

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2014

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

Address: PSNI Headquarters
65 Knock Road
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant requested information as to whether a particular police investigation was taking place. The Police Service of Northern Ireland ('PSNI') refused to confirm or deny whether this information was held, citing section 30(3) (information held for the purposes of an investigation) of FOIA.
2. The Commissioner's decision is that the exemption was engaged and that the public interest in maintaining the exclusion from the duty to confirm or deny outweighed the public interest in disclosing whether PSNI holds the information. The Commissioner therefore finds that PSNI had acted correctly in refusing to confirm or deny whether it held the information.
3. In responding to the request outside the statutory 20 working days limit, PSNI breached section 10(1) of FOIA. The Commissioner does not require PSNI to take any remedial steps.

Request and response

4. On 18 September 2013 the complainant wrote to PSNI via the *WhatDoTheyKnow.com* website and requested information in the following terms:

"I would like to make a freedom of information request whether you are investigating the Freddie Andrews case. I could not find any information about it on your website. The crime log number should be 13\6452. Is this correct?"
5. PSNI responded on 18 November 2013. It refused to confirm or deny whether it held the requested information, citing the exemptions at section 30(3) (investigations and proceedings conducted by public authorities), 31(3) (law enforcement) and 40(5) (personal information).
6. The complainant requested an internal review on 21 November 2013. PSNI did not provide the result of its internal review until 28 February 2014, during the Commissioner's investigation. It upheld its decision to neither confirm nor deny ('NCND') whether it held the information, but chose to rely only on section 30(3) and withdrew reliance on sections 31(3) and 40(5).

Scope of the case

7. The complainant contacted the Commissioner on 1 November 2013 to complain about the way his request for information had been handled. He contended that the case was several years old so that PSNI had had "*ample time to investigate it*". He also said that there is a public interest in knowing whether or not it is being investigated.
8. The Commissioner has considered whether PSNI acted correctly in refusing to confirm or deny whether it held the requested information in accordance with section 30(3).

Reasons for decision

Section 30 – investigations

9. Section 30 is a class-based exemption. Therefore, in order for it to be engaged there is no need for a public authority to demonstrate any level of prejudice should the requested information be disclosed. So, in this case there is no need for PSNI to demonstrate why confirming whether or not the requested information is held would result in any level of

prejudice. Rather, the public authority simply has to demonstrate that the requested information is held (or would be held) for the purposes specified in the relevant part of the exemption which has been cited.

10. Section 30(3) of the exemption states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

11. Subsection 30(1) provides an exemption for information which has at any time been held by a public authority for the purposes of:

- any investigation into whether a person should be charged with an offence or whether a person charged with an offence is guilty of it;
- any investigation which may lead the authority to initiate criminal proceedings which it has the power to conduct;
- any criminal proceedings which the public authority has the power to conduct.

12. The Commissioner is satisfied that if PSNI held information falling within the scope of the request, such information would have been held for one of the purposes set out in section 30(1). This is because the request seeks information about any investigation into the Freddie Andrews case. If PSNI are investigating this case, then any information associated with that investigation would be held for the purposes of one or more of the activities listed in section 30(1).

13. The Commissioner is therefore satisfied that the requested information – if held – would be exempt from disclosure on the basis of section 30(1). It follows that PSNI is therefore entitled to rely on section 30(3) to refuse to confirm or deny whether it holds information falling within the scope of the request.

Public interest test

14. Section 30 is a qualified exemption. The Commissioner must, therefore, consider the public interest test at section 2 of the FOIA, which is 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 public authority holds the information.

Public interest arguments in favour of maintaining the exemption

15. It would be rare for any police force to confirm whether or not it held information relating to a specific investigation, or an investigation into a particular body, about which there is not already information in the public domain as this would identify any police involvement regarding the individual(s) or body in question. In turn, this could prejudice law enforcement or potentially damage the criminal justice system. This is because complying with such requests would enable individuals to become aware of what the police are or have been investigating (or indeed not investigating) and this could enable individuals engaged in criminal activity to take action to minimise the risk of being detected.
16. Furthermore, PSNI argued that confirming whether or not the police are actively investigating a case may place information into the public domain which would impede on any ongoing and future investigations, some of which may involve covert operations. It would alert individuals involved as to whether or not the police may be investigating them and the police may not always wish to confirm this is the case.
17. PSNI considered that there is a clear interest in the public being reassured that information which is provided to the police about criminal matters is thoroughly investigated by the police. However, confirmation by the police as to whether or not it holds information falling within the scope of this request is likely to only be of limited value in serving this public interest. The concept of 'neither confirm nor deny' has to be used consistently by police services in relation to FOI requests, where the police have not already placed information in the public domain about an investigation, to remain effective.
18. PSNI commented that it is aware that there is information available on the internet relating to Freddie Andrews, which "*supposedly contains extracts from letters and statements from PSNI/RUC and to other public agencies and judicial bodies*", some posted quite recently. PSNI stressed that it has not confirmed publically whether there is any investigation ongoing or not, nor has PSNI uploaded any details or information into the public domain. It stated that it would be very unusual for PSNI to confirm details about specific investigations where to do so may prejudice the opportunity to gather evidence and to protect those interests covered by section 30 of FOIA.

Public interest arguments in favour of confirming whether or not information is held

19. PSNI acknowledged it would be in the public interest to ensure that the police are taking appropriate action to carry out their functions.
20. Confirming whether the police are investigating a case would provide transparency and reassure the public that police were exercising their functions and investigating those engaged in criminal activity. In the case of closed investigations, again if information were held, disclosure would further assist the public in understanding that the investigation was conducted properly.
21. The Commissioner has considered whether there is any specific public interest in disclosure of the confirmation or denial in relation to the Freddie Andrews case. Following brief research, the Commissioner has not found evidence of a particular public interest in whether PSNI has investigated this case.

Balance of the public interest arguments

22. The Commissioner believes that there is clear interest in the public being reassured that information which it provides to the police which may point towards the existence of criminal activity is taken seriously and that the police investigate any such matters effectively and expeditiously.
23. However, the Commissioner would suggest that the extent to which confirmation by the police as to whether or not it holds information falling within the scope of the request is likely to only be of limited value in serving this public interest. Nevertheless, the Commissioner accepts that confirmation as to whether or not the police hold any information falling within scope of the request could also inform the public as to the effectiveness of PSNI within the local community. As such, the Commissioner acknowledges that such information may be of legitimate interest to local residents.
24. In cases involving the application of section 30(3), the Commissioner believes that the wording of the request is key to determining whether the balance of the public interest favours maintaining the exemption. This is because the more specific a request, the more likely it is that confirmation as to whether or not information is held would result in the prejudicial effects described by the police above, and thus the more likely that the public interest favours maintaining the exemption.
25. In this case the request does focus on a specific investigation which may or may not be underway. In the Commissioner's view confirmation as to whether or not information is held would be likely to represent a

significant risk to the police's ability to prevent or detect crime and apprehend or prosecute offenders.

26. If PSNI did not in fact hold information falling within the scope of the request and it confirmed this fact, then anyone who had been, or was, involved in potential criminal activity linked to any ongoing police investigation could deduce that they were not the subject of a complaint to the police and thus in all likelihood their activities were not the subject of a police investigation. This could, in effect, alert any such individuals to the fact that, to date, their criminal activities had gone undetected by PSNI.
27. In contrast, if PSNI confirmed that it did hold information falling within the scope of the request, then anyone who had been, or was, involved in criminal activity associated with any ongoing police investigation could then be alerted to the possibility that PSNI was in fact aware of their activities. Such a situation could obviously undermine any investigatory activity that PSNI might be undertaking because such individuals could take action in an attempt to undermine any ongoing police investigation.
28. When considering the balance of the public interest in relation to the application of an NCND exemption, significant weight has to be given to the need to protect a public authority's ability to adopt a consistent approach when responding to similar requests in the future. That is to say, if PSNI routinely confirmed that it was not conducting investigations surrounding a particular individual – because this was in fact the case – and when it actually was investigating a particular individual it adopted an NCND approach, then its decision to do so could be reasonably assumed to be taken as an indication that it was in fact conducting an investigation into the individual cited in the request. This would of course undermine the rationale for adopting the NCND response in the first place.

Conclusion

29. Therefore, in light of the limited extent to which complying with the duty contained at section 1(1)(a) of the FOIA in respect of this request would serve the public interest, the Commissioner is satisfied that the public interest favours maintaining the exemption contained at section 30(3). PSNI is therefore not obliged to confirm or deny whether it holds information in respect of the request.
30. In this case, however, PSNI failed to respond to the complainant's request within 20 working days breaching section 10(1) of FOIA. The Commissioner would remind PSNI of the requirement to respond to requests within 20 working days of receipt.

Other matters

31. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 69 working days for an internal review to be completed, despite the publication of his guidance on the matter.
32. The Commissioner notes that PSNI has recognised that its Legal Services team, who had been providing additional resource for carrying out internal reviews were in actuality too busy with legal work. This led to the delay in the internal review in this case and in others. PSNI has confirmed that it has now trained other staff to deal with the backlog of internal reviews. It apologised to the complainant for the delay in completing his internal review.
33. The Commissioner has made a record of the delays in this case. This may form evidence in future enforcement action against PSNI should evidence from other cases suggest that there are systemic issues within PSNI that are causing delays.

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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

Jon Manners
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