Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **31 October 2018**

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

Decision (including any steps ordered)

1. The complainant requested information relating to an alleged incident involving a named individual.

2. Kent Police provided links to some relevant information. It refused to confirm or deny holding the information requested at parts 1, 2 and 6 of the request, citing sections 30(3) (investigations and proceedings), 40(5) (personal information) and 24(2) (national security).

3. The Commissioner's decision is that section 30(3) of the FOIA is engaged and that the balance of the public interest favours maintaining the exemption. Accordingly, Kent Police was entitled to rely on section 30(3) to refuse to confirm or deny whether it held information within the scope of parts 1, 2 and 6 of the request.

4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 14 March 2018, the complainant wrote to Kent Police and requested information in the following terms:

> *"According to this video on Youtube:-*
> [reference redacted]

[name redacted], *a Canadian citizen, was stopped at Calais, France, on or about* [date redacted] *and prevented from entering the U.K. by British authorities. She has named Kent Police as the relevant police force.*

1. Provide all records held regarding the decision to invoke Schedule 7 Terrorism Act 2000 ('the Act') or other legislation/powers and to stop/detain [name redacted]*.*
2. Provide the custody record or similar record.
3. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when stopped or detained at a U.K. port (including Calais) pursuant to the powers under the Act.
4. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when stopped or detained at a U.K. port (including Calais) pursuant to the powers under the Act when the relevant person refuses to provide information orally (i.e. answer questions) or refuses to unlock any electronic device such as a telephone, computer etc.
5. Provide leaflet given to those detained.
6. Provide all material held which was (allegedly) distributed by [name redacted] *on or about* [date redacted] *in Luton, U.K.*

6. The request was made using the 'whatdotheyknow' website.

7. Kent Police responded on 5 April 2018. It provided some guidance but refused to confirm or deny whether any relevant information was held, citing the following exemptions as its basis for doing so:

   - section 30(3) investigations and proceedings
   - section 40(5) personal information

8. Kent Police provided an internal review on 10 May 2018 in which it confirmed its application of sections 30(3) and 40(5) to parts 1, 2 and 6 of the request. It additionally neither confirmed nor denied whether it held information within the scope of those parts of the request citing section 24(2) (national security).

9. It revised its position with regard to parts 3, 4 and 5 of the request, confirming that it held information within the scope of those parts of the request. It provided links to information that was publically available, including a link to the information requested at part (5) of the request. In respect of the information that is publically available, Kent Police cited section 21(1) (information accessible to the complainant by other means).

10. Kent Police confirmed that it held further information in relation to questions 3 and 4 that was not in the public domain. It refused to

provide that information citing sections 24(1) (national security) and 31(1)(a)(b) (law enforcement) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 10 May 2018 to complain about the way his request for information had been handled.

12. Over the course of correspondence between the Commissioner and the complainant, the Commissioner sought, and was provided with, clarification of the nature and scope of his complaint.

13. During the course of the Commissioner's investigation, Kent Police revisited its handling of the request. As a result, it disclosed further information within the scope of parts (3) and (4) of the request, redacted in accordance with section 40(2) (personal information) of the FOIA. It confirmed its reliance on sections 21(1), 24(1) and 31(1)(a)(b) in respect of all other training material and guidance within the scope of parts (3) and (4) of the request.

14. Following further correspondence from the complainant as a result of that disclosure, the Commissioner wrote to him regarding the scope of her investigation. She told him that, in the absence of a response, her investigation would consider Kent Police's handling of parts 1, 2 and 6 of the request.

15. The complainant subsequently wrote to the Commissioner confirming that he did not wish to pursue his complaint with respect to Kent Police's handling of parts 3 and 4 of the request. No reference was made to part 5 of the request.

16. In light of the above, the analysis below considers whether Kent Police was entitled to neither confirm nor deny holding information within the scope of parts 1, 2 and 6 of the request.

17. The Commissioner has considered its application of section 30(3).

18. The complainant disputed that the exemption is engaged. He told the Commissioner:

> *"Section 30/31 does not apply,* [name redacted] *was not and is not under investigation. She is not a (suspected) criminal. She is a youtube journalist".*

Reasons for decision

19. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

20. 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 in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

21. A public authority will need to use the neither confirm nor deny response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.

22. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of the FOIA.

23. Kent Police has applied multiple exemptions to the information in scope of parts 1, 2 and 6 of the request. It considers those exemptions apply equally to the information in the scope of those parts of the request.

24. The Commissioner has first considered its application of section 30(3).

Section 30 investigations and proceedings

25. Section 30(3) of the FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if held, would fall within any of the classes described in sections 30(1) or 30(2) of the FOIA.

26. In this case, Kent Police considered section 30(3) applied to the information requested at parts 1, 2 and 6 of the request by virtue of section 30(1)(a).

27. Consideration of section 30(3) of the FOIA involves two stages; first, the information described in the request must fall within the class described in section 30(1)(a)(i) and/or 30(1)(b). Secondly, the exemption is qualified by the public interest. This means that if the public interest in maintaining the exemption does not outweigh the public interest in

confirming or denying whether information is held, then confirmation or denial must be provided.

28. Section 30(1) of the FOIA states:

> *"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose 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, or*
>
> *(c) any criminal proceedings which the authority has power to conduct".*

29. Section 30(3) of the FOIA states:

> *"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)".*

30. The Commissioner has issued guidance on section 30[1] which states that section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings. Her guidance also states that section 30 is class based and that information which has been held at any time for the purpose of these investigations and proceedings will be exempt.

31. The Commissioner considers that the phrase "*at any time*" means that information can be exempt under section 30(1) if it relates to a specific ongoing, closed or abandoned investigation. The information requested (if it was held) must be held for a specific or particular investigation and not for investigations in general.

Is the exemption engaged?

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[1] https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf

32. The public authority in this case is Kent Police. As a police force Kent Police clearly has a duty to investigate offences and allegations of offences.

33. In correspondence with the complainant, Kent Police told him:

> *"Information of the type you are requesting, were it to be held by Kent Police, would be held for the purpose of conducting an investigation with a view to ascertaining whether a person ought to be charged with an offence, and would be exempt from release by virtue of the exemption at Section 30(1)(a) of the FOIA".*

34. With respect to its reliance on section 30(3) in this case, Kent Police told the complainant:

> *"Confirming or denying whether the requested information is held would reveal (i) whether a specific named individual had been detained by Kent Police under Schedule 7 of the Terrorism Act 2000 and (ii) whether Kent Police holds information relating to a specific named individual and an incident in Luton earlier this year".*

35. In correspondence with the Commissioner, Kent Police confirmed its view in this case that, if the information were held, it would be exempt by virtue of subsection (1)(a)(i).

36. In support of that view, it told the Commissioner:

> *"Schedule 7 Terrorism Act 2000 enables specific examining officers, including police officers, to question persons at a port or in a border area entering or leaving Great Britain or Northern Ireland in order to determine whether the person is or has been concerned in the commission, preparation or instigation of acts of terrorism. Schedule 8 Terrorism Act 2000 is the relevant legislation under which individuals can be detained under Schedule 7.*
>
> *Due to the nature of the powers, there is the potential for a criminal investigation to ensue depending on the result of the Schedule 7 examination".*

37. It further explained:

> *"… the information requested at questions one and two (if held) has the potential to constitute information held for the purposes of an investigation and the information requested at question six (if held) would constitute information held for the purposes of an investigation".*

38. The Commissioner is satisfied that Kent Police has the power to carry out investigations of the sort described in section 30(1)(a).

39. Referring to the wording of the request, the Commissioner is also satisfied that any information, if held by Kent Police, would be held in relation to investigation(s) into the individual named in the request, and that it would fall within the class described in section 30(1)(a)(i). That is, it would be held for the purposes of an investigation into whether a person should be charged with an offence. The exemption provided by section 30(3) is, therefore, engaged in respect of the requested information.

The public interest test

40. The Commissioner must consider what public interest there is in confirmation or denial. She must also consider whether confirmation or denial would be likely to harm any investigation that Kent Police might be conducting, which would be counter to the public interest, and what weight to give to these public interest factors.

Public interest arguments in favour of confirming or denying

41. The complainant considered that the public had a right to know why Kent Police made the decision to ban the named individual from entering the country.

42. Kent Police acknowledged that to confirm or deny whether it held the requested information would contribute to openness and transparency.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

43. Arguing in support of neither confirming nor denying whether it held the requested information, Kent Police told the complainant:

> *"… to publically confirm or deny the existence under the FOIA of any information relevant to this request would risk prejudice to past, present or future investigations by disclosing whether Kent Police is or is not conducting an investigation, and it would not be in the public interest to do so".*

44. It also told him:

> *"If Kent Police were to confirm or deny whether information is held on this occasion and then received the same request regarding a different individual we would also be required to confirm or deny whether information is held regarding that individual and so on. This demonstrates how gradually through a series of requests under the FOIA the ability of Kent Police to protect information relating to investigations concerning national security would be eroded. This is often referred to as the "mosaic effect" of information disclosure".*

45. Similarly, it told the Commissioner that confirming or denying whether a specific named individual had been stopped or detained, or confirming whether an individual had distributed material on a specified date and at a specified location, would set a precedent for future requests of a similar nature made under the FOIA.

46. In that respect it said:

> *"The public expects Kent Police to respond to requests under the FOIA responsibly. Failure to protect investigations, particularly those relating to national security, would threaten the confidence that the public places in Kent Police. Consequently the public may be less inclined to provide information to Kent Police which would further impact on investigations…"*

Balance of the public interest

47. The purpose of section 30 is to preserve the ability of the police (and other applicable public authorities) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the act of confirming or denying whether the requested information is held could have a harmful impact on the ability of the police to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the police to investigate crime effectively.

48. The Commissioner recognises the importance of the public having confidence in those public authorities tasked with upholding the law. Confidence will be increased by allowing scrutiny of their performance and this may involve examining the decisions taken in particular cases.

49. The Commissioner considers that there is clearly a public interest in the transparency and accountability of public authorities. She recognises that confirming or denying whether the requested information is held would meet the public interest in transparency and accountability of Kent Police.

50. In this case, the complainant has referred to the existence of information in the public domain.

51. However, the Commissioner has not seen any evidence that Kent Police has publicly confirmed or denied an investigation. The Commissioner accepts that there is difference between the information that may be found online and formal, official confirmation or denial by a police force.

52. In this case the request focuses on a particular investigation rather than investigations in general and specifically asks for information about investigations in relation to a named individual. By confirming whether or not it holds, or ever held, the requested information, Kent Police

would be revealing whether or not it has been – or indeed continues to be - involved in a criminal investigation into the individual named by the complainant.

53. In considering the balance of the public interest in relation to the application of the neither confirm nor deny provisions of section 30 in this case, the Commissioner's view is that significant weight has to be given to the need to protect Kent Police's ability to adopt a consistent approach when responding to similar requests about investigations into named individuals in the future.

54. This goes to the heart of what the section 30 exemption is designed to protect - 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 - and so the public interest in maintaining the exemption must be very strong in such a case

55. Having considered the issues in this particular case, the Commissioner's view is that the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of Kent Police issuing such a confirmation or denial. Therefore, the Commissioner finds that Kent police was entitled to rely on the refusal to confirm or deny provided by section 30(3) of the FOIA.

Section 40(5) personal information

56. In light of her conclusion above, the Commissioner has not considered Kent Police's application of section 40(5) or 24(2) to the same information.

Other matters

57. The definition of personal data is set out in section 1 of the Data Protection Act 1998 (DPA), the legislation in force at the time of this request.

58. Given the information about herself that the named individual has put into the public domain, if the Commissioner had investigated Kent Police's application of section 40(5) in this case, she may have found that Kent Police should have confirmed or denied holding the information withheld by virtue of that section.

59. In the event that Kent Police had confirmed holding the information requested at parts (1), (2) and (6) of the request, the Commissioner would have had to take into account that the information was undoubtedly the named individual's personal data under the DPA and,

furthermore, her sensitive personal data by virtue of section 2(g) thereof.

60. The first data protection principle requires that such data cannot be processed (which includes disclosed) unless at least one condition in Schedule 2 and one condition in Schedule 3 is met.

Right of appeal

61. 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

62. 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.

63. 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 .....

Deborah Clark
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF