

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2012

Public Authority: The Chief Constable Thames Valley Police
Address: Thames Valley Police HQ
Oxford Road
Kidlington
Oxon OX5 2NX

Decision (including any steps ordered)

1. The complainant requested information, namely photographs, relating to the death of former weapons inspector Dr David Kelly.
2. The Commissioner's decision is that Thames Valley Police correctly applied section 38 (health and safety) to the requested information. He requires no steps to be taken.

Request and response

3. Following earlier correspondence, the complainant wrote to Thames Valley Police on 22 April 2012 and requested information in the following terms:

"If Thames Valley Police can not afford to send the Operation Mason file to us then we would like all photographs that pertain to the David Kelly case ie all photographs from the Operation Mason file. We want these photographs uncensored, un-redacted and complete".

4. Thames Valley Police responded on 11 May 2012. It confirmed holding the requested information but refused to provide it, citing the exemptions in sections 30(1)(a), (b) and (c) (investigations and proceedings) and 38(1)(a) (health and safety) of FOIA. In support of its decision to withhold the requested information, it told the complainant:

"The material sought is of a highly intrusive nature to the family of Dr David Kelly and any disclosure of this photographic material would be distressing to them".

5. Describing its response as 'preposterous', the complainant told Thames Valley Police:

"... we insist that if Thames Valley Police continues to pursue this illogical reasoning, that TVP sends us a written statement from Dr David Kelly's brother, that he does not want these photographs released to the public".

6. Thames Valley Police upheld its position regarding non-disclosure on 24 May 2012 following an internal review.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically, she complained about Thames Valley Police's refusal to disclose the requested photographs on the basis that release of the information would have a detrimental effect on the family of Dr Kelly. In this respect, she brought to the Commissioner's attention that Thames Valley Police did not reply to her request to contact Dr Kelly's brother to request the release of the photographs.
8. Given the basis of her complaint, the Commissioner wrote to the complainant explaining that the scope of his investigation would be with respect to Thames Valley Police's citing of the health and safety exemption (section 38). He also advised her that, although she had asked Thames Valley Police to contact Dr Kelly's brother about this request, it is the responsibility of the public authority to decide whether or not it considers an exemption applies. The public authority was under no obligation to comply with the complainant's request either that it contact the brother or that it ask him to provide consent. However, he notes that it would have been good customer service to have replied to the complainant on this point.
9. During the course of his investigation, having considered the submissions provided to him by Thames Valley Police, the Commissioner wrote to the complainant advising her of his findings. In that correspondence, he brought to her attention that, with reference to a decision in another case concerning the circumstances of Dr Kelly's death – a case that also concerned the photographs - he had said:

"As an aside, the Commissioner would observe that such information, given its sensitivity (particularly for Dr Kelly's family), would be unlikely to be disclosed under FOIA".¹

10. The complainant declined to withdraw her complaint, telling the Commissioner:

"I can not accept Thames Valley FOI rejection, without written proof that Dr David Kelly's brother refuses the release of the photographs of Dr David Kelly's body which are held in Operation Mason File by Thames Valley Police on the basis of it upsetting him. These photographs to be released, uncensored, un-redacted and complete. Therefore I request a Decision Notice (DN) from the Commissioner".

11. The Commissioner considers the scope of his investigation to be Thames Valley Police's citing of the health and safety exemption - section 38 of FOIA.

Reasons for decision

12. Section 38(1) of 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."

13. During the course of the Commissioner's investigation Thames Valley Police confirmed that it was relying on section 38(1)(a) and cited the lower level of likelihood. In other words, it argued that disclosure would be likely to endanger the physical or mental health of an individual. Specifically, it confirmed that it considers disclosure would be likely to endanger the physical or mental health of members of the family of the late Dr Kelly.

¹ FS50418745

The applicable interest

14. The Commissioner accepts that the outcome of disclosure in this case would be counter to the physical or mental health of an individual and that the arguments from the public authority in this respect are relevant to the prejudice described in section 38(1)(a).

The nature of the prejudice

15. Given the nature of the requested information, Thames Valley Police explained that it considered that the knowledge that the images would be available for all the world to see would be likely to have a significant detrimental effect on the family of Dr Kelly.

Likelihood of prejudice

16. In this case, the Commissioner takes the view that the phrase 'would or would be likely' to endanger means that there should be evidence of a significant risk to the physical or mental health of an individual. However, he notes that he is not required to identify in a decision notice the particular individual or individuals who would or would be likely to be so affected.
17. The Commissioner cannot give an expert opinion on this matter. However, having considered the submissions provided by Thames Valley Police, he is satisfied that there is evidence of a significant risk to the physical or mental health of an individual or individuals that amounts to endangerment, being more than mere stress or worry. Given the nature of the requested information and what is known about the circumstances of Dr Kelly's death, the Commissioner does not consider this to be at all surprising.

Is the exemption engaged?

18. The Commissioner has previously accepted an individual's mental wellbeing to fall within the scope of section 38. In this he includes emotional and psychological wellbeing, including the likelihood of causing significant upset or distress. In this case, having considered the nature of the photographs to which section 38 has been applied, the Commissioner considers that the consequences of the disclosure of this information into the public domain, especially if there is a likelihood of it being reported in the media, is such that it would cause significant distress to the family of Dr Kelly. The Commissioner has taken account of further arguments to support this view provided by Thames Valley Police, summarised in the confidential annex to this decision notice (which is provided to the public authority only.) As such the Commissioner is satisfied the exemption is engaged in relation to the requested information.

The public interest test

19. Having concluded that section 38(1)(a) is engaged, the Commissioner has gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosing the requested information

20. The Commissioner recognises the general public interest argument in ensuring transparency in the activities of public authorities. The Commissioner notes that transparency is the fundamental objective of the FOIA and accepts that this is a factor in favour of disclosure in most cases.
21. Similarly, in correspondence with the complainant, Thames Valley Police acknowledged that:

"There is a legitimate public interest, in general terms, in the circumstances of Dr Kelly's death".

Public interest arguments in favour of maintaining the exemption

22. Arguing in favour of maintaining the exemption, Thames Valley Police told the complainant:

"the extent to which that public interest weighs in favour of disclosure is significantly limited by the fact that there has already been a very public examination of the circumstances surrounding Dr Kelly's death (the Hutton Inquiry)".

23. Arguing strongly in favour of maintaining the exemption, Thames Valley Police told the complainant:

"The material sought is of a highly intrusive nature to the family of Dr David Kelly".

The balance of the public interest

24. The Commissioner recognises that the complainant has a specific interest in the circumstances surrounding Dr Kelly's death. However, in reaching a decision in this case he must take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public 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.
25. In balancing the opposing public interest factors in this case, the Commissioner has given greatest weight to those factors which he considers support the maintenance of the exemption, in other words

avoiding the significant distress which release would be likely to cause in all the circumstances of this case. It follows that the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Right of appeal

26. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

27. 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.
28. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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