

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2022

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 2EA

Decision (including any steps ordered)

1. The complainant requested information held in a prosecution case file relating to a specified manslaughter case in 1977. The Crown Prosecution Service (the 'CPS') refused to provide any information citing both section 38 of FOIA (the exemption for health and safety) for some of the information, and section 40 (the exemption for personal information) which it applied to all the information contained within the requested file. Both the defendant and the victim are deceased.
2. The Commissioner's decision is that:
 - The CPS was correct to withhold some of the requested information under section 40.
 - However, he also finds that section 40 is not engaged for information that relates to the defendant or the victim.
 - He also finds that the remaining information withheld only under section 40 is not personal data and so section 40 is not engaged. The CPS must disclose the information as set out in the Confidential Annex issued only to the public authority.
 - Finally, the Commissioner finds that the CPS was correct to withhold the majority of the remaining information under section 38 of FOIA. However, there are some exceptions which the CPS must disclose, details of which are as set out in the Confidential Annex.
3. The CPS 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

4. The request under consideration here relates to what is described by the complainant in his request as a 'murder', but the actual conviction was for manslaughter on the grounds of diminished responsibility.
5. The defendant, a former journalist, was found guilty of killing his wife in 1977 following a mental breakdown; he has since passed away in 2021, prior to the request in this case.
6. The complainant has requested disclosure of the entire content of the associated prosecution file for the defendant.

Request and response

7. On 13 May 2021 the complainant wrote to the CPS and requested information in the following terms:

"I am looking for the prosecution case file of deceased Sun journalist John Kay who murdered his wife, Harue Kay (maiden name, Nonaka), in 1977. Given Kay's activities during this time was a reporter for the Sun, I believe the facts of this investigation are in the public interest.

John Kay's obituary can be found here:

<https://www.pressgazette.co.uk/john-kay/>

John Kay was convicted of his wife's murder at St Alban's court. I assume that given this venue, Hertfordshire Police was the force that investigated this case."

8. On 18 May 2021 the CPS wrote asking the complainant to clarify which type of material he was requesting from the prosecution case file.
9. The complainant replied the same day as follows:

"I am looking for all documentation that was gathered that was deemed relevant for the potential prosecution and sentencing of John Kay for the murder of his wife Harue Kay. This can include witness statements, his own statement if any was given, character references, psychiatric reports, coroners [sic] report, press reports and the police investigation files. Essentially, the full case files.

I understand that in cases such as these, the documentation would be quite slim for the period.”

10. The CPS wrote to the complainant on 11 and 25 June 2021 to apologise for the delay in providing its substantive response, which it subsequently provided on 1 July 2021. It refused to provide the requested information citing the following FOIA exemptions:
 - Section 38 (health and safety) and
 - Section 40 (personal information).
11. Following an internal review the CPS wrote to the complainant on 8 July 2021 and maintained that the above exemptions applied to his request.

Scope of the case

12. The complainant contacted the Commissioner on 8 July 2021 to complain about the way his request for information had been handled. He reiterated some of the information within the published obituary about the Kay's relatives and asked the Commissioner to consider the CPS' reliance on sections 38 and 40.
13. In response to the Commissioner's investigation, the CPS submitted an 87 page sample of the withheld information (479 pages in total), together with an index setting out all the material held. The index details the document type (ie handwritten note, file record, correspondence etcetera), a description of the nature of the information, the relevant page number(s) within the withheld file and whether section 38, section 40 or both have been applied to that information.
14. Having reviewed the withheld information sample (which includes witness statements, photographs and court related information), and the accompanying index table, the Commissioner notes that the CPS has relied on section 40 for all the information held within the file. The CPS has additionally cited section 38 of FOIA for much of the withheld information. There is some information to which only section 40 has been applied.
15. However, given that section 40 of FOIA has been cited for all the information held within the prosecution case file, the Commissioner has first considered whether the CPS has properly relied on this exemption in refusing to provide the requested file.

Reasons for decision

Section 40 – personal information

16. 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.
17. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
18. 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 FOIA cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

24. The Commissioner has identified a number of entries within the file index that refer only to the defendant and victim and where the CPS has only applied section 40. Clearly, in this case, both the defendant and his wife are deceased, so section 40 cannot be applied to their own information. The Commissioner notes that the CPS recognised in its investigation response that:

"Material held in relation to John Kay and Harue Kay would no longer be considered their personal data as they are both deceased."
25. The Commissioner therefore finds that section 40 is not engaged in respect of information relating to these known deceased individuals. Where the CPS has not also relied on another exemption, the Commissioner must order disclosure of that information. The detail is set out in a confidential annex supplied only to the CPS.
26. In the circumstances of this case, having considered the remaining information within the file withheld under section 40, the Commissioner is satisfied that the majority relates to a number of individuals who were involved in the case as witnesses and other third parties. He is satisfied that this information both relates to and identifies those individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. The Commissioner will later consider that information not relating to the defendant and his wife for which he does not consider section 40 applies.
28. The fact that information constitutes the personal data of identifiable living individuals 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.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. 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".

31. 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.
32. 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.

33. The CPS has submitted that some of the information held on the file would constitute 'special category data'.

Is the information special category data?

34. Information relating to special category data is given special status in the UK GDPR.
35. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
36. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does not include special category data. Any information which may be defined as special category data relates to the deceased defendant and therefore is not personal data.
37. The CPS has also argued that the information held on the requested file also constitutes 'criminal offence data', namely witness accounts, exhibits and evidence, medical reports, correspondence, hearing outcomes and counsel documents .

Is the information criminal offence data?

38. Information relating to criminal convictions and offences is given special status in the UK GDPR.
39. Article 10 of the 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; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
40. However, given that the data subject to whom the offence, disposal of proceedings and subsequent sentencing relates is deceased, section 40 cannot be applied. Therefore the Commissioner finds that the requested information does not include criminal offence data.

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

41. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
42. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².
43. 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(s).

² Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

44. 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

45. 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.
46. The complainant submitted that there is a legitimate interest in the public knowing the "facts of this investigation" particularly given the perpetrator was working for The Sun newspaper at the time of the offence.
47. As set out in his internal review request, the complainant believes that the defendant's wife was murdered and that release of the file "will rectify this historical injustice".
48. The CPS acknowledged that disclosure would provide more information around the handling of this particular case.
49. The Commissioner is thus satisfied that disclosure would serve a legitimate interest and therefore the first part of the three-part test has been met.
50. He must next consider whether disclosure of that information is 'necessary'.

Is disclosure necessary?

51. '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.
52. In this case, the offence took place in 1977 and Mr Kay, the defendant, was investigated, tried and convicted of his wife's manslaughter on the grounds of diminished responsibility, all of which is in the public domain. Although the defendant passed away in 2021 which may have brought

details of his 1977 conviction back into the public conscience once again, the Commissioner's view is that the matter has been properly considered and has gone through the proper court and judicial channels, resulting in a sentence for the now deceased defendant.

53. The Commissioner notes that the complainant supplied a copy of the obituary for the defendant which appeared in The Times on 13 May 2021 which he said showed that there are no living relatives. The article stated that his second wife died in 2017 and that he had no children. The Commissioner appreciates that disclosure where there are no living relatives is less likely to cause harm and distress.
54. However, it is not known whether there are other living relatives, such as siblings, cousins etcetera, and certainly many of those involved in the investigation and named in the file, such as witnesses and police officers, are likely to still be living.
55. Whilst acknowledging the complainant's stated view of this case, the Commissioner does not deem it necessary for the content of the file caught by section 40 to be disclosed in order to meet his identified legitimate interest. The offence, which happened in 1977, has been investigated and considered in court. Further, both parties are deceased and release of the file would not serve to alter that fact or potentially remedy any outcome. In terms of the wider legitimate interest, the Commissioner considers that the matter was fully dealt with in 1977 and can find no requirement to disclose the file now, particularly bearing in mind that there will be living individuals who were both directly involved in, or closely connected to, this case.
56. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interests in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

Conclusion

57. The Commissioner has therefore decided that the CPS was entitled to withhold the majority of information under section 40(2), by way of section 40(3A)(a).
58. As stated in paragraph 27, there are some documents to which the CPS has only applied section 40 and which relate solely to the deceased individuals. Consequently, the CPS has failed to demonstrate that this information is exempt, and the Commissioner must therefore order disclosure as detailed in the annex. Whilst acknowledging the potential for distress to living individuals involved in or connected to the case, the

Commissioner has no alternative given that only section 40 has been cited by the CPS.

59. Further, some of the information on file has been withheld on the basis of section 40 only, which the Commissioner does not consider to be personal data. He has also ordered disclosure of that information within the Confidential Annex.
60. The CPS has applied section 38 to some of the information concerning the deceased defendant and victim. The Commissioner must next consider the CPS's reliance on section 38 for those parts of the requested file.

Section 38 – health and safety

61. Section 38(1) of FOIA states:

“Information is exempt information if its disclosure under this Act would, or would be likely to –

- a) endanger the physical or mental health of any individual, or
- b) endanger the safety of any individual.”

62. The CPS has cited section 38(1)(a) of FOIA. The Commissioner's section 38 guidance³ states:

‘The use of the phrase “any individual” in section 38 includes any specific individuals, any member of the public, or groups within society.’

63. In order to satisfy the Commissioner that this exemption is engaged, the public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information.
64. The public authority must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect cannot be trivial or insignificant. In the context of section 38, even if the risk falls short of being more probable than not, it needs to be such that there may very well be endangerment.
65. The CPS submitted the following rationale:

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

"As outlined in our original section 17 notice the release of the case material would be likely to endanger the mental health of the deceased's surviving family and release of this material after such a prolonged period of time would be likely to have the same endangering effect on the mental health of the surviving relatives as releasing it for the first time.

Even though John Kay and Harue Kay are deceased, disclosure would be likely to endanger the mental health of surviving relatives e.g. siblings or others involved in the case. As set out above and within the description of the index the material held is of a graphic nature and could cause harm to the family members or others that knew the deceased individuals. It is also reasonable to argue that the individuals may wish to move on from the matter many years after the event. For the CPS to release material passed to the CPS by the police in relation to criminal proceedings, some of which contains distressing images, into the public domain would be likely to cause further harm.

The requested information would be likely to cause shock, harm and distress to any surviving relatives of both the victim and the defendant 'to the extent that mental endangerment may be rendered to these individuals'.

The individuals involved in the case are still presumed to be living and section 38 is designed to protect those individuals. To lose any family member is distressing and when that family member is the victim or perpetrator of a crime this can cause severe anguish for a considerable amount of time, disclosure of the requested information now could be as damaging or distressing to surviving relative as if made in 1977.

Even though there is limited information in the public domain regarding the defendant and the criminality, it does not contain the substantive amount of detail on the criminal case which is captured within the records created by the investigation authorities and the prosecution material. Taking into account the notoriety of the case and the likely media interest in any new information disclosed, the CPS believes that there would likely to be new press intrusion into the lives of any surviving relatives furthermore, it would be likely that the mental health of any surviving relatives may be endangered as a result.

It is the CPS position that to potentially endanger even just one person would be irresponsible, dangerous and pose an unacceptable risk. The CPS considers 'There is a profound public interest in not endangering the mental health of a victim's family' and assigns considerable weight to this argument."

66. In the course of the Commissioner's investigation, the CPS also said:

"We would like to add the additional arguments to the below the reasons why section 38 is cited –

Section 38 should not only apply to the victim/defendant's family, due to the high profile nature of the case and media interest the third parties such as witnesses and experts that assisted in the investigation of the case should also be allowed to freely assist in the case without fear of their involvement being widely known to the public domain, disclosure of their involvement would be likely to endanger there [sic] well-being."

The applicable interests

67. The Commissioner accepts that the actual harm which the CPS alleges would, or would be likely to, occur if the withheld information was disclosed relates to the applicable interests which the exemption is designed to protect, as the Council states that disclosure of the withheld information would be likely to endanger the physical or mental health or the safety of living individuals involved in the case.

The nature of the endangerment

68. The Commissioner's guidance states:

"Endangering mental health... means it must have a greater impact than causing upset and distress."

69. The Commissioner must consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect. In order to do so, the Commissioner has reviewed the withheld information sample and information as described in the index file.

70. The Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of a causal link, because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment; there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.

71. The Commissioner is mindful that disclosure under FOIA is disclosure to the world and not just the complainant. Whilst the complainant may handle and interpret the requested information in a sensitive manner, there is no guarantee that others would do the same.

72. The Commissioner considers it appropriate to remind himself of the nature of the crime and conviction to which the requested information

relates. He has therefore chosen not to provide a complete summary of the requested information.

73. As stated, it is living relatives in particular, and those involved in and related to the case, whom the applied exemption is designed to protect. To lose any family member is distressing. However, the Commissioner agrees with the CPS that when that family member is the victim or perpetrator of a crime, this can cause severe anguish for a considerable amount of time. He also accepts that disclosure of the requested information now could be as damaging or distressing to surviving relatives as if made in 1977. Furthermore, the Commissioner feels that the death of the defendant so close to the date of the request is likely to heighten the distress and anguish that related individuals would be likely to feel.

Likelihood of endangerment

74. The CPS has stated 'would be likely' in this case. The Commissioner takes the view that the phrase 'would be likely to endanger' is a lower threshold than 'would endanger'.
75. The Commissioner recognises that the endangerment outlined by the CPS is not absolutely certain. However, having reviewed the withheld information, the Commissioner is satisfied that much of the information is not within the public domain. Therefore, taking into account the notoriety of the case and the likely media interest in any new information disclosed, he is satisfied that press intrusion into the lives of any surviving relatives would be likely and the mental health of any surviving relatives may be endangered as a result.

Is the exemption engaged?

76. Since the Commissioner is satisfied that the three criteria required to engage section 38(1)(a) have been met, he considers the exemption properly engaged in relation to the majority of the remaining withheld information. Where he finds that section 38 is not engaged, the Commissioner has ordered disclosure of that information as set out in the Confidential Annex.
77. Where section 38 is engaged, the Commissioner must consider the associated public interest test. Even though the section 38 exemption is engaged, the Commissioner may still require the CPS to release the requested information if the public interest in doing so outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the information

78. The CPS acknowledges the significant public interest in openness and transparency.

79. The Commissioner also accords weight to openness and transparency as it would demonstrate to the public how this particular case was handled.

Public interest arguments in favour of maintaining the exemption

80. The CPS must also consider the mental health needs of the individuals who would be likely to be affected by disclosure. It is the CPS's position that to potentially endanger even just one person would be irresponsible, dangerous and pose an unacceptable risk.

81. The CPS considers "There is a profound public interest in not endangering the mental health of a victim's family" and assigns considerable weight to this argument.

82. It argued that it had to take into account "the safety of all individuals in question".

83. The CPS also submitted that maintaining the exemption would maintain the integrity and effectiveness of the criminal justice system.

Balance of the public interest arguments

84. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental wellbeing. The natural consequence of this is that disclosure under FOIA will only be justified where a compelling reason can be provided to support the decision.

85. Clearly in any such situation where disclosure would be likely to lead to endangerment to health, there is a public interest in avoiding that outcome.

86. The Commissioner considers that disclosure of the parts of the file withheld under section 38 would inform the public and add to a public record of significant interest.

87. However, the Commissioner notes the difference between what the public may be interested in and what is in the best interests or greater good of the public.

88. In reaching a decision in this case the Commissioner must take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the world at large, without conditions. The wider public interest issues and the fairness to those parties involved must therefore be considered when deciding whether or not the information requested is suitable for disclosure.

89. FOIA is purpose blind which means that the purpose and intent of any request, whether nefarious or noble, must largely be disregarded. Whilst the Commissioner recognises the legitimate purpose behind the

complainant's request, he does not consider that an unfettered disclosure of the parts of the prosecution file withheld under section 38 of FOIA would be appropriate.

90. The Commissioner accepts that the balance must (and always will) lie with protecting an individual's mental well-being. Any surviving relative of the victim or defendant will already have suffered as a result of their involvement or affiliation with such events and, for this reason, the passage of time since the event itself is not a significant factor in this instance.
91. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision. With this in mind, the Commissioner has determined that the public interest lies in maintaining the exemption.

Right of appeal

92. 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

93. 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.
94. 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

Laura Tomkinson

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