

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2023

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

Address: 65 Knock Road
Belfast
BT5 6LE

Decision

1. The Commissioner's decision is that the Police Service of Northern Ireland is entitled to refuse the request under section 12(2) of FOIA as the cost of complying with section 1(1) would exceed the appropriate limit. There has been no breach of section 16(1).

Request and response

2. The complainant made the following information request to Police Service of Northern Ireland (PSNI) on 7 July 2022:

"Under the Freedom of Information Act 2000, [redacted] would ask if a report or record is held of the meeting between An Garda Síochána and the PSNI in May 1999, to discuss matters arising directly from the affidavit of [redacted]. I would specifically ask if this meeting addressed the evidence provided in para.9 of the [redacted] affidavit as to the location of the murder of Cpl James Elliott. If this is the case, could you please communicate a copy of this information to me by no later than the twentieth working day following the date of receipt of the present request.

3. The PSNI's final position was to refuse the request under section 12(2) of FOIA.

Reasons for decision

4. This reasoning covers PSNI's reliance on section 12(2) of FOIA to refuse the request and whether there was a breach of section 16(1).
5. Under section 1(1) of FOIA a public authority must confirm whether it holds information that has been requested.
6. However, under section 12(2) a public authority is not required to comply with section 1(1) if the cost of establishing whether or not it holds the requested information would exceed the appropriate limit. This is £450 (18 hours work at £25 per hour) in the case of PSNI.
7. In its submission to the Commissioner, PSNI detailed searches it had carried out and provided evidence to support its estimates. By way of background PSNI explained that the request was prompted by a letter sent to the complainant, received on the 28 August 2020, from an Assistant Commissioner of the police service of the Republic of Ireland - An Garda Síochána ('AGS'). In this letter AGS reference to an affidavit of a former RUC officer sworn on 3 January 1999. The complainant considers this important in relation to the murder of Cpl. Elliot in 1972, who was murdered close to the border of Northern Ireland and the Republic of Ireland. In its letter of August 2020 AGS informs the complainant that a meeting took place in May 1999 which discussed this affidavit between AGS and The Royal Ulster Constabulary (the letter from AGS references 'PSNI' as meeting in 1999 - however PSNI commenced as a police service in 2001). The complainant has asked for a record of this meeting.
8. PSNI says that in attempting to establish if it holds such a record, of the meeting from 1999, a number of business areas who would most likely have such information, if it was held, searched their records for evidence. All confirmed negative returns. To give an idea of the scope of this search, those business areas who searched their records and confirmed negative results were PSNI's Legal Services Department, PSNI's Executive Support Team (which handles correspondence to the offices of the Chief Constable and Deputy Chief Constable), PSNI's Crime Operation Branch, PSNI's Legacy Support Unit (which handles coronial and other legacy litigation), Legacy Investigation Branch (which investigates troubles related homicides between 1969-2004) and, given the communication with another police service, PSNI's Extradition and International Mutual Assistance Unit.
9. As the complainant was seeking information on behalf of another person, which they consider is relevant to that death, PSNI's Legacy Investigation Branch searched the boxes of information it holds in

relation to Corporal Elliot's murder in PSNI's Murder Archive. PSNI confirmed that the requested information of a meeting in 1999 was not contained within the files.

10. PSNI's Legacy Investigation Branch also provided details of another search it carried out. This included details of specific search/time estimates it had carried out for a particular piece of correspondence (not the same information that is the subject of this request). This was a search of three boxes of another individual who was murdered but is referenced in the affidavit of the RUC officer which the complainant has highlighted to PSNI in their request.
11. Whilst not the same information as in the current request, Legacy Investigation Branch provided details following a "dip sampling exercise" of how long it would take to search all of the information in those boxes to ascertain if a specific piece of correspondence could be located in that particular case. PSNI holds a detailed inventory of these boxes with the time estimates beside each indexed class of information. It has provided the Commissioner with summary findings, as follows:
 - Box 1 - total time estimated is 16 hours 45 minutes to go through this box
 - Box 2 - total time estimated is 34-42 hours to go through this box
 - Box 3 - total time estimated is 24-32 hours to go through this box
12. PSNI concludes by confirming that it has physically searched the materials held in respect of the murder of Cpl. Elliot but has not located a record within scope of the complainant's request. PSNI has also asked all of those business areas who would likely hold such information (if it is held) to search their records. PSNI therefore considers that, while it has carried out some initial searches that indicate it does not hold the requested information, it would take well in excess of 18 hours to ascertain definitively whether or not it does hold it.
13. In their complaint to the Commissioner, the complainant says that the individual they are representing recently met with the Serious Crime Review Team of An Garda Síochána. This team has been considering the Elliott murder case from the perspective of the jurisdiction of the Republic of Ireland. The team was able to report to the complainant's client information relating to the May 1999 meeting relevant to their request and had been able to recover its copy of the report without any difficulty. The complainant considers it would be reasonable to presume that standards of file management between two modern and professionally run police forces such as the PSNI and Gardaí would be similar. In the complainant's view, it would be surprising if Gardaí were

so comparatively advanced in its file management and organisation to the PSNI, as would be inferred by the PSNI response.

14. Furthermore, the complainant says, the affidavit referenced in the request is a central evidence base for the ongoing Barnard Review into the Glenanne Series, conducted by Operation Kenova under the auspices of the Metropolitan Police. PSNI's cooperation with the Barnard Review is essential, and the report of the 1999 review into implications of the affidavit would be central to a highly sensitive and ongoing police review. The complainant considers that the information they have requested should not be regarded as some obscure or misplaced document.
15. The Commissioner put the complainant's points to PSNI and asked it to clarify elements of its submission to him.
16. PSNI confirmed that it had carried out searches of all of the materials it holds in respect of information relating to Cpl James Elliot and that the requested information was not within these materials. The estimates it had provided of searches for other materials (the three boxes) were estimates of searches of other cases mentioned in the affidavit of the RUC officer mentioned in the request. Because this affidavit is detailed in the complainant's wider letter of the 7 July 2022 PSNI considered it was reasonable to include these in its searches.
17. With regard to the complainant's point at paragraph 13, PSNI advised the Commissioner that it is not in a position to comment on the information An Garda Siochana holds. That would be for that police service. PSNI says it can only advise on its own records and searches for this material.
18. Finally, with regard to the complainant's point at paragraph 14, PSNI has explained that Operation Kenova is tasked by and accountable to PSNI in accordance with relevant terms of reference for Operation Denton (which arose from the Barnard Judgement). Operation Kenova is not operating under the auspices of the Metropolitan Police Service as the complainant has asserted.
19. PSNI says that whilst respecting and supporting the investigative independence of Operation Kenova, PSNI has and continues to provide that operation with access to all the materials it requests. PSNI provides relevant materials to the ongoing Operation Denton investigation by providing its officers with access to PSNI's records and systems. PSNI says it has noted the complainant's views but retains the position that to establish if it holds the information requested would take it well in excess of 18 hours.

20. To summarise, PSNI has undertaken some initial searches for the requested information which indicate that it does not hold the information. However, its position is that to confirm definitively whether it does or does not hold the information would take longer than 18 hours.
21. The Commissioner has considered PSNI's submissions, the circumstances behind the request and the way in which PSNI holds information. He considers that the initial searches PSNI has carried out were appropriate and that its time estimates for further searches are credible and based on similar exercises PSNI has undertaken. The Commissioner's decision is that it would take in excess of 18 hours for PSNI to be able to confirm definitively whether or not it holds the information the complainant has requested and that, as such, section 12(2) of FOIA is engaged.
22. In respect of an application of section 12, under section 16(1) of FOIA a public authority should offer advice and assistance to an applicant to help them to refine their request to bring it within the cost limit if it is reasonable to do so. The complainant in this case has asked for a small amount of specific information. The time burden is caused by the volume of material that would need to be searched for this specific information and the way that at least some of that material is held (as hard copies in boxes). The Commissioner does not consider the request could reasonably be refined and therefore there has been no breach of section 16.

Right of appeal

23. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

24. 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.
25. 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

Cressida Woodall
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Wycliffe House
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