

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 7 November 2022

Public Authority: Police Ombudsman for Northern Ireland
Address: New Cathedral Buildings
St Anne's Square
11 Church Street
Belfast
BT1 1PG

Decision (including any steps ordered)

1. The complainant requested information relating to an investigation conducted by the Police Ombudsman for Northern Ireland. The Police Ombudsman refused to confirm or deny that it held the requested information, relying on section 44(2) of FOIA (statutory prohibitions on disclosure).
2. The Commissioner's decision is that the Police Ombudsman was entitled to rely on section 44(2). He does not require any steps to be taken.

Background to the requests

3. The two requests for information in this case relate to the McGurk's Bar bombing of 4 December 1971, in which fifteen people were killed.
4. The Police Ombudsman issued a report in 2011 that identified "investigative bias" in the police investigation into the bombing.¹

¹ <https://www.policeombudsman.org/Investigation-Reports/Historical-Reports/Investigative-bias-undermined-police-inquiry-Polic>

5. In June 2022 the High Court ordered the quashing of a police report produced in 2014 that had found "no bias" in the investigation.²

Request and response

6. On 31 August 2021 the complainant submitted two requests to the Police Ombudsman:

"Request 1

Its [sic] is a record from 39 Brigade Commander's Diary, Serial 12, 0100 hours 5th December 1971, which states that the Brigade Commander of 39 Brigade, then Brigadier Frank Kitson (now retired General Sir Frank Kitson) informed Brigade staff (and thereafter Headquarters Northern Ireland):

"RUC have a line that the bomb in the pub was a bomb designed to be used elsewhere, left in the pub to be picked up by the Provisional IRA. Bomb went off and was a mistake. RUC press office have a line on it – NI should deal with them."

1. Could you confirm that OPONI has considered this evidence and when OPONI considered it as I see no record of it in its 2011 report into the massacre?

2. If OPONI has considered and investigated, could you provide me with the background information to this secret agreement between the British Army and Royal Ulster Constabulary relating the bombing of McGurk's Bar, please, including:

- the minutes of this agreement and discussion between the British Army and/or General Sir Frank Kitson and RUC;

- the provenance of the RUC "line" or alleged intelligence including its source, its content and timing;

2

<https://www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Bridget%20Irvine%20-%20Court%20Quashes%20HET%20Report%20into%20McGurk%27s%20Bar%20Bombing.pdf>

- details of liaison with RUC press office to manage the dissemination of this "line" including who gave it to RUC press office and who RUC press office briefed; for example, RUC/British Army may have had to liaise with Hugh Mooney or Clifford Hill of the Information Research Department to get clearance for this "line". Both of these men worked directly under the UK Representative and his office at the time.

- Any further information between the British Army and/or General Sir Frank Kitson and RUC relating to this "line" after this initial secret agreement.

Request 2

May I request the provenance, dates and source (with any names redacted, of course) of the intelligence contained within "Special Branch Assessment for the Period Ended 15th December 1971" which was used as a briefing at a Joint Security Committee meeting on 16th December 1971 (1971/Joint Sec/50), please? OPOINI had been directed to this file and recorded it in its 2011 report.

Chief Constable Shillington and Assistant Chief Constable Johnston (Head of Special Branch) gave the briefing to the Northern Ireland Prime Minister and the General Officer Commanding.

I have the minutes and assessment if it helps but I am seeking proof of the assessment, Serial 5 which regarded the McGurk's Bar explosion of 4th December 1971 and alleged:

"Circumstantial evidence indicates that this was a premature detonation and two of those killed were known IRA members at least one of whom had been associated with bombing activities. Intelligence indicates that the bomb was destined for use elsewhere in the city."

Can you email me, please, proof that this was intelligence in police stores along with provenance, dates and source etc. For example:

- What circumstantial evidence indicated premature detonation (we know it was not)
 - Which two of those killed were alleged to be IRA, which was an alleged bomber and where that information came from or if it existed (we know that police alleged one was IRA but not two)
 - What was the intelligence that alleged it was destined for other premises and where did it come from or did that ever exist.”
7. The Police Ombudsman responded to both requests on 1 October 2021 (albeit that the refusal notice was dated 30 September 2021), refusing the requests under sections 31(1)(g) and 44(1)(a) of FOIA. The complainant requested an internal review on the same day.
 8. The Police Ombudsman issued the outcome of the internal review to the complainant on 7 March 2022. It clarified that it was refusing to confirm or deny that it held the requested information, citing sections 31(1), 41(2) and 44(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 15 March 2022 to complain about the way his request for information had been handled.
10. The Commissioner notes that the Police Ombudsman’s final position was to refuse to confirm or deny that it holds the requested information. Therefore the scope of the Commissioner’s investigation is to consider whether the Police Ombudsman was entitled to issue a “neither confirm nor deny” response. The Commissioner is not required to determine the extent to which the requested information is held, or whether any information should be disclosed.

Reasons for decision

Section 44: statutory prohibition on disclosure

16. Section 44(1)(a) provides an exemption from disclosure under the FOIA for information which is prohibited from disclosure under any law or enactment. Section 44(2) further provides that a public authority is not required to confirm or deny that the requested information is held if such confirmation or denial would fall within the scope of section 44(1)(a).

17. The Police Ombudsman advised the complainant that section 63 of the Police (Northern Ireland) Act 1998 (the Police Act) provides a statutory prohibition on disclosure of information. The relevant provision is as follows:

"(1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies..."
18. The Commissioner notes that section 63 relates to the Police Ombudsman and to any officer of the Police Ombudsman. It provides that the Police Ombudsman and her staff are not permitted to disclose any information received in connection with the Police Ombudsman's functions, except in very limited circumstances.
19. The Commissioner has considered the wording of the request in this case. He is satisfied that the information, if held, would have been obtained or received by the Police Ombudsman in connection with her functions, ie the investigation that led to the report that was published in 2011. Consequently the Commissioner finds that the requested information, if held, would fall within the scope of the statutory prohibition contained within section 63(1) of the Police Act.
20. The Commissioner is further satisfied that responding to an information request made under FOIA is not one of the reasons for disclosure provided for in subsections a) – e) of section 63 of the Police Act. Therefore the Commissioner concludes that the requested information, if held, may not be disclosed under FOIA.
16. The complainant argued to the Commissioner that the Police Ombudsman's report issued in 2011 had not addressed the issues raised in his request. The Commissioner acknowledges that the complainant has legitimate personal reasons for making his request. However, FOIA only provides for information to be disclosed to the public, and it cannot override statutory prohibitions on disclosure.
17. Accordingly, the Commissioner finds that the Police Ombudsman was entitled to rely on section 44(2) of FOIA, by virtue of section 63 of the Police Act. The Police Ombudsman was not required to confirm or deny that it held the requested information.
18. Section 44(2) is not subject to the public interest test therefore the Commissioner is not required to consider the public interest in confirming or denying that the requested information is held.

19. Since the Commissioner is satisfied that the Police Ombudsman was entitled to rely on section 44(2) in respect of the entirety of the request, he is not required to consider the other exemptions claimed.

Other matters

11. The Commissioner notes that the Police Ombudsman took five months to conduct the internal review in this case.
12. Although there is no statutory time limit for internal reviews, the Commissioner considers that public authorities should take no longer than 20 working days in most cases, and no longer than 40 working days in any case.

Right of appeal

13. 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

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

14. 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.
15. 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**