

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

### **Decision notice**

**Date:** 5 December 2022

**Public Authority:** National Police Chiefs' Council  
**Address:** 1st Floor  
10 Victoria Street  
London  
SW1H 0NN

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

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1. The complainant has requested a deceased individual's criminal records from the National Police Chiefs' Council ('the NPCC'). The NPCC would neither confirm nor deny holding the information, citing section 38(2) (Health and safety) of FOIA.
2. The Commissioner's decision is that the NPCC was not entitled to rely on the exemption cited.
3. The Commissioner requires the NPCC 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 must either be disclosed or the NPCC must issue a fresh refusal notice in compliance with section 17 of FOIA.
4. The NPCC 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 10 August 2022, the complainant wrote to the NPCC and requested information in the following terms:

"I am requesting the criminal records for former Sun journalist, John Kay. He was born on the 28th Oct 1943 and died on 7th May 2021.

I know that in December 1977 that John Kay was convicted of manslaughter under diminished responsibility. I understand that he may have had other arrests for offences and cautions under his name. I would like his full criminal record to be released to me.

John Kay's obituary can be found here:  
<https://www.pressgazette.co.uk/john-kay/> .

His wife, Mercedes Kay, died in September 2017 as confirmed in his obituary."

6. The NPCC responded on 17 August 2022. It would neither confirm nor deny that it held information falling within scope of the request, a position it maintained following an internal review.

## Reasons for decision

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### Neither confirm nor deny ('NCND')

7. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as "the duty to confirm or deny". However, there are exemptions to this duty.
8. Section 38(2) of FOIA excludes a public authority from complying with the duty where simply confirming or denying that it holds information has the potential to endanger the health or safety of any individual.
9. The NPCC has taken the position of neither confirming nor denying whether it holds the requested information by citing section 38(2) of FOIA. The issue that the Commissioner has to consider here is not the disclosure of any requested information that may be held. Rather, it is whether or not the NPCC is entitled to NCND whether it holds the information requested by the complainant.
10. Put simply, in this case, the Commissioner must consider whether or not the NPCC is entitled to NCND, under section 38(2), whether it holds any criminal records in respect of the late John Kay. Whether or not the

material that has been requested is suitable for disclosure is a different matter, and not one that is considered in this decision notice.

11. The Commissioner has reached his decision based on the documentation provided by the complainant. He does not know whether, as a matter of fact, NPCC does, or does not, hold information falling within scope of the request. He does not consider it necessary to know this in order to reach a decision in this case.

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

12. Section 38(1) of FOIA states:

“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.”

13. As set out above, section 38(2) provides an exemption from the duty to confirm or deny where doing so would, or would be likely to, have the effects mentioned in subsection 38(1).
14. The NPCC has argued that confirming whether or not it holds the requested information would be likely to severely affect the mental health of any surviving victims (if there were other victims), family members and close friends of the deceased. It also argued that an NCND response needs to be applied consistently, across multiple requests, to prevent inferences being made from its application in a single case.
15. The Commissioner has considered the NPCC’s arguments carefully and in this case, he disagrees that section 38(2) is engaged.
16. The request asks for a copy of John Kay’s criminal records. Mr Kay was convicted of the “manslaughter on the grounds of diminished responsibility” of his wife in 1977, and there is extensive information confirming this in the public domain. His own death last year was widely reported and the coverage included references to, and discussions of, his manslaughter conviction.
17. If the NPCC was to confirm that it held information falling within the scope of the request, this would not reveal information which was hitherto unknown by the public, as he is known to have had a criminal record for manslaughter. He may, or he may not, have had other criminal records, but providing confirmation in response to this request would reveal no information in that regard; it would reveal only that the NPCC holds information on at least one criminal record.

18. The exemption will be engaged if it can be shown that confirming/denying would, or would be likely to, endanger someone's mental health. Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it must have a greater impact than causing upset and distress<sup>1</sup>.
19. In light of the extensive coverage his manslaughter conviction has received in the media, the Commissioner considers that there can be little harm in NPCC confirming one way or the other whether it holds the information described in the request. While they may find it upsetting or distressing, he does not consider that the NPCC has shown, or that it is credible to believe, that the mental health of any surviving victims, family or friends would be endangered by it doing so.
20. As regards NPCC's arguments about the need to apply a NCND response consistently, these only come into play if the exemption is engaged and a public authority is deciding whether to apply it. Since, in this case, the Commissioner is not persuaded that the exemption is engaged, he has disregarded those arguments.
21. The Commissioner's decision is that section 38(2) of FOIA is not engaged. In light of this, it has not been necessary to consider the public interest test.
22. The NPCC must take the action set out in paragraph 3.

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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/>

## Right of appeal

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

24. 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.
25. 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**