

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2011

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

Summary

The complainant requested information relating to a specified address during the 1970s. The PSNI refused to confirm or deny whether it held any relevant information, citing the exemptions at sections 23(5), 24(2), 30(3), 31(3) and 40(5) of the Act. The Commissioner finds that the PSNI correctly applied the exemptions, and does not require any further steps to be taken. However the Commissioner also recorded a number of procedural breaches.

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. On 16 November 2009 the complainant requested the following information from the Police Service of Northern Ireland (the PSNI):

"Request for any information the PSNI might have on our family home at [address provided]."

Between the years 1972 until 1977 it was searched by the British Army on a regular basis under the Prevention of Terrorism Act... I would be

grateful if you could even point me in the right direction of some agency who might hold that information".

3. The PSNI responded to the complainant on 8 January 2010. The PSNI advised the complainant that it was refusing to confirm or deny whether it held information relevant to the request under a number of exemptions:
 - Section 24(2): national security
 - Section 23(5): information supplied by or relating to certain security bodies
 - Section 30(3): investigations
 - Section 31(3): law enforcement
 - Section 40(5): personal information
4. The complainant requested an internal review in an undated letter, which was acknowledged by the PSNI on 19 January 2010.
5. The PSNI responded to the complainant on 8 February 2010. The PSNI advised that it had completed the internal review and upheld its refusal to confirm or deny whether it held information relevant to the request.

The Investigation

Scope of the case

6. The Commissioner received the complaint on 16 February 2010. The complainant advised that he did not accept the PSNI's arguments in refusing his request.

Chronology

7. Unfortunately the Commissioner's investigation was delayed owing to the volume of complaints received. On 21 October 2010 the Commissioner wrote to the PSNI to request information regarding its handling of the request. The PSNI responded to the Commissioner on 28 October 2010.
8. On 7 February 2011 the Commissioner wrote to the PSNI to request further information. The PSNI responded on 4 March 2011.

Analysis

Exemptions

Section 23: information provided by or relating to security services

Section 24: national security

9. Under section 1(1)(a) of the Act, a public authority is obliged to advise the applicant whether or not it holds the requested information. This is known as the “duty to confirm or deny”. However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny in reliance on certain exemptions under the Act.
10. In this case the PSNI refused to confirm or deny whether it held information relevant to the request in reliance on sections 23(5) and/or 24(2) of the Act. Section 23(1) and (5) state that:

“(1) Information held by a public authority is exempt information if it was directly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)...

“...(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)”.
11. Sections 24(1) and (2) state that:

“(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security”.
12. In terms of refusing to confirm or deny, the Commissioner recognises that in some circumstances it will be appropriate for a public authority to rely on both provisions without stating which of the two exemptions actually applies. This approach was supported in the Information Tribunal case *Baker v Information Commissioner and the Cabinet Office*¹. In this case the Cabinet Office sought to rely on 23(5) and 24(2), explaining that relying on section 23(5) alone to neither confirm

¹ Appeal no EA/2006/0045

nor deny could itself reveal the fact that one of the security bodies listed in section 23(3) was or could have been involved. Therefore the Cabinet Office relied on both exclusions in order to avoid disclosing exempt information.

13. In this case the PSNI explained to the Commissioner that exclusion from the duty to confirm or deny was required to protect whether or not the PSNI (at that time the RUC) or other security bodies had an interest in the property in question. The PSNI noted the complainant's comments about the property as indicated by the wording of the request. However, the fact that the complainant expressed his own recollection of certain activities taking place at the property did not mean that the PSNI should confirm or deny whether it held any information about such activities.
14. Where a public authority has relied on an exclusion to the duty to confirm or deny, the Commissioner must ensure that his Decision Notice does not give any indication as to whether or not information is in fact held by the authority, or, in this case, under which exemption any information held would be exempt. As a consequence, it is not always possible for the Commissioner to comment in great detail on the reliance by a public authority on the exemption concerned.
15. In light of the above, the Commissioner notes that the PSNI provided to him a significantly more detailed explanation than can be referred to in this Decision Notice. The Commissioner can confirm that he was provided with sufficient information to enable him to reach the conclusion that the exclusions at section 23(5) and 24(2) are engaged in relation to the complainant's request.
16. Section 23(5) provides an absolute exclusion, but section 24(2) is qualified. Therefore the Commissioner is required to consider whether, 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 PSNI holds relevant information.

Public interest arguments in favour of confirming or denying whether information is held

17. The PSNI did not identify any arguments in favour of confirming or denying whether it held information. However the Commissioner acknowledges that there is a general public interest in the public being informed as to the information held by public authorities.

18. In this case confirming or denying whether information is held could arguably assist the public in understanding the work undertaken by the then Royal Ulster Constabulary (RUC) in the 1970s.
19. The complainant expressed the view that, given that any information would be more than thirty years old, its ability to cause harm could be limited. In addition, the complainant drew the Commissioner's attention to the wording of his request, in which he recollected that searches had taken place at the property in question. Therefore the complainant did not believe the PSNI could refuse to confirm or deny the existence of information that he considered was already in the public domain.
20. The Commissioner also notes that section 24(2) is not an absolute exemption. Therefore Parliament recognised that some circumstances might arise where the public interest would favour confirming or denying that information was held, even though exclusion from this duty was required for the purposes of safeguarding national security.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

21. Again, the Commissioner is limited in the extent to which he can include details of the PSNI's arguments in this Decision Notice. However he can confirm that the PSNI provided more detailed arguments than those summarised below.
22. The PSNI asserted that there remained a "serious terrorist threat" in Northern Ireland, and that anything that assisted terrorists in understanding the level or nature of police interest or activity in the past could subsequently enable them to assess current interest or activity. This would be detrimental to national security and would not be in the public interest.
23. The PSNI also argued that a refusal to confirm or deny must be applied consistently to avoid undermining future responses. Confirming or denying in this case would enable comparisons between other responses, past or future, which would undermine the use of the refusal to confirm or deny more generally.

Balance of the public interest

24. The Commissioner appreciates that the complainant lived at the property in question during the specified time period, and has recollections of searches having taken place. However the fact that searches may have taken place does not necessarily mean that information about those activities was held at the time of the complainant's request. In addition, the Commissioner must decide whether it is appropriate for a public authority to confirm or deny to the public that information is held, regardless of the views of a particular individual.
25. The Commissioner also acknowledges the difficulty in assessing whether confirming or denying whether the PSNI holds information relating to events more than thirty years ago could cause harm now. However, the Commissioner is mindful of the political situation in Northern Ireland, and accepts that the PSNI must avoid disclosing any information (even confirming whether information is held) which could assist terrorists and adversely affect national security.
26. The Commissioner recognises that section 24(2) provides a qualified exemption, but considers that there are strong arguments in this particular case for maintaining the refusal to confirm or deny whether information is held. Therefore the Commissioner concludes that in this case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the PSNI holds relevant information.

Section 40(5): personal information

27. The PSNI also cited section 40(5) to refuse to confirm or deny whether it held information relevant to the complainant's request. This is because information relating to the complainant's "family home" (as indicated in his request) could potentially be personal data of the complainant or other individuals. Therefore, in refusing to confirm or deny whether it held any information the PSNI was required to refuse to confirm or deny whether it held information relating to the complainant.
28. Requests for personal information of the requester (made by that requester) should be handled under the Data Protection Act 1998 (the DPA). Section 7 of the DPA gives an individual the right to request copies of personal data about them – this is referred to as the right of subject access. This right is subject to certain exemptions, including an exemption for the purpose of safeguarding national security in the same terms as that in the Act.

29. The Commissioner is satisfied that the PSNI is not required to confirm or deny whether it holds information which, if held, would be the personal data of the complainant, by virtue of the exclusion at section 40(5) of the Act.

Section 30(3): investigations

Section 31(3): law enforcement

30. As the Commissioner finds that the exemptions at section 23(5) and 24(2) apply to the entirety of the complainant's request he is not required to also make a decision in relation to section 30(3) and section 31(3) of the Act.
31. However, in the interests of completeness the Commissioner can confirm that, in this particular case, he is able to indicate that the exemptions appear to have been correctly applied to the complainant's request.

Procedural requirements

Section 17: refusal notice

32. Section 17(1) of the Act states that:

"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".*

33. Having considered the correspondence, the Commissioner is of the view that the PSNI did not sufficiently explain to the complainant why it was refusing his request. The Commissioner understands the need to avoid disclosing exempt information (or in this case to avoid confirming or denying whether information is held). However, the Commissioner considers that both the refusal notice and the internal review letter were difficult to follow, and did not adequately explain even in general terms how the exclusions were applied to the request. The Commissioner therefore finds that the PSNI failed to comply with the requirements of section 17(1)(c) of the Act in relation to this matter.

34. The Commissioner also notes that the refusal notice was issued well outside the statutory time for compliance (20 working days following the date of receipt of the request). The PSNI took 36 working days to respond to the complainant's request, which is a clear breach of section 17(1) of the Act.
35. In addition, section 17(3) states that, where a qualified exemption is applied, the public authority must also provide the complainant with
- “...the reasons for claiming –*
- (a) 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 authority holds the information”.*
36. Again, the Commissioner appreciates the inherent difficulties in refusing to confirm or deny. However he remains of the view that the PSNI did not adequately explain to the complainant how it considered the public interest in relation to each of the exemptions claimed which are subject to the public interest test. Therefore the Commissioner finds that the PSNI failed to comply with the requirements of section 17(3)(a).

The Decision

37. The Commissioner's decision is that the PSNI dealt with the following element of the request in accordance with the requirements of the Act:
- The PSNI correctly applied the exclusion from section 1(1)(a) provided by sections 23(5), 24(2) and 40(5).
38. However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:
- The PSNI failed to provide an adequate or timely refusal notice in compliance with sections 17(1), 17(1)(c) and 17(3)(a) of the Act.

Right of Appeal

39. 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
Arnhem House
31, Waterloo Way
LEICESTER
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 21st day of June 2011

Signed

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

Legal Annex: Relevant statutory obligations

Freedom of Information Act 2000

General right of access

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.”

Refusal of request

Section 17(1) provides that -

“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 –

“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, 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 authority holds the information”

Information supplied by or relating to, bodies dealing with security matters

Section 23(1) provides that –

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

Section 23(2) provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

Section 23(3) provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

Section 23(4) provides that –

“In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

Section 23(5) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

National security

Section 24(1) provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

Section 24(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

Investigations and proceedings conducted by public authorities

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.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b)

- (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources."

Section 30(3) provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

Law enforcement

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by

virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

"The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

Section 31(3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

Personal Information

Section 40(5) provides that –

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

- (b) does not arise in relation to other information if or to the extent that either-
- (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."