

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

### **Decision notice**

**Date:** 27 September 2021

**Public Authority:** Chief Constable of Bedfordshire Police  
**Address:** Police Headquarters  
Woburn Road  
Kempston  
Bedfordshire  
MK43 9AX

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

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1. The complainant requested information relating to 'stop and search' activities. Bedfordshire Police provided some information but refused to provide the remainder, citing sections 24 (national security) and 31 (law enforcement) of FOIA.
2. The Commissioner's decision is that Bedfordshire Police has failed to demonstrate that either exemption is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - disclose the requested information in scope of parts (1) and (2) of the request.
4. Bedfordshire Police must take this step 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.

#### **Background**

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5. The Terrorism Act 2000 received Royal Assent on 20 July 2000. It is described as:

*"An Act to make provision about terrorism; and to make temporary provision for Northern Ireland about the prosecution and punishment of certain offences, the preservation of peace and the maintenance of order"<sup>1</sup>.*

6. Section 43 is entitled 'Search of Persons'. Section 43(1) states:

*"A constable may stop and search a person whom he reasonably suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist".*

## **Request and response**

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7. On 11 September 2020, the complainant wrote to Bedfordshire Police and requested information in the following terms:

*"Can you please tell me:*

*1) How many 'stop and searches' under S.43 Terrorism Act 2000 were conducted by officers from Bedfordshire Police in the last 12 months (i.e. from September 2019 to August 2020);*

*2) How many of those searches resulted in further action being taken, such as the individual who was searched being arrested; and*

*3) How many of those searches resulted in complaints being filed against either the officers involved or Bedfordshire Police generally".*

8. The request was made using the 'whatdotheyknow' website.
9. Bedfordshire Police responded on 9 October 2020. It confirmed it held information within the scope of parts (1) and (2) of the request, but refused to provide it, citing the following exemptions:
- section 24(1) – National Security
  - section 31(1) – Law Enforcement.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2000/11/introduction>

10. It provided the information within the scope of part (3) of the request.
11. Following an internal review, Bedfordshire Police wrote to the complainant on 13 November 2020 maintaining its original position.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 14 November 2020 to complain about the way his request for information had been handled.
13. He was dissatisfied with Bedfordshire Police's handling of the request, noting in particular that it had failed to respond to the specific concerns that he had set out when requesting an internal review. He proposed a solution that would provide an acceptable outcome to him.
14. As is her practice, during the course of her investigation, the Commissioner invited Bedfordshire Police to revisit its handling of the request and provide her with any further submissions. She asked Bedfordshire Police for specific information in respect of each of the exemptions cited. She also asked Bedfordshire Police to confirm whether it was able to release information within the scope of parts (1) and (2) of the request in the way proposed by the complainant.
15. Bedfordshire Police confirmed that it did not wish to add to the arguments it had previously provided to the complainant.
16. In the absence of any comment from Bedfordshire Police about the informal resolution proposed by the complainant, the Commissioner progressed her investigation.
17. The Commissioner considers the arguments put forward by Bedfordshire Police in its correspondence with the complainant are contradictory in places. While she acknowledges it referenced the 'neither confirm nor deny' (NCND) provision, the Commissioner nevertheless considers from its correspondence that Bedfordshire Police is relying on sections 24(1) and 31(1) of FOIA.
18. The analysis below considers Bedfordshire Police's application of those exemptions to the information within the scope of parts (1) and (2) of the request.

## **Reasons for decision**

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### *Section 31 law enforcement*

19. Section 31 of 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.
20. In order to engage a prejudice based exemption such as section 31, there must be the likelihood that disclosure would, or would be likely to, 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 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 – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
21. 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.
22. 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.

*The complainant's view*

23. The complainant disputed Bedfordshire Police's handling of the request. He told Bedfordshire Police:

*"You have cited national security and law enforcement as the grounds on which you are refusing to release the figures on the number of s.43 stop and searches and the figures on subsequent actions. These are of course two very important considerations*

*however you have failed to adequately justify their use, instead relying on generic and vague assertions about terrorist plots and revealing " Police technics" (sic). These grounds are entirely unsubstantiated, indeed it is very difficult to see how any insights as to police tactics or ongoing investigations and trials can be gleaned from releasing simple figures on the past use of a well known police power".*

24. Similarly, he told the Commissioner that he considered the issue to be a matter of particular public importance.

*Bedfordshire Police's view*

25. With regard to the harm from disclosure in this case, Bedfordshire Police did not indicate which of its arguments related to which of the two exemptions relied on in this case, or whether all arguments applied equally. However, the Commissioner acknowledges that, of relevance to section 31, it told the complainant:

*"Revealing information regarding potential "terrorist attack plots on the UK", would release information regarding the Force's activities in this area. This awareness would help subjects avoid detection, and inhibit the prevention and detection of crime. This could either lead to the identification of specific cases or in providing this level of information at force level would result in presenting a real risk of identifying the resources available to individual departments monitoring groups or individuals likely to be committing offences within the force area and would compromise on-going operations and investigations, some of which may be covert, and undermine the effective delivery of operational law enforcement by revealing tactical capability of Bedfordshire Police".*

26. It also said:

*"The prevention and detection of crime is the foundation upon which policing is built. The Police Service has a clear responsibility to prevent crime and arrest those responsible for crime or those that plan to commit crime".*

27. It also told him:

*"Any information identifying the focus of policing activity could be used to the advantage of terrorists or criminal organisations. Information that undermines the operational integrity of these activities will adversely affect public safety and have a negative impact on both national security and law enforcement".*

*The likelihood of prejudice*

28. As evidenced from the arguments provided to the complainant, Bedfordshire Police variously cited the terms 'could', 'would' and 'will' in relation to the level of prejudice it envisaged occurring in this case.

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

29. Although it did not explicitly state which limb of the exemption it considers applies, the Commissioner considers that Bedfordshire Police is relying on section 31(1)(a) of FOIA. That subsection states that information is exempt if its disclosure would, or would be likely to, prejudice:

(a) the prevention or detection of crime.

30. In a case such as this, it is not enough for the information to relate to the interests protected by section 31(1)(a), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it would occur.
31. 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'.
32. The information withheld by virtue of this exemption comprises the number of section 43 stop and searches and subsequent actions during a specific time period.
33. In relation to the actual prejudice which Bedfordshire Police alleged would, or would be likely to occur if the requested information were to be disclosed, the Commissioner considers that the arguments it put forward were generic rather than specific to the actual information requested. Such that Bedfordshire Police has failed to demonstrate a causal relationship between the requested information and the harm envisaged.
34. From the evidence she has seen, the Commissioner is not satisfied that Bedfordshire Police has demonstrated a real and significant likelihood of prejudice resulting to the prevention or detection of crime. The exemption provided by section 31(1)(a) is not, therefore, engaged. Having reached this conclusion it has not been necessary to go on to consider where the balance of the public interest lies.
35. The Commissioner has next considered Bedfordshire Police's application of section 24 to the same information.

*Section 24 national security*

36. The section 24 exemption applies if the requested information is "required for the purpose of safeguarding national security". The exemption does not apply just because the information relates to national security.
37. The Commissioner has issued guidance on section 24<sup>2</sup>. In that guidance, she states:

*"In broad terms section 24(1) allows a public authority not to disclose information if you consider that releasing the information would make the UK or its citizens more vulnerable to a national security threat. To understand the exemption better it is important to look more closely at the language used".*

38. Although there is no definitive definition of national security, the Information Tribunal for *Norman Baker v the Information Commissioner and the Cabinet Office* ([EA/2006/0045](#) 4 April 2007) provided the following:

- national security" means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK ; and
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

39. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-guidance/section-24-safeguarding-national-security/>



40. The Commissioner accepts that the subject matter of the request in this case relates to terrorism. She also recognises that terrorists can be highly motivated and may go to great lengths to gather intelligence.
41. She recognises that Bedfordshire Police argued that any information identifying the focus of policing activity could be used to the advantage of terrorists. She also accepts that Bedfordshire Police told the complainant:

*"..., any disclosure no matter how generic, which may assist a criminal, terrorist or terrorist organisation will adversely affect public safety".*
42. However, the Commissioner is not satisfied that Bedfordshire Police has explained why disclosing the specific information within the scope of the request in this case could harm national security.
43. Nor does she accept that Bedfordshire Police has demonstrated that withholding the requested information is 'reasonably necessary' to safeguard national security.
44. Having considered the arguments above, the Commissioner is not satisfied that exemption from the requirements of section 1(1)(b) in this case is *"required for the purpose of safeguarding national security"*. She has therefore concluded that section 24 is not engaged.
45. In light of that decision, it has not been necessary to consider the public interest arguments.

## **Other matters**

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### *Section 17 refusal notice*

46. The Commissioner has issued guidance<sup>3</sup> on writing a refusal notice. That guidance states:
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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1628/refusing\\_a\\_request\\_writing\\_a\\_refusal\\_notice\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1628/refusing_a_request_writing_a_refusal_notice_foi.pdf)



*"The explanation in the refusal notice should be detailed enough to give the requester a real understanding of why the public authority has chosen not to comply with the request. This will usually mean explaining the following things in some detail:*

- if a prejudice based exemption has been claimed, exactly how disclosing the information, or confirming or denying whether it is held, would lead to the prejudice set out in the exemption; or*
- if a class based exemption has been claimed, exactly how the information requested, or confirmation or denial that would need to be provided, meets the test set out in the exemption.*
- When the exemption is qualified by a public interest test, all the matters taken into consideration and an explanation of why the public interest has been found to favour withholding the information or refusing to confirm or deny whether it is held".*

47. The Commissioner commends her guidance to Bedfordshire Police.

*The internal review*

48. The Commissioner cannot consider the quality of the internal review process in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice (the Code) issued under section 45 of FOIA<sup>4</sup>.
49. Section 5.8 of the Code sets out that internal reviews should provide "a fair and thorough review" of relevant matters.
50. In its internal review response, Bedfordshire Police told the complainant that it had considered the points he had raised. However, rather than respond to those points, Bedfordshire Police simply told him that, having reviewed the request and the decision taken, it upheld the application of the exemptions to the request.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

51. The Commissioner considers that Bedfordshire Police's correspondence to the complainant, in response to his request for an internal review, did not conform to the Code.

## Right of appeal

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52. 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)

53. 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.

54. 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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**