

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 30 March 2021

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

Decision (including any steps ordered)

1. The complainant requested information about monies owed, and other associated details, by a named goldmining company to the Police Service of Northern Ireland ('PSNI'). PSNI denied holding some of the requested information. For the majority of the request, it refused to confirm or deny whether the information was held on the basis that, if held, it would be exempt under section 42(2) of FOIA – the exemption for legal professional privilege.
2. The Commissioner's decision is that PSNI was correct to consider the request under FOIA as opposed to the EIR. She finds, on the balance of probabilities, that some of the requested information was not held by PSNI. She also finds that PSNI was entitled to rely on section 42(2) for the remainder of the request, and that the public interest test favoured maintaining the 'neither confirm nor deny' provision.
3. The Commissioner does not require PSNI to take any steps as a result of this notice.

Background

4. According to Galantas Gold's website¹:

"Galantas Gold Corporation is a public company, dual listed on the TSX [Toronto Stock Exchange] Venture Exchange, located in Toronto and London's AIM [Alternative Investment Market] market.

Galantas owns and recently operated a producing open pit gold mine near Omagh, County Tyrone, Northern Ireland. The mine also produces by-product silver and lead. A metals concentrate is produced by safe, non-toxic processing and sold under contract. The mine has now received planning permits to continue to mine underground with about a kilometre of underground development completed so far. The mine has completed part of a drilling exploration program with a significant increase in resources discovered and intends to continue that program."

Request and response

5. On 22 May 2020, the complainant wrote to PSNI and requested information in the following terms:

"Gold producer Galantas Gold detailed plans to resumed operations and said it had reached an agreement with the Police Service of Northern Ireland to increase blasting to a commercial level at its gold mine near Omagh, Northern Ireland."

There are a number of issues arising from that statement that may assist in allowing the public [sic] understand what has taken place between the police and the miners.

1. Have all outstanding invoices/security bills owing to the Psni/Public purse, by the goldming [sic] companies in question been resolved/paid.

¹<https://www.galantas.com/>

2. Is there a public record of talks between goldmine companies discussing security costs and can the public see them?

3. Will the Psni confirm they have reached an agreement with Galantas Gold regarding security costs and increased blasting.

4. Is there a valid reason for talks being held in secret between the Goldminers and Psni given that these matters are public?

5. Were the community in Cavanacaw consulted by the psni about the increase of blasting and the settlement Galantas say they have reached with the Psni?

6. Did the Psni alert the local PCSP/Council/DFI/Planning Service about the agreement Galantas say they have reached with them and what was their reply?

7. Have the Psni further meetings planned with goldmining companies in West Tyrone and will community groups opposed to industrial mining in the region be notified and invited to attend?

8. The arrangement Galantas Gold say they have made with the Psni will cost the public purse, what will that cost be and how will that impact upon local police budgets this financial year and for the next 5 years?"

6. PSNI responded on 23 June 2020. For parts 1, 3, 5, 6, 7 and 8 of the request, PSNI refused to confirm or deny that it held the requested information. It cited the 'neither confirm nor deny' provision within section 42(2) of FOIA – the exemption for legal professional privilege - and determined that the public interest test favoured neither confirming nor denying whether the requested information was held at the time of the request.
7. For parts 2 and 4 of the request, PSNI denied holding the requested information.
8. Following an internal review, PSNI wrote to the complainant on 6 August 2020 and maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 6 August 2020 to complain about the way his request for information had been handled.
10. He submitted the following grounds of complaint which the Commissioner relayed to PSNI for its consideration:

"Having exhausted the PSNI process I am compelled to write to your office seeking clarity on the relationship between the police and a private company. Its [sic] my belief that these matters are of the utmost importance to the public. As a former [redacted] in Omagh I understand the need for good communication between the public and police. Accountability has to mean more than just a catchphrase in this context. My requests are reasonable and given the possibility of a further 25 years of mining in the West Tyrone area the public should know arrangements between private companies and the police. For the Psni to obfuscate around financial arrangements with said company is to encourage the perception that they are acting as a private security police force.

I ask you to please adjudicate on this issue in the public interest and in the spirit of openness and transparency freedom of information legislation [sic] was designed for."

11. PSNI has highlighted to the Commissioner the parts of its investigation response which it considers to be confidential and therefore, not to be reproduced in this notice. Therefore, below and where applicable, the Commissioner has indicated where redactions have been made.
12. Given the subject matter of the request, the Commissioner has first considered whether the requested information is 'environmental' within the definition of the Environmental Information Regulations 2004 (the 'EIR'). She has then considered whether PSNI was correct, on the balance of probabilities, to deny holding the requested information in parts 2 and 4 of the request. Finally, she has determined whether PSNI was entitled to rely on section 42(2) for the remainder of the request.

Reasons for decision

13. As part of her investigation, the Commissioner asked PSNI to consider whether it should have instead handled this request under the EIR.

Is the requested information environmental information?

14. Regulation 2(1) of the EIR provides the following definition of environmental information; the Commissioner has set out the relevant subsections below referred to by PSNI :

"...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and

atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

15. In its response to the Commissioner, PSNI said:

"PSNI in its considerations is aware of the appropriateness of a broad approach being taken to define environmental information which has been confirmed by the Court of Appeal in England and Wales (The Department for Business, Energy and Industrial Strategy v the Information Commissioner and Anor [2017] EWCA Civ 844 (29th June 2017)). In this, the original Parliamentary intention of the EIR implementing EU Directive 2003/4/EC and the Aarhus Convention is given effect.

PSNI has now specifically considered the definition of Article 2(1)(c) and (f) of the EIR which states:

'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

16. PSNI also stated:

"The ICO guidance² on the definition of environmental information states:

'Affecting' means the effect on the elements of the environment, or factors such as those listed in regulation 2(1)(b), has already occurred, or is current or ongoing.

'Likely to affect' means there is a likelihood the elements of the environment, or factors such as those listed in regulation 2(1)(b), would be affected if the measure went ahead. This likelihood does not have to be more probable than not, but does have to be real and significant and substantially more than remote.

The information requested from PSNI relates to details in regard to PSNI's ability to recover costs in respect of its services provided to Galantas...[confidential sentence redacted]. In considering which regime applies, PSNI considered whether the information requested was integral to an activity or measure affecting, or likely to affect, the elements of factors of the environment and considered how remote the material was to that. We considered the example set out in ICO guidance relating to Omagh District Council which stated:

'In Omagh District Council v Information Commissioner [EA/2010/0163, 20 May 2011] the request was for the names of the authors of an Equality Impact Assessment (EQIA) about a policy on the disposal of land containing a memorial to IRA members who had died in hunger strikes in 1981. The memorial comprised a flag, a monument and 10 trees. The council had refused the request under FOIA; the Commissioner instead found that the information requested was environmental and should have been handled under the EIR. This was on the basis that the information was directly related to a measure – the proposed sale of the land - that would impact on the state of the land.

The council argued that the focus of the information was on equal opportunities, and that the EQIA was too remote from a measure affecting the environment, since it was too far removed from the final decision on the sale of the land. The Tribunal did not accept these arguments and decided the information did have a

² <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

significant connection with the decisions on the sale of the land and the future of the memorial and therefore was environmental information.'

The Tribunal supported the ICO approach and upheld the Decision Notice."

17. PSNI submitted that:

"Governance, oversight and security of the mining industry in Northern Ireland is complex with the Northern Ireland Office ['NIO'] responsible for primary legislation; the Department of Justice responsible for licensing; the Health and Safety Executive responsible for site safety; and PSNI responsible for security. There are numerous pieces of legislation (both national and local) which are relevant to the manufacture, sale, acquisition, storage, handling, use and disposal of explosives and pyrotechnics which are complex and precise clarity in terms of responsibilities is difficult to ascertain. PSNI also supports other bodies such as HM Armed forces or NIO in the licencing of controlled chemicals to in to carry out their role

In this case, in considering how integral the material is to a factor or element in relation to a measure or activity affecting the environment, PSNI is aware that as an activity blasting and mining will have a clear impact on the environment and the natural landscape of Northern Ireland. As above however, PSNI's role [confidential part-sentence redacted] is not as a direct result of the specific mining activity or its effects on the local landscape but in PSNI's assessment of the risk of this activity as a result of the security situation in Northern Ireland and the obligation in Section 32 of the Police (NI) Act 2000 to protect life and property.

In Northern Ireland the security threat is set at SEVERE. This means an attack is 'highly likely'. As a result PSNI has carried out specific policing activities at the sites operated by Galantas."

18. PSNI has described the types of policing activities undertaken but asked the Commissioner not to directly quote them, so she has omitted the detail from this notice. PSNI also explained:

"It is in policing the security threat and discharge of policing obligations that PSNI engages with and provides particular services to Galantas. [Remainder of confidential paragraph redacted].

The information sought by the requester has a clear, specific focus on the engagement and disclosure of any financial and/or cost recovery agreements which may exist between PSNI and Galantas (or other mining companies); namely: payment of any outstanding invoices; discussions in relation to security costs and public records of same; agreement of any security costs related to 'increased blasting'; details of any 'secret' talks; public/PCSP/Council/DFI/Planning Service consultation on any settlement/agreement; future meetings, and how any financial agreements will impact local policing budgets and 'the public purse'.

With due consideration to PSNI's role, namely in policing the security threat in Northern Ireland and the discharging of duties under Section 32 Police (NI) Act 2000 to protect life and property and prevent the commission of offences; [confidential part sentence redacted] and the focus on the disclosure of financial and cost recovery agreements for the provision of these services; PSNI considers that the information requested does not meet the definition of environmental information under Regulation 2 of the Environmental Information Regulations (EIR) 2004 and is remote from this in this regard. PSNI therefore considered the matter under the FOIA legislation..."

19. In reaching her conclusion, the Commissioner has considered the applicable definitions within the EIR, her guidance and PSNI's submissions as set out above.
20. The Commissioner agrees that PSNI's role (and its reason for holding any material, if held, in scope of this request) is not as a direct result of the specific mining activity or its effects on the local landscape but in PSNI's assessment of the risk of this activity as a result of the security situation in Northern Ireland.
21. She has, therefore, concluded that FOIA was the correct regime for the request under consideration in this notice. She has next considered PSNI's section 1 and section 42 responses.

Section 1 – General access to information – Parts 2 and 4 of request

22. Section 1 of FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and, if so, to have that information communicated to them.
23. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with

absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.

24. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
25. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, PSNI holds any recorded information for parts 2 and 4 of the request. Accordingly, she asked PSNI to explain what enquiries it had made in order to reach the view that it did not hold the information.
26. The parts of the request under consideration here concern whether there are any 'public' or 'secret' records talks between goldmine companies and PSNI.
27. PSNI has told the Commissioner that, in determining if a public record of talks existed, or if 'secret' talks were held, it contacted its Operational Support Department Management, Legal Services, and the Business and Policy Lead, explaining that these identified points of contact would be those responsible for managing any engagement with gold mining companies. PSNI said that these contacts confirmed that no 'secret' talks were held.
28. Additionally, it said that PSNI's Press Office (responsible for press releases and media engagement for PSNI), had also had sight of this request and response and that, in addition to providing information to support the development of the response, these individuals also quality assured the final document in advance of its release to the requester.
29. PSNI explained:

"When searching for available information, Corporate Information Branch regularly undertakes open source searches using keywords to determine if/what information is available in the public domain. In drafting this correspondence ... each point of contact detailed above was given sight of this response and asked for comment to re-confirm that requested information is

not held and open source searches were conducted using the following keywords:

*Galantas+Gold+PSNI
Galantas+Gold+PSNI+Finance
Galantas+Gold+PSNI+Security*

*Galantas+Gold+PSNI+Talks
PSNI+Goldmines+Finance
PSNI+Goldmines+Security
PSNI+Goldmines+Talks*

The outcomes of these measures to provide further assurance re-confirmed that 'secret' talks have not taken place; that requested information was not, and is not held, and that there is no public record of any talks detailing the financial agreements between PSNI and goldmining companies for security provision."

Conclusion

30. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out earlier, the Commissioner is required to make a finding on the balance of probabilities.
31. The complainant has not submitted any specific arguments as to why he believes there may be information held relevant to these parts of his request. Based on the explanations provided by PSNI, the Commissioner is satisfied, on the balance of probabilities, that no recorded information within the scope of parts 2 and 4 the request is held.

Neither confirm nor deny ('NCND')

32. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
33. The decision to use an NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or

denying whether or not a particular type of information is held. The Commissioner's guidance³ explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information can itself reveal something that is legally privileged.

34. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
35. PSNI has taken the position of neither confirming nor denying whether it holds the majority of the information requested by the complainant on the basis of section 42(2) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not PSNI is entitled to NCND whether it holds some of the information requested by the complainant.
36. Put simply, in this case the Commissioner must consider whether or not PSNI is entitled to NCND whether it holds information where to do so would disclose legally privileged information.

Section 42(2) – legal professional privilege – Parts 1, 3, 5, 6, 7 and 8 of request

37. Section 42(2) provides an exemption from the duty to confirm or deny where to do so would involve the disclosure of information covered by legal professional privilege ('LPP'). Section 42 is qualified by the public interest so consideration of it involves two stages.
38. The Commissioner must first determine whether the section 42 exemption is engaged.
39. There are two types of LPP: advice privilege and litigation privilege. Advice privilege is described in the Commissioner's published guidance⁴ on this exemption as follows:

"Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the

³ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

⁴ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.

The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem."

40. Litigation privilege is described, in the same guidance, as:

"Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports."

41. LPP protects the confidentiality of communications between a client and their legal adviser, but what it specifically protects is the substance of those communications. This interpretation is supported by the comment of Mr Justice Mann in *USP Strategies v London General Holdings Ltd [2004] EWHC 373 (Ch)*, that: *"The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice"* (paragraph 20). The fact of whether a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications.

42. This means that a public authority can only refuse to confirm or deny whether it holds information about legal advice it has sought or received if to do so would itself reveal something about the substance of that advice. 'Substance' means the content, rather than simply the general subject of the advice.

43. In correspondence with the Commissioner, PSNI stated:

"The information sought by the requester has a clear focus on the engagement and disclosure of any financial and/or cost recovery agreements which may exist between PSNI

and Galantas (or any other mining companies); namely: payment of any outstanding invoices; discussions and agreement in relation to security costs; public/PCSP [Police and Community Safety Partnerships] /Council/DFI [Department for Infrastructure] /Planning Service consultation on any settlement/agreement; future meetings with companies, and how any financial agreement will impact local policing budgets and 'the public purse'. In engaging this exemption, PSNI considered Information Tribunal case law 'Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)' which described Legal Professional Privilege as:

'a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation'."

44. PSNI told the Commissioner it considers that LPP protects the confidentiality and substance of communications between a client, in this case the PSNI, and its legal adviser. PSNI said:

"This interpretation is supported by the following statement made by Mr Justice Mann in paragraph 20 of 'USP Strategies v London General Holdings Ltd [2004] EWHC 373 (Ch.)':

'The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice'.

The fact of whether a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications or the confirmation or denial that information is held would in and of itself disclose legally privileged information. Section 42(2) removes the duty to confirm or deny requested information is held if doing so would involve the disclosure of any legally privileged information (whether held or not)."

45. PSNI also provided additional information in confidence to the Commissioner which she is not at liberty to reproduce here, although she has taken it into consideration in reaching her decision in this case.

46. The Commissioner considers that parts 1, 3, 5, 6, 7 and 8 of the request are worded in a detailed way, which means that confirmation or denial as to whether or not any information is held in response to them would in itself be revealing. As to whether what would be revealed would be subject to LPP, the Commissioner accepts that confirmation or denial would reveal a significant amount about the substance of any advice which may, or may not, have been given. This means that the confirmation or denial can in itself be subject to LPP and the Commissioner finds that section 42(2) is engaged.
47. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness and transparency of PSNI and the public interest in the maintenance of LPP, as well as those factors that apply in relation to the specific information in question here.

Public interest in favour of confirmation or denial

The complainant's view

48. The complainant did not provide any specific public interest arguments, other than stating:

"Its [sic] my belief that these matters are of the utmost importance to the public."

PSNI's view

49. In favour of the provision of the confirmation or denial, PSNI said:

"Public authorities should be accountable for the quality of decision making processes. There is a public interest in confirming or denying if any information is held in the interests of transparency and informing the public."

Public interest against confirmation or denial/maintenance of the exemption

50. As to the public interest in favour of maintenance of the exemption, in any case where section 42 is found to be engaged, it is necessary to take into account the inbuilt public interest in this exemption; that is the public interest in the maintenance of LPP. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt

interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (paragraph 35).

51. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42 is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
52. PSNI submitted the following arguments against the provision of the confirmation or denial:

"Decisions by public authorities should be made in a fully informed legal context. There is a strong public interest in protecting confidential communications (whether held or not) between a lawyer and a client and in protecting PSNI's ability to seek legal advice. Without recourse to such advice, a public authority's decision making may be compromised because it will not be fully informed."

Balance of the public interest arguments

53. In this case whilst the Commissioner has recognised the public interest in favour of provision of the confirmation or denial, she does not believe that this is of sufficient weight to outweigh the in-built public interest in favour of the maintenance of LPP. Her conclusion is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. PSNI was not, therefore, obliged to confirm or deny whether it held information falling within the scope of the parts of the request it was applied to.

Right of appeal

54. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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

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