

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2024

Public Authority: Chief Constable of Sussex Police
Address: Sussex Police Headquarters
Church Lane
Lewes East
Sussex
BN7 2DZ

Decision (including any steps ordered)

1. The complainant requested Sussex Police's flight logs for its drone unit during a specified time period in 2018. Sussex Police provided some of the requested information, but withheld the remainder, citing subsections 31(1)(a), (b) and (c) (law enforcement) of FOIA.
2. The Commissioner's decision is that Sussex Police was entitled to rely on sections 31(1)(a), (b) and (c) of FOIA to withhold the remaining information in scope of the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 10 October 2023, the complainant wrote to Sussex Police and requested information in the following terms:

"Under the Freedom of Information Act 2000 I wish to see a full copies [sic] of the flight logs for Sussex Police's drone/UAV [Unmanned Aerial Vehicle] unit dated December 5, 2018 through to 23 December, 2018. If possible can you please include the following:

- The make and model of drones.

- The flight plans and/or the location the drones were being operated.
 - The total time per flight.
 - Any accidents, incidents or anomalies that occurred during the flight.”
5. Sussex Police responded, late, on 27 March 2024. It provided some of the requested information in the form of a table, but refused to provide any details of some of the flights that had occurred on 20, 21 and 23 December 2018. It also refused to provide any details of the make and model of the drones utilised for any of the flights. It relied on section 31 of FOIA – the exemption for law enforcement to withhold this information.
6. Following an internal review Sussex Police wrote to the complainant on 8 April 2024. It explained that two of the disclosed five flights had been for training purposes, two further flights were made for the purpose of locating a missing person, with the fifth for investigative purposes at the scene of an industrial accident. It maintained that section 31 of FOIA applied to the withheld information for the five remaining flights because they had been undertaken for law enforcement purposes.
7. At internal review Sussex Police confirmed that it was relying on the following subsections of section 31 of FOIA:
- Section 31(1)(a) – the prevention or detection of crime.
 - Section 31(1)(b) – the apprehension or prosecution of offenders.
 - Section 31(1)(c) – the administration of justice.

Scope of the case

8. The complainant contacted the Commissioner on 24 April 2024 to complain about the way his request for information had been handled. He objected to the application of section 31 of FOIA and submitted that the make and model of the drones had previously been revealed on social media in 2018.¹ He also provided details of a related First-tier

¹ <https://twitter.com/SussexEye/status/499555683009048576>,
<https://twitter.com/SussexEye/status/1070779154415710208>
<https://twitter.com/SussexEye/status/519791823577837569>

Tribunal decision² which had ordered Sussex Police to disclose whether they hold information about a drone sighting at Gatwick Airport between 7:00 am and 8:15 am on 20 December 2018.

9. The Commissioner relayed the above grounds of complaint to Sussex Police as part of his investigation. He has included its responses below, for the complainant's benefit, and has considered them in reaching his own decision in this case.
10. In response to the social media posts, Sussex Police said:

"As regards Sussex Police discussing the acquisition of a new drone on social media, I do not consider this relevant. Very simply, these social media posts merely confirm that we have purchased a drone of a particular type. As discussed, we have put other similar information in the public domain via our website. The issue here however is not what equipment we own but much more specifically which equipment we **use** in different operational situations and the relative effectiveness of that equipment in terms of flight times and likelihood of malfunction. It is this which forms the basis of our s31 exemption."

11. With reference to the FTT decision, Sussex Police responded as follows:

"As regards the revised decision notice in EA/2023/0272, this related quite specifically to the purchase, rental or leasing of a 'protect and warn capability' and not to our own operational drone fleet. Further, the exemption in that case was in respect of s30 FOIA i.e. the conduct of our investigation as opposed to a s31 exemption in respect of our operational capability for Law Enforcement. I would argue therefore that this ground is not directly relevant. On the 'sUAS News' website to which [the complainant] provides a hyperlink, there is an implication that the decision of the FTT tribunal in that case may set precedent for all FOI applications relating to the Operation Trebor incident in 2018³. I disagree with this and would argue that it remains vital for public safety that each application continues to be assessed on its own merit."

² <https://www.suasnews.com/2024/03/tribunal-rules-sussex-police-must-release-gatwick-drone-information/>

³<https://www.sussex-pcc.gov.uk/media/3857/1-pam-minutes-1812019.pdf#:~:text=GY%20confirmed%20that%20Operation%20Trebor%20is%20the%20Sussex,both%20challenging%20and%20unprecedented%20on%20a%20global%20scale.>

12. The Commissioner has considered whether Sussex Police was entitled to rely on section 31 of FOIA to withhold the remaining information in scope of this request.

Reasons for decision

Section 31 – law enforcement

13. The withheld information in this case relates to five flights which Sussex Police has advised relate to law enforcement activities, together with the make and model of the drones utilised in all the flights (both disclosed and withheld).
14. Section 31(1) of 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.
15. In this case, Sussex Police is relying on subsections (1)(a), (b) and (c): (a) the prevention or detection of crime (b) the apprehension or prosecution of offenders and (c) the administration of justice.
16. Section 31 is a prejudice-based exemption. This means a public authority can only rely on it where disclosing the information (or confirming or denying that it holds the information) could cause harm. To demonstrate the harm, it must satisfy a prejudice test.
17. In this case, in order for the exemption to apply, it must be the case that, if the withheld information was disclosed, it would, or would be likely to, cause prejudice to the matters referred to in subsections (a), (b) and (c) of section 31. Three criteria must be met:
 - the actual harm which Sussex Police envisages must relate to the applicable interests within the limbs of the exemptions it has cited;
 - there must be a causal relationship between disclosure and prejudice to those interests. This prejudice must be real, actual or of substance; and
 - Sussex Police must show that the level of prejudice it envisages is met – ie it must demonstrate why disclosure 'would be likely' to result in prejudice or, alternatively, why disclosure 'would' result in prejudice.
18. Accordingly, the Commissioner expects Sussex Police to answer the following three questions:

- Which law enforcement interest(s), protected by section 31, could be harmed by the disclosure?
 - Is the harm you have identified real, actual or of substance and is there a causal link between disclosure and that harm?
 - What is the likelihood of that harm actually occurring: would it occur, or is it only likely to occur?
19. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Sussex Police's position

20. In its substantive response, Sussex Police told the complainant that:

"The specific information withheld would disclose operational capability, would undermine operational effectiveness, disclose tactics and the type of support that we provide to partners involved in national security issues and counter terrorism. This includes the make and model of drones deployed."

21. At internal review, Sussex Police said:

"Having assessed the information, I am satisfied that the flights undertaken between the 20th December and 23rd December 2018 did take place for a law enforcement purpose. In December 2018, following unannounced drone sightings close to its runways, Gatwick Airport was forced to suspend and/or cancel a number of domestic and international flights. This caused extensive disruption to a key national infrastructure resource whilst also raising a significant security threat generally. The flying of UAVs in restricted airspace at an airport is unlawful and will often constitute the serious offences of endangering the safety of an aircraft or of serious disruption to an aerodrome."

22. In its submissions to the Commissioner added:

"I therefore remain satisfied that s31(1) subs a-c are very much relevant in this case as it exposes our operational capability at the airport thereby creating a risk that our ability to prevent, detect or prosecute crime would be inhibited by a diminishment in the effectiveness of our own UAV assets brought about by an inappropriate level of detail entering the public domain . Essentially, as I referred to in the IR [internal review], this is about the risk of disclosure contributing to the sum of criminal knowledge (as found in Hogan & Oxford City Council v ICO,

2006)⁴. I would also be concerned that this sets precedent for the release of other information about our capability and equipment; although an example from the unrelated sphere of healthcare, concerns about the creation of precedent were explored in *Stevenson v ICO & North Lancs PCT* [2013]⁵.”

Is the exemption engaged?

23. Sussex Police has argued that disclosure would interfere with, and disrupt, police activity and harm its ability to protect the public. These are clearly matters that relate to the prevention or detection of crime and the apprehension or prosecution of offenders and the administration of justice.
24. As regards a causal relationship between disclosure and prejudice to the above matters, having considered the nature of the withheld information, the Commissioner is satisfied that its disclosure would allow interested parties to build up a picture of law enforcement practices, capabilities and tactics. He is satisfied that this is information that would assist those planning to commit crime or evade detection.
25. With respect to the prejudice test, Sussex Police told the Commissioner:

“As regards likelihood of prejudice, I have carefully considered the level of risk in the context of the 2018 incident in which an unlawful drone incursion at the aerodrome actually did cause very significant disruption. However, given the passage of time without further large scale incidents and the absence of specific intelligence regarding a threat, I believe that the lower threshold of ‘would be likely’ to have a prejudicial threat is to be relied on in this case.”
26. ‘Would be likely’ refers to a lower level of probability than ‘would’, but one which is still significant.
27. In this case, the Commissioner is satisfied that disclosure of the withheld information is capable of having a detrimental impact on law enforcement with respect to the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice. Disclosure would reveal information which is currently not

⁴ <https://www.casemine.com/judgement/uk/5a8ff78560d03e7f57eae165>

⁵

<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fadministrativeappeals.decisions.tribunals.gov.uk%2F%2F>

known and could potentially provide a tactical advantage to those who wished to cause disruption or break the law.

28. Having considered the arguments put forward by Sussex Police, the Commissioner is satisfied that the lower level of 'would be likely to occur' is met in this case.
29. As the three criteria set out above are satisfied, the Commissioner considers that subsections 31(1)(a)(b) and (c) of FOIA are engaged.

Public interest test

30. Section 31 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 31 is engaged, the information must be disclosed if the public interest in disclosing the information is equal to, or greater than, the public interest in protecting the matters referred to in subsections (a), (b) and (c).

Public interest in disclosure

31. The complainant did not provide any specific public interest arguments to demonstrate why disclosure would be in the wider public interest. The points he raised as part of his grounds of complaint have been considered and are detailed in the 'Scope' section of this notice.
32. In favour of disclosure, Sussex Police recognised that the factors of transparency and accountability in police action were applicable. It also acknowledged that disclosure would enhance the public's understanding of police performance and its use of public funds.
33. Sussex Police told the Commissioner:

"I recognise that there is already some information in the public domain and that in fact much of this is the result of Sussex Police being proactive and transparent on this subject. However, as will be explored further when addressing [the complainant's] grounds, the information put into the public domain is quite generic and not specific to deployment scenarios; therefore, I do not believe a precedent is created which undermines the PIT [public interest test] argument."

Public interest in maintaining the exemption

34. Arguing in favour of maintaining the exemption, Sussex Police said that disclosure of the remaining information could compromise law enforcement tactics. It argued that this would be likely to hinder the Force's ability to prevent and detect crimes.

35. Sussex Police told the Commissioner that:

"As regards severity, it is very clear (as demonstrated by the airport disruption in 2018) that the impact of further airspace incursion and/or a diminishment in the effectiveness of our response would be 'Severe'. In 2018, the impact was primarily economic but of course in a worst case scenario, the flying of drones in protected airspace constitutes a threat to life and so our obligations under Art 2 ECHR [European Convention on Human Rights] are engaged. I recognise of course that the lower likelihood 'score' reduces the severity assessment but only from 4 to 3. This is still a significant consideration."

36. Sussex Police recognised that the public interest in maintaining an exemption may diminish over time. This is because the issue the information relates to becomes less 'topical' or sensitive and the likelihood or severity of the prejudice diminishes. However, in this case, Sussex Police argued that neither the sensitivity nor the severity has diminished over time in this case given the overarching need to maintain public safety and to minimise public disruption.

37. At internal review, Sussex Police said:

"In this case, our original response cited prejudice to our ability to prevent crime through the disclosure of operational capability and the undermining of the partnership approach to law enforcement in this field. I find these arguments against disclosure are compelling. I am mindful that there is a lot of relate [sic] information in the public domain, however what is readily available in the news media and social media is quite distinct from operational police information and there is a risk of additional disclosure contributing to the sum of criminal knowledge (as found in Hogan & Oxford City v ICO, 2006). The undermining of police effectiveness in this operational field is also a public safety issue and I do not in fact concur with the rationale offered in the letter of 27th March [substantive response] that 'strongest argument for non-disclosure is the undermining of operational effectiveness and support for other agencies in the national interest'. In my view the over-riding consideration is how such undermining of effectiveness could impact on our core duty to keep the public safe."

The balance of the public interest

38. The Commissioner recognises the public interest in transparency and accountability, for example in knowing whether policing activity is efficient and investigations are being conducted appropriately. In this case, he accepts that there is a public interest in the transparency of

policing involvement in drone flights undertaken for law enforcement purposes and disclosure may provide assurance that Sussex Police is dealing appropriately with such matters.

39. However, in carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption. In this case he has considered the public interest in avoiding likely prejudice to law enforcement matters, specifically in avoiding prejudice to the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice.
40. Clearly, it is not in the public interest to disclose information that may compromise the police's ability to accomplish its core function of law enforcement.
41. Whilst the Commissioner recognises that there is already some information on this subject matter in the public domain, he accepts that this information is generic and not specific to actual deployment scenarios. He, therefore, agrees with Sussex Police that no precedent is created which undermines the public interest test argument.
42. The Commissioner has had regard to the very strong public interest in ensuring that the disclosure of information does not materially impede the prevention and detection of crime or the apprehension or prosecution of offenders, or the administration of justice. He has also taken into account that disclosure under FOIA to the applicant is effectively disclosure to 'the world at large', with no onward restrictions on how the information may be used.
43. On balance, the Commissioner is satisfied that, in the circumstances of this case, the public interest in maintaining the exemption outweighs that in disclosing the requested information.
44. His decision, therefore, is that Sussex Police was entitled to rely on subsections 31(1)(a), (b) and (c) of FOIA to withhold the information

Other matters

45. Although the complainant has not complained about the late response to his request, the Commissioner has made a record of the delay in this case.

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carol Scott
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