

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 31 July 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to a police investigation. The Police Service of Northern Ireland (the PSNI) confirmed that it held some relevant information but withheld it in reliance on the exemption at section 30(1)(a) of the FOIA. The PSNI refused to confirm or deny whether it held any information which would be the complainant's personal data under section 40(5). The PSNI also refused to confirm or deny whether it held any information relevant to one part of the request under sections 23(5) and 24(2) of the FOIA. The Commissioner's decision is that the PSNI was entitled to refuse the request. The Commissioner does not require the PSNI to take any further steps in relation to the request.

Request and response

2. This case relates to an alleged kidnapping incident in 1991, of which the complainant was the victim. The PSNI investigated and submitted a file to the Public Prosecution Service for Northern Ireland (the PPSNI), who decided that there was insufficient evidence to bring a prosecution.
3. The complainant submitted his request to the PSNI on 14 February 2011. The request comprised 20 questions relating to the PSNI's investigation of the alleged kidnapping, and correspondence between the PSNI and the PPSNI. The request is reproduced in full at Annex 1 at the end of this notice.

4. The PSNI originally refused the complainant's request as vexatious under section 14 of the FOIA. However the PSNI changed its position as a result of two decision notices¹ issued by the Commissioner in relation to two related complaints. In these decision notices the Commissioner found that similar requests made by the complainant were wrongly refused as vexatious by the PSNI.
5. Following the Commissioner's decision notices the PSNI advised the complainant on 29 November 2011 that it was withdrawing reliance on section 14 in this case. The PSNI provided a revised response to the complainant's request on 12 January 2012. This notice stated that the PSNI did hold some information but was refusing to provide it under the exemption at section 30(1)(a) of the FOIA. In addition the PSNI refused to confirm or deny whether it held any information which would be the complainant's personal information, under section 40(5)(a). Finally, the PSNI refused to confirm or deny whether it held any information relevant to part 16 of the request under sections 23(5) and 24(2) of the FOIA.

Scope of the case

6. The complainant has asked the Commissioner to make a decision in this case because he is of the view that the PSNI wrongly refused his request.
7. Under section 50(2)(a) of the FOIA the Commissioner is not required to make a decision if the complainant has not exhausted the public authority's internal review process. However, the Commissioner is mindful that the PSNI had originally refused the request as vexatious, and reconsidered the request in order to issue the revised refusal notice. Given that the complainant first made his request to the PSNI in February 2011 the Commissioner considered it appropriate to proceed to an investigation without requiring the complainant to request a further internal review.
8. In relation to the information withheld under section 30(1)(a) the Commissioner has considered whether the PSNI ought to have provided this information to the complainant. In relation to the application of sections 40(5), 23(5) and 24(2) the Commissioner considered whether

¹ Case references FS50387372, issued on 8 November 2011, and FS50393213, issued on 31 January 2012.

the PSNI ought to have confirmed or denied whether it held relevant information.

Reasons for decision

Section 40(5): personal information

9. Under section 1(1)(a) of the FOIA, 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 FOIA.
10. Section 40(5) provides that the duty to confirm or deny does not arise in relation to information that does, or would if it were held, fall within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA.
11. The PSNI cited section 40(5) of the FOIA to refuse to confirm or deny whether it held information relevant to the complainant’s request which would constitute the complainant’s personal information. The PSNI specified questions 7, 8, 10 and 14 of the complainant’s request as being relevant in this regard.
12. Section 40(1) provides an absolute exemption because individuals have the right to request their own personal information under the Data Protection Act 1998 (the DPA). The Commissioner notes that the PSNI has advised the complainant of this right. Therefore the Commissioner is of the view that the PSNI acted correctly in refusing to confirm or deny whether it held the complainant’s personal data under section 40(5) of the FOIA.

Section 30(1): investigations and proceedings

13. The PSNI relied on section 30(1)(a) in respect of all the withheld information which was not the complainant’s personal information. Section 30(1)(a)(i) applies to information that was at any time held by the public authority for the purposes of an investigation that the public authority has a duty to carry out with a view to it being ascertained whether a person should be charged with an offence.
14. In order to engage this exemption the information in question must relate to a specific investigation; not to investigations in general. The Commissioner is satisfied that the information held by the PSNI which is relevant to the complainant’s request is held for the purposes of the

PSNI's investigation into the alleged kidnapping. This is a specific criminal investigation and therefore sufficient for the purposes of the exemption.

15. As section 30(1)(a)(i) is a class-based exemption, there is no requirement to demonstrate harm or prejudice. In this case the Commissioner is satisfied that the information was held in relation to a criminal investigation which the PSNI had a duty to conduct. Therefore the Commissioner finds that the exemption at section 30(1)(a)(i) of the FOIA is engaged.

Public interest arguments in favour of disclosing the information

16. The PSNI acknowledged that there is a general public interest in transparency and accountability in relation to criminal investigations. The PSNI accepted that disclosure of the withheld information in this case could assure the public that the investigation is being conducted efficiently and appropriately. The PSNI also noted that disclosure of the withheld information might inform the public as to how public funds were being used in investigations.
17. The complainant argued that the requested information should be disclosed to him as the victim of the alleged kidnapping. The complainant made various allegations to the Commissioner about the PSNI's investigation, and it is clear that the complainant is frustrated that no-one has been prosecuted, successfully or otherwise, in connection with the alleged kidnapping incident. The complainant believes that disclosure of the withheld information will assist his understanding of the PSNI investigation.

Public interest arguments in favour of maintaining the exemption

18. The PSNI considered the live status of the investigation at the time of the request to be a strong public interest in favour of maintaining the exemption. The PSNI argued that disclosure of the withheld information would have a detrimental effect on the investigation as it would inform the public – including potentially the perpetrator(s) – as to the extent and quality of evidence gathered, as well as the progress of the investigation and lines of enquiry. This could prejudice the chances of a successful prosecution being brought, should further evidence become available.
19. The PSNI also argued that it would not be in the public interest to disclose information which could affect any individual's right to a fair trial, should a prosecution be brought in the future. This is particularly relevant given the fact that the request relates to evidence gathered and identification of individuals.

20. Where investigations are still open the Commissioner considers that there will generally be a strong public interest in maintaining the exemption. The Commissioner recognises that it is generally in the public interest to safeguard investigatory processes, and the right of access under the FOIA should not undermine the investigation and prosecution of criminal matters nor dissuade individuals from coming forward to report wrongdoing.
21. In this case the Commissioner is mindful that the requested information focused largely on forensic evidence and information provided by third parties as witnesses, which could play a crucial part in bringing a successful prosecution. The Commissioner accepts that witnesses, some of whom were members of the public, would have expected that information they provided to the PSNI was for the sole purpose of the investigation and not for general disclosure to the public. Disclosure of this information may result in witnesses being less willing to participate in the criminal justice system. This may diminish the likelihood of successful prosecutions, which the Commissioner considers would not be in the public interest.

Balance of the public interest

22. The Commissioner is mindful of the strong public interest in law enforcement agencies being accountable and transparent in their actions. The Commissioner also considers it important to allow the public to be assured that serious criminal investigations are conducted in a thorough and impartial manner.
23. However, the Commissioner believes that there is a significant public interest in ensuring that live investigations are not jeopardised. Although the alleged kidnapping took place in 1991, over 20 years ago, the Commissioner notes that at the time of the request no-one had been charged in connection with the incident, and that the case had not been closed. The Commissioner therefore attaches a strong public interest to protecting the investigation in this case.
24. The Commissioner appreciates the complainant's desire to be fully informed as to the extent and nature of the PSNI investigation, particularly given his criticisms of the investigation to date. However, the Commissioner has stressed to the complainant that the FOIA is motive-blind. This means that the Commissioner can only decide whether the information ought to be disclosed into the public domain. Therefore, whilst the Commissioner understands the complainant's position he is obliged to consider the wider public interest in ensuring that investigations are not prejudiced by premature disclosure of information which may be relevant in future proceedings. Although it is arguable that such an old case may be less likely to result in a

successful prosecution, given the passage of time, the Commissioner considers there to be a strong public interest in avoiding harm to the investigation which would reduce the chances of such a prosecution.

25. The Commissioner is aware that the alleged kidnapping and other incidents involving the complainant have been the subject of considerable media attention. However the Commissioner considers it important to remember that there may be a difference between information reported in the media and information actually held by the police in the context of an investigation. The Commissioner accepts that the complainant has published a substantial amount of information about the incidents involving him, including two books. However the information published by the complainant must be distinguished from information obtained and held by the PSNI in the course of its investigation. There are of course some circumstances when the PSNI may decide to publish information, for example with the aim of encouraging witnesses to come forward, but this is not the same as disclosing detailed information about the identity of suspects and the forensic information gathered. Therefore the Commissioner considers it unwise to attach significant weight to the fact that some information may be in the public domain.
26. Having carefully considered all the circumstances of this case, the Commissioner is of the view that the arguments in favour of maintaining the exemption at section 30(1)(a)(i) are considerably stronger than those in favour of disclosing the information. The Commissioner therefore finds that the public interest in maintaining the exemption outweighed the public interest in disclosing the information, and the PSNI was entitled to withhold the information.

Section 23: Information relating to security bodies

Section 24: National security

27. The PSNI refused to confirm or deny whether it held any information relevant to question 16 of the request in reliance on sections 23(5) and 24(2) of the FOIA.
28. Section 23 (5) states that:

"...(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)".

29. Section 24(2) states that:

"(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".

30. 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. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. In relation to requests touching on issues of national security they can be claimed jointly in order to obscure the involvement or otherwise of one of the designated security bodies.
31. The PSNI explained in its refusal notice why it was relying on sections 23(5) and 24(2). The PSNI highlighted the fact that question 16 of the request specifically referred to possible terrorist involvement in the alleged kidnapping. The PSNI also pointed out that it had responsibility for national security in Northern Ireland at the time of the incident, and that it was PSNI practice to liaise with other law enforcement and intelligence agencies in relation to national security.
32. The Commissioner accepts that an investigation which considers possible terrorist activity is likely to involve liaison with one or more of the security bodies listed at section 23(3) of the FOIA.
33. In addition the Commissioner notes that section 24(2) is engaged only if the refusal to confirm or deny is required for the purposes of safeguarding national security. "National security" is not defined in the FOIA, but in the Commissioner's view it would include the security of the United Kingdom and its people. Therefore the Commissioner accepts that the activity of gathering intelligence on a terrorist organisation would be highly relevant to safeguarding national security. Confirming or denying that relevant information was held would inform the public (including terrorists) as to the level of interest taken by the security services, which would assist them in evading detection. The Commissioner finds that refusing to confirm or deny whether this information is held is indeed required for the purposes of safeguarding national security.
34. In light of the above the Commissioner is satisfied that the PSNI was entitled to engage the exemptions at sections 23(5) and 24(2).
35. 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 the requested information is held

36. As discussed in relation to the exemption at section 30 above, the Commissioner appreciates that the complainant has strong reasons for wanting access to information relating to an incident that involved him. However the Commissioner must stress that the FOIA provides only for information to be disclosed into the public domain, and disclosure must be in the public interest, rather than to satisfy an individual.
37. There is a more general public interest in understanding how the PSNI investigated the possible involvement of terrorists in the incident. The PSNI acknowledged that confirming or denying whether information was held would enable the public to be better aware of the scope of intelligence held on terrorist organisations.

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

38. The PSNI was of the strong view that the refusal to confirm or deny should be upheld, particularly given the fact that the request concerned a live investigation and referred to potential terrorist activity. The PSNI argued that the public interest lay clearly in safeguarding both national security and the integrity of police operations and investigations.
39. The Commissioner understands that section 24(2) contains an inherently strong public interest argument in favour of maintaining the refusal to confirm or deny, given that the exemption is only engaged if it is required to safeguard national security.
40. The Commissioner is also mindful that the current threat level in Northern Ireland is "severe", which means that a terrorist attack is considered highly likely. The PSNI was of the view that it would not be in the public interest to confirm or deny whether it held information which would make it more difficult for the PSNI to fulfil its duties in relation to national security.

Balance of the public interest arguments

41. 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 relevant information is held. There is clearly a vital public interest in safeguarding national security, and the Commissioner is not persuaded that there is a convincing argument in favour of confirming or denying

that 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 information relevant to question 16 of the request.

Right of appeal

42. 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

43. 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.
44. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
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Wilmslow
Cheshire
SK9 5AF

Annex 1

Full text of request made on 14 February 2011

"The PPS stated in their 01-02-2011 correspondence to me that;

"Enquiries have been made with the Royal Victoria Hospital and Musgrave Park Military Hospital. No records have been identified concerning your admission on 8th August 1991."

1. Please supply all information and or documents relating to all such requests and enquiries by the PSNI (or RUC) to both Royal Victoria Hospital and Musgrave Park Military Hospital and also all replies received.

And; "While there is some indication that fingerprints of three suspects were recovered at the scene it is by no means clear that these could now be proved to the requisite standard. The original exhibits are unavailable and it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis."

2. Please give full details of all fingerprints recovered from the scene.

3. Please list and supply full details concerning the '...original exhibits ...' which are referred to in PPS letter and supply full details concerning all other exhibits recovered by the RUC at the crime scene.

4. Please supply full details, information and documents concerning all requests and enquiries made by PPS to PSNI, including all replies, for information relating to; 'The original exhibits are unavailable and it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis.'

5. Please supply all information and documents held by PSNI (and or RUC) concerning 'One of the suspects is thought to have been the tenant of the property at the time ...' as well as all information concerning; ' ... and the two other suspects were his associates.'

And; 'The fingerprints were on newspapers and books with no direct link to the alleged offence. There is, in short, no forensic evidence to support your account.'

6. Please supply all information Police have concerning where all fingerprints were found, on which items, number of items and where were the said items recovered from.

- 7. Please supply all information given to the PPS by the PSNI which confirmed that I was in the flat on the 8th Aug 1991.*
- 8. Are the PSNI satisfied that I was in the flat. If so, please supply all information and documents they have concerning my being inside the flat on 08-08-91.*
- 9. Please detail all other forensic evidence which was recovered from the scene by police, inside and outside the flat.*
- 10. Please supply all information relating to statements made by all other third parties which make reference to man jumping out of window.*
- 11. Please supply full details concerning '...crime scene was held at 54D Broom Park and that an examination was carried out by a scenes of crime officer and a photographer.' What was the name of all officers involved. When did they, police first arrive at the crime scene and when did they leave the crime scene. Was anyone arrested at the scene on the day, 8th Aug 1991.*
- 12, Please supply all detail, information or evidence which was recorded by the police photographer concerning broken window(s) and or broken glass both inside and outside the flat, crime scene.*
- 13, Please supply all information or detail concerning person(s) referring to man, at flat or nearby, who's feet were tied and who was not wearing shoes.*
- 14, Please supply all information which was recorded concerning my shoes, trainers and or the laces having been recovered from inside or outside the flat.*
- 15. When did Police first speak to the owner of the flat, what date, and how was the owner contacted. Please also explain any delay in making contact with the owner. How did the owner of the flat explain the events which took place at the flat on 08-08-1991, flat. What explanation did the owner of the flat give concerning broken window(s), man found injured on ground outside, police and others treating the flat as a crime scene etc.*
- 16. Please supply all detail or information concerning any reference relating to the flat having been taken over by anyone, including terrorists, by force, making threats or using intimidation.*
- 17. What date did the PSNI first made aware that; 'The original exhibits are unavailable ...' and by whom, name of officers.*

18. I'm being told; '...original exhibits are unavailable ...' Please supply all information and documents concerning what happened to these exhibits, where have they gone. When did police discover the exhibits were missing and what has been done to find them. Which officers were involved in same.

19. I'm also being told; '... it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis.' Please supply all information and documents concerning all attempts made by police to identify all officers involved.

20. When did the police first become aware that; '... it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis.' What was the name of officers. How was the information passed to the police. Please supply all documents and information concerning same letters to the police as well as all replies relating to same."