

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 17 August 2016

Public Authority: Department for Communities
Address: Lighthouse Building
1 Cromac Place
Belfast
BT7 2JB

Decision (including any steps ordered)

1. The complainant has requested information transferred to the Public Records Office of Northern Ireland (PRONI), part of the Department for Communities. At the time of issuing this decision notice PRONI had not provided the complainant with a substantive response to the request. The Commissioner's decision is that the public authority has failed to respond to the complainant's request within the statutory timescale.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Respond to the complainant's request: Firstly, confirm or deny that the requested information is held (or, if the public authority decides to refuse to confirm or deny that any of the requested information is held, then a refusal notice should be issued that complies with the requirements of section 17 of the FOIA).
 - Secondly, and subject to the above: to the extent that the requested information is held the public authority must either disclose it or, if it wishes to withhold any information, issue a refusal notice in relation to the information it wishes to withhold and disclose the remainder.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

4. The request in this case was made to PRONI. At the time of the request PRONI was part of the Department for Culture, Arts and Leisure (DCAL), but DCAL has since become part of the new Department for Communities. Therefore the Department, rather than PRONI, is the public authority under schedule 1 to the FOIA and on whom this decision notice is served.
5. On 14 January 2016 the complainant requested the following information from PRONI:

"Our FOIA and Data Protection request seeks disclosure of all contents of the 2 DPP files held by PRONI dating from 1972 to 1973 including all documents and materials listed below;

All manuscript and typed versions of all statements of evidence made by all witnesses in the above case including military, police, forensic and civilian witnesses held on the DPP files;

All documents emanating from the RUC, the MOD and the RMP (Royal Military Police) investigations into the murder of Private Frank Bell and the prosecution of our client held on the DPP files including any and all radio transmissions/recordings/transcripts and relevant witness statements which confirm contemporaneous evidence of a westerly gunshot trajectory (as opposed to southerly trajectory recorded in the false confession attributed to our client);

All documents provided by either the RUC, MOD including the RMP, which amount to disclosure emanating from the DPP during the prosecution/trial process held on the DPP files which may or may not have been communicated to the defence;

All internal DPP correspondence, records, notes and memoranda with/to and from all and any third parties including the MOD (at all levels), the RMP, and the RUC and any other parties whatsoever held on the DPP files;

All other internal documents and materials held on the 21 DPP files relating to prosecution of our client including any documents which contain (a) exculpatory information or evidence in relation to our client which may not have been provided to the defence at the time of the trial in 1972/3, (b) all and any documents which provide an assessment of the case by the DPP in 1972/3 which indicates that the case should not proceed to trial or which confirm the existence of the Blue Card Rules; (c) all and any prosecutorial directions or assessments which indicate that the prosecution against our client

should not proceed (for guidance see paragraph 14 of attached judgment R-v-Charles McMenamin [2007] NICA 22 whether communicated to any third party at the time or not, including the Court, prosecution and defence in 1972/3."

6. The complainant wrote to PRONI on 16 June 2016 to complain that they had not received a response to their request. The complainant contacted PRONI again on 20 June 2016 to advise that they had received a letter from the Public Prosecution Service for Northern Ireland (the PPS). This letter, dated 16 March 2016, confirmed that PRONI had contacted it as the "responsible authority" in respect of the complainant's request. The PPS confirmed that it had advised PRONI that there was "...no prosecutorial reason to withhold publication of PPS papers" within the requested files. However the PPS further advised that it was consulting with the Police Service of Northern Ireland (PSNI) and was awaiting a response before reverting to PRONI as the decision maker.
7. PRONI wrote to the complainant on 21 June 2016 to confirm that it had on 11 April 2016 received a substantive response from the PPS incorporating PSNI's views. PRONI advised that it was reviewing that response.
8. PRONI advised the complainant on 29 June 2016, 7 July 2016 and 27 July 2016 that it remained unable to provide a substantive response to the request at this stage.

Scope of the case

9. On 30 June 2016 the complainant contacted the Commissioner to complain that PRONI had not yet provided a substantive response to their request. The complainant asked that the Commissioner require PRONI to disclose the requested information to them.
10. 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, as PRONI has not responded to the request there is no decision to review. Therefore the Commissioner considers it appropriate to accept this complaint as valid without an internal review and proceed to make a decision.
11. Although the complainant asked the Commissioner to require PRONI to disclose the requested information, the Commissioner wishes to stress that she cannot make any decision as to whether or not the requested information ought to be disclosed to the complainant. This is because the public authority has not made any decision to refuse

the request to any extent. The Commissioner's decision in this case is accordingly limited to the Department's apparent failure to provide a substantive response.

12. Having obtained copies of the relevant correspondence from the complainant the Commissioner contacted PRONI on 25 July 2016 to ask when it would be in a position to issue a substantive response to the request.
13. On 3 August 2016 PRONI responded to the Commissioner, but was unable to provide an estimated date for compliance with the request.

Reasons for decision

Section 1: general duty to comply with a request

Section 10: time for compliance

14. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not it holds the requested information. This is known as the "duty to confirm or deny". Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a refusal notice has been issued to explain any exemptions relied on. This is known as the "duty to disclose".
15. Section 10(1) states that the public authority must comply with section 1 promptly and in any event no later than 20 working days after the date of receipt of the request. The Freedom of Information (Time for Compliance with Request) Regulations 2004 extend the time for compliance, in relation to requests received by PRONI, from 20 working days to 30 working days.

Duty to consult the responsible authority

16. Section 66(2) of the FOIA states that, before deciding whether any exemption applies either in respect of the duty to confirm or deny or the duty to disclose, PRONI must consult the "responsible authority".
17. Section 15(5) sets out how the responsible authority is determined in various scenarios:

"(d) in the case of a record transferred to the Public Record Office of Northern Ireland from a Northern Ireland department, the Northern Ireland Minister who appears to the appropriate Northern Ireland Minister to be primarily concerned".

“(e) in the case of a record transferred to the Public Record Office of Northern Ireland from any other person, the person who appears to the appropriate Northern Ireland Minister to be primarily concerned”.

18. The “appropriate Northern Ireland Minister” is defined at section 84 of the FOIA as the Northern Ireland Minister in charge of the Department for Culture, Arts and Leisure for Northern Ireland (now the Department for Communities).
19. The FOIA does not prescribe any form and extent of consultation with the responsible authority. However PRONI is required to consult with the responsible authority, and reach a decision about whether or not an exemption or exclusion from the duty to confirm or deny applies to the requested information, within the time for compliance (30 working days).

Section 17: refusal notice

20. Section 17(1) of the FOIA states that if a public authority wishes to refuse a request it must provide the complainant with a refusal notice within the statutory time for compliance. This decision notice must state what exemption is being relied upon and explain why this is the case. In the case of PRONI the Commissioner acknowledges that the Regulations referred to at paragraph 15 above extend the “normal” time for compliance to 30 working days.
21. PRONI received the complainant's request on 14 January 2016. The time for compliance runs from the day after the date of receipt, therefore under section 15 of the FOIA PRONI was required to consult with the responsible authority and make a decision as to the application of exemptions no later than Thursday 25 February 2016.
22. At the date of issuing this decision notice PRONI had not issued a substantive response to the complainant, nearly seven months after receipt of the request. Accordingly the Commissioner must find that PRONI has failed to comply with section 10(1) of the FOIA.

Other matters

23. The Commissioner has recorded in previous decision notices that PRONI has a large number of information requests awaiting a response. The Commissioner understands that PRONI is required to consult with third parties before issuing a response, and this process of consultation has proven to be complex and time-consuming. The Commissioner appreciates the unique difficulties faced by PRONI in

completing the consultation process within the time for compliance, despite the additional 10 working days.

24. The Commissioner notes that the request in this case was made on behalf of an individual who has understandable personal reasons for seeking access to the requested information. However the FOIA only provides for information ought to be disclosed into the public domain. Information cannot be disclosed to an applicant under the FOIA unless it could be disclosed into the public domain.
25. The Commissioner is aware that the Department has issued The Court Files Privileged Access Rules (Northern Ireland) 2016. These Rules do not affect the access provisions of the FOIA, but place on a statutory footing a specific access procedure operated by PRONI in respect of requests for court and inquest files. In contrast to the FOIA, the Rules are explicitly designed to provide privileged access to information for applicants who meet specific eligibility criteria. The Commissioner cannot comment on whether the complainant in this case would be able to access the requested information under the Rules.

Right of appeal

26. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 123 4504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF