

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 November 2007

Public Authority: Public Prosecution Service for Northern Ireland
Address: Belfast Chambers
93 Chichester Street
Belfast
BT1 3JR

Summary

The complainant made a request to the Public Prosecution Service for Northern Ireland ("PPS(NI)") for a copy of any psychiatric or probation report or any character references on Robert Lesarian Howard. Mr Howard was acquitted of the murder of Arlene Arkinson in June 2005. The PPS(NI) withheld the requested information relying on exemptions under sections 30(1)(a)(i) and (ii), 30(1)(b) and 30(1)(c) (investigations and proceedings conducted by public authorities) and 40(2) (personal data relating to third parties) of the Act. The complainant appealed to the Information Commissioner (the Commissioner). The Commissioner has not upheld the complaint as he is satisfied that the PPS(NI) was correct to withhold the information requested under section 40(2) of the Act, since its disclosure would breach data protection principles.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The Information Commissioner ("the Commissioner") has received a complaint which states that the following request for information was made to the PPS(NI) in accordance with section 1 of the Act:-

"I would like a copy of any psychiatric report or any probation report or any character references on Robert Lesarian Howard who was acquitted of murdering Arlene Arkinson". ("the request").

The report covered by the request is a psychiatric report about Robert Lesarian Howard which was compiled in January 1995 by Dr Ian Bownes, Forensic Psychiatrist (the Report). The Report was compiled following an order of the Court made during the trial of Mr Howard for the alleged rape of a teenage girl.

3. On 23 January 2007 the PPS(NI) corresponded with the complainant to inform him that it was unable to provide the Report as it was subject to exemptions under sections 30(a)(i) and (ii), (b) and (c), 38(1) (a) and (b) and 40(2) and (3) of the Act.
4. On 1 February 2007 the complainant corresponded with the PPS(NI) to request an internal review of its decision to refuse to disclose the Report.
5. On 23 February 2007 the PPS(NI) corresponded with the complainant informing him of the result of the review. This correspondence stated that the decision had been made that the exemption under section 38 of the Act would no longer be relied upon. However, the PPS(NI) also confirmed that the Report could not be disclosed as the exemptions under sections 30(1)(a)(i), 30(1)(b) and 30(1)(c) of the Act applied.

Background to the Request

6. Mr Howard was convicted of murdering a teenage girl, whose body was found in Northfleet, Kent, in March 2002, for which crime he received life imprisonment. He subsequently stood trial in 2005 at Belfast Crown Court for the murder of another teenage girl, Arlene Arkinson, who had disappeared from her home town in August 1994. Her body was never found. Details of Mr Howard's previous criminal record were not revealed at the second trial. The PPS(NI) did not ask the judge to consider making the trial jury aware of Mr Howard's convictions. Subsequently, Mr Howard was acquitted of the murder by a 10 to 2 majority verdict.
7. Following this acquittal, the Director of Public Prosecutions ("DPP"), in consultation with the Attorney General, asked Sir John MacDermott, a retired judge of the Court of Appeal, to review the prosecutorial decisions taken by the PPS(NI) in both the case of Miss Arkinson and the previous case in 1995 involving the alleged rape of a teenage girl. This course was taken following the enormous public concern expressed regarding Mr Howard's acquittal. The Police Ombudsman for Northern Ireland ("PONI") conducted an investigation into how the PSNI carried out its investigation. Conclusions were that lessons had been learned and, on the whole, current PPS(NI) and PSNI practices were satisfactory.
8. On 8 January 1995, during the course of the trial concerning the alleged rape of the teenage girl, the Court had ordered a psychiatric

assessment of the defendant for consideration by the judge when sentencing. That order gave rise to the compilation of the Report which is the subject of the request.

Scope of the case

9. On 26 February 2007 the complainant applied to the Commissioner for a decision as to whether his request had been dealt with in accordance with the requirements of the Act. The complainant specifically asked the Commissioner to consider the PPS(NI)'s application of the public interest test.

Chronology of the case

10. **26 February 2007.** The complainant submitted his complaint to the Commissioner via e-mail. On the same date the Commissioner replied to the complainant acknowledging receipt of his complaint and informing him that his case was to be allocated to a case officer. On 20 March 2007 a member of the Commissioner's staff telephoned the complainant providing a contact telephone number for the purposes of the investigation into his complaint.
11. **5 April 2007.** The Commissioner wrote to the PPS(NI) requesting a copy of the Report and detailed clarification of its application of the exemptions under the Act.
12. **2 May 2007.** The PPS(NI) telephoned the Commissioner and stated that the information held which was relevant to the complainant's request consisted solely of the Report. PPS(NI) confirmed that there were no other reports or character references relating to Mr Howard in its possession. The PPS(NI) also stated that it would make a copy of the Report available for collection by the Commissioner's staff at the PPS(NI) offices. The PPS(NI) discussed its application of the exemptions with the Commissioner who requested that these representations be submitted in writing. The Commissioner's staff collected the Report on 3 May 2007 and informed the complainant of this.
13. **14 June 2007.** The Commissioner corresponded with the PPS(NI) to request its written submissions in relation to the application of the exemptions. The PPS(NI) telephoned the Commissioner's office to state that these would shortly be sent via e-mail. During that telephone conversation, the Commissioner explored the possibility of resolving some of the issues in this case on an informal basis. The PPS(NI) stated that it was not agreeable to this. The Commissioner informed the complainant accordingly.
14. **21 June 2007.** The PPS(NI) contacted the Commissioner via e-mail providing its submissions in relation to the points raised in the

Commissioner's correspondence of 5 April 2007. The Commissioner has carefully considered same and sets out his conclusions below.

Analysis

Exemptions

Section 40 - Personal Information relating to third parties

The Personal Information

15. Section 40(2) of the Act is an exemption which relates to the personal information of persons other than the requestor. This provision creates an absolute exemption (one not subject to the public interest test) for information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 ("the DPA").
16. Personal data is defined in section 1(1)(a) of the DPA as:-

"data which relate to a living individual who can be identified:- from those data, or; from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."
17. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA, i.e. personal data consisting of information as to:-
 - (a) *the racial or ethnic origin of the data subject,*
 - (b) *his political opinions,*
 - (c) *his religious beliefs or other beliefs of a similar nature,*
 - (d) *whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),*
 - (e) *his physical or mental health or condition,*
 - (f) *his sexual life,*
 - (g) *the commission or alleged commission by him of any offence, or*
 - (h) *any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.*
18. The Commissioner is satisfied that the Report would fall within the definition of personal data within the DPA as it comprises mainly of information relating to Robert Lesarian Howard, who is a living individual and can be identified from those data. The Report was

prepared by a psychiatrist and focuses on Mr Howard's state of mind. It records the author's professional opinion concerning the state of mental health of Mr Howard and therefore contains mostly sensitive personal information relating to Mr Howard.

19. The Commissioner notes that the Report contains a residual amount of personal data, not of a sensitive nature, which relates to individuals other than Mr Howard. Although this information is limited in nature, the Commissioner is satisfied that those other individuals identified in the report would have had an expectation that their personal information was being provided in confidence.

The Data Protection Principles

20. The PPS(NI) refused to disclose the Report relying on section 40(3) of the Act. Section 40 (3) of the Act provides that this exemption will apply if disclosure of the information would contravene any of the data protection principles or breach a notice under section 10 of the DPA. Section 10 of the DPA entitles an individual to serve a written notice upon a data controller stating that processing his or her personal data would cause him or her unwarranted damage or distress. The Commissioner notes that no such notice has been served in this case, he must therefore consider whether there has been a breach of any of the data protection principles and considers that the first principle is the most relevant in this case.
21. The first Data Protection Principle requires as follows:-

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".
22. The Commissioner recognises that the interests of Mr Howard, who is the subject of the Report may be detrimentally affected by the disclosure of the Report, which was provided in confidence. He considers that in this case the Report was being provided to the PPS(NI) and the Court with the expectation that it was being provided in confidence and would only be used for the purpose for which it was obtained, namely the relevant court proceedings. The Commissioner notes that, during such court proceedings, the Report would not have been disclosed to the public at large, only to the judge and the relevant parties for the purposes of the sentencing process. The Commissioner notes that the Report was not discussed in open court and that therefore it had not lost the necessary quality of confidence. In the Commissioner's view the disclosure of the Report to the public would therefore be unlawful as it would breach confidentiality. In addition,

given the expectation of confidence, such disclosure would be unfair to the subject of the Report (Mr Howard) as well as the author.

23. The Commissioner is satisfied therefore that disclosure of the Report to the public under the Act would contravene the first principle. The Commissioner has also considered whether there is a condition for disclosure of the Report under schedule 3 of the DPA.
24. The Commissioner notes that Mr Howard has not given his explicit consent to the disclosure of the Report. PPS(NI) has indicated to the Commissioner that it did not consider it appropriate to seek such consent. Having considered the context of the Report and its contents, the Commissioner can find no condition under Schedule 3 of the DPA to justify the disclosure of the Report.
25. In conclusion the Commissioner considers that to disclose the Report to the public at large would breach the first data protection principle and is exempt from disclosure under section 40(2) of the Act.
26. PPS(NI) has claimed that a further exemption applies, namely the section 30(1) exemption. Although not required to do so in this case, given the particular background to his complaint and the sensitivity of the information contained in the Report, he has considered the PPS(NI)'s application of that exemption.

Section 30 – Investigations and proceedings conducted by public authorities

27. Section 30 of the Act exempts from disclosure information relating to investigations and proceedings conducted by public authorities. This is a qualified exemption and is one of the bases upon which the PPS(NI) withheld the Report. The PPS(NI) initially refused to disclose the Report, relying on sections 30(1)(a)(i), 30(1)(b) and 30(1)(c) (please see the attached Legal Annex). The Commissioner considers that PPS(NI) were wrong to do so. The Commissioner is satisfied that PPS(NI) does not hold the Report for the purposes of an investigation as provided for by sections 30(1)(a)(i) and 30(1)(b) of the Act. That is because, only the Police Service for Northern Ireland (PSNI) has power to conduct investigations in relation to crimes of such nature. The Commissioner notes that PPS(NI) role in this case was to conduct the relevant criminal proceedings.
28. In light of this, the Commissioner has concluded that 30(1)(c) (any criminal proceedings which the authority has power to conduct) is the relevant exemption which PPS(NI) ought to have considered in this case. The Commissioner is mindful that in order to establish that information is exempt under section 30(1)(c) of the Act there is no requirement on a public authority to establish prejudice to any proceedings. For the section 30(1)(c) exemption to apply, the information in question must be held for the purpose of “any criminal

proceedings which the authority has the power to conduct. In effect, there must be specific or particular criminal proceedings which the authority has the power to conduct". In effect, there must be specific or particular criminal proceedings with which the authority is concerned in order for it to rely on this exemption. In this case the Commissioner is satisfied as a result of his investigation that the Report was held for the purposes of the criminal trial relating to the alleged rape of the teenage girl.

29. The Commissioner notes that, where the information is exempt by virtue of section 30(1)(c) of the Act, it will remain exempt even if the particular purposes or purposes for which the information was retained is or are no longer material, justified or required, such as would be the case if an investigation resulted in a decision not to prosecute, or if criminal proceedings had concluded.
30. The Commissioner has considered in this case the Information Tribunal's decision in the case of Guardian Newspapers Ltd v The Information Commissioner and The Chief Constable of Avon & Somerset Police – Information Tribunal 6th March 2007 (EA/2006/0017) ("the Avon and Somerset case").
31. He considers therefore that section 30(1) (c) has been correctly relied upon by the PPS(NI) and the exemption is engaged in relation to the information contained in the Report. The Commissioner will therefore consider whether in all the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure.
32. Section 2 of the Act sets out the circumstances under which a public authority may refuse a request for information (see Legal Annex). According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*".
33. When applying the public interest test, a public authority has to decide whether, in all the circumstances of a particular case, it serves the interests of the public better to withhold or to disclose information. There is a presumption running through the Act that openness is, in itself, to be regarded as something which is in the public interest.
34. The Commissioner has considered the PPS(NI)'s balancing of the public interest factors when deciding whether to uphold this complaint. In the Avon and Somerset case the Information Tribunal considered in detail the application of section 30 to the information relating to a 27 year old investigation and the public interest arguments in favour of both withholding and disclosing the information. The Tribunal upheld

the Commissioner's original decision that there was a stronger public interest in withholding the information.

35. The Commissioner considers that the request for information in that case is similar to the Request. In the former case, the request was for all files held by Avon & Somerset Police in relation to the investigation into and subsequent trial of Jeremy Thorpe, a former Liberal Party leader, following allegations against him of conspiracy to commit murder.
36. The Commissioner has considered the PPS(NI) arguments on the competing public interest factors in detail in this case. The Commissioner considers that there is public interest, acknowledged by the PPS(NI), in allowing public scrutiny of the Report, namely:-
 - This may serve to increase the accountability and transparency of the PPS(NI) in the prosecution decision-making process by allowing individuals to understand the reasoning behind decisions made by it which may affect their lives.
 - This may further the understanding of and participation in the public debate concerning the appropriate punishment for individuals who commit serious crimes.
 - The publication of the information may encourage public confidence in the efficacy of prosecutorial decisions.
 - Disclosure would assist the public in understanding the particular sentence in this case.
37. The Commissioner has considered these arguments in the context of the Request. The PPS(NI)'s handling of the prosecution decision-making process in both the 1995 case and, in particular, that of Miss Arkinson's disappearance, has also come under considerable public scrutiny. There has been significant public debate surrounding both trials, fuelled greatly by the fact that Robert Howard was convicted and sentenced to life imprisonment in England in October 2003 for the murder of a teenage girl.
38. The Commissioner accepts that it could be argued that release of the Report would enable the public to see how the PPS(NI) handled the prosecution decision-making process. This would inform public debate on the prosecution of such crimes. However, the Commissioner considers that disclosure of the Report alone would not demonstrate how PPS(NI) arrived at its decision to prosecute.
39. The results of both PONI's investigation and Sir John McDermott's review are publicly available for scrutiny and the Commissioner considers that public debate as to decisions taken PPS(NI) in both cases is sufficiently informed by these results and would not be any

further informed by the release of the Report. In a sense, the public interest in openness and transparency has already been served in this case.

40. The Commissioner has also taken into account the possibility that Mr Howard could be re-tried or another person charged in connection with this matter. This would be more likely if Miss Arkinson's body were to be found, particularly in the light of advances in the use of DNA evidence. The PPS(NI) has stated that Should Miss Arkinson's body ever be found, a re-trial would be very likely. Should the Report be made publicly available, this might greatly prejudice the jury in any subsequent trial of Mr Howard or anyone else for the murder of Miss Arkinson. The Commissioner, while recognizing that there has already been significant public debate about Mr Howard's guilt or innocence, considers this to be a serious and compelling factor which goes to the very heart of the criminal justice system and weighs the balance in favour of non-disclosure in this case.
41. The Commissioner has also taken into account the fact that there was a UTV (Ulster Television) programme entitled "Under the Law" which aired on October 12 2005. This discussed extensively the issues surrounding the allegations against Mr Howard and his conviction and life imprisonment for the murder of the teenage girl in Kent. That programme also explored the actions of the PSNI, the PPS(NI) and the judge who sentenced Mr Howard for unlawful carnal knowledge. The Report was also mentioned, although it was quoted from selectively. It was indicated on the programme that the Report was not in the public domain. There was also a brief interview with Dr Ian Bownes, which dealt with the main issues in the Report. The Commissioner considers that the salient facts of the case are well known to the public and that the main points in the Report have also been aired for discussion by the public, and that therefore the public would be no better informed should the Report be released in its entirety.
42. The Commissioner has taken into account the age of the requested information in this case (the information is 12 years old). Parliament has specifically provided, in section 63(1) of the Act, that information which is exempt under section 30(1) of the Act should lose that exemption thirty years after it was created. This suggests that there is a public interest in maintaining the exemption for the 30 year period unless there are strong public interest arguments in favour of disclosure. The Commissioner, having regard to the Information Tribunal's observations in the Avon & Somerset case above that, "the existence of the thirty year exemption suggests that Parliament regarded *that period and no lesser period as the appropriate interval before relaxation of the exemption*" (paragraph 9) does not consider in this particular case that the public interest arguments in favour of disclosure are sufficiently strong to justify the premature release of the requested information.

43. The Commissioner has considered all of the competing public interest factors in this case. Having weighed those arguments in favour of maintaining the qualified exemption against those in favour of disclosure of the information, he has concluded that the arguments in favour of maintaining the exemption outweigh those in favour of disclosing the information. The Commissioner considers that the arguments regarding the age of the information and the Tribunal's ruling in the Avon and Somerset decision cited at paragraph 41 above, regarding the possibility of prejudice to any future trial or retrial and the fact that the investigation and decision by the PSNI and the PPS(NI) have already been exposed to public scrutiny are strong and compelling and outweigh the complainant's arguments in favour of support of disclosing the Report into the public domain.
44. Therefore he considers that, in all the circumstances of the case, the public interest in maintaining the exemption under section 30(1)(c) of the Act outweighs that in disclosure of the Report.
45. In reaching this conclusion, the Commissioner is mindful of the fact that, even when the Report becomes an historical record, it will still not be capable of disclosure because it comprises mainly of personal information. That is because the exemption under the Act for personal information remains regardless of its status as an historical record (see section 63 of the Act.)

Section 32 – Court records

46. The Commissioner has considered the application of the section 32 exemption to the Report. The Commissioner considers that, in all probability, the Report would constitute a court record under section 32 (1)(a) of the Act (see Legal Annex). However, the PPS(NI) has not sought to apply this exemption to the Report and the Commissioner does not propose to go into detail in this Decision Notice regarding the exemption as the Report is clearly covered by the exemptions under sections 30(1)(c) and 40(2) of the Act.

The Decision

47. The Commissioner's decision is that PPS(NI) was correct in its application of the exemptions under section 30(1)(c) and sections 40 (2) and(3) to the Report. He therefore does not uphold the complaint in this case.

Steps Required

48. In light of this conclusion, the Commissioner requires no steps to be taken.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX
Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 12th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant Extracts from the Freedom of Information Act 2000:-

Section 2 - Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

the information is exempt information by virtue of a provision conferring absolute exemption, or

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 30 - Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct, investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iii) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.”

Section 32 – Court Records

Section 32(1) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter.

Section 40 – Personal Information

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(iii) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 41(1) provides that –

“Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”