

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2023

Public Authority: Chief Constable of the Police Service of Northern Ireland

Address: 65 Knock Rd
Belfast
BT5 6LD

Decision (including any steps ordered)

1. The complainant has requested details of criminal investigations she believes were opened into two judges, one of whom she named. The above public authority ("the public authority") relied on section 30 (criminal investigations) and section 40(5B) of FOIA (third party personal data) in order to refuse to confirm nor deny that it held any relevant information.
2. The Commissioner's decision is that the public authority was entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny that it held any information about the named judge. In respect of the un-named judge, the Commissioner is satisfied that section 30(3) of FOIA is engaged and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 19 September 2022, the complainant wrote to the public authority and, referring to one named judge and one un-named judge, requested information in the following terms:

"In March 2021 PSNI Musgrave opened an investigation into 2 members of the NI Judiciary...please disclose the details of the original issues brought to the PSNI about these 2 Judges, under FOI law within 28 days [sic]."

5. The public authority responded on 17 October 2022. It refused to confirm or deny that any information within the scope of the request was held, relying on sections 30 and 40 of FOIA in order to do so.
6. Following an internal review the public authority wrote to the complainant on 8 November 2022. It appeared to change its position slightly, in that it now relied on section 31(3) of FOIA instead of 30(3), but, in a subsequent submission to the Commissioner it confirmed that section 30(3) was the exemption on which it wished to rely.

Reasons for decision

7. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that it holds information if the mere act of confirmation or denial would disclose the criminal offence data of an identifiable individual.
8. The only exceptions to this rule are if the identifiable individual had already placed the personal data in the public domain themselves or if they had given their consent for the personal data to be revealed.
9. The request itself named a particular judge and seeks information about a criminal investigation allegedly opened into their conduct by the public authority. If the public authority were to confirm or to deny that it held the information it would be confirming whether or not the named judge had been the subject to a criminal investigation. That would be the judge's criminal offence data and, as there is no indication that the judge has placed this personal data in the public domain, or given consent for the public authority to do so, it follows that the public authority is entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny that the information is held.
10. In respect of the un-named judge, whilst this individual is allegedly one of a very low number of judges of a particular rank, the Commissioner is not satisfied that this individual is identifiable from the information currently in the public domain. Whilst the Commissioner cannot rule out that there are people who can identify this judge but are unaware of whether or not a criminal investigation has taken place, he does not consider that the public authority has demonstrated why a confirmation that information was held could be linked to an identifiable individual and therefore section 40(5B) would not apply. He has therefore gone on to consider whether section 30(3) of FOIA would apply instead.
11. A public authority is entitled to rely on section 30(3) of FOIA to refuse to confirm or deny whether it holds information that would (if it were held) be held for the purposes of a criminal investigation.

12. The Commissioner considers any information that the public authority did hold within the scope of the request (if indeed it held any) must, by definition, be held for the purpose of a criminal investigation. The exemption is therefore engaged.
13. Turning to the public interest, the Commissioner recognises that there is a reasonably strong public interest in understanding whether members of the judiciary (particularly relatively senior members of the judiciary), who are of course tasked with upholding the law, have themselves broken it.
14. However, the Commissioner considers that the stronger public interest is in knowing whether the public authority has found sufficient evidence to justify an arrest or charge of a member of the judiciary – rather than that a criminal allegation (of unknown merit) has been made.
15. If the public authority were to confirm that it held information, it would only be confirming whether it had received an allegation, not whether it considered that a criminal offence had indeed been committed. Any allegations that had been made could have been entirely without merit.
16. If any allegations have been made that have merit, revealing that fact, or the status of any investigation could provide the perpetrator with useful information of which they would otherwise be unaware.
17. Whilst denying that any information was held (if indeed that was the public authority's true position) would be unlikely to be harmful to the individuals involved, the public authority cannot refuse to confirm or deny holding information only when information is actually held.
18. Finally, the Commissioner notes that, whilst he is not persuaded that the judge in question is easily identifiable, the evidence in the public domain indicates that the data subject is one of a very small number of judges of a particular rank. He therefore considers that issuing a confirmation or a denial that any information was held would cast suspicion over all judges of that rank. At worst, all the judges could face suspicion over an allegation of criminal behaviour that has no merit. The Commissioner does not consider this to be in the public interest.
19. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Right of appeal

20. 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

21. 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.
22. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF