

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2020

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

Decision (including any steps ordered)

1. The complainant requested information relating to Kent Police's internal force guidance on a number of topics, including the investigation of domestic abuse.
2. Kent Police provided some information within the scope of the request but refused to provide the remainder, citing sections 40 (personal information) and 31 (law enforcement) of the FOIA.
3. The complainant did not object to the application of section 40.
4. The Commissioner investigated Kent Police's application of section 31 to the information withheld by virtue of that exemption.
5. The Commissioner's decision is that Kent Police was correct to cite sections 31(1)(a) and (b) of the FOIA and to conclude that the balance of the public interest test favoured maintaining the exemption. However, she found that Kent Police breached section 10 (time for compliance) of the FOIA by not providing disclosable information within the statutory timeframe.
6. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

7. On 17 January 2019, the complainant wrote to Kent Police and requested information in the following terms:

"Please could you provide a copy of all your internal force guidance for officers, including policies, procedures, checklists, toolkits on:

 1. *Domestic abuse*
 2. *Harassment and stalking*
 3. *Victims Right to Review".*
8. Kent Police responded on 18 February 2019. It provided some information within the scope of the request. It refused to provide the remaining information, citing sections 31(1)(a) (law enforcement) and 40 (personal information) of the FOIA as its basis for doing so.
9. The complainant challenged its application of section 31 to the information withheld by virtue of that exemption.
10. Following an internal review, Kent Police wrote to the complainant on 29 April 2019 maintaining its original position.

Scope of the case

11. The complainant contacted the Commissioner on 24 July 2019 to complain about the way part (1) of her request for information had been handled. While she acknowledged that Kent Police had provided a policy relating to domestic abuse, she told the Commissioner it had refused to provide disclosure of police procedures and guidance for officers in relation to the investigation of domestic abuse.
12. She disputed Kent Police's application of section 31(1) of the FOIA to part (1) of the request. She disputed the harm, by way of disclosure, claimed by Kent Police. She also considered that it was in the public interest that the withheld information – policies and procedures in relation to the investigation of domestic abuse - be made available to the public.
13. Although the Commissioner understands from the complainant that some police forces would appear to have complied with similar requests, the Commissioner does not consider that this sets an automatic precedent for disclosure under the FOIA. Each case must be considered on its own merits.

14. During the course of the Commissioner's investigation, Kent Police released further information within the scope of part (1) of the request to the complainant. It also confirmed that it considered that subsections (a) and (b) of section 31(1) applied to the remaining withheld information.
15. While grateful to receive the additional information disclosed to her, the complainant confirmed that she remained dissatisfied with Kent Police's response and asked the Commissioner to continue with her investigation.
16. Accordingly, the analysis below considers Kent Police's application of sections 31(1)(a) and (b) of the FOIA to the disputed information. That information comprises information in scope of part (1) of the request.
17. The complainant was also dissatisfied with the way in which the information provided to her was redacted. She considered that, as it did not show the redactions blocked out, it was not possible to know how much of the policy had been redacted. The Commissioner has addressed the matter of redaction in 'Other matters' below.

Reasons for decision

Section 31 law enforcement

18. Section 31 of the FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
19. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed 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 disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;

- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
20. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
 21. In this case, Kent Police is relying on sections 31(1)(a) and (b) of the FOIA. Those subsections state that information is exempt if its disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders.
 22. The Commissioner accepts that there is clearly some overlap between those subsections.
 23. As joint arguments have been submitted in respect of subsections (a) and (b), the Commissioner has considered these together.

The applicable interests

24. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity in section 31(1) – in this case, the prevention or detection of crime (section 31(1)(a)) and the apprehension or prosecution of offenders (section 31(1)(b)).
25. In correspondence with the complainant, Kent Police told her:

"Domestic Abuse policy details the process to be followed by officers and staff concerning the reporting, recording, risk assessment and investigation of any incident of domestic abuse.

...It identifies lines of enquiry and sensitive considerations ... which, were they to be released into the public domain, have the potential to put victims of domestic abuse and their children at risk".

26. Similarly, in its submission to the Commissioner, Kent Police explained that release of the requested information would undermine its ability to support victims of domestic abuse.
27. The Commissioner is satisfied that the prejudice Kent Police is envisaging in this case is relevant to the particular interests which sections 31(1)(a) and (b) are designed to protect. Accordingly, the first limb of the three part test outlined above is met.

The nature of the prejudice

28. The Commissioner next considered whether Kent Police demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (b) are designed to protect. In her view, disclosure must at least be capable of harming the interests in some way, ie have a damaging or detrimental effect on them.
29. With regard to harm being caused by disclosure, having considered the withheld information the Commissioner is satisfied that it contains sensitive details of Kent Police procedures which, if disclosed, could undoubtedly assist any individuals intent on circumventing the law. This could have a detrimental effect on law enforcement. The Commissioner is satisfied that the resultant prejudice can be correctly categorised as real and of substance.
30. She is also satisfied that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.

The likelihood of prejudice

31. The Commissioner does not consider that Kent Police gave a clear indication, in its correspondence with the complainant, as to whether the prejudice would occur, or would be likely to occur.
32. She has therefore considered the lower level of likelihood – '*would be likely to prejudice*'.

Is the exemption engaged? Would disclosure be likely to prejudice law enforcement?

33. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.
34. Having duly considered the arguments put forward by Kent Police, and having viewed the withheld information, the Commissioner is satisfied that the arguments are relevant to sections 31(1)(a) and (b).

35. She is satisfied that the prejudice alleged by Kent Police is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.
36. Having had the benefit of examining the withheld information, the Commissioner accepts that it comprises material relating to the process to be followed by officers and staff concerning the reporting, recording, risk assessment and investigation of any incident of domestic abuse.
37. She accepts that such information could be useful to someone intent on remaining undetected having broken the law.
38. Consequently, she is satisfied that its disclosure would be likely to represent a real and significant risk to law enforcement matters.
39. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would be likely to occur, she is therefore satisfied that the exemption provided by sections 31(1)(a) and (b) is engaged.

Public interest

40. 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 exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

41. Arguing in favour of disclosure, the complainant put forward a number of arguments. For example, she told Kent Police:

"... women who have reported as victims and survivors ... will benefit directly in terms of their experience of the criminal justice system and their ability to improve the service received from the police where this falls short".

42. She considered that, as the requested policies were intended to ensure that staff responded to reports of abuse appropriately, disclosure would enable 'active engagement', improving the confidence of victims and survivors and identifying where any improvements could be made.

43. In support of disclosing the requested information the complainant also told Kent Police:

"Overall ... disclosure is not merely of general or theoretical benefit in improving awareness and understanding, but of concrete benefit to many women...".

44. Kent Police acknowledged that disclosure of its domestic abuse policy could be said to contribute to openness and transparency.
45. It also recognised, in its correspondence with the Commissioner, that release of the information may provide reassurance to the public that Kent Police has an appropriate response guidance document.

Public interest arguments in favour of maintaining the exemption

46. In favour of maintaining the exemption, Kent Police told the complainant that disclosure of any information that had the potential to impact negatively on the investigation of domestic abuse crimes cannot be considered to be in the public interest.
47. Acknowledging its duty of care and responsibility to the victims of domestic abuse, it further argued that disclosure of information relating to its response to domestic abuse, namely the requested policy and support documents:

"... would give the suspect an increased opportunity to manipulate the victim and their environment through their own psychological, physical and emotional behaviour".

48. In Kent Police's view, increasing the risk to the victims of domestic abuse was not in the public interest.
49. Similarly, in its submission to the Commissioner, while accepting that disclosure in this case would bolster public confidence in the actions taken by the police, Kent Police argued that:

"... the potential risk to the victims by offenders being aware of the tactics used, and the potential for identifying ways around these tactics outweighs the public interest [in disclosure]".

50. Kent Police also explained that the police response to domestic abuse is published and audited by Her Majesty's Inspectorate of Constabulary¹.
51. The Commissioner notes that the report, which considers "*... the response the police service provides to victims of domestic abuse*", includes Kent Police.
52. Kent Police told the Commissioner:

¹ <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/the-police-response-to-domestic-abuse-an-update-report.pdf>

"... the public interest is better served by these assessments rather than releasing police processes, and operation guidance".

Balance of the public interest arguments

53. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and Kent Police.
54. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime and to the apprehension or prosecution of offenders, against the public interest in openness and transparency.
55. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
56. She also acknowledges the public interest arguments in favour of openness and transparency, and of scrutiny of policing methods.
57. The Commissioner considers that it is important that the general public has confidence in the police service, which is responsible for enforcing the law. Confidence will be increased by allowing scrutiny of how the police execute their duties. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
58. The Commissioner acknowledges the serious nature of the subject matter. She also recognises that the requested information is clearly of genuine interest to the complainant. However, disclosure under the FOIA is disclosure to the world at large. She must therefore consider whether the information is suitable for disclosure to anyone and everyone.
59. In that respect, the Commissioner is mindful that Kent Police expressed concerns that disclosure of further information relating to its domestic abuse procedures would be likely to impact on its ability to undertake its duties effectively. She has also taken into account the argument that release of the withheld information would be likely to put victims at serious risk.
60. While restricted in what she is able to say about the content of the withheld information, without disclosing the nature of the information itself, the Commissioner recognised Kent Police's description of the information as comprising *"sensitive details of Kent Police procedures and actions"*.

61. Clearly, disclosing information that may enable individuals seeking to conduct themselves improperly to adapt their behaviour, in order to evade detection, is not in the public interest. This would be contrary to the policing purpose i.e. the prevention and detection of crime and the apprehension and prosecution of offenders.
62. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that may compromise the police's ability to accomplish its core function of law enforcement.
63. In that respect, she recognises that there is a very strong public interest in protecting the law enforcement capabilities of a police force and she considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to the prevention or detection of crime and the apprehension or prosecution of offenders.
64. She gives weight to the argument that further disclosure has the potential to put victims of domestic abuse at serious risk: this would also be contrary to the policing purpose.
65. In the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that Kent Police was entitled to rely on sections 31(1)(a) and (b) of the FOIA to refuse to disclose the requested information.

Section 10 time for compliance

66. Section 10(1) of the FOIA provides that -

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

67. As set out above, Kent Police reconsidered its handling of the request and provided further information to the complainant during the course of the Commissioner's investigation.
68. As this was clearly disclosed outside of the statutory timeframe, the Commissioner finds that Kent Police breached section 10 of the FOIA.

Other matters

69. The FOIA does not lay down any rules about redaction. However, the Commissioner considers it good practice for a public authority to give an indication of how much text it has redacted, and where from. She also recommends that, if possible, the public authority indicates which sections it removed using which exemption².
70. The Commissioner recommends such practice to Kent Police in its future handling of requests.

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

Right of appeal

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

72. 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.

73. 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

**Carolyn Howes
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Wycliffe House
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Wilmslow
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