

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2016

Public Authority: Chief Constable of Devon & Cornwall Police

Address: Police Headquarters
Middlemoor
Exeter
Devon
EX2 7HQ

Decision (including any steps ordered)

1. The complainant has requested information about the investigation into the possible involvement of Robert Black in the disappearance of Genette Tate in 1978. Devon and Cornwall Police ("D&CP") stated that it held information that was relevant to the request but that it was exempt from disclosure under sections 30(1) (investigations and proceedings) and section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that D&CP was entitled to apply section 30(1) to withhold the information. The Commissioner requires no steps to be taken.

Background

3. Robert Black was a convicted child murderer who died in prison on 12 January 2016. He was a key suspect in the disappearance of 13 year old Genette Tate, who disappeared in August 1978. However, he was never formally charged in connection with Genette's disappearance.

Request and response

4. On 12 January 2016, the day of Black's death, the complainant wrote to D&CP and requested information in the following terms:

“ Please provide copies of the conclusions in the investigating officer's report into the murder of Genette Tate, submitted to the CPS in 2005 and 2014.*

** Please provide copies of all MG3s or similar submitted to the CPS in relation to the suspect Robert Black.”*

5. D&CP responded on 3 February 2016. It stated that the information held was exempt from disclosure by virtue of sections 30(1) and 40(2) of the FOIA. It stated that the case remained under active investigation and that disclosure could prejudice the outcome.
6. Following an internal review D&CP wrote to the complainant on 2 March 2016, upholding its decision to apply section 30(1) and 40(2). It explained that the fact that the case was still open and under active investigation was central to its decision that the information should not be disclosed.

Scope of the case

7. The complainant contacted the Commissioner on 2 March 2016 to complain about the way his request for information had been handled. It was his belief that the police had enough evidence to charge Black with Genette's murder before his death. He argued that there was a compelling public interest in transparency regarding the reasons why this was not done.
8. The Commissioner considers the scope of this decision notice to be whether D&CP was entitled to apply the exemptions it cited to refuse to disclose the requested information.

Reasons for decision

Section 30 – investigations and proceedings

9. D&CP confirmed to the Commissioner that it was relying upon the exemptions at 30(1)(a) and 30(1)(b) of the FOIA.
10. The exemptions state:

“30(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,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct”.

11. The phrase “*at any time*” means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
12. Section 30 of the FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. In order for the exemption to be applicable, information must be held for a specific or particular investigation and not for investigations in general.
13. Section 30(1)(a) may only be claimed by a public authority that has a duty to investigate offences. The public authority in this case is D&CP. As a police force, it clearly has a duty to conduct criminal investigations. The Commissioner is therefore satisfied that it has a duty to carry out investigations of the sort described in section 30(1)(a).
14. Section 30(1)(b) also applies to investigations but the public authority only needs to have the *power* to conduct those investigations rather than a duty. Importantly, however, the public authority must also have the power to institute and conduct any criminal proceedings that result from its investigation.
15. In this case, it is the Commissioner’s view that such proceedings would be conducted by the Crown Prosecution Service rather than by D&CP. Therefore, the Commissioner does not accept D&CP’s submission that the information in question is exempt from disclosure on the basis of section 30(1)(b) and has not considered its application of this exemption further.
16. Finally, the Commissioner must consider the age of the information in this case. The criminal investigation into Genette’s disappearance commenced 37 years ago. Section 63 of the FOIA states that information contained in a historical record cannot be exempt from disclosure by virtue of section 30(1). A historical record was originally defined under section 62 of the FOIA as one over 30 years old, or if forming part of a file, the last entry on that file must be over 30 years old. However, this age limit was amended to 20 years by section 46 of the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years. In effect, from the end of

2013, the time limit was 29 years, reducing by another year, every year, until it reaches 20 years at the end of 2022¹.

17. D&CP has confirmed to the Commissioner that the investigation into the disappearance of Genette Tate remains ongoing. The Senior Investigation Officer for the case stated that he has been in position since 2012 and that he oversees a dedicated investigation team who remain working on the investigation. Lines of enquiry remain open and active and additional evidence is still being sought.
18. Taking the above into account, the Commissioner is satisfied that there have been records added to the case file recently and that the withheld information therefore does not constitute a historical record for the purposes of the FOIA. He is therefore satisfied that the exemption at section 30(1)(a) is engaged.

The public interest test

19. Section 30(1)(a) is a qualified exemption. Therefore, the Commissioner must consider the public interest test set out at section 2(2)(b) of the FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

20. The complainant considered the public interest in disclosure to be particularly strong. He stated:

"As is clear, the request relates to the unsolved murder of a child almost 40 years ago.

Specifically, it relates to the IO's conclusions submitted to the CPS in 2005 and 2014 in relation to the suspect Robert Black and the MG3. Transparency surrounding this information is paramount. It is capable of informing the public why no charges were brought in 2005 and 2014.

There is a compelling public interest in transparency surrounding information capable of demonstrating why Black was not charged before he died.

¹ <http://www.legislation.gov.uk/ukxi/2012/3029/made>

The public must have the ability to scrutinise the reports of the police and actions of the CPS in cases where charges are not brought despite the police themselves considering they have sufficient to charge. In this case, the chief suspect has died before being brought to justice. There is a compelling public interest in transparency surrounding the lack of charge.

And as the FOIA makes clear, the reasons for non-disclosure must outweigh the reasons for disclosure. No argument put forward in the response is capable of surpassing the significant and compelling public interest in transparency surrounding this case."

21. D&CP acknowledged the considerable public and media interest in Genette's disappearance and recognised that there was a public interest in assisting the public to understand why charges were never brought against Black. Referencing the ongoing nature of the investigation, it stated:

"Release of this information to the public may assist the conclusion of the case surrounding any suspects and may aid the police in their investigation into the suspect in question as the public would have more information to scrutinise. It would allow the public to interact with the force and possibly provide new evidence or witness statements which may assist in the conclusion of this investigation."

22. D&CP also acknowledged that disclosure would demonstrate its commitment to openness and transparency and would enhance public understanding of how public funds were being spent.

Public interest arguments in favour of maintaining the exemption

23. By way of background, D&CP explained that the withheld information comprises 5650 pages of information, held in 17 folders. It details every aspect of the criminal investigation into Genette's disappearance, including current lines of investigation and recent consultation with the CPS.
24. D&CP explained that the MG3 forms specifically requested by the complainant could not be disclosed in isolation from the remaining information as they merely instruct the reader to refer to documents contained in the 17 folders of material.
25. D&CP received the request the day after Black's death. It confirmed to the Commissioner that the investigation was still live at that point. Although events have since moved on (a file of evidence about Black's involvement with Genette's disappearance was submitted to the CPS. The CPS responded that it was unable to provide any charging advice as

new national policy dictates that it not give speculative charging advice on a deceased suspect) the investigation is nevertheless still considered "live". D&CP is considering its response to the CPS's decision. It is currently liaising with a number of interested parties and enquiries are being conducted both in the UK and abroad to try to ascertain the true level of Black's offending and to potentially identify other victims.

26. On this last point, D&CP explained that the case is being considered alongside other unsolved murders of young girls believed to be linked to Black, and that disclosure of the requested information could also have a detrimental effect on the ongoing investigations into those unsolved cases.
27. D&CP also argued that disclosure would have an impact on its future investigation of crimes of this nature. Disclosure of the requested information, containing as it did all known evidence about Genette's disappearance and Black's connection to it, may assist individuals intent on committing similar crimes to change their actions or behaviours in a way which may enable them to evade detection.
28. Furthermore, the information contains a large number of eyewitness statements. Disclosure of these would be harmful because such individuals would be less likely to come forward, or co-operate with the police when interviewed, if they believe that the information they provide will be disclosed in circumstances outside of the criminal justice process.
29. Disclosure could also restrict the flow of information to D&CP in future, as potential sources of information may be discouraged from coming forward if they anticipate that the information they provide may later be disclosed under the FOIA. In particular it may dissuade victims of sexual offences from coming forward, offences which are already largely under-reported.

Balance of the public interest

30. When considering the application of the exemptions at section 30(1), the Commissioner believes that consideration should only be given to protecting what is inherent in that exemption – the effective investigation and prosecution of crime - which requires the following:
 - the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
 - the maintenance of independence of the judicial and prosecution processes;

- preservation of the criminal court as the sole forum for determining guilt;
 - allowing the investigating body space to determine the course of an investigation; and
 - information that deals with specialist techniques.
31. With the above underpinning the consideration of 30(1), when weighing up the public interest in relation to the exemption the following factors (amongst others) should be considered:
- the stage or stages reached in any particular investigation or criminal proceedings;
 - whether and to what extent the information has already been released into the public domain;
 - the significance or sensitivity of the information; and
 - the age of the information.
32. The Commissioner accepts the relevance of all the arguments put forward by D&CP, above, and considers that they weigh heavily in favour of maintaining the exemption in this case.
33. Although the request relates to a criminal investigation that commenced 37 years ago, D&CP has demonstrated to the Commissioner that the investigation remains live and that pertinent information continues to be added to the case file; D&CP has demonstrated that investigatory work continues to be actively taking place.
34. The Commissioner acknowledges that over the 37 years since Genette disappeared, a lot of information about the case has appeared in the public domain, and that there remains widespread public interest in this high profile case, particularly given suggestions of Black's involvement. However, it is clear that the sensitive and detailed evidential information requested here has not previously been released into the public domain. Indeed, as it relates to live and ongoing investigations into the disappearance of Genette Tate and the true extent of Black's offending, the Commissioner considers that its disclosure would necessarily have a negative impact on those investigations. It could allow potential offenders to evade justice, deter further contact with possible witnesses (in these cases and others) and it could, ultimately, undermine the right to a fair trial of any individual prosecuted in connection with the investigation.

35. The Commissioner also recognises the detriment that could be caused to the police service because of the inherent danger of restricting the flow of information to the police in respect of future investigations, including the ongoing investigation of this case, if witness statements (and other evidence) from a live murder investigation were disclosed.
36. Having given due consideration to the arguments put forward, on this occasion the Commissioner accepts that the public interest favours maintaining the exemption at section 30(1)(a).
37. In light of the Commissioner's findings in respect of section 30(1)(a) he has not gone to consider D&CP's reliance on section 40(2).

Right of appeal

38. 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@hmcts.gsi.gov.uk

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

39. 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.
40. 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
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