

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 May 2009

Public Authority: Police Service for Northern Ireland
Address: Police Headquarters
65 Knock Road
Belfast BT5 6LE

Summary

The complainant requested information from the Police Service of Northern Ireland (the 'PSNI') relating to an investigation into a murder. The PSNI refused the request, claiming that all of the requested information was exempt under section 30(1)(a)(i) and (ii) of the Act.

The PSNI initially advised the Commissioner that it had not considered whether it actually held information of the description specified in the request, and that it had come to the view that it might not hold the information. Subsequently the requested information was discovered by the PSNI, but it was intermingled with information not relevant to the request. The PSNI then sought to refuse the request under the cost limit set out in section 12.

The Commissioner found that the PSNI had not adequately searched for the information at the time of the request, and that its refusal notice failed to comply with the requirements of section 17 of the Act. However, the Commissioner is satisfied that the request could correctly be refused under section 12 of the Act, as the process of extracting the requested information from the physical files would exceed the cost limit. Accordingly the Commissioner does not require the PSNI to take any remedial steps in relation to this request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

2. The complainant has advised that on 4 August 2006 he requested the following information from the PSNI under section 1 of the Act:
 - “1. Witness depositions prepared for use at the trial of the accused Sean O’Callaghan, particularly interviews conducted by [two named police officers] at the time of O’Callaghan’s request and thereafter insofar as they concern O’Callaghan’s activities in County Tyrone.
 2. Service record of RUC (formerly RIC) Sergeant _____ Flanagan (Father of Peter), who resided with his family during the 1930s and possibly earlier at the RUC barracks in Beragh, County Tyrone. (I do not at present know the first name of Flanagan senior but will supply that information when/if I obtain it).
 3. Any other publicly available documents that would shed light on IRA and/or Sean O’Callaghan activities in County Tyrone in the mid 1970s.”
3. The complainant clarified to the PSNI that the information he sought related to the murder of Special Branch Detective Inspector (DI) Peter Flanagan in Omagh, Co. Tyrone, in August 1973, and the arrest of Sean O’Callaghan in 1988 in relation to that murder. In 1990 Mr O’Callaghan was sentenced to 539 years in prison for crimes he committed (not including the murder of DI Flanagan), and he was released in 1996 having served six years of that sentence. Subsequently, in 1998 Mr O’Callaghan published a book¹, which included a detailed account of DI Flanagan’s murder, claiming that Mr O’Callaghan himself had planned and carried out the killing.
4. The PSNI responded to the complainant on 15 August 2006. The PSNI advised the complainant that it had decided not to supply the information he requested, as all of it was considered exempt under sections 30(1)(a)(i) and 30(1)(a)(ii) of the Act. Section 30 provides an exemption for information which is held by a public authority in relation to certain investigations and proceedings. The PSNI advised the complainant that the information related to an ongoing criminal investigation being conducted by the Historical Enquiries Team (HET), and stated that the public interest lay in maintaining the exemption.
5. The HET is an investigation team set up by the PSNI in 2005 to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998². The role of the HET is twofold: to assist the bereaved families with any “unanswered questions” relating to their losses, and to provide a thorough re-evaluation of each unsolved case.

¹ O’Callaghan, S, *The Informer*, Bantam Press, May 1998

² www.psnipolice.uk/index/departments/historical_enquiries_team.htm

6. The complainant was dissatisfied with the response he received, and requested an internal review on 25 August 2006. The complainant advised the PSNI that he had spoken to Mr O'Callaghan, as well as [one of the police officers named in his request], and that neither individual had expressed any concern about the information being released. The complainant also referred the PSNI to Mr O'Callaghan's book (see paragraph 3 above). Therefore the complainant did not accept that there was any reason why the information could not be disclosed.
7. The complainant's request for an internal review was acknowledged by the PSNI on 22 September 2006. On 30 November 2006 the PSNI advised the complainant that the internal review was now complete.
8. The PSNI advised the complainant that it had considered each of the three parts to his request separately (see paragraph 2 above), as opposed to the refusal notice of 15 August 2006, which considered the request in a more general manner. In relation to the first part, the PSNI upheld its refusal to provide the information in reliance on the exemptions under sections 30(1)(a)(i) and 30(1)(a)(ii) of the Act. The PSNI advised the complainant that it was now also seeking to apply the exemption under section 38 of the Act to this part of the requested information. Section 38 provides an exemption if disclosure of the information would or would be likely to endanger the physical or mental health or safety of any individual.
9. In relation to the second part of the request, the PSNI advised the complainant that the relevant information was not part of the HET's remit, and that this part of the request was being dealt with by the PSNI freedom of information team.
10. In relation to the third part of the request, the PSNI advised the complainant of its view that the cost of compliance would exceed the "appropriate limit" as set out in section 12 of the Act. The PSNI stated that "The information is not in an easily retrievable format. It has taken the Historical Enquiry team over a year with a team of officers, to recover material relating to the deaths in N. Ireland attributed to 'The Troubles'". The PSNI suggested that the complainant may wish to submit a "refined, more specific" request, but that this would be treated as a new request under the Act.
11. Finally, the PSNI advised the complainant that any "publicly available" information as specified in his request, would be exempt under section 21 of the Act. Section 21 provides an exemption for information which is reasonably accessible to the applicant.
12. The PSNI wrote to the complainant on 22 January 2007 to address the second part of his request. The PSNI advised that it had now located some information relevant to the request, but that it was held by the "RUC museum". The PSNI clarified that information held by the Museum

was held by the Trustees of the RUC George Cross Historical Society, a separate organisation from the PSNI. The PSNI provided the complainant with contact details for the Trustees. Therefore the PSNI concluded that it did not hold any information in relation to the second part of the complainant's request. The PSNI also advised the complainant that it had contacted surviving family members of DI Flanagan, who had declined to comment in relation to the complainant's request.

The Investigation

Scope of the case

13. On 27 February 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant clarified that his complaint related only to the first part of his request, namely:

“1. Witness depositions prepared for use at the trial of the accused Sean O’Callaghan, particularly interviews conducted by [two named police officers] at the time of O’Callaghan’s request and thereafter insofar as they concern O’Callaghan’s activities in County Tyrone.”

14. The complainant noted that the PSNI had applied qualified exemptions to this information, and was of the view that the PSNI had incorrectly considered the public interest test. The complainant challenged the PSNI’s assertion that the information related to an ongoing criminal investigation, and referred the Commissioner to the book written by Mr O’Callaghan. The complainant argued that Mr O’Callaghan had deliberately placed detailed information about DI Flanagan’s murder into the public domain in 1996. Therefore the complainant was of the view that any prosecution could have been initiated at this time, although he noted that the HET’s remit focused on bringing “closure” to cases rather than enabling prosecutions.

Chronology

15. The Commissioner contacted the PSNI on 26 July 2007 to advise it of the complaint. The Commissioner requested that the PSNI clarify the nature of the information held which was relevant to the first part of the complainant’s request. The PSNI advised that it held two boxes of information which it considered may be relevant to the request, but that it had not actually examined the information contained within these boxes. At this stage the Commissioner reminded the PSNI that an authority must consider what information is held when responding to a request, and that this did not appear to have been the case in this instance.

16. The PSNI advised the Commissioner on 14 August 2007 that it had now examined the information contained within the two boxes, but that they contained no information relevant to the complainant's request. However, the PSNI advised that further information had recently been located, which may be relevant to the request.
17. On 4 September 2007 the PSNI confirmed to the Commissioner that it had now discovered four further boxes of files which appeared to contain information relevant to the request. The PSNI advised the Commissioner that it had:

“undertaken an initial assessment of this information, and that the information contained within these boxes which was relevant to the request was intermingled with non-relevant information”.
18. The PSNI provided the Commissioner with further submissions on 12 September and 18 October. The HET confirmed to the Commissioner that it was generally re-examining cases in chronological order, and had not yet reached DI Flanagan's murder. For this reason the information relevant to the complainant's request had not been examined by the HET as part of its remit (as described in paragraph 5 above).
19. The PSNI explained that a substantial amount of general information was gathered by the HET from various sections, stations and departments of the PSNI in 2007. Officers subsequently spent a number of months going through the information to see whether it was relevant to the work of the HET. In August 2007 four large boxes were identified which appeared to contain information about the murder of DI Flanagan, along with other information. The HET advised the Commissioner that it had conducted a more detailed scoping exercise, which took seven hours. This comprised an initial examination of the material to ascertain its relevance to the request, and from this the HET concluded that the material contained some relevant information, as well as some information not relevant to the request. Given the result of this initial consideration, the HET estimated that it would take 30-40 hours for a HET officer to examine the information in more detail and enable extraction of all the information relevant to the complainant's request.
20. The Commissioner noted that the refusal notice provided to the complainant on 15 August 2006 was clearly inadequate in light of this new information. The Commissioner asked the PSNI to explain to the complainant what had happened, which it did by letter dated 12 December 2007. The complainant did not accept the PSNI's explanation of how the information was held, and asked the Commissioner to make a formal decision in the case.
21. Staff from the Commissioner's office met with the HET on 22 January 2008. At this meeting the HET provided further information about the process by which it came across the four boxes of information. The HET confirmed that it routinely obtained information from police stations

across Northern Ireland, and that this information was not centrally catalogued until received by the HET. Three of the four boxes were transferred to the HET in August 2007, the fourth was transferred in October 2007.

22. An inspection of the four boxes of information was conducted to establish the extent to which the information requested by the complainant was intermingled with non-relevant information. The boxes contained folders of information which indicated the type of information contained. These included statements, interview records, descriptions of evidence, and so on. However, some of the folders were not accurately labelled, and appeared to contain other information.

Analysis

Procedural matters

Section 17: refusal notice

23. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' detailing the refusal and explaining the exemption or exemptions relied upon.
24. In addition, where the public authority is seeking to rely on a qualified exemption (one subject to the public interest test) it must provide details of the public interest arguments considered for and against disclosure of the requested information. The authority must also explain why the balance of these competing arguments favours maintaining the exemption, rather than disclosing the information.
25. The Commissioner noted that the PSNI's refusal notice of 15 August 2006 did not provide sufficient detail on the application of the exemptions to the withheld information. As required under section 17(1), the PSNI did identify that the exemptions under sections 30(1)(a)(i) and (ii) were being applied to the withheld information. However, the refusal notice did not explain that section 30 provides an exemption for information which is held by a public authority in relation to certain investigations and proceedings. It was therefore not clear from the refusal notice why the exemptions applied to the withheld information.
26. The PSNI did provide details of the public interest factors it had identified for and against disclosure of the withheld information, as well as its balancing exercise. However, these arguments were generic and did not refer to the actual requested information. In any event, the Commissioner notes that the PSNI had not at the time of the refusal notice examined the requested information. The PSNI had assumed that the information was held in the two boxes referred to at paragraph 15

above. The PSNI had also made assumptions about the extent and nature of the information, and had sought to apply exemptions accordingly.

27. For the reasons set out above, the Commissioner finds that the PSNI provided the complainant with an inadequate refusal notice. The notice did not explain why the exemptions cited were applicable to the information which was being withheld. Therefore the Commissioner is satisfied that the PSNI breached section 17(1)(c) of the Act. In addition, the notice did not explain why, in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosing the information. Therefore the Commissioner also finds that the PSNI breached section 17(3)(b) of the Act.
28. Section 17(5) of the Act provides that, if a public authority is relying on section 12 in order to refuse a request it must serve a notice to this effect within the statutory time limit (ie twenty working days). The Commissioner notes that the PSNI did not initially rely on section 12 to refuse the part of the request to which this decision relates (although it did rely on section 12 in relation to other parts of the request, see paragraph 10 for further details). The PSNI advised the complainant on 12 December 2007 that it was now seeking to rely on section 12, and for this reason the Commissioner finds that the PSNI breached section 17(5) of the Act.

Was the requested information held at the time of the request?

29. The complainant made a request for a specific type of information, namely witness depositions (see paragraph 2 above). The Commissioner has considered whether the PSNI, as the public authority, held this information at the time of the complainant's request, irrespective of whether it was in the physical possession of the HET, as a department within the PSNI. As explained at paragraph 21 above, the information was in fact held by the PSNI when it was transferred to the HET in August and October 2007. Before then, the information was stored in various PSNI departments, and therefore technically held by the PSNI, but consequently it was not known where this information was held.
30. The Commissioner has reminded the PSNI that public authorities must attempt to locate and examine the requested information before making a decision as to whether that information is exempt. Had this step been taken it would have been clear that the two boxes held by the HET at the time of the request, did not in fact contain any information relevant to that request. In this circumstance the PSNI should have conducted a search for the information, although it is difficult to ascertain whether the information could have been located at the time of the complainant's request.

31. In light of the above, the Commissioner concludes that the requested information was in fact held by the PSNI, as the public authority, at the time of the complainant's request.

Section 12: cost limit

32. As the Commissioner is satisfied that the information was held by the PSNI at the time of the complainant's request, he must then consider whether it ought to have been provided to the complainant. The PSNI claimed that compliance with the request would exceed the "cost limit" as set out at section 12 of the Act. Section 12 provides that an authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit (£600 for central government, £450 for all other authorities).
33. Section 12 of the Act should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken in:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
34. Paragraph 4(4) of the Regulations states that the authority should calculate the cost of complying with a request by multiplying the time estimated by £25 per hour. If the authority considers that complying with the request would therefore cost more than the appropriate limit, it is not obliged to comply with the request. In the case of the PSNI, the £450 limit applies, which, at £25 per hour, equates to 18 hours.
35. Having inspected the contents of the boxes identified at paragraphs 21 and 22 above, the Commissioner is satisfied that it would take more than eighteen hours to identify and extract the relevant information from the boxes. This is because the information is not structured sufficiently clearly for the relevant information to be readily identified, and the boxes contain a significant amount of information not relevant to the request. The Commissioner accepts that the PSNI would have to go through each piece of information in each box to ascertain exactly what was held, before any decision could be considered as to whether the information could be disclosed. The PSNI has demonstrated to the Commissioner that this process would exceed eighteen hours, and the Commissioner accepts the PSNI's arguments in this regard.

Duty to provide advice and assistance

36. The Commissioner is mindful of the Code of Practice issued by the Secretary of State under section 45 of the Act (the 'Code'). Paragraph 14 of the Code recommends that, where a public authority estimates that compliance with a request would exceed the cost limit, the authority should also consider whether it could provide the complainant with advice and assistance in order to bring his request within the cost limit. However, the complainant made a request for specific information, and given the way the information is held in the four boxes, the Commissioner is satisfied that the complainant's request could not be revised or refined to the extent necessary.
37. As the Commissioner is satisfied that the complainant's request has been correctly refused in reliance on the cost limit, he has not considered whether or not the information is exempt under any of the exemptions set out in Part II of the Act.

The Decision

38. The Commissioner's decision is that the PSNI did not deal with the request for information in accordance with the Act in a number of respects:
- section 17(1)(c), in that the PSNI failed to explain why it was applying the exemptions under sections 30 and 38 to the withheld information
 - section 17(3)(b), in that the PSNI failed to provide as part of its refusal notice, the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosing the information
 - section 17(5), in that the PSNI failed to cite section 12 in its refusal notice.
39. However, the Commissioner finds that the PSNI correctly applied the cost limit under section 12 to the requested information.

Steps Required

40. The Commissioner is satisfied that, eventually, the PSNI correctly applied the cost limit under section 12 of the Act, therefore the PSNI is not required to take any remedial steps in relation to this request.

Other matters

41. The Commissioner does not uphold the complaint in this case but wishes to draw the PSNI's attention to a good practice issue arising from the handling of the complainant's request.

The internal review

42. The complainant requested an internal review of the PSNI's initial decision on 25 August 2006. He received a partial response on 30 November 2006, and a further response on 22 January 2007.
43. Paragraph 41 of the Section 45 Code of Practice states that:
- In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint.*
44. The Commissioner's guidance recommends that, in most circumstances, a reasonable time for completing an internal review is 20 working days, and he is concerned that the review took significantly longer than this to complete. However the Commissioner appreciates that this complaint was handled by the PSNI in 2006, and the Commissioner notes that the PSNI has subsequently taken steps to improve its review handling procedures.

Right of Appeal

45. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 21st day of May 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

2. **Section 12(1)** provides that:

Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

3. **Section 17(1)** provides that:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that:

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 17(5) provides that:

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

4. **Section 30(1)** provides that –

Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.

5. **Paragraph 14 of the Code of Practice issued under section 45 of the Act** provides that -

Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.

6. **Regulation 4 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004** provides that -

(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

- (a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act, and to which section 7(1) of that Act would,

apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.