

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

### **Decision notice**

**Date:** 25 June 2014

**Public Authority:** Chief Constable of South Wales Police  
**Address:** Police Headquarters  
Cowbridge Road  
Bridgend  
CF31 3SU

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

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1. The complainant requested information relating to South Wales Police's review in 2002 of the original Royal Military Police investigation into the disappearance of Katrice Lee. South Wales Police refused the request by virtue of sections 31 and 40(2) of the FOIA. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of sections 31(1)(a) and (b). He does not require any steps to be taken.

#### **Request and response**

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2. On 17 June 2013, the complainant wrote to South Wales Police and requested information in the following terms:

“Under the Freedom of Information Act I am writing to request the following information:

Please provide copies of any reports, documents, e-mails, letters, or any other records which refer to the findings of South Wales Police's review in 2002 of the original Royal Military Police investigations into the disappearance of Katrice Lee. Katrice Lee is a 2 year old who went missing from a military shop in Paderborn Germany on the 28<sup>th</sup> November 1981”.

3. South Wales Police issued a refusal notice on 2 September 2013 stating that the information requested was exempt under sections 31(1)(a) & (b) and 40(2) of the FOIA.
4. On 29 October 2013 the complainant requested an internal review of South Wales Police's refusal to disclose the information requested.
5. South Wales Police provided the outcome of its internal review on 18 December 2013 and upheld its decision that the information requested was exempt under sections 31 and 40 of the FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 23 December 2013 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation into this complaint is to determine whether South Wales Police should disclose the information requested on 17 June 2013.

### **Reasons for decision**

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#### **Section 31 – law enforcement**

8. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
9. South Wales Police considers that section 31(1)(a) and (b) applies to all of the withheld information. Sections 31(1)(a) and (b) state that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

  - (a) the prevention or detection of crime,
  - (b) the apprehension or prosecution of offenders”.

10. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

### **South Wales Police's position**

11. The withheld information comprises two reports produced following a review which South Wales Police conducted into an investigation carried out by the Royal Military Police ('RMP') into the disappearance of Katrice Lee in November 1981.
12. The RMP has publicly acknowledged that the original investigation into the disappearance of Katrice was flawed. On 16 January 2012, the RMP commenced a re-investigation into the case, which was on-going at the time of the request and remains on-going at the date of this notice.
13. As part of the re-investigation, the RMP is reviewing all the earlier investigative material, which includes any shortcomings linked to the recommendations contained within the review conducted by South Wales Police. The aim of the re-investigation is to determine whether modern investigative techniques can shed any light on Katrice's disappearance.
14. The head of the RMP, the Provost Marshall has stated publicly that, once the re-investigation is concluded he will ask an independent civilian police force to conduct a full review of the current re-investigation and review the RMP's findings in relation to the earlier investigations. The

civilian force will have access to all the papers and evidence, including those from the 1981 investigation and the review conducted by South Wales Police.

15. South Wales Police advised that the purpose of the review was not to identify failings in the original investigations, but to identify if there are/were any further investigative opportunities and if so, what they are/were. South Wales Police pointed out that the withheld information makes various comments, some in relation to actions that could be carried out in an attempt to uncover any additional information and/or evidence, as well as any areas where investigatory opportunities have been missed.
16. South Wales Police advised that it consulted with the RMP both at the time of the request and following the complaint to the Commissioner. The RMP has indicated that disclosure of the withheld information could have a prejudicial effect on the re-investigation of the case. This in turn could hinder the detection of crime and the apprehension of any offender(s).
17. In its refusal notice South Wales Police stated that "There is a good chance that one of more individuals were criminally responsible for Katrice's fate. It is also still possible that they could be brought to justice". South Wales Police argues that, if the information requested was disclosed, any offender would be made aware of how much information/evidence the police are in possession of, any gaps in the original investigation and any actions that may or may not be taken now or in the future to further the investigation. South Wales Police is of the view that the information could potentially assist any offender(s) in evading detection.
18. South Wales Police explained that there is a common expectation that information relating to witnesses and evidence (or lack of) concerning potential unsolved murder and/or abduction cases should be kept confidential. South Wales Police pointed out that there is no formal statute of limitation for the offence of murder of abduction, one or both of which may have occurred in this particular case, and there is a still a possibility that a prosecution could be brought.
19. The review of the original investigations remains an integral part of the current re-investigation being undertaken by the RMP as the scene, the witnesses and the victim are the same. South Wales Police pointed out that the withheld information contains information which is directly relevant to a number of current and action lines of inquiry being undertaken by the RMP.

20. South Wales Police referred to the Information Tribunal decision in the case of *Hargrave v Information Commissioner* – EA/2007/0041<sup>1</sup>. At paragraph 23 of this decision, the Tribunal stated that:

“We accept that the nature of a murder investigation is not such that the file can be redacted or partially disclosed. In this case, it is all or nothing”.

South Wales Police pointed out that the above case related to a request in the form of a file of documents relating to the investigation of an unsolved murder dating back to 1954, and that it is broadly similar to what is contained in the withheld information in this case, which is potentially an unsolved murder. South Wales considers the same considerations apply here in that it is not possible to distinguish information within the review that could be critical to any future investigation (ultimately impacting on law enforcement) from any information that might not have such an effect. South Wales Police consider that all the information within the report may potentially have some future significance.

21. South Wales Police acknowledges that the original investigations on which its review focused were conducted by the RMP in 1981 and 2000. However, it referred to the fact that offenders are sometimes prosecuted many years after an offence has been committed. It provided two examples to support this position, the case of Fred and Rose West, where it took 27 years to detect the murder of Fred West’s first victim and 21 years to detect Rose West’s first murder. It also referred to the case of Tony Dyce, who committed three murders in London in 1982 and was arrested 28 years later in 2010.
22. South Wales Police also provided the Commissioner with further arguments in support of its application of section 31, which are not included in this notice due to their confidential nature.

### **The complainant’s position**

23. The complainant argues that there is currently no level of certainty that any crime was committed. In the three decades since the disappearance of Katrice, no arrests have been made, and the RMP has been unable to bring anyone to justice. In view of this, the complainant does not agree that disclosure of the requested information could prejudice any law enforcement functions or activities.

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<sup>1</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i134/Hargrave.pdf>

24. The complainant referred to the fact that press restrictions begin to apply in incremental degrees after arrest, charge and then trial, but in the case in question there is currently no arrest, no charge and no trial. Should the situation change, the press would be legally obliged to restrict any information on the case that it reports.
25. The complainant referred to the case involving the disappearance of Madeline McCann where the family have been granted unprecedented access to the case file and the methods being used to locate their daughter. The press has reported extensively on potential suspects, theories and lines of inquiry that the police have used. The complainant considers that the Madeline McCann case is far more likely to reach a court than Katrice's.
26. The complainant also contends that the family of Katrice, and the public, have a right to openly scrutinise the effectiveness of the authorities involved in the original investigation. He believes that there is a strong case for disclosure of the South Wales Police review in order to see what was learned about the original investigation, particularly as it has been publicly acknowledged that the original investigation was flawed.

### **The Commissioner's position**

27. With regard to the first criterion of the three limb prejudice test described earlier in this notice, the Commissioner accepts that potential prejudice to an ongoing police investigation clearly relates to the interests which the exemptions contained at sections 31(1)(a) and 31(1)(b) are designed to protect.
28. With regard to the second criterion, having considered the contents of the withheld information the Commissioner is satisfied that its disclosure clearly has the potential to harm the ongoing re-investigation of the case which is being undertaken by the RMP. The Commissioner therefore accepts that there is a causal link between disclosure of the information and the interests which the exemptions contained at sections 31(1)(a) and (b) are designed to protect. Moreover, given the potential consequences of disclosure, the Commissioner is satisfied that the resultant prejudice which South Wales Police considers would be likely to occur is one that can be correctly categorised as real and of substance.
29. In relation to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Tribunal decisions. He believes that for the lower level of likelihood, i.e. 'likely', to be met the chance of prejudice occurring should be more than a hypothetical possibility; there must have been a real and significant risk. With regard to the alternative limb of 'would prejudice' the Commissioner believes that this places a stronger

evidential burden on the public authority to discharge. The Commissioner understands that the South Wales is relying on the lower limb that prejudice would be likely to occur.

30. Having had the benefit of examining the withheld information the Commissioner notes that it contains significant detail about the original investigations, examination of witness statements and identifies further investigative opportunities and lines of enquiry in relation to the case. In light of the fact that the RMP is (and was at the time of the request) in the process of conducting a re-investigation into the case in question, the Commissioner is satisfied that disclosure of the withheld information would represent a real and significant risk to the ongoing investigation. While the Commissioner notes the complainant's arguments that it is unlikely that an arrest/prosecution will result in this case, the Commissioner accepts that the potential prejudice to such a prosecution from prior disclosure of the information would be very significant. The Commissioner also accepts that South Wales Police was justified in concluding that it is impossible to partially disclose the requested information (eg by excluding the names of witnesses and third parties) without risk of prejudice.
31. Based on the contents of the withheld information, and the representations provided by South Wales Police, the Commissioner is satisfied that the exemptions contained at sections 31(1)(a) and (b) are engaged.

### **Public interest test**

32. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 31(1)(a) and (b) outweighs the public interest in disclosing the information.

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

33. South Wales Police acknowledges that disclosure would provide the public with an insight into the methods used to investigate what is potentially an unsolved murder. Disclosure would, therefore, increase the accountability of the organisations involved in the original investigations (the RMP and the German Police).
34. South Wales Police also accepts that disclosure would increase public confidence in police investigative processes and review processes. It could also facilitate the public's contribution of further evidence to the benefit of the re-investigation.

35. The complainant argues that there is a significant interest in the public having access to information in order to openly scrutinise the effectiveness of the authorities involved in the original investigation and to see what was learned about that investigation as a result of the review which South Wales Police conducted into it.

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

36. South Wales Police acknowledges that the case in question relates to an incident which occurred in 1981. The withheld information comprises a report on a review that it conducted in 2002. The review focuses on both the 1981 and 2000 original investigations into the case carried out by the RMP.
37. In its public interest arguments, South Wales Police referred again to the fact that there is no statute of limitation for the offence of murder or abduction, one or both of which may sadly have occurred in this case. In light of this, the case which is the subject of this request is capable of investigation from which, potentially, a prosecution could result. The RMP has also already publicly acknowledged that there were failings in its original investigation. South Wales Police consider that premature disclosure of information relating to enquiries already conducted by the RMP (the withheld information) in relation to a live investigation could prejudice any current or future investigation and/or prosecution of any offenders, which will in turn have a negative impact on law enforcement.
38. In terms of the age of the information in question, South Wales Police referred to the Information Tribunal decision in *Guardian v The Information Commissioner and Avon and Somerset Police* (EA/2006/0017). In this case, the Tribunal considered the age of the information requested and stated that:

"...The passage of time was a double-edged argument, whichever side wielded the sword. It probably reduced the risks of prejudice to future investigations but it similarly weakened the legitimate public interest in knowing more of the background fact..."

In relation to this particular tribunal case, South Wales Police referred to the Commissioner's specialist guidance<sup>2</sup> which states that:

"Although this argument has some merit, the Commissioner does not believe that in all circumstances that the older the information is the

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<sup>2</sup> <http://ico.org.uk/foikb/PolicyLines/FOIPolicyPublicinterestfactorsfors30.htm>



less risk of prejudice there is, there is always the possibility that the status of an investigation can change over time and that information has the potential of becoming relevant again. In the context of the assumption in favour of disclosure under FOIA, a public authority would have to demonstrate that there is a realistic prospect of a case being reopened and that the risk of prejudice still exists. If there was no evidence of prejudice occurring, there would be little public interest in maintaining the exemption; however the public interest in transparency and understanding the full picture of the investigation (and potentially although not a weighty factor, consideration of investigations from a historical perspective) would remain”.

39. South Wales Police again referred to the Information Tribunal case of *Hargrave v Information Commissioner* (as referred to in paragraph 20 of this notice). This decision related to a request for information about an unsolved murder which took place in 1954. Although this case is nearly 30 years older than the case of *Katrice Lee*, the Tribunal ruled that the public interest favoured non-disclosure, based largely on the fact that the case was unsolved. In the *Hargrave* case, there were allegations of misconduct, which may have shifted the public interest towards disclosure. In the case of *Katrice Lee*, South Wales Police is aware of allegations that the 1981 investigation was not carried out properly, however, it is not aware of any allegations of misconduct.
40. However unlikely a prosecution in *Katrice's* case may seem, South Wales Police considers that the potential prejudice to such a prosecution from prior disclosures of the withheld information would be significant. It has weighed up the relative unlikelihood of a prosecution arising, against the severity of the prejudice should a prosecution be secured. Whilst South Wales Police does not take the view that the public interest in the prevention or detection of crime and the apprehension or prosecution of offenders will always outweigh any public interest arguments in favour of disclosure, in this case it has taken into account the very serious nature of any crime(s) which may have occurred and the possibility of a future successful prosecution as a result of the re-investigation of the case.

### **Balance of the public interest test**

41. The Commissioner accepts that the disappearance of *Katrice Lee* and the review into the original investigations conducted by the RMP have resulted in a significant amount of media and press release. Disclosure of the withheld information would allow the public to examine the effectiveness of the original investigation processes and see what failings were identified as a result of the review which South Wales Police conducted into the original investigations.

42. However, the Commissioner believes that there is stronger public interest in ensuring that the overall effectiveness of the ongoing re-investigation into the case by the RMP is not undermined or compromised. The Commissioner considers that there is a very strong public interest in ensuring that the apprehension and prosecution of individuals is not prejudiced as a result of inappropriate disclosure. The public is entitled to expect that those who have committed offences are successfully prosecuted. It would clearly not be in the public interest if the disclosure of information resulted in the inability of the prosecuting authorities to successfully apprehend or prosecute offenders.
43. While the Commissioner does not take the view that the public interest in the investigation and prosecution of crime will always outweigh other public interest factors in favour of disclosing information, in this case he has had regard to the very serious nature of any crime(s) which may have been committed and the possibility (however remote) of a successful future prosecution as a result of the re-investigation. In reaching the conclusion in this case the Commissioner recognises the detailed nature of the withheld information and the clear insight disclosure would provide to any potential offender in evading detection.
44. The Commissioner has concluded that in all of the circumstances of the case the public interest in maintaining the exemptions at sections 31(1)(a) and (b) outweighs the public interest in disclosing the withheld information.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Anne Jones**  
**Assistant Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**