

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

### **Decision notice**

**Date:** 30 September 2022

**Public Authority:** Northern Ireland Policing Board

**Address:** Waterside Tower  
31 Clarendon Road  
Clarendon Dock  
Belfast  
BT1 3BG

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

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1. The complainant has requested information from the Northern Ireland Policing Board (NIPB) regarding the procedure for making a claim for an injury award under various statutory provisions. NIPB provided the complainant with some information, however it refused to disclose the remainder, citing section 40(2) of FOIA as a basis for non-disclosure. It also stated that it did not hold some of the requested information.
2. The Commissioner's decision is that NIPB has correctly applied section 40(2) of FOIA to the information it has withheld ("the withheld information") and that, on the balance of probabilities, it holds no further information within the scope of the complainant's request other than that which it has already provided to them.
3. The Commissioner therefore requires no steps to be taken by NIPB.

## Request and response

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4. On 10 October 2020 the complainant made the following request for information to NIPB:
    - “1. The criteria NIPB have used in reaching the decision to exclude my chosen representative.
    2. The legal basis upon which NIPB have disqualified my chosen representative.
    3. The legal basis in demanding I appoint another representative....when my current representative has no legal impediment that I am aware of, which disbars him from acting for me.
  - 4 (a) In light of the actions of NIPB, I make a subject access request about any reasonable adjustments, psychological impact assessment, or any mitigation about the effect the letter would have before NIPB sent the letter to a vulnerable person.
  - (b) The number of letters like mine sent by NIPB to people suffering with [specified condition] about their choice of representative.
  5. The total number of letters sent by NIPB about my chosen representative.
  6. The appeals procedure in respect of the NIPB decision of 28 September 2020, and why the appeals procedure was not published or accessible.”
5. The NIPB responded on 6 July 2021, providing the complainant with some information in response to his request (2-4 and 6) and citing section 40(2) of FOIA as a basis for not disclosing information in response to parts 1 and 5 of the complainant’s request.
  6. The complainant sought an internal review on 6 July 2021. A response to this was provided by NIPB, following correspondence from the Commissioner, on 26 August 2021. The review response examined the NIPB’s handling of the complainant’s request point by point. It acknowledged procedural elements in relation to its handling of the request and upheld the original decision in respect of its application of section 40(2) to parts 1 and 5 of the complainant’s request. It also now sought to apply section 40(2) of FOIA to part 4(b) of the complainant’s request in respect of the total number of letters sent to

NIPB about the chosen representative. In respect of part 4(a) it acknowledged that it had not previously fully answered this and stated that NIPB held no further recorded information in respect of this under FOIA.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 6 July 2021 to complain about the way their request for information had been handled.
8. The Commissioner has considered the NIPB's handling of the complainant's request, in particular its application of the section 40(2) exemption to parts 1, 4 (b) and 5 of the request and its assertion that it does not hold further recorded information within the scope of part 4 (a) of that request.

## **Reasons for decision**

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### **Section 40 -personal information**

#### **Section 40(1) of FOIA**

9. In relation to part 4(b) of the request, the Commissioner is of the view that this is the personal data of the complainant. The information clearly relates to the complainant as it is about the complainant's choice of representative and also the wording of the request suggests that the complainant themselves has the specified condition, which is clearly their personal data.
10. Given his dual role as the regulator of data protection legislation, the Commissioner has a responsibility to prevent personal data being inadvertently disclosed under FOIA. He has therefore applied section 40(1) of FOIA to part 4(b) of the request himself, proactively to prevent any possibility that the information might be disclosed under FOIA.

#### **Section 40(2) of FOIA**

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

15. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. NIPB has stated that the withheld information is personal data as it relates to an individual who is acting as a 'representative' for a number of applicants for injury awards under the Regulations. The individual is not employed or engaged by NIPB in any way rather they are a private citizen performing a role in their personal capacity.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

## **Section 40(1) of FOIA**

20. In relation to part 5 of the request, the Commissioner is of the view that this is the personal data of the complainant. The information clearly relates to the complainant as it is about the complainant's choice of representative in respect of an application for injury award and also the wording of the request suggests that the complainant themselves has the specified condition, which is clearly their personal data.
21. Given his dual role as the regulator of data protection legislation, the Commissioner has a responsibility to prevent personal data being inadvertently disclosed under FOIA. He has therefore applied section 40(1) of FOIA to part 5 of the request himself, proactively to prevent any possibility that the information might be disclosed under FOIA.
22. In the circumstances of this case, having considered the remaining withheld information, the Commissioner is satisfied that the information relates to both the representative in question and other individuals. He is satisfied that the representative could be identified from it.
23. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

26. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
27. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

29. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

### **Lawful processing: Article 6(1)(f) of the GDPR**

30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.
32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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<sup>2</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

34. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

35. In considering the release of information that is deemed to be personal data of a third party (the representative) NIPB identified that there is a legitimate interest in being open and transparent in regards to how it conducts the process for injury awards under the Regulations.

#### **Is disclosure necessary?**

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

37. The NIPB concluded that disclosure of this level of information was not necessary for the following reasons –

- The withheld information relates to an individual who is acting as a 'representative' for a number of applicants for injury awards under the Regulations.
- The individual is not employed or engaged by the Board in any way rather they are a private citizen performing a role in their personal capacity.

- The criteria applied to reach the decision to exclude the 'representative' from having contact with the Board was based on consideration of a number of factors that are specific to that individual. By disclosing the criteria used it would reveal very specific information about the behaviours / actions of the individual.
- While this information is clearly of interest to the complainant there is no identified pressing social need for disclosure of the information into the public domain.

38. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

### **The Commissioner's view**

39. The Commissioner has therefore decided that the NIPB was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Information not held**

#### **Section 1 of FOIA**

40. Section 1 of FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
41. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
42. In this case NIPB has explained that the part of the request regarding which it holds no further recorded information is part 4 (a) of the request. NIPB states that the letter it sent to the complainant to advise them of the situation regarding their representative was part of normal course of business and there was no other requirement, legislative or otherwise, to necessitate NIPB conducting any sort of assessment before doing so.

43. The Commissioner has not been presented with any evidence that counters NIPB's position that it holds no further recorded information in relation to question 2 of part 4 of the complainant's request as an assessment of the type specified by the complainant was not carried out as this was not a requirement.
44. The complainant also referred to the 'legal basis' upon which NIPB excluded their representative and had alluded to certain legislation being applicable. NIPB informed the Commissioner that this legislation did not appear to apply in the case of the complainant, who had provided no evidence that it did apply, and that therefore there was no requirement for NIPB to consider that legislation. It therefore did not require a 'legal basis' to exclude the representative and as such holds no recorded information about this.
45. FOIA only applies to recorded information held at the time a request is received. The Commissioner cannot require a public authority to create new information in order to satisfy a complainant's request.
46. The Commissioner, based on the above, concludes that on the balance of probabilities NIPB has provided all the information it holds falling within the scope of the request.

**Right of appeal**

47. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.

49. 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**