had reached this view having sought independent advice from a specialist doctor and psychotherapist who works with victims of sexual abuse, who had said:

"...following many years as a member of a specialist Child Sexual Abuse team in an NHS Child and Adolescent service, working with traumatised victims of abuse, followed by many more years of facilitating specialist services for adult survivors of childhood sexual abuse in outpatient Psychotherapy, I concur with your view.

I agree that it would be re-traumatising for these women to have to listen to their abuser denying their version of events in a dismissive manner in the public domain. The recent SCR [Serious Case Review]

of the impact on Mrs A³ of being cross-examined in a public domain when her abuser was present and felt to be dismissive, should have taught us lessons regarding how easily a Survivor can be affected by past trauma being reactivated in the present. The reality of these tapes finding their way into the public domain and possibly the internet, could mean that for some victims, who had no justice as children, they feel that they are on trial, with the inevitable feelings of guilt and shame that survivors of abuse struggle against being reactivated, but now as a public not just a private matter.”

The Commissioner's view

27. The Commissioner considers that making the audio recording of Savile discussing allegations against him, available for everyone to hear without restriction, is likely to be extremely distressing to the women who made the particular allegations considered in the interview, and to wider victims and survivors of Savile's offending. He considers it reasonable to believe that, for at least some, the level of distress would be severe, to the point of endangering their mental health.
28. This endangerment arises from the content of the interview, the distress caused by hearing Savile denying the allegations in his own voice and the fact that the recording would then be available to anyone wishing to listen to it. Once information is disclosed under FOIA, it is considered to be available to the world at large. As such, the information has been irrevocably placed into the public domain and the public authority loses any ability to control how widely the information is then spread or how it is used.
29. The Commissioner does not consider the complainant's suggestion that any harm to victims and survivors could be prevented by them being "supported" prior to disclosure, or advised to avoid listening to the audio, to be realistic, reasonable or practical; there is also no way of facilitating this as part of a disclosure under FOIA. His suggestion that the material be redacted of harmful information fails to recognise that he also specified that the **full** recording be disclosed. Furthermore, it is the delivery of Savile's words in his **own** voice, which is likely to be triggering for victims. Savile denies the offences and belittles these and other allegations made against him. Expert opinion indicates that, were survivors to hear his voice saying these things, it would be likely to have

³ <https://www.surreysab.org.uk/wp-content/uploads/2020/09/FINAL-Mrs-A-Exec-Summary-26.03.14-.doc-Website-Accessibility-update-September-2020.pdf>

a significant, negative impact on them; plainly, this is not something which can be mitigated by simply making certain redactions.

30. Taking all the above into account, the Commissioner is satisfied that section 38 is engaged in this case.

Public interest

31. As section 38 is a qualified exemption, the Commissioner will consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

32. The complainant has offered the following arguments:

- “• **Transparency and Accountability:** The release of the audio recording would promote transparency and accountability in the handling of Savile's case. The public has a right to know the full extent of Savile's interactions with law enforcement, especially given the gravity of the allegations against him.
- **Historical Record:** The audio recording represents a crucial piece of historical evidence that sheds light on Savile's behavior [sic] and the police's investigation into his alleged offenses [sic]. Preserving this record is essential for historical understanding and future inquiries.
- **Potential for Public Benefit:** The audio recording could provide valuable insights into Savile's modus operandi and the nature of his interactions with potential victims. This information could potentially aid in identifying and supporting other victims who may have come forward in the wake of Savile's death.”

33. Noting that it had already disclosed a written transcript of the interview, Surrey Police was unable to identify any public interest in disclosing the audio recording, beyond the interviews being of interest, in general, to the public.

Public interest arguments in favour of maintaining the exemption

34. Addressing the point it made in paragraph 33, Surrey Police said:

“While there may still be an appetite from some members of the public to hear Jimmy Savile’s voice, there is a difference between what the public would find interesting and what is actually in the public interest; there must be some tangible benefit to the community in such a disclosure. Ultimately it must be something that serves the interests of the public.”

35. It said its publication of the transcript of the interview has already substantially contributed to the public interest in transparency in relation to the police investigation of Savile's conduct. Disclosure of the audio does not materially add to transparency, or assist the public understanding of the interview beyond that which is achieved by publication of the transcript.
36. Surrey Police argued that, in light of the clear harm that disclosure would be likely to cause, and in view of the lack of compelling public interest arguments for disclosure, the welfare of victims and survivors must be prioritised.

Balancing test

37. In considering the balancing test, the Commissioner will weigh up whether the public interest would be served better by disclosing the requested information, or by withholding it.
38. The Commissioner recognises that, generally speaking, disclosure under FOIA will serve the public interest in transparency. However, in this case he is not persuaded that this is sufficiently compelling to justify disclosing information which he accepts would be likely to endanger the mental health of victims and survivors. He considers the likelihood of this harm occurring to be a public interest argument against disclosure, of considerable weight.
39. The Commissioner agrees with Surrey Police that the audio recording adds nothing additional to the public's understanding of Savile's offending, or the police's investigation, beyond what is already contained in the published transcript. Scrutiny of those matters is already provided by the published transcript and hearing Savile voice his words adds nothing further in that regard.
40. As regards the complainant's claim that the audio recording is an 'historical record' which must be preserved, that is simply not an argument which is relevant when considering whether or not it is suitable to be disclosed into the public domain under FOIA.
41. The Commissioner is therefore satisfied that the public interest in maintaining section 38 outweighs the public interest in disclosure, by a significant degree. Surrey Police was therefore entitled to rely on section 38 to withhold the information in question.

Section 40(2) – Personal information

42. Surrey Police has applied section 40(2) to withhold the remaining audio recording of its officers, and another person, speaking during the

interview⁴, as well as their names, and the names and other personally identifying information of people discussed in the interview.

43. Bearing in mind that the complainant agreed to scope out redactions of "personal information", the Commissioner is satisfied that names and the other personally identifying information of people discussed in the interview, fall within the complainant's understanding of "personal information"; this means that the Commissioner has excluded the redaction of that information from the scope of this decision notice.
44. However, the Commissioner does not believe that it is within the complainant's expectation that the audio of the police officers' voices, and the voice of a person who attended with Savile, comprise "personal information". The Commissioner also notes that while names can be easily redacted from the transcript of the interview (meaning that identities will not be disclosed) this is not the case for an actual voice recording.
45. The Commissioner has therefore considered whether that information (ie the remaining portion of the audio recording that is not Savile speaking) falls within the scope of the exemption at section 40(2).
46. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
47. In this case, the relevant condition is contained in section 40(3A)(a)⁵. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
48. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.

⁴ Section 40(2) only applies to personal information about living individuals and, as Savile is deceased, it cannot be engaged in respect of information about him

⁵ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

50. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

51. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

52. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

53. Surrey Police has argued that the mere sound of the voices captured in the recording is the personal data of the police officers and the third party who accompanied Savile, and that each can be identified by their voice:

“The Interviewing Officers’ voices will readily identify them to a wide number of people. They worked in a public-facing role and interacted daily with others working in the criminal justice context and with members of the public, together with their interactions in their family and social circles. There will be a significant cohort of people who will be able to identify them from their voices...Equivalent arguments apply to the voice of the person who accompanied Mr Savile.”

54. Having considered the matter, the Commissioner is of the view that the audio recording is the personal data of the police officers and the third party. He considers that there is a high probability the voices of the officers will be identifiable to each other and to anyone who works/worked with them, and that the voice of the third party will be identifiable to anyone who knows them and knows that they knew Savile. He is satisfied that this information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

55. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

56. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

57. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

58. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

59. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

60. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁶.

61. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

⁶ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

62. The test is a cumulative one, with it being necessary to meet each one in turn before the balancing test under stage (iii) is applied. If any step cannot be met, then there is no lawful basis for the disclosure and it will be unlawful.

Legitimate interests

63. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
64. Surrey Police said one of the complainant's stated purposes in making the request had been to understand whether Surrey Police had "something to hide" regarding its handling of Savile. It said:
- "In the circumstances of Mr Savile's case the Force accepts that the request pursues transparency which facilitates assessment of the issue raised by the requestor ('insight into how and why Surrey Police failed to convict the most prolific child abuser in history')."
65. The Commissioner recognises that the issue of Savile's offending and of how he was treated by the police and 'the establishment', are matters which continue to concern, and be of interest to, the general public.

Is disclosure necessary?

66. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
67. The Commissioner does not consider that disclosure to the world at large is necessary to satisfy the legitimate interest in accountability and transparency. As set out in paragraphs 38-41, above, he has examined the public interest arguments put forward for disclosure by the

complainant. They did not persuade him that the audio recording offered any further information or insight than that provided by the published transcript.

68. In the Commissioner's view, disclosing an audio recording is not necessary to enable scrutiny of Surrey Police's handling of Savile during the interview, nor will it further the public's understanding of how he conducted himself. A transcript of the interview has already been published which provides that information.
69. The Commissioner therefore considers that as disclosure is not necessary, no lawful basis exists for the processing that would take place to facilitate disclosure and it is unlawful. It therefore does not meet the requirements of principle (a).
70. Therefore, the Commissioner's decision is that Surrey Police was entitled to withhold the remainder of the audio recording under section 40(2), by way of section 40(3A)(a) of FOIA.

Other matters

Section 45 - Internal review

71. The Commissioner cannot consider a public authority's handling of an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
72. However, where a public authority offers to conduct an internal review, the code of practice states that it should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
73. In this case, it is clear that Surrey Police did not comply with these timescales. The Commissioner would remind Surrey Police of the importance of responding promptly and adhering to recommended timescales.

Right of appeal

74. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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