

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2019

Public Authority: Chief Constable of Kent Police
Address: Police Headquarters
Sutton Road
Maidstone
ME15 9BZ

Decision (including any steps ordered)

1. The complainant requested information relating to children being recruited as Covert Human Intelligence Sources (CHIS). Kent Police refused to confirm or deny holding the requested information. It cited multiple exemptions, namely sections 23(5) (Information supplied by, or concerning, certain Security Bodies), 24(2) (National Security), 30(3) (Investigations and proceedings conducted by public authorities), 31(3) (Law Enforcement), 38(2) (Health and Safety) and 40(5) (Personal Information) of the FOIA.
2. The Commissioner investigated Kent Police's application of section 30(3) (Investigations and proceedings) of the FOIA.
3. The Commissioner's decision is that section 30(3) of the FOIA is engaged and that the balance of the public interest favours maintaining the exemption. Accordingly, Kent Police was entitled to rely on section 30(3) to refuse to confirm or deny whether it held information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. Following earlier correspondence, on 29 October 2018, the complainant wrote to Kent Police and requested information in the following terms:

"1. In the past three years (between 1st August 2015 and 31st July 2018) have any authorisations been made to use a person under

the age of 18 as a Covert Human Intelligence Source?

2. If the answer to Q1 is yes, how many such authorisations have been made?"

6. Kent Police responded on 31 October 2018. It refused to confirm or deny whether it held the requested information, citing:
 - section 23(5) (Information supplied by, or concerning, certain Security Bodies);
 - section 24(2) (National Security);
 - section 30(3) (Investigations and proceedings conducted by public authorities);
 - section 31(3) (Law Enforcement);
 - section 38(2) (Health and Safety); and
 - section 40(5) (Personal Information).
7. Following an internal review, Kent Police wrote to the complainant on 28 November 2018 maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 10 December 2018 to complain about the way his request for information had been handled.
9. With reference to an earlier, related, request for information which had received a 'neither confirm nor deny' [NCND] response from Kent Police, the complainant told the Commissioner:

"Following this reply, we attempted to reformulate the request in a way that would allow the police force to provide a substantial response".
10. He disputed whether it was appropriate to use a NCND response in this case:

"... simply because the request concerns a sensitive area of policing".
11. The complainant argued that there is significant public interest *"in this information being made available"*.
12. The decision to neither confirm nor deny is separate from a decision not to disclose information. Therefore, in a case such as this, where a public

authority neither confirms nor denies holding information, the Commissioner's role is to determine whether the public authority was entitled to neither confirm nor deny.

13. As is her practice, the Commissioner wrote to the complainant at the start of her investigation, clearly setting out the scope of her investigation. Specifically, she explained that her investigation would look at whether Kent Police was entitled to rely on exemption(s) as a basis for refusing to confirm or deny whether it held the requested information.
14. During the course of the Commissioner's investigation, Kent Police confirmed its application of each of the exemptions cited.
15. The analysis below considers whether Kent Police was entitled to neither confirm nor deny holding the requested information.

Reasons for decision

16. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
17. The decision to use a neither confirm nor deny response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
18. A public authority will need to use the neither confirm nor deny response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is, in fact, held.
19. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of the FOIA.

20. In this case, Kent Police considered that multiple exemptions applied to the information in scope of the request. In correspondence with the complainant it told him:

"Whilst I appreciate there are a number of exemptions engaged here, this properly reflects the far reaching impact confirming or denying whether information is held would have in this case, from investigations and law enforcement to national security and personal harm".

21. During the course of her investigation, Kent Police told the Commissioner:

"Whilst all the exemptions cited are relied upon it is considered that the most heavily relied upon exemptions are Section 30(3) and Section 38(2)".

22. The Commissioner has first considered its application of section 30(3).

Section 30 investigations and proceedings

23. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if held, would fall within any of the classes described in sections 30(1) or 30(2) of the FOIA.

24. Kent Police said that the information described in the request, if it was held, would be exempt from disclosure by virtue of section 30(2)(b).

25. Consideration of section 30(3) of the FOIA involves two stages; first, the information described in the request must fall within the classes described in sections 30(1) or 30(2). Secondly, the exemption is qualified by the public interest. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in confirming or denying whether information is held, then confirmation or denial must be provided.

26. In this case, the complainant told the Commissioner:

"Our request is solely concerned with the policy question of whether the force has in the past recruited children as CHIS. It does not seek the details of their recruitment in relation to any investigation".

27. The complainant also emphasised that he was only seeking information:

"... on whether a power under RIPA 2000 has been exercised".

28. In his view, the information requested *"does not concern exempt information within the scope of s 30(2)".*

29. In that respect, however, Kent Police argued that, rather than ask whether it has the ability to recruit children as CHIS, the request is seeking to establish whether Kent Police has authorised the use of a child as a CHIS within a specified period. It argued that such information, if held:

"... clearly relates to investigations and to the obtaining of information from confidential sources".

30. Acknowledging the complainant's view that, for many forces, information may not be held, Kent Police told him:

"... those determined to identify informants have the ability to use small pieces of information in order to build a more complete picture and it is the cumulative effect of information disclosures that the Police Service feel will lead to harm".

31. In its submission to the Commissioner, Kent Police maintained that confirming or denying whether information is held would highlight whether Kent Police has authorised the use of a child as a CHIS within the time period specified in the request.

32. Kent Police explained to the Commissioner:

"If a child has been authorised as a CHIS then this must and will be in relation to a specific criminal investigation, therefore whilst the applicant may not be seeking the details of any specific investigation the information he is seeking would, if held, relate to an investigation".

33. It also argued:

"Confirming or denying whether information is held would highlight whether Kent Police has authorised the use of a child as a CHIS within the specified time period.

...

If each force were to confirm or deny whether it had authorised the use of a child as a CHIS in the specified period then it would highlight [in] which areas of the country investigations involving child CHISs have or are occurring".

34. The Commissioner has issued guidance on section 30¹. That guidance states:

*"For information to be exempt under section 30(2) it must both relate to the public authority's investigations or proceedings **and** relate to confidential sources.*

*However, it does not have to be obtained or recorded as part of a particular investigation. It only has to be obtained or recorded by the public authority for the purposes of its functions **relating** to those investigations or proceedings. For example, a police force may have its own procedures for handling confidential sources. Those confidential sources are used to assist the police in their investigations and so the procedure will relate to its duty to investigate criminal offences even though it is not held for a particular investigation".*

35. The Commissioner also accepts that it can be important to use a neither confirm nor deny response consistently.
36. Having considered the wording of the request, and taking into account the purpose and nature of covert human intelligence sources, the Commissioner is satisfied that the requested information, if held, would both relate to Kent Police's investigations or proceedings and to confidential sources.
37. The Commissioner is therefore satisfied that the exemption provided by section 30(3) of the FOIA is engaged.

The public interest test

38. Section 30(3) is subject to the public interest test. Although the exemption may be automatically engaged where the information described in a request would be exempt under either subsection (1) or (2), it may only be maintained in the public interest if confirmation or denial would interfere with the effective conduct of the investigations or proceedings.
39. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.

¹ <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

40. In broad terms, the section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.
41. In her guidance, the Commissioner recognises:

"A vital element of many investigations and proceedings is the intelligence supplied by confidential sources and it is important that section 30 serves to protect these sources so that they are not deterred from cooperating with public authorities".

Public interest arguments in favour of confirming or denying

42. The complainant argued that there is significant public interest in the subject matter of his request. He recognised, in particular, *"the increased parliamentary and media interest in the use of juvenile CHIS"*.
43. In that respect, in his correspondence with the Commissioner, the complainant disputed that confirming or denying whether Kent Police recruits children as CHIS will increase the risk borne by any individuals in that position.
44. Kent Police acknowledged the public interest in confirming or denying that any information exists, recognising that such confirmation or denial:

"... would lead to a better informed public, improving their knowledge and understanding of how the Police Service utilises the use of Covert Human Intelligence Sources as part of their investigative policing".

45. It recognised that confirming or denying that information exists could promote public trust in providing transparency and demonstrating openness and accountability with regard to investigations.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

46. Arguing in favour of maintaining the exemption, Kent Police told the complainant that, by its very nature, information held relating to informants is sensitive. It told him:

"In some cases it is that confirmation, or not, which could disclose facts harmful to informants. ... The only methodology which will provide the required degree of protection to those individuals is if the force takes advantage of its ability under FOIA legislation to,

when appropriate, not confirm or deny that the information requested is, or is not held".

47. Arguing generically, Kent Police told the complainant:

"The Police Service will never confirm or deny information is held if in doing so could identify investigative activity and therefore undermine investigations. To do so would hinder the prevention or detection of crime".

48. With reference to the particular subject matter of this request, it told him:

" ... Whilst I acknowledge there is a public interest in knowing how frequently under 18s are being recruited as CHIS, this would be met by provision of a National figure in the future. It would not, for the reasons outlined, be in the public interest to confirm or deny whether authorisations have been made at police force level".

49. In its submission to the Commissioner, Kent Police argued that disclosure of any information in relation to CHIS, by way of confirmation or denial, would be perceived as a breach of trust and confidentiality by CHIS.

50. It further explained:

"Individuals who provide information to the police as a CHIS do so at a level of risk to themselves. Any information disclosed at a local level by a police force which has the impression of increasing that risk of harm would deter individuals from providing information to the police as a CHIS in the first place and consequently this would harm investigations and increase the risk of harm to members of the public from offenders".

Balance of the public interest

51. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the act of confirming or denying whether the requested information is held could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

52. The Commissioner recognises the importance of the public having confidence in those public authorities tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.

53. The Commissioner considers that there is clearly a public interest in the transparency and accountability of public authorities. She recognises that confirming or denying whether the requested information is held would meet the public interest in transparency and accountability of Kent Police.
54. The Commissioner recognises that the subject matter – the use of CHIS under the age of 18 - is a sensitive issue. By confirming whether or not it holds the requested information, Kent Police would be revealing whether or not it has authorised the use of a person under the age of 18 as a CHIS during the timeframe specified in the request.
55. The Commissioner also accepts that a public authority may issue a NCND response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is, in fact, held.
56. This does not mean that public authorities should use a NCND response in a blanket fashion. They should base their decision on the circumstances of the particular case with regard to the nature of the information requested and with appropriate consideration given to the public interest test.
57. In considering the balance of the public interest in this case, the Commissioner recognises that there is a significant public interest in protecting the supply of information from confidential sources.
58. This goes to the heart of what the section 30 exemption is designed to protect - the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings - and so the public interest in maintaining the exemption must be very strong in such a case
59. The Commissioner also considers that significant weight has to be given to the need to protect Kent Police's ability to adopt a consistent approach when responding to similar requests about authorisations in the future.
60. Having considered the issues in this particular case, the Commissioner's view is that the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of Kent Police issuing such a confirmation or denial. Therefore, the Commissioner finds that Kent Police was entitled to rely on the refusal to confirm or deny provided by section 30(3) of the FOIA.

Right of appeal

61. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.
63. 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

Samantha Bracegirdle
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