

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2023

Public Authority: National Police Chiefs' Council
Address: 1st Floor
10 Victoria Street
London
SW1H 0NN

Decision (including any steps ordered)

1. The complainant has requested the criminal record of a deceased journalist. The National Police Chiefs' Council (the "NPCC") refused to provide the requested information, citing sections 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that section 40 is engaged in respect of a small amount of the withheld information. He finds that section 38 is not engaged.
3. The Commissioner requires the NPCC to take the following steps to ensure compliance with the legislation:
 - disclose the criminal record, withholding the names of any third parties and any private addresses.
4. The NPCC 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 Commissioner has previously issued a decision notice in respect of this information request¹.
6. When first responding to the request, the NPCC would neither confirm nor deny holding the requested information citing section 38(2)(Health and safety) of FOIA as its basis for doing so. The Commissioner determined that the exemption wasn't engaged and, by way of the decision notice referred to, the NPCC was required to confirm or deny whether or not any information was held.
7. Its response to that step has resulted in this investigation.
8. Information about criminal records can be found online². This link explains that:

"The Police National Computer (PNC) records details of convictions, cautions, reprimands, warnings and arrests".
9. The Commissioner is also considering a separate request to the Metropolitan Police Service for a copy of the associated murder investigation file.

Request and response

10. On 10 August 2022, the complainant wrote to the NPCC and requested information in the following terms:

"I am requesting the criminal records for former Sun journalist, John Kay. He was born on the 28th Oct 1943 and died on 7th May 2021.

I know that in December 1977 that John Kay was convicted of manslaughter under diminished responsibility. I understand that he

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023286/ic-194988-j5c0.pdf>

² <https://commonslibrary.parliament.uk/criminal-records/#:~:text=The%20Police%20National%20Computer%20%28PNC%29%20records%20details%20of,the%20PNC%20is%20reta%E2%80%8Bined%20until%20their%20100th%20birthday.>

may have had other arrests for offences and cautions under his name. I would like his full criminal record to be released to me.

John Kay's obituary can be found here:
<https://www.pressgazette.co.uk/john-kay/>

His wife, Mercedes Kay, died in September 2017 as confirmed in his obituary."

11. On 16 December 2022, in compliance with the decision notice referred to in 'Background' above, the NPCC responded. It refused to provide the requested information citing sections 38(1) (Health and safety) and 40(2) (Personal information) of FOIA.
12. The complainant requested an internal review on 30 December 2022.
13. The NPCC provided an internal review on 30 January 2023 in which it maintained its position.

Scope of the case

14. The complainant contacted the Commissioner on 10 February 2023 to complain about the way his request for information had been handled. He said:

"I know that in December 1977 that John Kay was convicted of manslaughter under diminished responsibility. I understand that he may have had other arrests for offences and cautions under his name. I would like his full criminal record to be released to me".

15. The Commissioner will consider the application of exemptions to the request. He has viewed the withheld information, which consists of a criminal record printout from the Police National Computer ("PNC").

Reasons for decision

Section 40 – Personal information

16. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. 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.
18. In this case, as John Kay is deceased, his criminal record is not classed as being his personal data. However, the Commissioner is satisfied that there is a small amount of personal information within his criminal record which relates to third party individuals. This consists of the names of individuals other than John Kay, and private addresses. This information clearly relates to living individuals and the Commissioner considers they will be identifiable from it. It is therefore their personal data and its potential disclosure must therefore be considered under section 40(2).
19. (The Commissioner is satisfied that the remainder of the withheld information does not constitute personal data and so it will be considered under section 38, below.)
20. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
21. In the case of an FOIA request, 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.
22. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider:
 - whether a legitimate interest is being pursued in the request for information;
 - if so, whether disclosure is necessary to meet the legitimate interest in question; and
 - whether those interests override the rights and freedoms of the data subject.
23. The complainant has not stated why he wants the requested information. However, the wording of this request and the fact that the Metropolitan Police Service has also been approached for the investigation file, suggests that the focus of the request is John Kay rather than any other party.
24. Whilst there is a general legitimate interest in knowing what is held on his criminal record, the Commissioner considers that that legitimate

interest can be met without disclosure of the names and addresses he is considering here, ie by disclosure of a redacted version of the record. The parties concerned would have no expectation that their details could be disclosed under FOIA.

25. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that disclosing the third party names / addresses in the record would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation.

Section 38 – Health and safety

26. Section 38(1) of FOIA says that information is exempt information if its disclosure would or would be likely to (a) endanger the physical or mental health of any individual, or (b) endanger the safety of any individual. Section 38 is subject to the public interest test.
27. Consideration of this exemption involves two stages. Firstly, the exemption must be engaged as a result of endangerment to physical or mental health being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The endangerment test

28. In order to engage this exemption, the NPCC must demonstrate that there is a causal link between the endangerment and disclosure of the information.
29. The NPCC must also show that disclosure of the withheld information in this case would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect must be more than trivial or insignificant.
30. In order for section 38 to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant

endangerment which is alleged must be real, actual or of substance;
and

- Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment. In relation to the lower threshold the Commissioner considers that the chance of endangerment occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated endangerment must be more likely than not.
31. FOIA does not explain the level to which physical or mental health or safety must be endangered for the exemption to be engaged. However, the Commissioner's published guidance on section 38³ implies that disclosure of information may cause endangerment where this leads to an adverse physical impact, which often involves medical matters, or where it might lead to a psychological disorder or make existing mental illness worse.
32. According to its internal review, the NPCC is relying on section 38(1)(a). Although it did not state whether the envisioned endangerment 'would' or 'would be likely to' occur, in its refusal notice the NPCC said that it:
- "... considers that to release the information requested would be likely to have a detrimental effect on the surviving family and friends of any victims as well as any surviving members of John Kay's family".

Therefore, the Commissioner will consider the lower level of 'would be likely' to endanger.

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

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

between disclosure and the likely endangerment in order to engage the exemption.

Is the exemption engaged?

34. When refusing to provide the requested information, the NPCC argued:

“PNC records contain dates, descriptions of the circumstances and locations of offending that are likely to be recognised by those involved. Given the length of time that has elapsed, those concerned would be under no expectation that the NPCC would disclose information which may ignite distressing memories”.

35. It also said:

“The Information Commissioner’s guidance states:

The prejudice test is not limited to the harm that could be caused by the requested information on its own. Account can be taken of any harm likely to arise if the requested information were put together with other information. This is commonly known as the ‘mosaic effect’. To be clear, it is not simply the risk of victims being identified by others that is of concern, but also that victims would identify themselves from any records released and suffer mental harm and anguish as a consequence. The likelihood of mental trauma to victims and family is real and significant and not a remote or hypothetical risk of mental harm.

Disclosure could prompt unwanted questions and interest from friends, relatives who are not aware of the information contained within the records sought.

The arguments already outlined above in respect of the risks of the ‘mosaic effect’ resulting in the identification of victims and family, if any information is held, apply in this case. The NPCC has a duty of care to victims of crime and their families. Disclosure of the requested information would not be in their best interests. It is not simply the risk of potential victims being identified by others that is of concern, but also that victims, friend and family would identify themselves from any records released and suffer mental harm and anguish as a consequence”.

36. Having viewed the withheld information, the Commissioner does not find these arguments to be relevant. He notes there is some allusion to neither confirming nor denying that content is held, but this has not been made clear, was not cited and was not referred to again at internal review stage. The NPCC also advised the Commissioner that it did not

need to make a further submission when it was notified regarding the complaint, saying it would rely on any arguments already provided.

37. When providing its internal review to the complainant, the NPCC argued:

“When a member of the public dies, the family of the deceased are likely to be distressed for a considerable period of time. When that death is not attributable to natural causes, the distress caused can be greater and on the rare occasion that the cause of death is murder, that distress can be even more severe. In homicide cases, it is common that close family members never get over the loss of their loved one. This sense of loss can extend to the wider family and to close friends. The NPCC has a duty of care (including psychologically) to the families of homicide victims and must assess where its actions would likely to cause further distress to the family.

The NPCC does not know the mental state of friends and relatives of the murder victim, but one or more of them could already be suffering with mental health issues and could be deeply affected by criminal records of the offender being released for the world to see, some 45 years after she died. The NPCC places significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.

You have indicated that disclosure of the criminal records of John Kay is in the public interest as he was a Sun journalist who murdered his first wife, Mercedes Kay, whilst working at the newspaper and then continued to work for the newspaper after he was convicted for Manslaughter under Diminished Responsibility. He was later the subject of investigation for bribing of public officials. However, beyond a general public interest in police being open and transparent with the records that they hold, you have put forward little further public benefit in the release of the records captured by your request”.

38. To engage section 38, the NPCC needs to demonstrate a causal relationship between the disclosure of the criminal record and the endangerment to the physical or mental health of any individual. The alleged endangerment must be real, actual or of substance.
39. Having considered the response which the NPCC has made, the Commissioner is not persuaded that the NPCC has provided this causal link. Although it argues that friends and relatives of the murder victim could be deeply affected by release of the PNC printout, it has also said that it “does not know” the mental state of any of those who may be

connected – the Commissioner notes that the murder happened some 45 years ago and there is nothing publicly available to suggest there are any surviving children, or other family members. The Commissioner also notes that there is very little detail about the murder that is included within the PNC printout; the PNC has been used to record basic facts. Whilst the associated murder investigation file is likely to hold more details (see 'Background' above), the content of the criminal record printout from the PNC is minimal.

40. Other than what has been considered in paragraphs 37 and 38, no other rationale has been provided in respect of any other content which may be held on the record.

The Commissioner's conclusion

41. Based on the submissions made, and the content of the criminal record once any personal information has been removed, the Commissioner does not find that the NPCC has provided sufficient evidence to demonstrate a causal relationship between the endangerment to the physical or mental health of any individual and the disclosure of the requested information. He therefore finds that section 38 is not engaged and the criminal record should be disclosed, with the redaction of any personal information, as set out in paragraph 25.

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Right of appeal

42. 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

43. 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.
44. 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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