

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2022

Public Authority: Commissioner of Police of the Metropolis
Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested a murder file from the Metropolitan Police Service (the "MPS"). The MPS would "neither confirm nor deny" (NCND) holding the information citing sections 30(3) (Investigations and proceedings), 31(3) (Law enforcement), 38(2) (Health and safety) and 40(5) (Personal information) of FOIA.
2. The Commissioner's decision is that the MPS was not entitled to rely on the exemptions cited. The Commissioner requires the MPS to take the following steps to ensure compliance with the legislation:
 - Confirm or deny whether the requested information is held.
 - If information is held, it should either be disclosed or the MPS should issue a fresh refusal notice in compliance with section 17 FOIA .
3. The MPS 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

4. On 22 November 2021, the complainant wrote to the MPS and requested information in the following terms:

"I am looking for the case file of deceased Sun journalist John Kay who murdered his wife, Harue Kay (Nonaka), in 1977 whilst living at Alston Road, Barnet. A borough of North London.

Given Kay's activities during his time as a reporter for the Sun, I believe the facts of this investigation are in the public interest. He died in May 2021.

John Kay's obituary can be found here:

<https://eur02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.pressgazette.co.uk%2Fjohn-kay%2F&data=04%7C01%7CMPSDDataOffice%40met.police.uk%7C8f9a87f32fcf447d721308d9adb49655%7Cf3ee2a7e72354d28ab42617c4c17f0c1%7C0%7C0%7C637731814581765298%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6IjkihaWwiLCJXVCI6Mn0%3D%7C3000&sdata=HhRrzQvAcnFn7W0eVj6qTeHwq9OWU%2BM49q6jTtWrsmU%3D&reserved=0>

John Kay was convicted of manslaughter for his wife's death at St Alban's court in December 1977.

I presume that the files that I am looking for are from the period of 1977. I have been unable to locate any surviving family members of John Kay or Harue Kay".

5. On 1 March 2022, the MPS responded. Its position was to NCND holding any information, citing sections 30(3), 31(3), 38(2) and 40(5) of FOIA.
6. The complainant requested an internal review on 1 March 2022.
7. The MPS provided an internal review on 22 March 2022 in which it maintained its original position.

Reasons for decision

Neither confirm nor deny ("NCND")

8. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.

9. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
10. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
11. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing sections 30(3), 31(3), 38(2) and 40(5) of FOIA. The issue that the Commissioner has to consider here is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it actually holds the information requested by the complainant.
12. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds the murder case file.

The Commissioner's view

13. The Commissioner has reached his view based on the documentation provided; he did not deem it necessary to conduct a full enquiry at this stage.
14. John Kay was convicted for the "manslaughter on the grounds of diminished responsibility" of his wife in 1977, which is in the public domain. His own death last year was also widely reported. The Commissioner has also considered a related request on the subject matter¹.
15. The murder took place in Barnet, which is a London area policed by the MPS. This means that the MPS would, usually, be responsible for undertaking any investigation.
16. Accordingly, it seems highly likely to the Commissioner that any investigation material, if still held (ie not since destroyed or misplaced) would be held by the MPS.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021136/ic-116624-f8k2.pdf>

17. On this basis, the Commissioner does not agree that the MPS should take an NCND position regarding whether or not it holds the information requested. As there was a murder trial, clearly a police force has been involved and, in this case, the MPS is the likely force. If the investigation were not undertaken by the MPS, then there can be little harm in it confirming one way or the other. If any material has been destroyed in light of the passage of time then this could be stated, as indeed could the loss of any material.
18. Reinforcing the point, the Commissioner is only considering whether or not the MPS is entitled to NCND whether it holds any material. Whether or not the actual material is suitable for disclosure is a different matter.
19. Having considered all the arguments put forward by the MPS in respect of confirming or denying whether it holds any information, the Commissioner finds that 31(3), 38(2) and 40(5) are not engaged. In respect of section 40, the subject is deceased so confirming or denying whether a case file is held would not disclose personal data.
20. However, as it is a class-based exemption, the Commissioner will necessarily consider section 30(3).

Section 30 – Investigation and proceedings

21. Section 30(3) of FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if held, would fall within any of the classes described in sections 30(1) or 30(2) of the FOIA.
22. The MPS did not specify which classes these were, but, based on the arguments provided, the Commissioner considers that the most appropriate are 30(1)(a)(i) and (ii).
23. Section 30 of FOIA states that:
 - “(1) 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...”.
24. The Commissioner considers that the phrase ‘at any time’ means that information can be exempt under section 30(1) of FOIA if it relates to a specific ongoing, closed or abandoned investigation.

25. Consideration of section 30(1) is a two-stage process. First, the exemption must be shown to be engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This involves determining whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Is the exemption engaged?

26. The first step is to address whether the requested information, if held, falls within the class specified in section 30(1) of FOIA.

27. Any information, if held, relates to a murder trial.

28. In his guidance², the Commissioner states:

“Section 30 is a class based exemption. Information simply has to fit the description contained in section 30 to be exempt. There is no need for the information to prejudice, for example, the investigation or set of proceeding that it was obtained for”.

29. He also states:

“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. However, the purpose of the investigation must be to establish whether there were grounds for charging someone, or if they have been charged, to gather sufficient evidence for a court to determine their guilt. Section 30(1)(a) will still protect information if a police investigation fails to establish that an offence has been committed, or concludes that there is insufficient evidence to charge anyone”.

30. The Commissioner is satisfied that the withheld information if held, would be held by the MPS for the purpose of an investigation of the type described in section 30(1)(a) of FOIA. He is therefore satisfied that the exemption provided by section 30(1)(a) is engaged.

Public interest test

31. Section 30(1)(a) is subject to a public interest test. This means that even though the exemption is engaged, the MPS can only NCND whether

² <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

the information is held if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying that the information is held.

32. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information, if held, could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

Public interest arguments in favour of confirmation or denial

33. The MPS argued:

“There is a public interest in disclosure (i.e. a confirmation or denial statement) to the extent that it may:

- Increase public trust and confidence that the MPS conduct murder investigations in a transparent manner.
- Provide reassurance that the MPS conduct murder investigations efficiently and retain relevant records in line with relevant retention policy schedules.
- Increase the overall transparency and accountability of the MPS and its operations”.

Public interest arguments in favour of maintaining the exemption

34. The MPS argued:

“There is a public interest against disclosure (i.e. a confirmation or denial statement) to the extent that it would:

- Undermine public trust and confidence in the MPS such that individuals would be discouraged from assisting the police and law enforcement functions would be impaired.
- Undermine any future investigative processes and the use of NCND exemptions in general, such that disclosure would not be in the public interest.
- Encourage speculation and queries which are likely to be taken out of context and lead to a large volume of queries or leads that the MPS would have an obligation to record and follow up.
- Lead to the discovery of other matters requiring criminal investigation.
- Breach any duty of confidence that the MPS may have to deceased individuals and any other third parties”.

Balance of the public interest

35. In accordance with his guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
36. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations.
37. The MPS has argued:

“... disclosure of information related to specific investigations is done on a case by case basis. The [MPS] will only put information into the public domain relating to investigations at a time when it considers that disclosure will not be prejudicial to investigations or cause harm to the interests of individuals”.
38. It is noted that the arguments provided, which were done at refusal stage and jointly cover all the relevant exemptions cited, are very generic and not specific to this particular investigation. No further public interest arguments were provided at internal review.

Conclusion

39. In reaching a conclusion on the balance of the public interest in this case, the Commissioner has considered the public interest in the MPS confirming or denying whether it holds any information about the investigation. The Commissioner has also considered whether such confirmation or denial would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.
40. He has also taken into account that, at the time of the request, the investigation had been complete for several decades and the perpetrator was deceased.
41. The Commissioner recognises that there is a general public interest in promoting transparency and accountability. FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.
42. The Commissioner acknowledges the importance of the public having confidence in public authorities that are tasked with upholding the law and he recognises that the public interest will be served by disclosures which serve that purpose. Alongside this, he has also taken into account the public statements regarding the investigation which the MPS has made and he considers that these go some way in meeting the public interest in transparency and accountability.

43. While noting the public interest arguments in favour of disclosure, the Commissioner is mindful that the purpose of section 30 is to protect the effective investigation and prosecution of offences. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate allegations of crime effectively.
44. The Commissioner states in his guidance:

“When considering the public interest in maintaining the exemptions it is necessary to be clear what they are designed to protect. In broad terms, the section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings”.
45. On this occasion, irrespective of whether it was the MPS or a different force, the investigation was completed several decades ago. The perpetrator was dealt with at that time and is now deceased. It does not therefore seem plausible that any prejudice could be caused by the MPS simply confirming or denying whether it holds the original case file. This would only confirm or deny whether it was the investigating force.
46. In the circumstances of this case, the Commissioner has accorded greater weight to the arguments surrounding the public interest in confirmation or denial.
47. The Commissioner is therefore satisfied that the MPS was not entitled to rely on section 30(3) of FOIA to refuse to confirm or deny whether it holds any information.
48. As the Commissioner has concluded that this exemption is not engaged (nor any of the others cited), the MPS is directed to comply with the steps at paragraph (2) above.

Right of appeal

49. 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

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

50. 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.

51. 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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