

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2023

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 the case file of a murder investigation from the Metropolitan Police Service (the "MPS"). The MPS refused to provide the requested information citing sections 30(1)(Investigations and proceedings), 31(1)(a)(b) (Law enforcement), 38(1)(a)(b) (Health and safety) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that sections 30, 31 and 38 are not engaged. He finds that section 40 is partially engaged.
3. The Commissioner requires the MPS to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information with **the exception** of the following: statements of members of the public (this does not include the two statements where the parties have exceeded the age of 100); the names of all parties; private addresses; a Vehicle Registration Mark and some content in the letter at pages 38-39 of the file (this will be provided to the MPS in a confidential annex, for reference).
4. 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.

Background

5. The MPS previously refused to confirm or deny whether it held the requested investigation file. The Commissioner issued a Decision Notice¹ requiring it to do so and to either disclose any information, if held, or issue a valid refusal notice. The MPS went on to confirm that information was held but refused to disclose it. This investigation is as a result.
6. The Commissioner also ordered the National Police Chiefs' Council (NPCC)² to confirm whether or not it held a criminal record in respect of the party named in the request. Having subsequently confirmed that it held a criminal record, the NPCC refused to disclose it. The Commissioner has already considered a complaint relating to that case. He issued a Decision Notice IC-215926-K4H0 (this has not yet been published on his website) ordering disclosure of the majority of what it held. (NB At the time of writing, it is not known whether or not this decision has been appealed by the NPCC.)

Request and response

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

"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%7CUnkown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Iik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=HhRrzQvA>

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022464/ic-162912-k8w0.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023286/ic-194988-j5c0.pdf>

[cnFn7W0eVj6qTeHwq9OWU%2BM49q6jTtWrsmU%3D&reserveid=0](https://www.ica.gov.uk/foia/foia-requests/cnFn7W0eVj6qTeHwq9OWU%2BM49q6jTtWrsmU%3D&reserveid=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”.

8. On 8 December 2022, in response to the decision referred to in paragraph 6, above, the MPS responded. It confirmed holding a case file but refused to provide it, citing sections 30(1), 31(1)(a)(b), 38(1)(a)(b) and 40(2) of FOIA.
9. The complainant requested an internal review on 9 January 2023. He explained that he disagreed with the citing of sections 30, 31 and 38. He made no reference to the citing of section 40.
10. The MPS provided an internal review on 7 February 2023, in which it maintained its position.

Scope of the case

11. The complainant contacted the Commissioner on 10 February 2023 to complain about the way his request for information had been handled; he did not provide any specific grounds of complaint. The Commissioner will therefore take into account the comments he made when requesting an internal review and consider the exemptions he said he disagreed with.
12. Although not specifically mentioned by the complainant in his complaint, as the Commissioner considers section 40 to be of relevance to his decision-making, he has also considered its application.
13. The Commissioner has viewed the withheld information. He notes that, although the crime file refers to photographs, there are none held within the file; the MPS has confirmed that there were none in the file and that there is no other information held.

Reasons for decision

Section 30 – Investigations and proceedings Section 31 – Law enforcement

14. The MPS has cited both sections 30(1) and 31(1)(a)(b) to cover the file in its entirety. However, these exemptions are mutually exclusive and cannot be cited to cover the same information.

15. Regarding their engagement, the MPS advised:

“Sec 30 was applied as the request relates to the investigation of a murder.

Sec 31 was applied as disclosure would impact the investigation of crime generally if we were to disclose contents of murder investigation files. In particular, the relationship the MPS has with those that provide statements / evidence to assist us with the investigation of crime would be harmed”.

16. It subsequently added that: “section 30 is the stronger exemption for us”.

17. As stated above, the exemptions are mutually exclusive. The MPS has not clarified which has been relied on for the various documents within the file, rather, it seems to have applied its rationale to the file as a whole in a ‘blanket fashion’.

18. The Commissioner considers that the MPS has had ample opportunity to set out its position regarding the request. Furthermore, he is of the view that it should be adequately conversant in the application of both of these exemptions, with them being relevant to much of the core business of policing. However, on this occasion it has failed to differentiate between the two and has simply applied them both to all of the file.

19. It is not for the Commissioner to speculate or ‘fill in the gaps’ for inadequate submissions and it is not the Commissioner’s role to go through the withheld information in this case to consider whether section 30 or 31 is the most appropriate exemption to apply to the various pieces of information. Accordingly, the Commissioner has determined that neither exemption is properly engaged.

20. The Commissioner further notes that the age of the records (the latest record on the file being a ‘general registry’ entry on the cover from 1990) means that it appears to be an historical record by virtue of section 63(1) of FOIA³. If this is the case, section 30(1) cannot be relied on.

³ a historical record is one over 20 years old, or if forming part of a file, the last entry on that file must be over 20 years old

Section 38 – Health and safety

21. The MPS has cited sections 38(1)(a)(b). It has not explained which parts of the withheld information these have been applied to.
22. As with the exemptions above, the Commissioner considers that the MPS has had ample opportunity to set out its position regarding the request. Also, again as with the above exemptions, it has cited section 38 in respect of **all** of the withheld information.
23. The Commissioner does not consider section 38 to be of any relevance to much of the content of the file as it is factual and the outcome and method are already in the public domain.
24. As with the application of sections 30 / 31 above, it is not for the Commissioner to speculate or 'fill in the gaps'. The exemption has again been applied in a 'blanket fashion' and it is not the Commissioner's role to go through the withheld information and consider whether section 38 is appropriate; this is for the MPS to have already done.
25. Accordingly, the Commissioner has determined that section 38 is not engaged.

Section 40 – personal information

26. Although the complainant did not specify any grounds of complaint regarding section 40 when he requested an internal review, consideration of this type of data does specifically fall within the Commissioner's remit; this is because he is also the regulator for data protection legislation. The Commissioner has therefore considered the application of section 40 as part of that role, to ensure that no personal information is inadvertently disclosed, particularly as he has concluded that the other exemptions cited are not engaged.
27. 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.
28. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

29. 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 the FOIA cannot apply.
30. 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?

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

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

32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. 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.
34. 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.
35. The Commissioner considers that the withheld information falling under consideration here can be categorised as follows:
 - Witness statements from members of the public and their names in any listings on the file
 - Witness statements from police officers and other professionals, such as pathologists, doctors, forensic officers and ambulance drivers, and their names in any correspondence on the file
36. These parties are all named so are readily identifiable and, with two exceptions*, the Commissioner considers their statements, and any other references to them in the file, to be their personal data.

(*Although not all ages are specified, there are two members of the public who would be over 100 years of age. Under the 100 year rule, the Commissioner considers that these parties are likely to be deceased so their statements do not fall within the definition of personal data; these

statements will therefore not be covered by section 40, other than where private addresses have been included, as these will relate to the living individuals who reside there now and who may be sought out by researchers / journalists.)

37. The Commissioner also considers the registration number of a private vehicle not owned by the defendant, part of a letter from the Japanese Embassy to the Officer in the Case and any private addresses, to fall within the first bullet point.
38. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to all the parties concerned. He is satisfied that this information both relates to and identifies them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

42. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

44. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f).
45. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
46. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

47. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
48. The complainant hasn't provided any specific legitimate interests. However, it is noted in his request for an internal review that he said:
- "Many of the parties involved are now dead and coverage of the original case was suppressed by the media until John Kay's death. It is only after domestic violence charities protested that the case came back into the public eye. There is a greater public interest to learn more about the case and to ask ourselves why the husband was not prosecuted for murder which it appears he committed".
49. The Commissioner is not aware of the complainant's claim regarding suppression by the media or protestation by domestic violence charities. However, he accepts that there is a public interest in understanding more about the outcome of the case at the time.

Is disclosure necessary?

50. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

51. The Commissioner cannot envisage any other way of accessing the requested information at this time. The main subject is now deceased so there is no real prospect of any future enquiry into the matter. As such, disclosure under FOIA is the only realistic avenue to access the information.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

52. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that their information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

53. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

54. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

55. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.

56. The MPS has argued:

"In the context of disclosing personal information requested under FOIA, the MPS have to consider the possible consequences of disclosure on the individuals that disclosure would be likely to affect. Disclosure under the Act would have an unjustified adverse effect on the individuals concerned should they identify themselves from the specific information requested. Disclosure would identify the individuals concerned/involved including the police officers and possible witnesses, making identifying (or misidentifying) an easier prospect.

Therefore, it would be reasonable for an individual to expect any information which may be held about them to only be used to support a policing purpose. This supports the argument that disclosure of the information requested would be unfair to the individual(s).

In considering fairness in disclosure, the MPS has taken into account the reasonable expectations of the data subjects whose information is held. It is only right to take into account the expectations of the individual(s) concerned. We should take into account these expectations as we do not believe any individual would reasonably expect the requested information to be re-released to the world through a Freedom of information Act disclosure, especially 46 years later when all the individual(s) would have moved on with their lives.

The data subject(s) to whom the requested information relates too have not been asked if they are willing to consent to disclosure of the requested information as we believe this would be impractical and inappropriate in the circumstances especially when the incident is 46 years later.

Disclosure under the Act is disclosure to the world at large, rather than a personal transaction with the applicant. Consequently, if the MPS were to comply with the request we would in effect be making an unrestricted disclosure of personal data to the general public on the strength of the applicant's private interests. This would constitute a disproportionate and unwarranted level of interference with the individual(s) rights and freedoms. In this case, the MPS considers that the legitimate interest is only that of the complainant's own interest and very limited legitimate public interest in disclosure of the information.

The named individuals would not reasonably expect their information to be released to the world through a Freedom of Information Act [sic], and would have no reasonable expectation that the MPS would make this information publicly available without their knowledge.

The MPS considers the matter was fully dealt with at the time in 1977 and find no purpose or legitimate interest to disclose the requested information at this present time especially as there will be living individuals who were involved or connected to this case".

57. Although the MPS has provided arguments considering all types of data subject together, the Commissioner does not agree with this approach as they had different roles in the investigation. The Commissioner has

already 'categorised' the data subjects above and he will consider each category in turn, as there are different factors to take into account.

Members of the public

58. The Commissioner accepts the MPS' rationale above in respect of members of the public who have provided witness statements. He agrees that they would have no expectation that their statements would be placed into the public domain, especially after such a considerable length of time. Whilst it may be feasible to anonymise some of them, they would nevertheless recognise themselves and would not expect their statements to be released to the world in this way.
59. This rationale also applies to the following:
- their names, where held elsewhere on the file
 - any private addresses which could be used by researchers / journalists to try and trace people
 - the VRM of a car not owned by the defendant
 - some content of a letter at pages 38-39 of the file provided to the Commissioner
60. The Commissioner agrees that the parties concerned would have an expectation of privacy and that disclosure of their statements would be unfair.

Witness statements from police officers and other professionals

61. Unlike members of the public, these statements were given in a professional capacity rather than a private one. This includes statements from police officers, photographers, ambulance drivers, forensic staff, doctors, legal staff and a pathologist.
62. This rationale also applies to any other general documentation on the file where parties are named.
63. The Commissioner accepts that these parties would have no expectation that their names would be disclosed as a result of an FOIA request, after such a considerable period of time. It is highly likely that they are all retired and such a disclosure may facilitate unnecessary intrusion into their personal lives by researchers or journalists who wish to try and find out more details from them.
64. However, the Commissioner does not agree that they would have no reasonable expectation that their professional views may be shared at some point in the future, albeit he accepts that they would not expect their names to be disclosed at this time.

The Commissioner's view

65. Based on the above factors, the Commissioner has made two separate determinations.
66. Firstly, he has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms as regards any statements made by members of the public, as well as the other information indicated in paragraph 59. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of this information would not be lawful. Given his conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
67. Secondly, in respect of the statements made by police officers and other professionals, he has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of disclosure of the various parties' names. However, once the names are redacted, he considers that the disclosure of the remaining information is both fair and lawful. The nature of their work is such that they would have a reasonable expectation that this type of information may be disclosed.
68. The MPS is required to take the steps ordered in paragraph 3.

Right of appeal

69. 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

70. 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.

71. 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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