

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2020

Public Authority: Chief Constable of Thames Valley Police

Address: Headquarters

Oxford Road

Kidlington

OX5 2MX

Decision (including any steps ordered)

1. The complainant requested information relating to a specified address. Thames Valley Police confirmed it held information within the scope of the request but refused to provide it, citing sections 31(1)(a) and (b) (law enforcement) and 38(1)(a) and (b) (health and safety) of the FOIA.
2. The Commissioner investigated its application of sections 31 and 38. She finds that neither section is engaged and therefore Thames Valley Police is not entitled to rely on either exemption.
3. The Commissioner requires Thames Valley Police to take the following step to ensure compliance with the legislation:
 - disclose the requested information to the complainant.
4. Thames Valley Police must take this step 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.

Request and response

5. On 1 May 2019 the complainant wrote to Thames Valley Police and requested information in the following terms:

"Please provide the following data for call outs to [address redacted].

How many call outs were there in the following calendar years? 2013, 2014, 2015, 2016, 2017, 2018 and up to 1/05/2019

How many arrests were made following call outs to [address redacted]? In calendar year:

2013, 2014, 2015, 2016, 2017, 2018 and up to 1/05/2019

Please provide details of any charges made after call outs to [address redacted], in the years specified above".

6. Thames Valley Police responded on 30 May 2019. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
 - section 12(1) cost of compliance.
7. The complainant requested an internal review on 31 May 2019 in which she outlined suggested changes to refine the request to make it easier to comply with.
8. Thames Valley Police provided its internal review response on 25 June 2019. It revised its position, clarifying that it considered that section 12(2) applied. It also advised that, even if held, other exemptions would apply to the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 26 June 2019 to complain about the way her request for information had been handled.
10. She disputed that section 12(2) applied. She told the Commissioner:

"I struggle to see how cost is an issue – when it seems to me it would be a straight-forward address search of their records. I also don't see how releasing this information would affect individuals or policing work ... I would argue that as it concerns a publicly-funded service, people should be able to access information regarding the homeless shelter and crime and disorder".
11. During the course of the Commissioner's investigation, Thames Valley Police acknowledged that the terms of the complainant's request for internal review *"effectively changed the scope"* of her request. It accepted that she had asked that the part of her request for the number

of call outs was prioritised, and that she was prepared to amend the timeframe so that it only went back to 2015.

12. Accordingly, Thames Valley Police revisited its handling of the part of request relating to the number of call outs to the specified address. As a result, while confirming that it held information within the scope of the request, Thames Valley Police told the complainant that it considered that the exemptions at sections 31(1)(a)(b) (law enforcement) and 38(1)(a)(b) (health and safety) of the FOIA applied.
13. The complainant confirmed that she remained dissatisfied with Thames Valley Police's revised response.
14. The request for information in this case relates to a hostel for homeless people. In support of its position in this case, Thames Valley Police referred to a case¹ involving a request for information relating to a nursing care home. It considered that, although that case cited a different exemption (section 30 (investigations and proceedings)) of the FOIA, and involved a 'neither confirm nor deny' response, the arguments:

"... highlight the important factors which relate to protecting police data and vulnerable members of the community".
15. While acknowledging the outcome of that case, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with the FOIA.
16. The analysis below considers Thames Valley Police's application of the exemptions at sections 31 and 38 to the requested information. That information comprises the number of call outs, to the specified address, between 1 January 2015 and 30 April 2019 only.

Reasons for decision

17. In order to engage a prejudice based exemption such as sections 31 and 38, there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
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¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/823300/fs_50478108.pdf

- first, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed 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 disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
18. The Commissioner has first considered Thames Valley Police's application of section 31 to the requested information.
19. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

Section 31 law enforcement

20. Section 31 of the FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities.
21. In this case, Thames Valley Police is relying on sections 31(1)(a) and (b) of the FOIA in relation to the withheld information.
22. Those subsections state that information is exempt if its disclosure would, or would be likely to, prejudice:
- "(a) the prevention or detection of crime;*
- (b) the apprehension or prosecution of offenders,".*
23. In its submission to the Commissioner, rather than differentiate between the subsections of the exemption, Thames Valley Police presented one set of arguments.

24. The Commissioner recognises that there is clearly some overlap between subsections 31(1)(a) and 31(1)(b).

The applicable interests

25. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activities mentioned in sections 31(1)(a) and (b) – the prevention or detection of crime and the apprehension or prosecution of offenders.
26. With respect to law enforcement activities, the Commissioner recognises, in her published guidance², that section 31(1)(a) will cover all aspects of the prevention and detection of crime. With respect to section 31(1)(b), she recognises that this subsection:

"... could potentially cover information on general procedures relating to the apprehension of offenders or the process for prosecuting offenders".

27. The Commissioner considered that, in its correspondence with the complainant, Thames Valley Police relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis. Nor did it attempt to explain why each of the separate limbs of the exemption applied.

The nature of the prejudice

28. The Commissioner next considered whether Thames Valley Police demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (b) are designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
29. In its correspondence with the complainant, Thames Valley Police recognised the need for homeless hostels within the community to support individuals, provide them with a viable alternative and a foothold in society.
30. However, in the context of this request, it said:

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

"It would be remiss of the police to contribute to circumstances that may lead to these individuals being less likely to contact the police for fear that such a fact could be disclosed (either individually or as part of a cumulative picture)".

31. In that respect, it said that disclosure of the requested information:

"... could lead to harm as both staff and client's confidence in calling the police either to report a crime or a safeguarding concern would be compromised".

32. Thames Valley Police also told the complainant:

"It is essential that individuals feel able to report information in complete confidence in order that crime is both detected and/or avoided".

33. As is her practice in a case such as this, during the course of her investigation, the Commissioner asked Thames Valley Police to provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

34. In its submission to the Commissioner, Thames Valley Police re-iterated the arguments it had made to the complainant. It confirmed its view that any disclosure would have a *"detrimental impact on the hostel's proactive stance to preventing an incident or crime occurring"*. It argued that both Thames Valley Police and the hostel were committed to ensuring crime is reported and that their clients are protected

35. Thames Valley Police told the Commissioner:

"From an operational perspective the trust between residents, staff and police is paramount to ensuring crime is both reported and dealt with correctly".

Likelihood of prejudice

36. With regard to the likelihood of prejudice in this case, Thames Valley Police considered that disclosure of the requested information *would be likely* to have the stated detrimental effect.

Is the exemption engaged? Would disclosure be likely to prejudice the prevention or detection of crime/apprehension or prosecution of offenders?

37. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.

38. It is not enough for the information to relate to an interest protected by section 31(1), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.
39. Mindful of the wording of the request, and relying on a broad definition of the terms "*prevention or detection of crime*" and "*apprehension or prosecution of offenders*" the Commissioner accepts that the requested information relates to the law enforcement activities that the exemption is design to protect
40. In this case, the Commissioner accepts that, if Thames Valley Police had been called out in relation to incidents at, or in connection with, the hostel, it would hold the requested information for the purposes of one or more of the activities listed in section 31(1).
41. With respect to protecting the law enforcement interests, the Commissioner recognises the importance of protecting information which, if disclosed, would undermine law enforcement activity or make someone more vulnerable to crime.
42. However, she does not consider that Thames Valley Police has provided evidence to support its view that disclosure of the number of call outs would be likely to result in third parties being unwilling to call the police, which may also lead to those individuals being less likely to contact the police and supply them with information.
43. From the evidence she has seen, the Commissioner is not satisfied that Thames Valley Police has demonstrated a causal relationship between the potential disclosure of the information being withheld and the prejudice the exemption is designed to protect.
44. As she is not satisfied that there would be a real and significant likelihood of prejudice to the prevention or detection of crime or the apprehension or prosecution of offenders through disclosure of the requested information, the Commissioner finds that Thames Valley Police failed to establish engagement of the section 31(1) exemption, either by virtue of section 31(1)(a) or 31(1)(b).
45. The Commissioner has next considered Thames Valley Police's application of section 38 to the same information.

Section 38 health and safety

46. Section 38(1) of the FOIA states that:

"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."

47. In her guidance on section 38, the Commissioner's view is that the use of the term 'endanger' equates to 'prejudice' and that section 38 is subject to the prejudice test. Accordingly, in order to be engaged, it must meet the criteria set out in paragraph 18 above.
48. Section 38 is also a qualified exemption and is subject to the public interest test.
49. In this case, Thames Valley Police considered that both limbs of section 38(1) applied. In that respect, it told the complainant, albeit in relation to the public interest test, that it considered that disclosure in this case:
- "... could negatively impact [on residents] and cause further stress and concern that could be avoided..."*
50. As is her practice in a case such as this, and given that Thames Valley Police considered that both limbs of the exemption applied, the Commissioner asked it to explain why disclosure of the information would, or would be likely to, endanger the health or safety of an individual.
51. In its submission to the Commissioner, Thames Valley Police relied on similar arguments to those it had put forward in support of its application of section 31. In support of its application of section 38, it told the Commissioner:
- "For some of the reasons outlined under the Section 31 exemption we believe that disclosure of the information would endanger the physical or mental health of any individuals who resided at this homeless hostel.*
- This exemption applies to 'any individual' and the harm may be actual or perceived. It refers to physical, mental, emotional, psychological etc., types of harm. As such, we believe this is also engaged due our concerns [sic] which are articulated under Section 31 and clearly sit under both exemptions".*
52. The Commissioner recognises that the withheld information comprises the number of call-outs to the address over a series of years.
53. However, in order to engage the exemption, the public authority must be able to show a connection between the disclosure and the endangerment that section 38 is designed to protect.

54. She also notes that Thames Valley Police considered that the higher threshold – “would endanger” – applied in this case. The Commissioner considers that the term “would...endanger” means that it is more likely than not to occur (ie a more than 50% chance).
55. In this case, having considered the arguments put forward by Thames Valley Police in support of its application of section 38, the Commissioner does not find that it has demonstrated how disclosure of the specific information requested would lead to the endangerment which the exemption is designed to protect. While she accepts that Thames Valley Police has argued that disclosure would increase the likelihood of individuals being caused ‘further stress and concern’, she has not seen any evidence to support this view.
56. Although not cited by Thames Valley Police, the Commissioner has also considered whether the lower threshold of ‘would be likely’ to endanger has been met. However, she does not find that Thames Valley Police has demonstrated that there is a real and significant likelihood of the endangerment occurring.
57. Given that the Commissioner’s view is that Thames Valley Police has not demonstrated any causal relationship between the potential disclosure of the requested information and the prejudice which section 38 is designed to protect, she considers that section 38(1)(a) and (b) are not engaged.

Right of appeal

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

59. 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.

60. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**