

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

### **Decision notice**

**Date:** 2 August 2021

**Public Authority:** Chief Constable of Thames Valley Police

**Address:** Headquarters

Oxford Road

Kidlington

OX5 2MX

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

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1. The complainant submitted a three part request for information about religiously aggravated hate crime to Thames Valley Police (TVP). TVP said that the requested information was exempt from disclosure under sections 30(1)(a) and (b) (Investigations and proceedings) and 40(2) (Personal information) of the FOIA.
2. The Commissioner's decision is that TVP was not entitled to rely on the exemptions at section 40(2) or sections 30(1) (a) and (b) of the FOIA to withhold the information described in part (1) of the request. However, she found that it was entitled to rely on section 40(2) of the FOIA to refuse to disclose the information specified in parts (2) and (3) of the request, which she found to be special category data.
3. The Commissioner requires TVP to take the following steps to ensure compliance with the legislation.
  - Disclose the information described in part (1) of the request.
4. TVP must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. Previously, on 10 March 2020, the complainant had submitted a request for information to TVP about how many hate crime offences it had recorded where the victim was targeted on the basis of being (or being presumed to be) an 'apostate' – a person who has left, converted from, or 'apostatized' from any religious group. TVP had confirmed that there was one case.

6. Following on from this, on 23 July 2020 the complainant wrote to TVP and requested information in the following terms:

*"As you have identified a relevant offence, I should be grateful if you would receive a supplementary FoI request for the additional information below (following the normal practice in such cases), for processing subject of course to a further 20 working day timescale:*

- 1. The nature of the offence concerned, however this can be most conveniently identified from your records - for example, either by description (e.g. 'Religiously aggravated criminal damage'), corresponding Home Office Data Hub Code ('58J') or legislative provision (for this example, section 30 of the Crime and Disorder Act 1998);*
- 2. The religious group the victim has left or is presumed to have left; and*
- 3. The religious group the victim has adopted or is presumed to have adopted. This may well of course be 'no religion', although research suggests that there are other possibilities.*

*In the event that a section 40(2) exemption would apply to this information (for example by identifying any individual, however indirectly), would you kindly supply any of the above details which could be disclosed without attracting the exemption."*

7. TVP responded on 19 August 2020 and said that the information was exempt from disclosure under sections 30(1)(a) and (b) and 40(2) of the FOIA. It maintained this position at the internal review.

## Scope of the case

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8. The complainant contacted the Commissioner on 6 November 2020 to complain about the way his request for information had been handled. He disagreed with the application of sections 30 and 40 to withhold the

information. He said the information was wanted in connection with a submission he had wished to make to a Law Commission consultation on hate crime laws and he referred the Commissioner to other police forces that he said had disclosed similar information, largely without redaction. He considered that it should be possible to comply with the request, if not in whole, then at least in part.

9. The analysis below considers TVP's application of the exemptions at section 30 and section 40 of the FOIA to refuse the request.

## Reasons for decision

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### Section 40 – personal information

10. Section 40(2) of the 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.
11. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 General Data Protection Regulation ('GDPR').
12. 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 the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

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

*"any information relating to an identified or identifiable living individual".*

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The request being considered here is for the name of the offence recorded, and the former and subsequent religious affiliations of the alleged victim.
19. The withheld information clearly *relates to* the individual who was the victim of the alleged offence, although they are not named. The second part of the test is whether the withheld information identifies them (or any other individual).
20. On this point, the Commissioner's guidance on section 40<sup>2</sup> states:

*"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them"*.
21. The withheld information in this case doesn't directly identify any individual. However, just because the name of an individual is not stated does not mean that they cannot be identified. The Commissioner's guidance on what is personal data<sup>3</sup> states:

*"A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable*

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

*chance that those who may receive the data will be able to identify particular individuals."*

22. The guidance also states:

*"The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual. When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals."*

23. In considering whether an individual could be identified from apparently anonymised information, a test used by both the Commissioner and the First-tier Tribunal is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so.
24. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.
25. TVP has not offered an analysis of how re-identification could occur, it has simply stated that it might occur if the complainant (or any other third party) was motivated to try it. However, it has confirmed to the complainant that there was only one such offence which featured the characteristics specified in the request.
26. The Commissioner notes that the information relates to a single offence. It does not identify the victim directly. However, she recognises that the victim may live, work and socialise with people who have access to particular knowledge and information about them (including whether they have (or are suspected to have) converted from one religion to another and whether they have had recent interaction with the police) which will not necessarily be known by the wider public. When considering this, she has had regard to the Tribunal's comments in *Marshall vs Information Commissioner and Barts Health NHS Trust* EA/2019/0338, that where re-identification was achieved using information which might not be available to the wider public, the information was still personal data.
27. The Commissioner has viewed the withheld information at parts (1), (2) and (3) of the request. She is satisfied that, when considered together,

and combined with a motivated intruder's pool of knowledge, this could result in the victim becoming identifiable to those who know him/her.

28. The Commissioner has seen nothing to suggest that the complainant wishes to use the information in this way. Nevertheless, disclosure under the FOIA is treated as a disclosure to the world at large, and once made it cannot be rescinded. The potential exists for other people (including the alleged perpetrator) to cross reference the information in this way, and in so doing, to have confirmed to them under the FOIA that the individual had reported being the victim of a criminal offence, and also their religious affiliations.
29. The ICO's Code of Practice on Anonymisation<sup>4</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*
30. The Commissioner notes that information about criminal offences and religious affiliations is treated as highly sensitive information under the DPA, requiring higher levels of protection. She also notes that the request asks for information relating to offences where the victim's conversion from one religion to another has played a central role in the offence. This in itself indicates that religious conversion can be a contentious matter and that there are people who will be sufficiently motivated to try to confirm whether someone they suspect of converting to another religion, has in fact done so (including the alleged perpetrator of the offence in this case).
31. The Commissioner's view in this case is that because the withheld information relates to a single alleged offence, this increases the possibility of re-identification occurring when all the withheld information is combined with other information. As the Commissioner has identified that there will be individuals interested in identifying people who have converted to another religion, she considers the risk of re-identification occurring in this case to be reasonably likely. As set out above, the Commissioner's guidance states that if the risk of identification is 'reasonably likely' the information should be regarded as personal data.
32. Having accepted that the withheld information as a whole refers to a sufficiently small cohort that a single individual may be identifiable, the

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<sup>4</sup> <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

Commissioner has considered whether, instead, a partial disclosure of information would be possible without the same result. Her decision is that it would be possible.

33. She considers that on its own, the information described in part (1) of the request (the name of the alleged offence) is sufficiently broad that even combined with the knowledge that it relates to the issue of religious conversion, the possibility of it identifying a particular individual is remote. It is only when the name of the offence is combined with information about the victim's former and subsequent religious affiliations that this reduces the number of possible data subjects sufficiently for an individual to be identified with a reasonable degree of certainty by a motivated intruder. Without information as to the former and subsequent religious affiliations of the data subject, the offence on its own could relate to a person of any religious persuasion, or of none.
34. As the Commissioner considers the possibility of re-identification being achieved is remote, then, in accordance with her guidance, the information specified in part (1) of the request is not personal data and TVP is not entitled to rely on section 40(2) of the FOIA to withhold it.
35. The Commissioner considers whether section 30(1) of the FOIA provides alternative grounds for this information to be withheld, later in this decision notice. (Her conclusion is that it does not and therefore that the information should be disclosed.)
36. Turning to the information at parts (2) and (3) of the request (ie the former and subsequent religious affiliations of the data subject) and the motivated intruder test, the Commissioner is satisfied that this information, when combined with the information specified in part (1) of the request (which she has concluded should be disclosed), *relates to* the data subject and there is a reasonable likelihood that they may be *identified* from it. The information specified in parts (2) and (3) of the request therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
37. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
38. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

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

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

40. 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.
41. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
42. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

***Is the information special category data?***

43. Information relating to special category data is given special status in the GDPR.
44. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
45. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that it does include special category data. She has reached this conclusion on the basis that it is information on the religious affiliations of the person who is the victim of the alleged offence that the request concerns.
46. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
47. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
48. The Commissioner has seen no evidence or indication that the data subject has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
49. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this



special category data would therefore breach principle (a). The information specified in parts (2) and (3) of the request is therefore exempt from disclosure under section 40(2) of the FOIA<sup>5</sup>.

### **Section 30 – investigations and proceedings**

50. TVP cited section 30(1)(a) and (b) to withhold the information at all three parts of the request. As the Commissioner agrees that the information specified in parts (2) and (3) may be withheld under section 40(2), she has only considered the application of section 30(1)(a) and (b) to the information described in part (1) of the request (ie the name of the offence or the legislative provision under which it was recorded).

51. Section 30(1)(a) and (b) of the FOIA states:

*"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

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

*(i) whether a person should be charged with an offence, or*

*(ii) whether a person charged with an offence is guilty of it,*

*(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct...".*

52. The phrase "at any time" means that information can be exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation.

53. As joint arguments were submitted in respect of both subsections cited by TVP, the Commissioner has considered them together.

#### ***Is the exemption engaged?***

54. Section 30 is a 'class based' exemption and it is not necessary to show that disclosure would, or would be likely to, result in any prejudice, for it to be engaged. It is enough that the information sought by the request

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<sup>5</sup> The Commissioner also considers that the information is criminal offence data, which attracts similar protections to special category data. It is not necessary to consider this point separately as the outcome would be the same.

falls within the particular class of information described by the exemption.

55. In order for the exemption to be engaged, any information must be held for a specific or particular investigation and not for investigations in general.
56. The Commissioner's guidance on section 30<sup>6</sup> describes the circumstances in which the subsections of section 30(1) might apply. With respect to section 30(1)(a), the guidance says:

*"The exemption applies to both investigations leading up to the decision whether to charge someone and investigations that take place after someone has been charged. Any investigation must be, or have been, conducted with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it. It is not necessary that the investigation leads to someone being charged with, or being convicted of an offence..."*
57. The withheld information in this case relates to a particular allegation of a criminal offence which TVP has confirmed was the subject of a police investigation, which was closed at the point the request was received.
58. As a police force, TVP has a duty to investigate allegations of criminal offences by virtue of its core function of law enforcement. The Commissioner is therefore satisfied that it has the power to carry out investigations of the type described in section 30(1)(a) of the FOIA and that the information was held in connection with a specific investigation. She is therefore satisfied that the exemption provided by section 30(1)(a) is engaged.
59. With regard to section 30(1)(b), the Commissioner's guidance states that this exemption may only be claimed where a public authority has the power to institute and conduct criminal proceedings that result from its investigation.
60. The Commissioner has not been presented with any evidence that TVP holds such powers. Her understanding, from previous experience of considering this exemption, is that charging decisions on criminal investigations are generally made by the Crown Prosecution Service. The Commissioner therefore considers that section 30(1)(b) of the FOIA

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<sup>6</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

is not engaged by the information at part (1) of the request and she has not considered its application further in this decision notice.

**Public interest test**

61. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the information may only be withheld if, 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 disclosure**

62. The complainant explained to the Commissioner that there was a clear public interest in the information being disclosed. He said he had requested it from TVP, and other police forces, to support a response to a Law Commission consultation on hate crime.
63. He also believed that TVP had failed to demonstrate that disclosure would genuinely have an adverse affect on its investigative functions. He felt that TVP should be required to engage meaningfully with the public interest balancing test, rather than simply seeking to apply the exemption in a 'blanket' fashion.
64. In its refusal notice, TVP said that disclosure: *"...would lead to a better informed public, improving their knowledge and understanding of how the Police Service undertakes investigations"*.

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

65. Noting that the case had not been made public, TVP said:

*"By its very nature, information held relating to specific cases is sensitive in nature. The Police Service will never disclose information under FOIA which could identify investigative activity and therefore undermine their past, present and future investigations. To do so would hinder its ability to perform this function."*

66. It commented that FOIA requests could be misused to obtain information about specific crimes and about victims, which: *"...would hinder our ability to protect the victim and perform our core function."*
67. TVP said that it had been unaware that the complainant wanted the information in support of a consultation on hate crime, but it believed that it would hold little value in that regard. It said that the complainant appeared to be acting in pursuit of his own, private interests and it could see no wider public benefit that would result from the information being disclosed

***Balance of the public interest***

68. When considering the public interest in maintaining exemptions the Commissioner considers it important to be clear about what they are designed to protect.
69. The purpose of section 30 is to preserve the ability of relevant public authorities to carry out effective investigations. Key to the balance of the public interest in a case where this exemption is found to be engaged is whether disclosure 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, and in turn, increase the risk of harm to members of the public from offenders.
70. Set against this, the Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. The FOIA is a means of helping to meet that public interest, as confidence will be increased by allowing scrutiny of how they discharge their functions.
71. TVP has said that it believes the complainant was pursuing his own personal interests with the request and that there are no compelling arguments for the information to be disclosed to the wider public. The Commissioner would disagree. There is always a public interest in transparency and accountability in relation to information held by public authorities. The subject matter of the request in this case is an alleged hate crime incident. Disclosing the name of the offence under which the allegation was recorded would show the public that the police had received and recorded as a crime, a serious allegation of a particular nature. She considers it might encourage other victims to come forward if they feel their complaints will be treated seriously by the police. This is a factor in favour of disclosure of considerable weight.
72. The complainant has accused TVP of treating the exemption at section 30 as a *de facto* absolute exemption, citing its claim that it will “never” disclose information which could identify investigative activity. The Commissioner considers that TVP has placed considerable emphasis on the damaging effect to future investigations that disclosure of the information would have. However, it has failed to show a clear causal link between disclosure in this case and the harm that it envisages. It has also not elaborated on the precise nature of the harm that would occur.
73. In view of the very limited information that was being requested, the Commissioner asked TVP to clearly show how disclosure would lead to the harm it envisaged. In response, TVP alluded to the possibility of third parties being able to identify the victim. The Commissioner has

accepted this as an argument for the application of section 40(2) to parts (2) and (3) of the request, but TVP has not shown how the disclosure of the name of the offence on its own would undermine its investigative functions.

74. As a general rule, the Commissioner accepts that certain information held by the police about criminal investigations can impart intelligence which may be useful to those seeking to commit criminal offences and evade detection. Its disclosure may also, in future, deter people (victims, witnesses and suspects) from cooperating with the police, for fear that information which might be capable of identifying them may be placed in the public domain. The Commissioner has placed considerable weight on these as arguments for withholding information, when the information requested has been, for example, specific details of offences, locations, dates, and the names or other identifiers of victims or suspects.
75. However, the Commissioner has difficulty accepting these adverse effects as potential outcomes when the information being requested in this case is merely the name of the offence recorded by TVP, even where this is accompanied with the knowledge that it relates to religious conversion. TVP has not explained how such limited information would result in the outcomes it has alluded to and it is by no means obvious. In the absence of these arguments, the Commissioner does not see there is any realistic harm which would be caused by disclosure on this occasion.
76. TVP has also argued that the fact the complainant has not supplied a compelling reason for wanting the information is in itself an argument favouring maintaining the exemption. On that point, the Commissioner recognises that the FOIA is 'purpose blind' and that while the strength of competing arguments may be weighed against each other when considering the public interest in disclosure, a requester's failure to provide what a public authority considers to be a suitable reason for wanting information in the first place, is not, on its own, valid grounds for refusing a request.
77. Whilst the Commissioner fully understands the inherent need to protect police investigations, she does not consider that in this case TVP has shown that disclosure of such limited information would have any impact on current or future investigations. Consequently, she finds that the arguments in support of transparency are stronger than those in favour of maintaining the exemption. Her decision is that TVP was not entitled to rely on section 30(1)(a) to refuse the information specified in part (1) of the request.

78. Since the Commissioner has also determined that TVP is not entitled to rely on section 40(2) to withhold this information, TVP must now take the steps specified in paragraph 3, above.

## Right of appeal

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

80. 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.

81. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**