

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 31 July 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to specified police investigations. The Police Service of Northern Ireland (the PSNI) refused to confirm or deny whether it held the requested information under sections 23(5), 24(2), 30(3) and 40(5)(a). The Commissioner's decision is that the PSNI was entitled to refuse the request under the exemptions cited. The Commissioner does not require the public authority to take any steps in relation to the request.

Request and response

2. The complainant in this case was the victim of a number of incidents which were investigated by various police forces including the PSNI. The complainant is of the view that these incidents have not been properly investigated and has made several requests for information relating to the investigations.
3. The complainant originally submitted this request to the PSNI on 19 December 2010, and the PSNI refused it as vexatious under section 14 of the FOIA. The Commissioner issued a decision notice¹ on 8 November 2011, finding that the request was not vexatious. Therefore the PSNI was required to respond to the request, either by providing the

¹ Case reference FS50387372

requested information or by issuing a refusal notice under section 17 of the FOIA.

4. The complainant's request referred to two newspaper articles about an attempt to murder the complainant. It comprised six detailed questions about links between two murders and an attempt to murder the complainant, and whether the PSNI believed the IRA to have been involved in any of the incidents. The PSNI was investigating the two murders, but the attempted murder was being investigated by another police force, as it did not occur in Northern Ireland. The complainant's request is reproduced in full at Annex 1 at the end of this notice.
5. Following the Commissioner's decision the PSNI provided its revised response to the complainant's request on 13 December 2011. The PSNI refused to confirm or deny whether it held the requested information under sections 23(5), 24(2), 30(3) and 40(5)(a).

Scope of the case

6. The complainant has asked the Commissioner to consider the PSNI's application of the aforementioned exemptions.
7. Under section 50(2)(a) of the FOIA the Commissioner is not required to make a decision if the complainant has not exhausted the public authority's internal review process. However, the Commissioner is mindful that the PSNI had originally refused the request as vexatious, and reconsidered the request in order to issue the revised refusal notice. Given that the complainant first made his request in December 2010 the Commissioner considered it appropriate to proceed to an investigation without requiring the complainant to request a further internal review.
8. In the previous decision notice the Commissioner found that some of the requested information, if it were held, was likely to be the complainant's personal data. The decision notice explained that the Commissioner conducted a separate assessment under section 42 of the Data Protection Act 1998 (the DPA).
9. In light of the above the Commissioner's investigation in this case is similarly limited to those parts of the request which do not relate to the complainant's personal information. The Commissioner also wishes to stress that his decision relates only to the issue of the exemptions relied upon – i.e. whether or not the PSNI was entitled to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the PSNI actually holds any of the requested information, or whether any information which may be held should be disclosed.

10. During the course of the investigation the PSNI advised that it was no longer seeking to rely on the exemption at section 30(3) in relation to parts 5 and 6 of the complainant's request. The PSNI confirmed that it now sought to rely on the exemption at section 31(3) to neither confirm nor deny whether it held this information. The Commissioner has discretion as to whether or not he will allow a public authority to rely on additional exemptions during his investigation. Given the circumstances of this case the Commissioner has decided to allow the PSNI to switch reliance from section 30 to section 31 in relation to parts of the request. The two exemptions are designed to protect similar interests, but are mutually exclusive. This means that both can not apply to the same piece of requested information. The Commissioner considers them to be closely linked, and understands that it may on occasion be difficult to identify which is the correct exemption to apply to a particular piece of information. Therefore the Commissioner considers it appropriate to allow the PSNI in this case to reconsider its position and amend its arguments accordingly.

Reasons for decision

Exemptions claimed

11. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise the applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny in reliance on certain exemptions under the FOIA.

Section 40(5): Personal information

12. The PSNI cited section 40(5) of the FOIA to refuse to confirm or deny whether it held information relevant to the complainant's request which would constitute the complainant's personal information. Section 40(5) provides that the duty to confirm or deny does not arise in relation to information that does, or would if it were held, fall within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA.
13. As indicated above the Commissioner has previously found that some of the relevant information, if held, will be personal data relating to the complainant. The Commissioner is satisfied that the PSNI is not required to confirm or deny under the FOIA whether it holds information which, if held, would be the personal data of the complainant, by virtue of the exemption at section 40(5).

Section 30(3): investigations and proceedings

14. The PSNI relied on section 30(3) in respect of the requested information at parts 1-4 of the request, to the extent that, if it were held, it would not be the personal data of the complainant. Parts 1-4 of the complainant's request were for information relating to possible links between his attempted murder in 1999 and the murder of two other individuals.
15. Section 30(3) provides an exemption from the duty to confirm or deny in relation to any information, whether held or not, that falls within any of the classes specified in sections 30(1) or 30(2). In this case the PSNI considers section 30(1)(a)(i) to be the relevant class.
16. Section 30(1)(a)(i) applies to information that was at any time held by the public authority for the purposes of an investigation that the public authority has a duty to carry out with a view to it being ascertained whether a person should be charged with an offence. In addition the information in question must relate to a specific investigation; not to investigations in general.
17. The PSNI clearly has a duty to carry out investigations which fall under the exemption at section 30(1)(a)(i). Although the PSNI was not responsible for investigating the complainant's attempted murder, it was responsible for investigating the two murders specified by the complainant. Therefore, if the PSNI held information relating to links between the two murders and the attempted murder, it would be held partially at least for the purposes of the two murder investigations. As the PSNI investigations into the two murders would fall under the scope of section 30(1)(a)(i), the Commissioner is satisfied that the exemption is engaged. As this is a qualified exemption the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of confirming or denying that information is held

18. The PSNI accepted that confirming or denying that information is held would assist the public's understanding of how the PSNI operates. In particular the PSNI identified a benefit in assisting the quality and accuracy of public debate about the effectiveness of the police.
19. The PSNI also acknowledged that confirming or denying that information is held may encourage trust among the public that the PSNI is acting effectively and efficiently. It would also inform the public as to how the PSNI considered potential links between crimes when investigating them.

20. The complainant is of the view that he should be given relevant information as the victim of the attempted murder.

Public interest arguments in favour of maintaining the refusal to confirm or deny whether information is held

21. The PSNI explained to the Commissioner that no-one had been charged in connection with the two murders. Therefore the investigations were still "live", with the aim of bringing possible perpetrators to justice in the future. The PSNI argued that confirming or denying that information was held would have a detrimental effect on any investigation as it would inform the public – including potentially the perpetrator(s) – as to the extent and quality of evidence gathered, as well as the progress of such an investigation and lines of enquiry.
22. The PSNI argued that there was a strong public interest in protecting its ability to conduct (or not to conduct) investigations effectively. If the PSNI were to confirm or deny what information it held in this case the investigation would be hampered, which would not be in the public interest. This is particularly relevant given that the complainant's request comprised several detailed questions about the PSNI's investigation of the attempted murder and the evidence obtained.
23. The PSNI also argued that the complainant's attempted murder was perceived as particularly sensitive, as allegations had been made about paramilitary groups, as well as the security services. The PSNI claimed that there was an overwhelming public interest in safeguarding the integrity of police investigations in highly sensitive areas.
24. The PSNI provided some arguments in relation to routine confirmation or denial that information of the nature requested is held. While not irrelevant, the Commissioner would remind public authorities that each request must be considered on its own merits.

Balance of the public interest

25. The Commissioner is of the view that the public interest in maintaining the refusal to confirm or deny that information is held will often diminish over time. In this case the two murders and the attempted murder took place over ten years ago. However, the Commissioner is also mindful that no-one has been charged in connection with any of these incidents. He considers this to be a strong public interest argument in favour of maintaining the refusal to confirm or deny. Although the public has a legitimate interest in the work of the PSNI, this does not extend to information which would prejudice ongoing investigations. The Commissioner has expressed similar views in a number of cases relating

to live investigations, and he sees no reason to take a different approach in this case.

26. The Commissioner acknowledges that some information has been put into the public domain by the complainant, and some has been published in various media. However the Commissioner is of the view that this can not equate to official disclosure of information by the PSNI, therefore he attaches limited weight to it as an argument in favour of confirming or denying that information is held. The Commissioner has seen no evidence to suggest that the PSNI has publicly confirmed or denied that it holds the requested information.
27. The Commissioner recognises that the complainant has personal reasons for making the request, as he alleges that he has been the victim of crime and is dissatisfied with the police investigations. However, the Commissioner has stressed to the complainant that the FOIA is motive-blind. This means that the Commissioner can only decide whether confirmation or denial that information is held should be put into the public domain.
28. The Commissioner appreciates that there is a general public interest in informing the public about how police forces investigate serious crimes, and allowing proper scrutiny of such issues. The Commissioner also understands that there will be a legitimate public interest in the public being informed as to how these particular incidents, given their high profile and sensitive nature, have been investigated.
29. The Commissioner has considered the various arguments in detail, and concludes that the arguments in favour of maintaining the refusal to confirm or deny that information is held are compelling. The Commissioner finds that the arguments in favour of maintaining the refusal far outweigh the arguments in favour of confirming or denying that information is held. Therefore the Commissioner finds that the PSNI was entitled to rely on the refusal to confirm or deny provided by section 30(3) of the FOIA.

Section 31(3): law enforcement

30. Questions 5 and 6 of the complainant's request refer only to the attempted murder of the complainant. As noted above, this incident was not investigated by the PSNI but by a different police force as it occurred outside Northern Ireland. Therefore the PSNI was unable to rely on section 30(3), and sought instead to rely on section 31(3) in order to neither confirm nor deny that information was held.
31. Section 31(3) provides an exemption from the duty to confirm or deny where to do so would, or would be likely to, prejudice any of the law

enforcement functions set out at sections 31(1)(a)-(i). For the exemption to be engaged it must be at least likely that the prejudice identified would occur. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

32. Although the PSNI did not specify a particular subsection, it referred to the "detection of crime and prosecution of offenders". The Commissioner considers that these functions correspond to sections 31(1)(a) and (b):

*"(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders"*.

33. The PSNI argued that confirming or denying whether information was held in this case *would* assist offenders, which *could* undermine an investigation. The Commissioner takes this to mean that confirming or denying would be likely to, rather than would, cause the prejudice identified above.
34. The PSNI argued that confirmation or denial of its involvement in another police force's investigation would inform the public as to whether the PSNI had an interest in that investigation. The complainant has publicly expressed his view that the IRA attempted to murder him, and confirmation or denial that the PSNI was involved in the investigation could assist the perpetrator(s) by providing an indication of lines of enquiry or intelligence received. This could in turn enable them to evade detection or apprehension, which would obviously have a detrimental impact on the police investigation.
35. The PSNI also argued that confirming or denying that information was held would reveal policing tactics regarding who or what was of interest to the police generally. It could indicate patterns of correspondence (or the absence of such correspondence) which could inform criminals as to the level and nature of co-operation between police forces.
36. The Commissioner notes that the functions described at sections 31(1)(a) and 31(1)(b) are not limited to those carried out by the PSNI. In this case the Commissioner accepts that confirmation or disclosure of information relating to another police force's investigation would be likely to prejudice that investigation and make it less likely that the perpetrators be caught. This is of particular relevance since no individual has been prosecuted in connection with the attempted murder. Therefore the Commissioner is satisfied that the exemption is engaged and will move on to consider where the public interest lies.

Public interest arguments in favour of confirming or denying that information is held

37. The PSNI acknowledged that confirmation or denial that information was held could reduce the likelihood and impact of rumour and speculation as to the PSNI's involvement or otherwise in this case. In this case confirming or denying that the PSNI had assisted in the investigation could encourage the public to come forward with information.
38. The PSNI also identified a more general public interest in transparency and accountability. There is a legitimate interest in confirming or denying that information is held, where to do so may increase the public's understanding of how a police force operates and how investigations are managed.

Public interest arguments in favour of maintaining the refusal to confirm or deny that information is held

39. The PSNI argued that the public interest clearly lay in avoiding prejudice to the law enforcement functions of any public authority. In this case the prejudice would be to an investigation which has to date not resulted in any prosecutions. Prejudice to an ongoing investigation would more widely damage the law enforcement function of the police force conducting the investigation.
40. The PSNI also referred the Commissioner to the public interest arguments it had made in respect of section 30(3). As set out at paragraph 11 above, the Commissioner appreciates the similarities between sections 30 and 31. The Commissioner considers it reasonable to conclude that arguments relating to a particular police investigation may also apply to the functions of apprehending and prosecuting offenders. The Commissioner is mindful that section 30(3) and section 31(3) were applied to different parts of the request, and it is important to consider each separately. However, the Commissioner is of the view that the arguments put forward by the PSNI at paragraphs 21 and 23 above are also relevant to section 31(3).

Balance of the public interest

41. The Commissioner is mindful of the strong public interest in ensuring that police forces are accountable and transparent in their actions. The Commissioner is also aware of the importance of allowing the public to be assured that criminal investigations are conducted in a thorough and impartial manner. The Commissioner therefore finds that there is a legitimate public interest in ensuring that the public have confidence in the criminal justice system and that all efforts are made to ensure that the perpetrators of crimes of this nature are brought to justice.

42. The Commissioner is also mindful of the complainant's personal reasons for making his requests, as the victim of crime. The Commissioner has noted in a number of decision notices that this complainant has expressed criticism at the way various police forces have treated him. However the Commissioner remains clear that neither the identity nor the motives of the applicant can be taken into account when considering how to respond to a request for information under the FOIA. The Commissioner notes that the complainant, like any other individual, has the right to complain about a police force to the relevant regulatory body. However this falls clearly outside the FOIA, and outside the Commissioner's remit. The Commissioner has therefore taken into account only the general public interest in respect of this case.
43. The Commissioner believes that there is a compelling public interest in ensuring that criminal investigations should not be jeopardised. The Commissioner is of the view that it would clearly not be in the public interest to release information when proceedings are still ongoing or where there is a prospect of further investigations with a view to bringing a successful prosecution.
44. Taking all the relevant arguments into account the Commissioner accepts that there is a legitimate public interest in confirming or denying whether information is held when to do so could *enhance*, rather than prejudice, the law enforcement function of a police force. However, for the reasons set out above he considers that there are overwhelming arguments in favour of maintaining the refusal to confirm or deny.

Section 23: Information provided by or relating to security bodies
Section 24: National security

45. In this case the PSNI refused to confirm or deny whether it held information relevant to the request in reliance on sections 23(5) and/or 24(2) of the FOIA. Section 23(5) states that:
- "...(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".*
46. Section 24(2) states that:
- "(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security".*
47. In terms of refusing to confirm or deny, the Commissioner recognises that in some circumstances it will be appropriate for a public authority to

rely on both provisions without stating which of the two exemptions actually applies. In relation to requests touching on issues of national security they can be claimed jointly in order to mask the involvement or otherwise of one of the designated security bodies.

48. The PSNI explained in its refusal notice why it was relying on sections 23(5) and 24(2). The complainant's request in this case focused on whether the PSNI had found any evidence that the IRA was involved in the attempted murder. The PSNI explained that it had responsibility for national security in Northern Ireland at the time of the incident. Consequently, the PSNI explained, intelligence gathered for the purposes of national security and law enforcement would include paramilitary organisations such as the IRA.
49. The Commissioner must be careful not to provide any indication as to whether or not relevant information is held by the PSNI. However, the Commissioner accepts that the PSNI's intelligence gathering role at the time of the alleged attempted murder would have been likely to involve liaison with one or more of the security bodies listed at section 23(3) of the FOIA.
50. In addition the Commissioner notes that section 24(2) is engaged only if the refusal to confirm or deny is required for the purposes of safeguarding national security. "National security" is not defined in the FOIA, but in the Commissioner's view it would include the security of the United Kingdom and its people. Therefore the Commissioner accepts that the activity of gathering intelligence on a terrorist organisation would be highly relevant to safeguarding national security. Confirming or denying that relevant information was held would inform the public (including terrorists) as to the level of interest taken by the security services, which would assist them in evading detection. The Commissioner finds that refusing to confirm or deny whether this information is held is indeed required for the purposes of safeguarding national security.
51. In light of the above the Commissioner is satisfied that the PSNI was entitled to engage the exemptions at sections 23(5) and 24(2) in respect of its refusal to confirm or deny whether the requested information is held.
52. Section 23(5) provides an absolute exclusion, but section 24(2) is qualified. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the PSNI holds relevant information.

Public interest arguments in favour of confirming or denying that information is held

53. The PSNI accepted that there is a public interest in the public being informed as to the scope of intelligence held on terrorist groups such as the IRA. If the PSNI were to confirm or deny that it held information in this case it would inform the public of its assessment of the likelihood of IRA involvement in the attempted murder.

Public interest arguments in favour of maintaining the refusal to confirm or deny that information is held

54. The Commissioner has expressed the view in several decision notices that section 24(2) contains an inherently strong public interest argument in favour of maintaining the refusal to confirm or deny, given that the exemption is only engaged if it is required to safeguard national security.
55. The PSNI was of the view that it would not be in the public interest to confirm or deny whether it held information which would make it more difficult for the PSNI to fulfil its duties in relation to national security.

Balance of the public interest

56. The Commissioner recognises that there is clearly a very great public interest in safeguarding national security. In this case the Commissioner does not consider there to be a public interest argument sufficiently compelling to override the need to protect national security. In addition, as has been made clear in the section 30(3) and section 31(3) analysis above, the investigation into the attempted murder is ongoing and future intelligence may become available. Therefore the Commissioner concludes that in this case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the PSNI holds the requested information.

Right of appeal

57. 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: 0300 1234504
Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

58. 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.
59. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
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Wilmslow
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Annex 1

Full text of request made on 19 December 2010

"1. Please confirm if there has been any ballistic link between my attempted murder and that of [two named individuals].

2. The reports refer to 'home-made' bullets being used in murders of above named and also in my attempted murder in June 1999. Did RUC and/or PSNI ever establish any kind of link between both cases, whether it be ballistic, weapons used or from ammunition used, forensically linked to either attack, if so, please supply full details.

3. Have the RUC and/or PSNI established that the terrorist outlawed group, the IRA, was behind the Fegan, Downey murders and/or involved in the attack, if so, please supply full details.

4. Have the RUC and/or PSNI established that the terrorist outlawed group, the IRA, was behind my attempted murder in June 1999 and/or involved in the attack, if so, please supply full details.

5. Have the RUC and/or PSNI at any time relayed or passed information to Northumbria Police, which identified the terrorist outlawed group, the IRA, as having been involved in my June 1999 attempted murder, if so, please supply full details.

6. Have the RUC and/or PSNI at any time relayed or passed information to Northern Ireland Office, British Government or any other third parties, including Ministers, which identified the terrorist outlawed group, the IRA, as having been involved in my June 1999 attempted murder, if so, please supply full details.

Please note for the avoidance of doubt, that I would be interested in any information which is held by PSNI, (RUC before them), regarding my 1999 attempted murder case, this request. Please deal with this request under all laws of rights of access to information, including FOIA, DPA and other associated laws."