

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

### **Decision notice**

**Date:** 1 February 2023

**Public Authority:** Chief Constable of Kent Police  
**Address:** Sutton Road  
Maidstone  
Kent  
ME15 9BZ

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

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1. The complainant has requested information from Kent Police (the Police) relating to an alleged criminal offence. The Police stated that it could neither confirm nor deny that it holds the requested information.
2. The Commissioner's decision is that the Police correctly cited section 40(5) of FOIA to neither confirm nor deny that it holds the requested information.
3. The Commissioner does not require the Police to take any further steps in relation to this matter.

#### **Request and response**

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4. On 2 June 2021, the complainant wrote to the Police and requested information in the following terms:

"In the course of correspondence arising from my complaints I have identified issues requiring information that I need to further support my complaints. To date I have been unable to obtain that information from officers and staff at Kent Police and therefore I write to request release of the undernoted details.

A reference has been made to an e-mail chain of correspondence between Derbyshire Constabulary and Kent Police in arranging the arrest of [redacted] and out of which several disputes have arisen concerning;

- a) Grounds for reasonable suspicion
- b) Doubts as to the reliability of information used by the OIC
- c) The necessity to arrest
- d) The lawfulness of the arrest
- e) The hostile attitude and behaviour of Kent Police officers in making an arrest during which I was assaulted.
- f) Inordinate timescale.

Derbyshire Constabulary denies any complicity in the manner of the arrest whilst Kent Police claim they were acting in accordance with Derbyshire Constabulary instructions.

The Solicitor acting for [redacted] had been privy to additional information at 'disclosure' and is adamant that the arrest was Unlawful, Unnecessary, and exhibited an Abuse of Power.

To help clarify the situation I now request details of the entire correspondence between Derbyshire Constabulary and Kent Police. The likely time period could be from March 2020 to 15<sup>th</sup> September 2020 when the arrest was made.

I also request copies of the Custody Log and explanations as to what and why certain decisions were made; e.g. detention at Tonbridge Police station and the time of day to execute the arrest.

Similarly, I also request details of the 'Disclosure' information."

5. The Police responded on 3 June 2021. It stated that it could neither confirm nor deny that it holds the requested information, citing section 40(5)(personal information) of FOIA. It also informed the complainant that in order to assist them it had passed the request on to the Police's Subject Access Request Team, as some of the information they were requesting related to the complainant themselves.
6. The complainant wrote to the Police on 31 July 2022 and asked it to conduct an internal review. The Police responded to the complainant on 4 November 2022 and explained that as they had requested the internal review well outside of the 40 working day deadline which they were informed of in the Police's initial response on 3 June 2021, it would not be conducting an internal review. However, it reiterated that it had previously passed the request on to the Subject Access and Disclosure

sections of its team, to consider the complainants own personal information and the custody log, respectively.

## Reasons for decision

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### Section 40 – Personal information

7. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA – i.e., the applicant's own personal information.
8. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise in relation to other information – i.e. third party personal information - if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
9. The decision to use a 'neither confirm nor deny' 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 a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.

### **Would the confirmation or denial that the requested information is held constitute the disclosure of either the complainant's or a third party's personal data?**

10. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:-

"any information relating to an identified or identifiable living individual".
11. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
12. 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.

13. In the circumstances of this case the Commissioner accepts that, if held, any information within the scope of the request would clearly be the personal information of identified or identifiable individuals. Therefore, he is satisfied that if the Police were to confirm or deny whether it holds the requested information, this would in turn be disclosing personal information to the world at large.
14. The Commissioner also considers it appropriate to consider whether confirming or denying whether it holds the requested information would result in the Police's disclosure of criminal offence information relating to identified or identifiable individuals.
15. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) the alleged commission of offences by the data subject; and
  - (b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.
16. From the wording of the request, along with the substantial information which the complainant has provided to the Commissioner to support their complaint, the Commissioner is satisfied that the requested information clearly relates to an alleged criminal offence.
17. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a request for information under FOIA, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
18. The Commissioner has considered each of these conditions and whether any of them could be relied on by the Police to confirm or deny whether it holds criminal offence data falling within the scope of this request. The Commissioner has considered these on his own merit and finds that, having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, none of the conditions can be met.
19. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data protection principle (a). Therefore, the Commissioner finds that the Police were entitled to rely on section 40(5)

of FOIA to neither confirm nor deny whether it holds the requested information in this case.

### **Other matters**

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20. Although not explicitly required in the circumstances of this case, the Commissioner wishes to highlight the relevant advice and assistance which the Police provided to the complainant in terms of the appropriate avenues (Subject Access Request, etc) to use for access to particular information whilst still protecting the privacy of the data subjects. Disclosures, or confirmation or denials, under FOIA are disclosures to the world at large, rather than being a private transaction between the public authority and the requester. There are very limited circumstances where the Commissioner would find it appropriate, or in fact lawful, to order a public authority to disclose either a complainant's own personal information, or that of a third party, to the world at large.

## Right of appeal

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21. 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)

22. 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.
23. 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 .....**

**Catherine Fletcher**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**