

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

### **Decision notice**

**Date:** 6 July 2023

**Public Authority:** Crown Prosecution Service  
**Address:** 102 Petty France  
London  
SW1H 9EA

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

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1. The complainant has requested information relating to extradition proceedings in respect of Julian Assange. The Crown Prosecution Service ('CPS') would neither confirm nor deny ('NCND') whether it held the requested information, citing section 30(3) (Investigations and proceedings) of FOIA.
2. The Commissioner's decision is that the CPS was entitled to rely on section 30(3) to NCND holding the requested information.
3. The Commissioner does not require any steps as a result of this decision.

#### **Background**

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4. Julian Assange is the founder and publisher of WikiLeaks. He has been held in UK custody since 2019 and is currently the subject of extradition proceedings brought by the US, to face criminal charges there. In December 2021, the High Court ruled that he could be extradited, following assurances by the US that, if convicted, he could serve his sentence in Australia. In July 2022, it was announced that Mr Assange

was appealing the extradition order, and at the time of the request those proceedings were ongoing<sup>1</sup>.

5. The request also refers to David Mendoza Herrarte, a convicted drug trafficker. Mendoza has publicly claimed that, following his 2008 arrest in Spain on US drug charges, US prosecutors reneged on assurances that he could serve his sentence in Spain if he agreed to be extradited and to plead guilty<sup>2</sup>.
6. The Commissioner understands that when conducting extradition proceedings, the relationship between the CPS and a foreign authority is akin to the relationship between lawyer and client. The CPS has provided the following information about its role in extradition cases:

“Extradition is the formal process for requesting the surrender of requested persons from one territory to another for the following purposes: to be prosecuted, to be sentenced for an offence for which the person has already been convicted, or to carry out a sentence that has already been imposed. The Extradition process is a sensitive one which includes the disclosure of complex material and evidence between countries, it will also involve disclosure of how each country [sic] conducts this process and the investigation of criminal activities.

The CPS’ role in extradition proceedings is to represent the foreign authority seeking the return of the requested person in extradition cases. The CPS provides advice to foreign authorities on the content and validity of extradition requests received. This function is assigned to the CPS as outlined in the Extradition Act 2003. The Act outlines that the role the CPS has in extradition proceedings is to give, to such extent as [the Director of Public Prosecutions] considers appropriate, and to such persons as he considers appropriate, advice on any matters relating to extradition proceedings or proposed extradition proceedings.”

## **Request and response**

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7. On 4 January 2023, the complainant wrote to the CPS and requested information in the following terms:

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<sup>1</sup> <https://www.reuters.com/world/julian-assange-appeals-european-court-over-us-extradition-2022-12-02/>

<sup>2</sup> [https://english.elpais.com/elpais/2015/03/24/inenglish/1427195693\\_336297.html](https://english.elpais.com/elpais/2015/03/24/inenglish/1427195693_336297.html)

"I am writing to ask you under the terms of the FoI Act for any documentation indicating whether, either before or after the case of David Mendoza was raised before the Lord Chief Justice and Lord Holroyde at the High Court last year by Julian Assange's defence team, the Crown Prosecution Service has contacted the Spanish authorities to ascertain the details of Mendoza's incarceration, and whether it is correct that the U.S. failed to honour its assurances to allow Mendoza to serve the rest of his sentence in Spain until after Mendoza had successfully petitioned the Spanish Supreme Court, and, if so, when such a request was made.

N.B. There is a strong public interest in disclosure of whether the United States can be trusted to honour solemn commitments given during extradition hearings, and whether the CPS fulfils its investigative responsibilities under the CPI Act 1996 [Criminal Procedure and Investigations Act 1996]."

8. The CPS responded on 7 February 2023. It issued an NCND response, citing section 30(3) of FOIA.
9. Following an internal review, the CPS wrote to the complainant on 6 April 2023, confirming its reliance on section 30(3) to issue an NCND response.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 22 April 2023 to complain about the way his request for information had been handled.
11. He disagreed with the CPS's decision to apply section 30(3) to the request. However, to resolve matters informally, he said he would be prepared to restrict its scope to just knowing whether or not the CPS had contacted Spanish authorities for the specified information, and if so, the date of its request.
12. During the Commissioner's investigation, the CPS wrote to the complainant to provide clarification regarding its obligations under the CPI Act 1996. However, it confirmed to the Commissioner that section 30(3) remained engaged by the proposed reduced scope of the request.
13. The analysis below therefore considers the CPS' application of section 30(3) to give an NCND response to the request of 4 January 2023.

## Reasons for decision

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### Neither confirm nor deny

14. Section 1(1)(a) of FOIA obliges a public authority to confirm whether or not it holds information that an applicant has requested. This is known as 'the duty to confirm or deny'. However, there are exemptions to this duty.
15. The CPS has taken the position of neither confirming nor denying whether it holds the requested information by citing section 30(3) of FOIA. The issue that the Commissioner has to consider here is not the disclosure of any relevant information that may be held. Rather, it is whether or not the CPS is entitled to NCND whether it holds the information requested by the complainant.
16. Put simply, in this case, the Commissioner must consider whether or not the CPS is entitled to NCND, under section 30(3), whether it holds information on any approach it might have made to the Spanish authorities regarding the Mendoza case. 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.
17. The Commissioner does not know whether the CPS 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 on the application of section 30(3).

### Section 30 – Investigations and proceedings

18. Under section 30(3) of FOIA, the duty to confirm or deny does not arise in relation to information which, if held, would be exempt by virtue of one of the subsections of section 30(1) of FOIA.
19. Under section 30(1)(c) of FOIA, information is exempt if the public authority has held it at any time for the purposes of any criminal proceedings which the public authority has the power to conduct.
20. The First-tier Tribunal has previously confirmed that extradition proceedings are a form of criminal proceedings which the CPS has the power to conduct<sup>3</sup>.

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<sup>3</sup>[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2117/Maurizi,%20Stefania%20EA.2017.0041%20\(11.12.17\)%20Decision\\_amended%2016.1.18.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2117/Maurizi,%20Stefania%20EA.2017.0041%20(11.12.17)%20Decision_amended%2016.1.18.pdf)

21. Given the nature of the information requested, the Commissioner is satisfied that, if the CPS did hold any information relevant to the request, it would do so for the purposes of Mr Assange's extradition proceedings. The information would therefore be exempt information by virtue of section 30(1)(c) of FOIA, and it follows that section 30(3) of FOIA is engaged.

**Public interest test**

22. Section 30(3) is a qualified exemption. This means that the Commissioner must consider the public interest test contained at section 2 of FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.
23. 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. In broad terms, the section 30 exemptions 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.

**Public interest arguments in favour of confirming or denying whether the information is held**

24. The complainant believes the public interest favours confirming or denying for the reasons summarised in the second paragraph of his request. He believes that Mr Assange has been given certain assurances regarding extradition to the US, and he considers it is in the public interest to know whether the CPS is conversant with Mr Mendoza's experiences, regarding the assurances he was reportedly given, and which, the complainant believes, the US then reneged on.
25. The CPS recognised that this is a high-profile matter and confirming/denying would further public understanding of CPS decision making in relation to extradition processes. It also accepted that transparency may increase public confidence and trust in the CPS.

**Public interest arguments against confirming or denying whether the information is held**

26. The CPS stated:

"There is a considerable public interest in the ability of public authorities to obtain information in relation to investigations and proceedings. To confirm or deny whether we hold the information would undermine that.

Confirmation or denial would interfere with the effective conduct of proceedings which the CPS has power to conduct. Revealing the CPS' litigation strategy in response to [the request], whilst a case is ongoing and where the court procedures do not require it, would interfere with the CPS' ability to conduct proceedings effectively and in the best interests of the foreign state concerned.

...

There is a strong public interest in allowing CPS to conduct extradition proceedings without these being undermined by any ongoing information regarding extradition proceedings being disclosed.

Confirming or denying whether the relevant information is held would disclose information which may allow individuals or groups to avoid discovery of CPS effective conduct of proceedings.

...

The relationship of trust and confidence that underlies the information sharing between prosecuting authorities is vital. If the confirming or denying of the content of such discussions were to be made public, it would damage confidence and reduce cross-border cooperation in criminal proceedings.

Extradition proceedings involve correspondence and effective information sharing over a wide range of issues. If the confirming or denying of this information were to be disclosed, it would have a definite effect on the willingness of requesting states to engage with the UK authorities. This would inhibit the ability of the CPS to conduct extradition proceedings.

Confirming or denying that information is held would impede the UK's ability to fulfil its international obligations under various extradition treaties but also the ability of the CPS and the UK to assist in the prosecution of offenders and the administration of justice across borders.

To confirm or deny whether information was held would be to reveal the focus of prosecution activity into the public domain, and potentially hinder the prevention or detection of a crime."

### **Balance of the public interest**

27. In considering the balance of the public interest in this case, the Commissioner recognises that there is a significant public interest in the need to prevent any disclosure (by way of confirmation or denial) that would prejudice a set of proceedings, and prosecution processes

generally, including any prejudice to future proceedings. This goes to the heart of what the section 30 exemption is designed to protect.

28. The Commissioner accepts that confirming or denying in this case would add to the public's understanding of the handling of Mr Assange's case. It would increase transparency as regards the conduct of a very high profile extradition case, about which there is considerable strength of feeling on all sides. It would inform public understanding of the information that might be taken into consideration, in reaching a decision on extradition.
29. However, he also recognises that confirmation or denial as to whether the CPS had requested information about the Mendoza case could be harmful to its ability to manage live extradition proceedings effectively. It would allow an inference to be made as to whether or not the CPS had considered that information in its decision-making, and would disclose the type of information that it relies on in its work. As such, the Commissioner accepts that, in this case, both confirming **and** denying would reveal information about the CPS' strategic approach to the proceedings. There is a strong public interest in allowing the CPS to conduct proceedings without them being undermined by such information being disclosed.
30. Confirming or denying could also encourage third parties to try to influence the CPS' conduct by arguing why it should, or should not, take account of particular information. The Commissioner considers that this would be likely to undermine the proceedings and that a safe space is needed to allow the CPS to consider all cases away from external interference and distraction.
31. The Commissioner also recognises that it is important to maintain the trust and confidence of the overseas authorities with which it shares information, or which it is representing. If information about what was, or was not, being considered in the course of these proceedings, was to be made public by the CPS, it would damage confidence in the CPS and reduce cross-border co-operation in criminal proceedings with foreign authorities. This would prejudice the UK's interests.
32. The Commissioner recognises that there is a very strong public interest in protecting the CPS' ability to conduct extradition cases effectively. He considers that appropriate weight must therefore be afforded to the public interest inherent in the exemption – in this case, the public interest in the CPS being able to participate in extradition proceedings effectively.
33. He is satisfied that the public interest in neither confirming nor denying whether information is held, outweighs that in responding to the requirements of section 1(1)(a) of FOIA. It follows that the

Reference: IC-230707-F1L5



Commissioner's decision is that the CPS was entitled to rely upon section 30(3) of FOIA to NCND whether it holds the requested information.



## **Right of appeal**

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34. 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)

35. 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.
36. 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**