

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

### **Decision notice**

**Date:** 9 December 2022

**Public Authority:** Chief Constable of Essex Police

**Address:** PO Box 2  
Springfield  
Chelmsford  
Essex  
CM2 6DA

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

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1. The complainant requested information from Essex Police ("the Police"), in relation to arrests made between 2019 and 2020, regarding online sexual offences of any kind, related to children. The Police cited sections 31(1)(a)(b) and 31(3) of FOIA – law enforcement, section 38 of FOIA – health and safety and section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that the Police cannot rely on sections 31(a)(b) and 31(3) of FOIA as they have failed to demonstrate that the exemptions are engaged. The Commissioner went on to consider section 38 – health and safety and section 40(2) of FOIA, however, the Police also failed to demonstrate that these exemptions are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with the requested information and/or;
  - Issue a new response to the complainant, not relying on the above sections of FOIA.
4. The public authority 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. On 2 January 2021, the complainant wrote to the Police and requested information in the following terms:

"1a. Please provide the number of arrests you made in 2019/20 regarding online sexual offences of any kind related to children.

1b. Please provide a breakdown of all the sexual offences associated with these arrests:

e.g. section 8 of SOA 2003 [insert number]; section 10 of SOA 2003 [insert number]; section 12 of SOA 2003 [insert number] section 14 of SOA 2003 [insert number]; and section 15 of SOA [insert number]; section 127 of the Communications Act 2003 [insert number].

1c. Please specify the number of these arrests that involved at least one child decoy. By 'child decoy' I am referring to an adult who pretends to be a child.

2. Please provide the number of arrests you made in 2019/20 in connection with online sexual offences against children based on evidence acquired by your own officers acting as decoys.

3. Please provide the number of arrests you made in 2019/20 in connection with online sexual offences against children based on evidence provided to you by so-called paedophile hunters.

4. Please provide the names of all so-called paedophile hunting groups who provided information to you that led to the arrest of individuals in connection with sexual offences against children in 2019/20."

6. The Police responded on 30 April 2021. It provided information in relation to parts 1a, 1b and 3. In relation to parts 1c, 2 and 4, the Police stated that it could neither confirm nor deny that it holds information relevant to these questions, by virtue of section 35(5) of FOIA – information supplied by or concerning certain security bodies; section 31(3)- Law enforcement and section 40(5) – personal information.
7. Following an internal review, the Police wrote to the complainant on 23 December 2021. It stated that it was relying on the following exemptions of FOIA: section 30(1)(a)(b) -investigations and proceedings conducted by public authorities and section 38 – health and safety.

8. During the Commissioner's investigation, he asked the Police to clarify which exemptions they were relying on, as it was not clear if they were referring to section 30 – Law enforcement, or section 31 investigations and proceedings conducted by public authorities.
9. The Police responded, advising that they had reviewed their response and were now relying on sections 31(a)(b) and 31(3) – law enforcement, section 38 – health and safety and section 40(2) – personal data. The exemptions they are relying on are in relation to part 4 of the complainant's request.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 31 December 2021, to complain about the way their request for information had been handled. Specifically, they wished to challenge the Police's refusal to disclose information within scope of part 4 of his request. i
11. The Commissioner considers that the scope of this case is to determine if the Police are able to rely on the following exemptions of FOIA to withhold the requested information: section 31(a)(b), section 31(3), section 38 and section 40(2).

### **Reasons for decision**

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12. Whilst the Police have not been clear about which exemptions they are relying on, the Commissioner has decided to consider if the Police could have relied on all the exemptions cited, using the information provided.
13. The Commissioner did provide the Police with the opportunity to explain which exemptions they were relying on, and to be able to provide any further arguments should they wish to do so. However, he has not received a response from the Police and, as such, he is making a determination using the information provided.

### **Section 31 – law enforcement**

14. 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.
15. In this case, the Police appears to be relying on sections 31(1)(a) and (b) of FOIA in relation to all the withheld information. These 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.

16. In order to engage a prejudice based exemption such as section 31 there must be 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:

- 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 – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

17. 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.

18. Rather than differentiate between the subsections of the exemption, the Police have presented one set of arguments. The Commissioner recognises that there is clearly some overlap between subsections 31(1)(a) and 31(1)(b) and he has therefore considered these together.

19. 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 activities mentioned in sections 31(1)(a) and (b) – the prevention or detection of crime and the apprehension or prosecution of offenders. With respect to law enforcement activities, the Commissioner recognises in his published guidance that section 31(1)(a) will cover all aspects of the prevention and detection of crime. With respect to section 31(1)(b), he recognises that this subsection:

"... could potentially cover information on general procedures relating to the apprehension of offenders or the process for prosecuting offenders".

20. The Commissioner acknowledges that the arguments presented by the MPS refer to prejudice to the prevention or detection of crime and to the apprehension or prosecution of offenders and that the appropriate applicable interests have therefore been considered.

### **The nature of the prejudice**

21. The Commissioner next considered whether the Police have 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 his view, disclosure must at least be capable of harming the interest in some way, i.e., have a damaging or detrimental effect on it.

22. In their response to the Commissioner the Police explained:

"...The Police Service will not disclose specific intelligence relating to this type of offending as to do so would undermine the effective delivery of operational law enforcement, the more information disclosed over time will give more tactical infrastructure capabilities, allowing offenders to map operational capabilities and tactics. Modern day policing is intelligence led and this is particularly pertinent with regard to Law Enforcement, disclosure would undermine public safety, with repercussions that could hinder the prevention or detection of crime."

23. On the evidence provided, the Commissioner is not satisfied that the Police has demonstrated a causal link between the requested information and the applicable interests relied on, or that disclosure would be likely to have a detrimental impact on law enforcement.

### **Likelihood of prejudice**

24. With regard to the likelihood of prejudice in this case, the Police's arguments are mostly presented at the level of 'would be likely to' prejudice. Therefore, this is the level of likelihood that the Commissioner has considered.

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

25. In a case such as this, it is not enough for the information to relate to an interest protected by sections 31(1)(a) and (b), 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.

26. The Commissioner recognises the importance of protecting information which, if disclosed, would undermine law enforcement activity or make someone more vulnerable to crime.
27. Having considered the arguments put forward by the Police, the Commissioner does not accept that disclosure of the names of paedophile hunter groups would be prejudicial to law enforcement. The Police has had the opportunity to further support their arguments but have failed to do so.
28. As the Commissioner does not accept that the outcome of disclosure predicted by the Police would be likely to occur, he is therefore not satisfied that the exemptions provided by sections 31(1)(a) and (b) are engaged.

### **Section 31(3) law enforcement**

29. Section 31 FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. That means that, in order to engage the exemption, there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.
30. Section 31(3) excludes a public authority from complying with the duty to confirm or deny in relation to information if to do so would, or would be likely to, prejudice any of the functions in sections 31(1). In legal terms, the word 'prejudice' is commonly understood to mean harm. To say that disclosure would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.
31. Consideration of the section 31 exemption is a two-stage process. First, the exemption must be engaged as a result of prejudice occurring or being likely to occur. Secondly, the exemption is qualified by the public interest, which means that, unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure, the information should be disclosed.
32. In this case, the Police have confirmed already that they hold the information in relation to the complainant's request and, as such, section 31(3) is not engaged. As the exemption is not engaged, there is no requirement for the Commissioner to carry out a public interest test.

### **Section 38 – Health and safety**

33. The Police have cited section 38 of FOIA; however they have not advised which of the limbs of section 38 they are relying on. The Commissioner will therefore refer to both limbs of section 38 to determine if the Police are able to rely on it.

34. Section 38 of FOIA states:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

- a) endanger the physical or mental health of any individual, or
- b) endanger the safety of any individual

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to have either of the effects mentioned in subsection (1).”

35. In section 38 the word ‘endanger’ is used rather than the word ‘prejudice’ which is the term used in other similar exemptions in FOIA. However, in the Commissioner’s view the term endanger equates to prejudice.

36. Consideration of this exemption involves two stages. Firstly, the exemption must be engaged as a result of endangerment to physical or mental health being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

**The endangerment test**

37. In order to engage this exemption, the Police must demonstrate that there is a causal link between the endangerment and disclosure of the information.

38. The Police must also show that disclosure of the withheld information in this case would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect must be more than trivial or insignificant.

39. In order for section 38 to be engaged the Commissioner considers 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 endangerment which the exemption is designed to protect. Furthermore, the resultant

endangerment which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment. In relation to the lower threshold the Commissioner considers that the chance of endangerment 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. The anticipated endangerment must be more likely than not.

40. FOIA does not explain the level to which physical or mental health or safety must be endangered for the exemption to be engaged. However, the Commissioner's published guidance on section 38<sup>1</sup> implies that disclosure of information (or confirmation or denial in this case) may cause endangerment where this leads to an adverse physical impact, which often involves medical matters, or where it might lead to a psychological disorder or make mental illness worse.

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

41. The Police explained the following to the Commissioner:

"Disclosure of information relating to individuals named that provide intelligence could provide reassurance to the general public that Essex police uses tactical option in line with intelligence by providing information that highlights the groups that have been subjected to appropriate checks. To provide the level of detail regarding any intelligence contact would allow these groups be identified. The knowledge of the groups may allow identification and allow contact with those groups, this would increase the risk of harm to those associated with OCAGs."

42. The Police have not differentiated between the two limbs of section 38 of FOIA and, as such, the Commissioner can only make a determination using the limited information the Police has provided to him.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>



43. The Commissioner finds that the Police have not demonstrated that any endangerment would occur through the disclosure of the information, nor have they demonstrated that a causal link exists between confirming or denying whether they hold information within the scope of the request and a significant or weighty possibility of endangerment to the safety of any individuals occurring that is "real, actual or of substance".
44. His decision, therefore, is that the Police have not shown that either limb of section 38 of FOIA is engaged in this case and that they were not entitled to rely on this exemption to neither confirm nor deny whether it holds the requested information or as a basis for non-disclosure.

### **Section 40(2) – personal information**

45. Section 40(2) of 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.
46. In this case the relevant condition is contained in section 40(3A)(a)1 . 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 UK General Data Protection Regulation ("UK GDPR").
47. 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 FOIA cannot apply.
48. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

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

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

50. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
51. 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.

52. 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.
53. The withheld information in this case are the names of paedophile hunter groups, where they have provided information to the Police, which has led to the arrest of an individual.
54. The Police say that providing the names of the groups could lead to individuals being identified. The Commissioner does not, however, see how those individuals could be identified from the information requested and notes that the Police did not provide any detailed reasoning to corroborate its argument on this point.
55. The Commissioner refers to the recent Upper Tribunal case *NHS Business Services Authority v Information Commissioner and Spivack* GIA/0136/20215.<sup>2</sup>

“Identifying a pool that contains or may contain a person covered by the data is not sufficient. Saying that it is reasonably likely that someone is covered by the data is not sufficient. Still less is it sufficient to say that it is reasonably likely that a particular individual may be one of the pool. Linking any specific individual to the data in any of these circumstances does not rely solely on the data disclosed and other data available by reasonable means; it involves speculation.”

56. The above Tribunal hearing explains that a public authority needs to make a case for the identifiability of an individual or individuals.
57. The Police advised that “providing the names relating to paedophile hunting groups would not be fair to those groups who may contact the policy [sic] to provide intelligence.”.
58. The Police has not provided the Commissioner with any other arguments for why it considers that releasing the names of the groups would be considered personal data.

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<https://www.ons.gov.uk/census/2001censusandearlier/dataandproducts/outputgeography/outputareas>

59. In this case, the Commissioner considers that the Police has failed to demonstrate how an individual could be identified from the names of the groups being released.
60. As such, the Commissioner considers that the requested information is not personal data and, therefore, the Police is not entitled to rely on section 40(2) of FOIA to withhold it.
61. Whilst the Commissioner notes the Police's concerns, he is unsure how the names of the groups could lead to individuals being identified. The Commissioner is also aware that other Police Forces have released this type of information, as he has previously dealt with other requests for the same information. When spoken with, the other Police Forces have provided the information to the complainant. Additionally, looking on the WhatDoTheyKnow website, the Commissioner can see again that other Police Forces have released this information. As other Police Forces have provided this information, it becomes more difficult to justify why it would be withheld. The Police, in this case would need a strong argument to support the exemptions that they have applied but they have failed to provide sufficient evidence to support any of the exemptions they have applied..

## **Other matters**

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62. The Commissioner notes that the arguments provided for each exemption, but specifically section 31 have been done so jointly and are very generic and not specific to the particular investigation.
63. The Commissioner reminds the Police that it needs to demonstrate, in detail, why it has applied specific exemptions, not only when refusing a request, but when the Commissioner asks questions/provides an opportunity to provide further information.

## Right of appeal

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64. 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)

65. 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.
66. 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 .....**

**Michael Lea**  
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