

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 April 2019

**Public Authority:** Police Service of Northern Ireland

**Address:** [foi@psni.pnn.police.uk](mailto:foi@psni.pnn.police.uk)

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the Police Service of Northern Ireland ('PSNI'). The PSNI refused to either confirm or deny whether it held the requested information, citing sections 30(3) and 40(5)(b)(i) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the PSNI has correctly applied the exemption at section 40(5)(b)(i) of the FOIA to the requested information. As this applies to the entirety of the requested information, the Commissioner has not gone on to consider the PSNI's application of section 30(3) of the FOIA.
3. The Commissioner requires no steps to be taken.

## **Request and response**

4. The complainant on 16 June 2017 made a request to the PSNI for the following information:-

"I therefore, under the Freedom of Information (FOI) Act 2000 request from the PSNI (without redactions) copies of said letters that you must hold, that being the case I am entitled to have that information communicated to me. Those letters issued to.

1/ [name redacted]

2/ [name redacted]

3/ Any other named member of [redacted] during those thirty eight years."

5. The complainant received a response letter from the PSNI on 24 July 2017, stating that it was neither confirming or denying that it held information within the scope of the complainant's request, citing section 40(5)(b)(i) (personal information) as a basis for this.
6. The complainant then sought an internal review of this decision, the result of which was provided to him on 21 August 2017. The reviewer stated that the original decision was being upheld, and further sought to apply section 30(3) (investigations and proceedings conducted by public authorities) as another basis for non-confirmation or denial, the reasoning being that the review of potential criminal liability of 'on-the-runs' with a view to commencing an investigation was live and ongoing at the time of the complainant's request and revealing what information the PSNI does or does not hold would impact on the conduct of the review or any investigation that follows.

## **Scope of the case**

7. The complainant first contacted the Commissioner on 21 September 2017 to complain about the way his request for information had been handled, specifically the PSNI's refusal to either confirm or deny whether the requested information is held by it.
8. The Commissioner has considered the PSNI's handling of the complainant's request.

## **Reasons for decision**

### **Section 40(5)(b)(a)(i)**

9. As the PSNI's refusal of the request was before 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and the General Data Protection Regulation EU2016/679 (GDPR) legislation came into force, the Commissioner considers that the Data Protection Act 1998 applies in this case.
10. Section 40(5) of the FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
11. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
12. There may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of complaints. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

### **If held, would the information be personal data?**

13. The Commissioner has first considered whether the requested information would be the personal data of any person.
14. The Data Protection Act 1998 (DPA) defines personal data as data that relates to a living individual from which that individual can be identified. If held, the information would confirm whether or not the name of the individual provided in the complainant's request had been the subject of any complaints.
15. Therefore, the Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public something about the individual, namely whether or not the person was the subject of complaints.

**Would confirming or denying the information is held breach any of the data protection principles?**

16. If confirming or denying whether the information is held would contravene the first data protection principle, that personal data should be processed fairly and lawfully, section 40(5)(b)(i) is applicable.
17. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
18. In this case confirming or denying whether the information is held would communicate whether or not the individual named in the request was the subject of any complaints.
19. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
20. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
21. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
22. The PSNI is aware that the first data protection principle requires personal data to be processed in a fair and lawful manner. In considering whether it is 'fair' or 'lawful' to individuals to release this information about them, the PSNI considered the likely expectations of those individuals as well as the PSNI's positive legal obligations to protect life under Article 2 of the ECHR. Individuals would reasonably expect the PSNI not to release information which could put an individual at risk. It is unlikely that it would be within the expectations of those individuals that this information, if it exists, be put into the public domain or the individual be put at risk as a result. Release of this information, if applicable, could leave any of the unnamed individuals ("any other persons named as members of [redacted] during those thirty-eight years") as well as those named, if this information is held, open to attack for their criminality. Therefore, it

would be reckless of the PSNI to disclose such information given that one of its core functions is to protect the lives of all citizens and it would not be 'fair' or 'lawful' within the first principle of the Data Protection Act 1998 to put individuals at risk.

23. The Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the PSNI is entitled to refuse the request on the basis of section 40(5)(b)(i) of the FOIA.
24. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or 3 conditions is met.

## Right of appeal

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25. 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: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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 .....**

**Deirdre Collins**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**