

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2010

Public Authority: Northern Ireland Office
Address: 11 Millbank
London
SW1P 4PN

Summary

The complainant submitted a request to the Northern Ireland Office, for information relating to a murder investigation. The public authority withheld the information claiming it was exempt under sections 31(1)(c), 38(1)(a), 38(1)(b), 40(2) and 44(1)(c) of the Act. The public authority also refused to confirm or deny whether it held further information, citing sections 23(5) and 24(2).

The Commissioner finds that the public authority correctly relied on sections 23, 24 and 31(1)(c) to refuse the request. As the Commissioner finds that these exemptions are correctly engaged, the Commissioner does not need to consider the application of the remaining exemptions to the requested information. The Commissioner directs that there are no further steps to be taken.

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.

Background

2. The Commissioner notes that under the Act, the Forensic Science Northern Ireland (FSNI) is not a public authority itself, but was, at the

time of the request, an executive agency of the Northern Ireland Office (the NIO). Therefore, the public authority in this case was the Northern Ireland Office, not the Forensic Science Northern Ireland.

3. At the time of the request the NIO was responsible for Northern Ireland's constitutional and security issues, in particular, law and order, political affairs, policing and criminal justice. However, on 12 April 2010, FSNI became an executive agency of the Department of Justice (DoJ) following the devolution of policing and justice powers. Whilst the NIO originally created the information, the DoJ is now the primary stakeholder in relation to this case as any release of information would be from FSNI. However, for the purposes of clarity and the fact that the NIO held the information at the time of the request, the Commissioner has referred to the NIO rather than FSNI or DoJ throughout this Decision Notice.
4. FSNI provides a number of different services to a variety of agencies, including the Police Service of Northern Ireland (PSNI), the Police Ombudsman for Northern Ireland, the State Pathologist and other investigative authorities. FSNI's primary role is to provide objective, independent scientific advice to support the Courts which is also available to those representing both defence and prosecution interests in criminal cases¹.
5. This complaint focuses on forensic information gathered as part of an investigation into 2 murders which occurred in 2000. Following the investigation, two individuals were charged with a number of offences in relation to the murders. One co-defendant subsequently pleaded guilty and was sentenced in June 2008. The trial of another co-defendant took place between November 2008 and February 2009. This individual was found guilty and was sentenced in April 2009. An appeal was lodged against the conviction and sentence awarded to the second co-defendant. The outcome of this appeal had yet to be determined when the Commissioner made his decision in this case.
6. The complainant in this case is the father of one of the murder victims. Prior to submitting his request the complainant had been in contact with a number of public authorities in relation to the investigation into his son's murder.

¹ <http://www.fsni.gov.uk/about-us/>

The Request

7. On 14 April 2008, the complainant submitted the following request to FSNI:

"I am [name redacted], father of [name redacted]. I would like to request under the freedom of information act any and all information which is within your power to disclose to me under said act i.e. dates, times and the names of who sent and also who received any and all items tested, also the dates of any and all items for retesting and who sent and received such items. I could go into specifics but I think it would be better all around if you were to send everything that I am legally entitled to under foi and then I can sive [sic] through what I need".

8. On 13 May 2008, the NIO advised the complainant that his request was being refused under section 31(1)(c) of the Act, namely prejudice to the administration of justice. The NIO considered the public interest test and decided that the public interest in maintaining the exemption outweighed the public interest in disclosure.
9. On the same day, the complainant asked for an internal review of this decision, as he remained of the view that the requested information ought to be released to him.
10. The NIO contacted the complainant on 30 July 2008 and confirmed that an internal review of the earlier decision had now been carried out. The NIO upheld its decision to withhold the information under section 31(1)(c) of the Act. However, the NIO was of the view that the requested information was also exempt under sections 31(1)(a), 31(1)(b) and 44(1)(c) of the Act. The NIO had re-considered the public interest test in respect of section 31 and found that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

The Investigation

Scope of the case

11. On 1 August 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled and the fact that the information had not been released.

12. Regrettably there was a delay before the complaint was allocated to a case handler. The Commissioner contacted the NIO on 12 May 2009 and asked for sight of the withheld information. The Commissioner also invited the NIO to provide him with further arguments in relation to the exemptions claimed.
13. On 15 May 2009 the NIO advised the Commissioner that the complainant had submitted a further request on 19 March 2009. The content of this second request is as follows:

*"As per our discussion on 19/3/09, now that the trial in the murders of **[name redacted]** and **[name redacted]** is over, can you now supply me with the full forensic files in the case. It was my understanding that the only obstacle was the trial and since that is now over and we have a conviction I see no reason why I shouldn't have the files. This is a freedom of information request and without restrictions I would like all and any documents that I am legally entitled to".*

14. Following discussions with the Commissioner the NIO agreed to conduct a further review of its original decision (as set out in the NIO's letter of 30 July 2008), taking into consideration the change of circumstances since the time of the original refusal, namely the conclusion of the court proceedings. The NIO also advised the Commissioner that it would provide a substantive reply to the Commissioner's letter of 12 May 2009 in due course.
15. The Commissioner contacted the NIO on 10 June 2009 to ascertain whether the further review had been completed. On 11 June 2009 the NIO advised the Commissioner that it hoped to have the review completed by 1 July 2009. The NIO also provided details of its handling of the complainant's request of 14 April 2008.
16. On 1 July 2009 the NIO advised the Commissioner that its Internal Review Panel had not been able to convene as anticipated. However, the NIO advised the Commissioner that the panel was due to meet on 10 July 2009 and that a response would be provided to the complainant by 7 August 2009.
17. On 7 August 2009 the NIO confirmed to the Commissioner that the Review Panel had met on 10 July 2009. The NIO advised the Commissioner that the Review Panel was of the view that the NIO should consult with various third parties before a final decision could be made. The NIO confirmed that there was a possibility that the requested information could also be withheld under exemptions which had not been previously considered. The NIO advised the Commissioner that the Review Panel would need to be reconvened

before a response could be provided to both the Commissioner and the complainant. The NIO considered it unlikely that this response would be provided before 1 October 2009.

18. The Commissioner wrote to the NIO on 12 August 2009 to express his concern as to the ongoing delay in concluding the internal review. The Commissioner advised the NIO that whilst he appreciated that there had been a significant change of circumstances arising from the conclusion of the court proceedings, it was not to be unexpected that the complainant would still wish to have the information disclosed to him. It would have been reasonable, therefore, to expect the NIO to have already consulted with third parties following the conclusion of the court proceedings.
19. The Commissioner contacted the NIO a number of times between August and December 2009 to enquire about the progress of the internal review. The Commissioner was increasingly concerned as to the ongoing delay regarding the response which, in turn, was delaying the Commissioner's investigation.
20. On 22 December 2009, the NIO provided the complainant with the outcome of its review. The NIO did not make any reference to sections 31(1)(a) and 31(1)(b) that had been considered applicable following the conclusion of the previous review in July 2008. However, the NIO provided further details of its application of section 31(1)(c) and clarified that it now considered that the information was exempt under section 44(1)(a) rather than 44(1)(c) of the Act.
21. The NIO also advised the complainant that it now sought to rely on a number of additional exemptions in relation to the information he requested. The NIO indicated that any personal data contained within the information would be exempt from disclosure under section 40(2) of the Act. Furthermore, the NIO held that some of the requested information would be exempt under section 38 of the Act. Finally, the NIO advised that it was unable to confirm or deny whether it held information supplied by, or relating to, bodies dealing with security matters, or which related to national security. The NIO advised that it was relying on sections 23 and 24(2) of the Act in this respect.
22. The Commissioner notes that under section 50 he is under a duty to make a decision as to whether a request for information has been dealt with in accordance with the requirements of the Act. The Commissioner notes that the complainant made similar requests to the NIO on 14 April 2008 and 19 March 2009, both of which were refused in full. In the interests of thoroughness the Commissioner has investigated the NIO's handling of both requests, but his decision relates only to the request of 19 March 2009. This is because the Commissioner is mindful

that the complainant submitted a further request because he was of the view that circumstances had changed and the information he sought could be released. Therefore the Commissioner considers it appropriate to examine the NIO's more recent deliberations in relation to what is essentially the same withheld information.

Chronology

23. On 6 January 2010 the Commissioner wrote to the NIO. The Commissioner advised that he required sight of the withheld information. The NIO requested that, given the sensitivity of the withheld information, the Commissioner would have to inspect the information at FSNi premises. An inspection duly took place on 15 February 2010.
24. The Commissioner wrote to the NIO on 12 April 2010 with a number of questions in relation to the exemptions cited. The Commissioner contacted the NIO a number of times during April 2010 seeking a response to this letter. Despite the Commissioner having a number of lengthy discussions with the NIO and giving the NIO numerous opportunities to provide him with its response, the NIO failed to do so within the timescale required by the Commissioner.
25. On 4 May the Commissioner had further discussions with the NIO. The Commissioner reminded the NIO of his powers under section 51 of the Act which could compel the NIO to provide the Commissioner with detailed arguments in relation to its reliance of the various exemptions cited. The Commissioner advised the NIO that if it did not wish to provide any further arguments, he may proceed to a Decision Notice, which would be likely to find that the NIO had failed to satisfy the Commissioner that it had handled the request in accordance with the Act. The Commissioner gave the NIO one final opportunity to present him with its arguments in relation to the exemptions cited.
26. On 6 and 7 May 2010, the NIO provided the Commissioner with two detailed submissions.

Findings of Fact

The withheld information

27. The Commissioner notes that the complainant requested "*the full forensic files in the case*". Having inspected the requested information, the Commissioner notes that these files contain the following categories of forensic information:

A. Toxicology

This includes information relating to highly specialised tests as to what chemicals were in the bloodstream of the witness or the deceased. It involves a detailed analysis of the findings to assess whether an individual was under the influence of prescribed or illegal drugs and whether they could affect an individual's performance or capacity.

B. Alcohol

This is a measurement of the alcohol content in blood or urine samples to determine an individual's level of intoxication.

C. Fingerprints

This is an analysis of uncovering and obtaining fingerprints (it is the role of the PSNI to match any prints obtained).

D. Electronics

This is information obtained from a number of different sources, such as mobile phones or computers. FSNI provided the Commissioner with detailed representations as to the techniques used to locate and retrieve information.

E. Drugs

This relates to substances seized or found at the scene. Whilst toxicology traces evidence for usage of drugs, this team of experts determine the kind of drug and its purity.

F. Metallurgy

This type of information relates to vehicles and essentially provides a "fingerprint of the car".

G. Physical methods

This type of information is tests of marks made by other substances such as paint, feet, shoes or tyre marks etc.

H. Biology

This is another highly complicated and detailed process which includes the blood pattern analysis as to how and where blood was dispersed. It also involves detailed analysis of fibres and hairs that are found on a body or an object.

Analysis

Exemptions claimed

28. The Commissioner notes that, in relation to the request of 19 March 2009, the NIO claimed reliance on the following exemptions:

- Section 23(5) (in relation to the duty to confirm or deny)
- Section 24(2) (in relation to the duty to confirm or deny)
- Section 31(1)(c)
- Section 38(1)
- Section 40(2)
- Section 44(1)

29. The Commissioner has first considered the information which the NIO confirmed that it held but which was considered exempt. As the NIO claimed reliance on section 31(1)(c) in relation to all of this information the Commissioner has considered this exemption first.

Section 31(1)(c) - law enforcement

30. In response to the request of 14 April 2008, the NIO claimed that sections 31(1)(a), 31(1)(b) and 31(1)(c) applied to the withheld information. In response to the request of 19 March 2009 the NIO considered that section 31(1)(c) only applied to the requested information. Therefore the Commissioner has focused on the exemption at section 31(1)(c) of the Act, although he recognises that the three subsections could be said to overlap in some respects in relation to the withheld information in this case. The full text of section 31 can be found in the Legal Annex attached to this Decision Notice.

31. Following the Information Tribunal decision in *Hogan v Information Commissioner*² the Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question:

1. Identify the prejudice in the exemption;
2. consider the nature of the prejudice in question; and

² EA/2005/0026, EA/2005/0030

3. consider the likelihood of the prejudice in question occurring.

Identifying the prejudice

32. The NIO has argued that disclosure of the requested information would prejudice the "administration of justice". This term is not defined in the Act, but the NIO explained that:

"FSNI plays a key role in the administration of justice by providing scientific expertise and opinion in the investigation of crime. These scientific facts and opinions, and the systems and procedures which FSNI relied upon to deliver them in a scientifically sound, objective and impartial manner, are tested in court before the trial judge."

33. The Commissioner considers that the administration of justice can be interpreted broadly, and accepts the NIO's argument in this respect on the facts of this case.

Nature of the prejudice

34. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
35. The Commissioner notes that FSNI's primary role is to provide objective, independent scientific advice to support the Courts which is also available to those representing both defence and prosecution interests in criminal cases (as set out at paragraph 4 above). In relation to criminal investigations, FSNI assists the PSNI at scenes of crime and examines forensic information.
36. The NIO explained to the Commissioner that, while a large amount of forensic information may be gathered in any particular case, only a small proportion of this information may be actually used in a prosecution. Therefore, the forensic information held by FSNI in relation to the complainant's request would include information obtained for the purposes of the investigation which may not have been considered relevant to the criminal investigation or prosecution. The NIO also stated that the FSNI did not have any input as to how a case was prosecuted and it was the decision of the PSNI and the PPS as to how this information was presented to the court in support of its case.

37. The NIO was of the view that disclosure of this “raw information” into the public domain would introduce information which was irrelevant, flawed or ambiguous. Disclosure of this information could therefore mislead the public as to how investigations were conducted and how evidence was selected. The NIO argued that

“...the release of forensic evidence could prejudice investigatory work crucial to the effective administration of justice.”

38. The NIO also argued that disclosure of information about the evidence of a criminal case could assist those responsible to take steps to avoid being identified, apprehended and successfully prosecuted. By releasing this type of information, those engaged in such activities would be able to gather intelligence as to how forensic examinations take place and adopt countermeasures to avoid detection. For example, if a criminal became aware of the process by which FSNI could recover certain types of evidence, that individual may be able to take countermeasures to avoid such evidence being recoverable. The Commissioner received detailed arguments from FSNI in relation to this issue, but he is unable to reproduce them in this Decision Notice as to do so would disclose exempt information.
39. The Commissioner accepts the arguments put forward by the NIO in relation to the nature of the prejudice that could occur if the requested information was to be disclosed into the public domain. Therefore the next step is to decide what level of prejudice would exist to the administration of justice.

Likelihood of prejudice

40. With regard to the degree of likelihood of prejudice (i.e. would, or would be likely to), the Commissioner has been guided on the interpretation of the phrase from a number of Tribunal decisions. In terms of ‘*likely to*’ prejudice, the Tribunal in *John Connor Press Associates Limited v Information Commissioner*³ confirmed that:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk”.

41. In respect of the phrase ‘*would prejudice*’, the Commissioner notes the comments of the Tribunal in the case of *Hogan* where the Tribunal found that this places a much stronger evidential burden on the public authority to discharge⁴. Whilst it would not be possible to prove that

³ EA/2005/0005, para 15

⁴ EA/2005/0030

prejudice would occur beyond any doubt whatsoever, prejudice must be more probable than not.

42. The NIO provided the Commissioner with arguments as to why it believed that disclosure '*would prejudice*' the administration of justice. The NIO advised the Commissioner that this particular case was "*highly controversial*". The NIO also advised the complainant on 22 December 2009 that:

"Although the initial trial has been concluded an appeal has been lodged against a conviction and sentence awarded. Also there may be future investigations into this incident [the murder] or referrals to other independent organisations for review".

43. The complainant advised the Commissioner that he was in fact aware of a referral to an independent organisation for review. However the complainant remained of the view that the forensic information ought to be disclosed.
44. The NIO argued that disclosure of the forensic information into the public domain would undoubtedly prejudice the appeal. The NIO also argued that there was a substantial likelihood that if any future investigations or proceedings were to take place, these would be compromised either in respect of their outcome or in relation to the manner in which they are carried out. The NIO argued that disclosure of the forensic information into the public domain would be likely to prejudice any future review or investigation of the matter.
45. In light of the above it is clear to the Commissioner that the case is still "live" and further developments may occur. As the Commissioner has accepted the NIO's arguments in relation to the nature of the prejudice, the fact that the case is not complete increases the likelihood of prejudice. The Commissioner is of the view that the NIO was correct to apply the higher level of prejudice to the withheld information. Whilst it is impossible to state with certainty that prejudice would occur, the nature of the information requested and the context in which it was obtained makes it more likely than not that these proceedings and investigations would be jeopardised if the information was to be released.
46. In light of the above the Commissioner is satisfied that disclosure of the withheld information would prejudice the administration of justice. Therefore the Commissioner is satisfied that the exemption at section 31 (1)(c) is engaged.

Public interest arguments in favour of disclosing the requested information

47. Section 31(1)(c) is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides exempt information must still be disclosed if:

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

48. The NIO accepted that there was a general public interest in disclosure of information relating to any murder investigation. Disclosure would provide greater transparency and accountability as well as increased levels of public confidence and trust in FSNI and in the criminal justice system generally. The NIO also acknowledged the public interest in being able to understand the way in which FSNI and the wider criminal justice system works.
49. The NIO also recognised that, although the murders took place in 2000, the trial did not take place until 2008. The NIO considered that there was a legitimate public interest in releasing information about the procedures adopted and followed by the PSNI and FSNI given the delay in bringing the case to court.
50. The Commissioner noted that some information relating to the murder, the investigation and the trial was in the public domain as a result of a number of legal applications and the media coverage surrounding the subsequent court proceedings. The Commissioner considers that there is sometimes an argument in favour of disclosing certain information in order to allow the public to have a complete understanding as to how investigations were conducted.
51. However, the Commissioner recognises that information which has entered the public domain having being disclosed or referred to in court, does not necessarily mean that it remains in the public domain. Very often this information is only limited to those present during the court proceedings. Information usually has a short life-span subject to the amount of coverage it was granted, unless it has a particularly high level of interest. Given the circumstances surrounding the murders, the Commissioner recognises that this is a case which has attracted considerable interest from the public and the media. The Commissioner has considered the findings of the Information Tribunal in relation to this argument. In the case of *Armstrong v Information Commissioner and the HMRC*, the Tribunal stated that:

"... knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is generally short-lived.... even if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weighs in favour of disclosure, it is merely one consideration to be weighed in the public interest balance".⁵

52. The Commissioner is also aware that not all the information provided to the FSNI in the context of an investigation is either disclosed during the court proceedings or reported in subsequent media coverage. Therefore the Commissioner is of the view that limited weight can be attached to this argument in favour of disclosure.
53. The Commissioner is of the view that there is a considerable public interest in the public being assured that justice is done. The Commissioner notes that two lengthy court hearings resulted in two individuals being convicted in relation to the murders.

Public interest arguments in favour of maintaining the exemption

54. The NIO was of the view that there were strong public interest arguments in maintaining the exemption, given the nature and likelihood of the prejudice that would occur if the information were to be disclosed.
55. The NIO argued to the Commissioner that there was a strong public interest in protecting the confidentiality of the detailed forensic analyses of the evidence in a criminal investigation. It would not be in the public interest for criminals to be able to take countermeasures to avoid forensic detection, as this would harm the ability of the PSNI to conduct criminal investigations. The NIO was of the view that this in turn would cause the public to lose confidence in the criminal justice system. The Commissioner considers that this is a strong public interest in maintaining the exemption.
56. The NIO also argued that if the public were to have full access to the forensic files this could seriously compromise the forthcoming appeal of one of the individuals convicted in relation to the murder. The NIO also argued that any subsequent investigations or reviews could also be seriously compromised. The NIO was of the view that the correct avenue for releasing such information is through the disclosure procedures within the criminal justice system, which allows for relevant information to be viewed for the purposes of seeking and obtaining justice. The public interest would not be served by information being placed in the public domain which would prevent access to the fair trial

⁵ EA/2008/0026, paragraphs 85 and 86

process. The NIO advised the Commissioner that the only way to properly challenge the validity of the forensic evidence was in the court arena. The Commissioner also accepts that there is a strong public interest in protecting the appeal process.

57. The NIO also argued that the withheld information contained details of the thinking processes that FSNI undertook during the course of its examination. This may well contain details of any differences of opinion that existed between the initial views held and the findings that resulted in the final evaluation. To release this information would be highly misleading to those unfamiliar with the scientific processes. The Commissioner accepts the importance of enabling scientists to express and discuss individual opinions, which may or may not be considered relevant in the evaluation results. The Commissioner is of the view that disclosure of the information would provide the public with the opportunity of being able to see how the investigation developed and why some views or findings were discarded in favour of others. However, bearing in mind the arguments above in relation to the fact that much of the information gathered was not used for the prosecution case, the Commissioner is inclined to consider this as a strong argument in favour of maintaining the exemption.
58. The Commissioner is mindful that there is an ongoing review by an independent organisation in relation to the original criminal investigation into the murders. The Commissioner accepts the NIO's argument that disclosure of the forensic information into the public domain would be likely to prejudice this or any future review or investigation of the matter. The Commissioner considers this to be a strong public interest argument in favour of maintaining the exemption. The Commissioner is of the view that the administration of justice includes ensuring that bodies such as the PSNI are properly regulated. It would not be in the public interest to disclose information which would adversely affect such regulation.
59. The NIO maintained that forensic evidence can be confusing or misleading unless presented and explained by expert reporting officers and subject to cross examination. FSNI had also expressed concern about the role that the media would play in terms of providing misleading or misinformation to the public. However, the Commissioner does not accept that information should be withheld simply on the basis of what is or is not said about a case in the wider public domain. The Commissioner is also of the view that the possibility that the information requested could be misunderstood or regarded as too technical or complex is an irrelevant consideration when considering the public interest test.

60. The NIO stated that disclosure of forensic information could generally prejudice the role of scientists and reporting officers, and that this would not be in the public interest. The Commissioner does not accept this to be a valid argument as these individuals act as professionals and should not be discouraged from doing their job properly for fear of outside scrutiny. The Commissioner also notes that FSNI staff are routinely audited by a number of external authorities to ensure that investigations are carried out to the highest possible standards. Therefore the Commissioner is not persuaded that this is a relevant public interest consideration.
61. The NIO advised the Commissioner that FSNI staff who provided information in respect of this case did so with an expectation that it would be held for the sole purposes of the police investigation and any subsequent court proceedings that may or may not be issued. The NIO argued that there was the potential for scientists or reporting officers to keep lower quality records of any mistakes made as these could be used against them during the cross-examination process to undermine their credibility. The Commissioner does not consider that this is a strong public interest argument in favour of maintaining the section 31(1)(c) exemption, as the forensic information was provided by individuals during the course of their professional duties.
62. The NIO also argued that if information was to be released in relation to this case, this could set a precedent for all future requests submitted to the FSNI as well as other investigatory authorities. The NIO held that this would lead to an unpredictable amount of requests relating to all other criminal cases, which would have a significant and negative impact upon its limited resources. The Commissioner has noted the concerns of the NIO but does not find that any substantial weight can be attributed to this argument. The Commissioner is only able to consider each complaint on its own merits and on the basis of the arguments advanced by the public authority. The Commissioner recognises that there may be situations where information can and should be disclosed even when section 31(1)(c) is engaged. There are however other situations in which it would not be in the public interest to disclose information withheld under section 31(1)(c). It is for the Commissioner to decide, taking into account the circumstances of the particular case, whether or not the information should be withheld or disclosed.

Balance of the public interest arguments

63. The Commissioner is mindful of the strong public interest in allowing law enforcement agencies to be accountable and transparent in their actions. The Commissioner is aware of the importance of allowing the public to be able to scrutinise the manner in which criminal

investigations are carried out to ensure that they 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.

64. The Commissioner is also mindful of the inherently personal and sensitive nature of the requested information. However, while the Commissioner understands the complainant's reasons for seeking access to the information held by FSNI, neither the identity nor the possible motive of the applicant can be taken into account when considering whether or not information should be disclosed. The Commissioner must consider whether or not it is appropriate for the requested information to be released to the general public and not just to a private individual. The Commissioner notes that FSNI has offered the complainant a meeting to discuss his issues, which would be outside the remit of the Act.
65. The Commissioner believes that there is a compelling and competing public interest in ensuring that criminal investigations should not be jeopardised, whether in relation to this particular case or other investigations. The Commissioner is also mindful of the appeal lodged by one of the convicted individuals. 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 securing additional prosecutions.
66. The Commissioner has carefully considered the arguments in favour of disclosing the withheld information, and those in favour of maintaining the exemption. The Commissioner concludes that the balance of the public interest in all the circumstances of the case lies in favour of maintaining the exemption at section 31(1)(c).

Section 23 – Information supplied by, or relating to bodies dealing with security matters

Section 24 – national security

67. Under section 1(1)(a) of the Act, a public authority is generally obliged to advise the applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny".
68. Where a public authority has relied on an exemption which involves a refusal to confirm or deny whether information is held, the Commissioner must ensure that his Decision Notice does not give any indication as to whether or not information is in fact held by the authority, or, in this case, under which exemption any information held

would be exempt. As a consequence, it is not always possible for the Commissioner to comment in great detail on the reliance by a public authority on the exemption concerned.

69. Section 23(1) of the Act states that:

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".

70. Section 23(5) of the Act states that:

"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)".

71. The full list of the bodies contained within section 23(3) can be found in the legal annex attached to this Notice. Section 23 is an absolute exemption, which means that there is no requirement to consider the public interest test.

72. Section 24(2) of the Act states that:

"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."

73. The NIO's explanation for its refusal to confirm or deny is that it maintains that the information sought by the complainant would be exempt by virtue of sections 23(5) and/or 24(2) of the Act. Although the Act does not allow section 24(1) to be applied to information which is exempt by virtue of section 23(1), there is nothing in the Act which prevents an authority from refusing to confirm or deny that it holds information to which either section 23(1) or 24(1) would apply, if such information were held.

74. The Commissioner accepts that citing section 23(5) and 24(2) in conjunction where either of these exemptions is engaged may be an appropriate approach in order to obscure the involvement (or non-involvement) of any security body. The Information Tribunal supported this approach in *Baker v Information Commissioner and the Cabinet Office*⁶. In that case, the Cabinet Office also sought to rely on 23(5) and 24(2) explaining that relying on section 23(5) alone to neither confirm or deny could itself reveal the fact that one of the security

⁶ EA/2006/0045

bodies listed in section 23(3) was or could have been involved. Therefore it was necessary to rely on both sections 23(5) and 24(2) in order not to reveal any exempt information in a particular case. In this case the Commissioner also considers it important to bear in mind that the NIO's arguments in relation to sections 23 and 24 cannot be taken to imply that information is in fact held.

75. In relation to this case, the NIO provided more detail relating to the specific request for information and provided further arguments to the Commissioner to support the exclusion of the duty to confirm or deny. The Commissioner has taken these into consideration when reaching his decision but details have not been included in the Decision Notice for the reasons stated above.
76. The Commissioner has considered the arguments made by the NIO regarding these exemptions and is of the view that both exemptions are engaged in relation to the duty to confirm or deny.

Public interest test

77. Section 24 is a qualified exemption and therefore consideration must be given as to whether or not the public interest in maintaining the exemption is outweighed by the public interest in disclosure.
78. The NIO accepted that there is a general public interest in understanding how information relating to national security is held. Such disclosure could assure the public that the relevant authorities had all the information necessary to investigate serious crimes.
79. The NIO provided a number of arguments as to why it considered that the public interest favoured maintaining the exemption. Again, the Commissioner is mindful that he is unable to outline any of these arguments in any considerable detail as to do so would disclose exempt information.
80. The Commissioner is mindful of the fact that the request related to a murder which was initially linked with paramilitary organisations. To confirm or deny whether information relating to security bodies or national security was held would harm national security, in that this information, if it were held, would be highly sensitive. In particular the NIO argued that to confirm or deny whether this type of information was held would effectively disclose what lines of enquiry were pursued during the murder investigation. The NIO also reminded the Commissioner of its usual practice of not commenting on the existence of reporting from the security and intelligence agencies, due to the potential adverse impact on agency operations.

81. The Commissioner accepts that there is a strong inherent public interest in the need to safeguard national security. Therefore, where the exclusion of the duty to confirm or deny has been claimed, the Commissioner considers that there must be equally weighty public interest factors in favour of confirming or denying whether the information requested is held in order to justify overturning the public authority's decision. The Commissioner is not satisfied that such factors apply in the present case. Therefore he has concluded that the public interest in maintaining the exclusion of the duty to confirm or deny outweighs that in disclosing whether relevant information is held.

Section 38 – Health and Safety

Section 40 – Personal information

Section 44 – Prohibitions on disclosure

82. The Commissioner has decided that all of the withheld information is exempt under section 31(1)(c), and that the NIO correctly refused to confirm or deny whether it held further information in reliance on sections 23(5) and 24(2) of the Act. Therefore the Commissioner is not required to make a decision in relation to the other exemptions claimed in this case.

The Decision

83. The Commissioner's decision is that the NIO dealt with the request for information in accordance with the Act:
- The NIO correctly withheld information under section 31(1)(c); and
 - The NIO correctly relied upon sections 23(5) and 24(2) in refusing to confirm or deny whether it held further information.

Steps Required

84. The Commissioner requires no steps to be taken.

Other matters

85. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

86. The complainant submitted his initial request for information on 14 April 2008. The NIO provided the complainant with a refusal notice on 13 May 2008 and cited sections 31(1)(c) in relation to this information. The complainant asked for an internal review of this decision on 13 May 2008. The NIO contacted the complainant on 24 June 2008 and advised the complainant that the outcome of the internal review would not be known until 8 July 2008. This was due to the fact that it had not been possible to arrange a suitable time to convene the review panel. The complainant was advised on 30 July 2008 that a decision was made to uphold the previous decision to withhold the requested information.
87. The complainant lodged his 'second' information request to the NIO on 19 March 2009. The NIO, in conjunction with advice from the Commissioner's office, treated this as a further review of the original request. Despite providing a number of different timeframes for this response to be finalised, the NIO only provided the final response to the Commissioner and the complainant on 22 December 2009.
88. The Commissioner has published guidance on the time it should take a public authority to complete an internal review.⁷ The guidance suggests that in most cases 20 working days will be sufficient to conduct a review and even in more complicated cases the time taken should not exceed 40 working days. The Commissioner appreciates the NIO's argument that the reasons for the delays in holding the internal review in this case were due to practical difficulties and the need to convene the review panel. The Commissioner further notes that the NIO kept the complainant informed of the reasons for the delay. However, the Commissioner is not satisfied that it should have taken so long for the review panel to be reconvened and for the response to be communicated to the complainant. The Commissioner expects that the NIO will take steps to ensure that breaches of this nature do not recur in relation to future requests.

⁷http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 21st day of June 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex
Freedom of Information Act 2000

Section 1 - General Right of Access

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him."

.....

Section 23 – information supplied by, or relating to, bodies dealing with security matters

23(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

23(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

23(3) The bodies referred to in subsections (1) and (2) are –

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,

- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.

23(4) In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

23(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).

Section 24 – National Security

24(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

24(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.

.....

Section 31 – Law enforcement

31(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,

- (c) the administration of justice,

.....

Section 38 – Health and safety

38(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

38(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Section 40(2) - Personal information.

40(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

40(2) 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."

40(3) 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
- (b) 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 44 – prohibitions on disclosure

44(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.