

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2024

Public Authority: Police Service of Northern Ireland
Address: Police Headquarters
65 Knock Rd
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation conducted by the Police Service of Northern Ireland (PSNI). PSNI refused to confirm or deny that it held the requested information, citing section 30(3) (investigations), section 38(2) (health and safety) and section 40(5B)(a)(i) (third party personal data) of FOIA.
2. The Commissioner's decision is that PSNI was entitled to rely on section 40(5B)(a)(i) to refuse to confirm nor deny whether it held the requested information. No steps are required.

Request and response

3. On 2 November 2023, the complainant wrote to PSNI and requested information in the following terms:

The Historical Enquiries Team (under PSNI) produced a fingerprint ledger from RUC/PSNI files which proved that the RUC recovered 3 articles of evidence (Appendix 4 HET report, Fingerprint References 233 – 235). THET references it in Appendix 4 as "FINGERPRINT BRANCH 992589025" if that helps.

We now know from this file that RUC recovered:

- A. 1 print at FP ref. 233/71D (an "anonymous letter re McGurks pub");
- B. 2 prints at FP ref. 234/71D (in "car used in explosion Gt. George St."), and;
- C. 2 prints at FP ref. 235/71D (another "anonymous letter re McGurk's pub")

I have attached the relevant part of the cropped file.

Print evidence relating to the mass murder of fifteen civilians including two children is obviously of critical importance, so can you tell me, please:

1. Are these prints in PSNI files today
 2. If not, do we know when they were lost
 3. If they are in PSNI files, have these prints been linked to any suspects
4. PSNI responded to the request on 30 January 2024, refusing to confirm or deny that it held the requested information. PSNI cited section 30(3) (investigations), section 38(2) (health and safety) and section 40(5B)(a)(i) (third party personal data) of FOIA.
 5. The complainant requested an internal review on 1 February 2024 and PSI provided them with the outcome of that review on 27 February 2024. PSNI maintained its refusal to confirm or deny that it held the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 28 February 2024 to complain about the way their request for information had been handled.
7. Since PSNI adopted a "neither confirm nor deny" (NCND) stance in response to the request, the Commissioner has not sought to establish whether the requested information is in fact held. He is required to consider only whether PSNI was entitled to refuse to confirm or deny that it held the requested information at the time of the request.

Reasons for decision

Section 40(5B)(a)(i) – neither confirm nor deny that personal data is held

8. 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.
9. Section 40(5B)(a)(i) of FOIA provides that a public authority may refuse to confirm or deny that it holds information if doing so would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (the UK GDPR).
10. Therefore, for PSNI to be entitled to rely on section 50(5B) of FOIA in this case, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data (ie someone other than the requester); and
 - Providing this confirmation or denial would contravene one of the DP principles.
11. 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 the main focus for an NCND response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.¹

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-two-can-you-confirm-or-deny-holding-the-requested-information/>

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

12. Section 3(2) of the Data Protection Act 2018 (the DPA) defines personal data as:

“any information relating to an identified or identifiable living individual”.

13. 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.

14. 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.

15. The Commissioner is disappointed that PSNI did not, either in its refusal notice or internal review, explain to the complainant how the requested information would, if it is held, comprise personal data within the meaning of the DPA.

16. The Commissioner has considered the wording of the request, ie the complainant's description of the information they wish to receive. Put simply, the complainant wishes to know whether PSNI holds fingerprint evidence gathered in connection with the McGurk's Bar bombing, and whether the fingerprint evidence has been linked to any suspects.

17. In light of the above, the Commissioner is mindful of his role as data protection regulator. He is satisfied that confirming or denying whether the information is held would result in the disclosure of a third party's personal data. This is because the requested information, if held, clearly relates to one or more identifiable individuals on the basis that an individual may be identified by their fingerprints. If PSNI denied that it held the requested information it would be stating that it did not hold this personal data.

18. The Commissioner cannot be certain that, if the information is held, it relates to one or more living individuals. He recognises that a public authority may not always know the whereabouts and status of an individual. Where there this is the case, however, there is a considerable privacy risk attached to the making of an assumption that an individual is deceased. In this case the requested information dates from 1971, 53 years before the request was made. If an individual was 18 in 1971 they would be 71 years old at the time of the request (if they were still alive).

19. Accordingly, and in the absence of information to the contrary, the Commissioner considers it reasonable to proceed on the assumption that if PSNI does hold the requested information, it relates to one or more living individuals.
20. The Commissioner has therefore decided that the requested information would, if held, constitute personal data. The Commissioner is further satisfied that the requested information, if held, would comprise criminal offence data. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences.
21. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) the alleged commission of offences by the data subject; and
 - (b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.
22. The Commissioner is satisfied that the information described in Part B of the request clearly relates to a criminal offence, namely fingerprints found in a car used for the McGurk's Bar bombing in 1971, in which 15 individuals were murdered. It therefore follows that this portion of the requested information, if held by PSNI, will comprise criminal offence data relating to one or more individuals or data subjects.
23. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a request for information under FOIA, if one of the conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.²
24. The Commissioner has considered each of these conditions and whether any of them could be relied on by PSNI to confirm or deny whether it holds criminal offence data falling within the scope of this request. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner finds that none of the conditions can be met.

² <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/criminal-offence-data/what-are-the-conditions-for-processing/>

25. The Commissioner observes that the Historical Enquiries Team has referred to fingerprint evidence being held by the then RUC at the time of the initial investigation in 1971. However this does not itself confirm that PSNI held the specific information requested by the complainant on 2 November 2023.
26. Since none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data protection principle (a). Therefore, the Commissioner finds that PSNI was entitled to rely on section 40(5) of FOIA to neither confirm nor deny whether it holds the information at part B of the request.
27. The Commissioner has gone on to consider whether PSNI was entitled to rely on section 40(5B)(a)(i) in respect of the remainder of the request. He is satisfied that this information, ie information relating to fingerprints found on correspondence, would be personal data of third parties. Furthermore the Commissioner acknowledges that information relating to fingerprints would comprise biometric data within the meaning of Article 4(14) of the UK GDPR:

“biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data”.³
28. The term ‘dactyloscopic data’ means fingerprint data.
29. Special category data is similar to criminal offence data in that it is afforded special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a request for information under FOIA, if one of the conditions of Article 9 can be met.⁴

³ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-is-special-category-data/#scd4>

⁴ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-are-the-conditions-for-processing/>

30. The Commissioner considers that the only Article 9 conditions that could be relevant to FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject).
31. The Commissioner has seen no evidence or indication that either of these conditions are satisfied, therefore he finds that there is no legal basis for processing. Consequently, confirming or denying that it is held would contravene principle (a) and PSNI was entitled to rely on section 40(5B)(a)(i).
32. The Commissioner is satisfied that PSNI was entitled to rely on section 40(5B)(a)(i) to issue an NCND response to the request. Therefore he has not gone on to consider PSNI's reliance on section 30(3) or section 38(2).

Procedural matters

Section 1: general right of access

Section 17: refusal notice

33. Section 1(1)(a) of FOIA requires a public authority to inform the requester in writing whether or not recorded information is held that is relevant to the request, unless an exemption or exclusion applies. Section 17(1) states that a public authority that is relying on an exclusion from the duty to confirm or deny should provide the requester with a refusal notice within the same timescale.
34. In this case PSNI took two months to respond to the complainant's request. This clearly exceeds 20 working days, therefore the Commissioner finds that PSNI failed to comply with section 17(1) of FOIA.

Right of appeal

35. 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

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF