

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2023

Public Authority: Police Service of Northern Ireland

Address: Police Headquarters
65 Knock Road
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant requested from the Police Service of Northern Ireland (PSNI) information regarding the destruction order issued by the RUC (Royal Ulster Constabulary) for a specific weapon. PSNI refused to confirm or deny whether information was held and cited section 30(3).
2. The Commissioner's decision is PSNI was not entitled to rely on section 30(3) of FOIA. He finds the public interest argument lies in favour of confirming or denying whether the requested information is held.
3. The Commissioner requires PSNI to take the following steps to ensure compliance with the legislation:
 - Confirm or deny whether it holds the information requested.
 - If the information is held, PSNI should issue a response or a valid refusal notice, with regard to the second part of the request, in compliance with section 17 of FOIA.
4. PSNI must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 February 2023, the complainant wrote to PSNI and requested information in the following terms:

"I would ask if you hold a copy of the destruction order issued by the RUC on 20 February 1985, for a 9mm short 'Savage' semi-automatic pistol. This weapon was used in the murder of [name redacted] on [date redacted].

If this is the case, could you please communicate a copy of this information."

6. On 13 April 2023 PSNI responded. It said it can neither confirm or deny (NCND) it holds the requested information and cited section 30(1)(a) of FOIA.
7. On 2 May 2023 the complainant asked PSNI for an internal review. On 31 May 2023 PSNI provided its review response and upheld its original position. PSNI also recognised that it had incorrectly cited sub-section 30(1) instead of sub-section 30(3) of FOIA which refers to the NCND element of the exemption.

Reasons for decision

8. This reasoning covers whether PSNI was entitled to refuse to confirm or deny whether it holds the requested information and apply section 30(3) of FOIA to the request.

Section 30 – Investigations and proceedings

9. Section 1(1)(a) of FOIA requires a public authority to confirm whether or not it holds information which an applicant has requested – known as 'the duty to confirm or deny'.
10. However, under section 30(3) of FOIA the duty to confirm or deny does not arise in relation to information which is (or if held, would be) exempt information by virtue of subsection (1) or (2).
11. Under section 30(1) of FOIA information is exempt if the public authority has held it at any time for the purposes of:
- (a) investigations which the public authority has a duty to conduct to ascertain whether a person should be charged with an offence whether a person charged with an offence is guilty of it

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

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

12. In its response to this request, PSNI referred to the ICO guidance regarding the application of the NCND principle. PSNI advised the complainant that information disclosed under FOIA is disclosed [or confirmed or denied it is held] to the world and not just to the individual requester.
13. Therefore, PSNI did not wish to confirm or deny to the public at large whether it held information about the destruction order for a particular weapon. PSNI explained that confirming or denying whether it holds information "would amount to a release of information either on this occasion or on other occasions where a similar request is made. Irrespective of what information is or is not held, the public entrust the Police Service to make appropriate decisions with regard to their safety and protection, and the only way of reducing risk is to be cautious with what is placed into the public domain."
14. The complainant provided the Commissioner with detailed arguments to support their position. However, it is not appropriate for the Commissioner to document them here.
15. In its submissions to the Commissioner, PSNI provided some background relating to HET and rebuttals of the complainant's arguments. PSNI explained that the HET¹ was an investigation team set up by PSNI to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998. The HET would produce a RSR or Family report, which was given to families once a review was complete.

¹ <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/hmic-inspection-of-the-historical-enquiries-team/>

16. In September 2014, it was announced the HET would close, due to financial constraints, and the establishment of a new LIB² was later announced. The LIB assumed responsibility for work previously undertaken by the HET in addition to cases involving murder that took place before the establishment of PSNI's Crime Operations Department in 2004.
17. PSNI stated it had received a number of FOI requests for information contained within HET reports including those RSR specifically provided to family members. Some of which resulted in investigations under section 50 and decision notices had been issued. PSNI referred the Commissioner to similar decision notices seeking HET information³ and said "it has previously been accepted by the ICO that RSR and reports to families are not deemed disclosures made to the public at large but made outside of the FOIA."
18. Having reviewed PSNI's submissions, the Commissioner acknowledges its explanation but considers it has only provided a generic response with regard to its reliance on section 30(3) of FOIA. The Commissioner also finds PSNI's references to historical cases and previous decision notices do not make a compelling argument.
19. The Commissioner notes PSNI did not state the harm which would arise if it confirmed or denied whether information was held, or clarified how or why it would occur. As such, the Commissioner considers PSNI is not entitled to rely on section 30(3) to neither confirm or deny whether it holds this information.
20. Although the Commissioner is not convinced by the arguments presented by PSNI, given the nature of the information requested, he has gone on to consider the public interest test.

Public interest test

21. Section 30(3) of FOIA is a qualified exemption and therefore subject to the public interest test. The Commissioner will consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.

² <https://www.psni.police.uk/legacy-investigation-branch>

³ FS50571914; FS50373733; FS50697061 and FS50566057

Public interest argument in favour of confirming or denying whether the requested information is held

22. PSNI recognises there is a strong public interest in ensuring any investigation is or has been undertaken professionally and rigorously by the PSNI. It said, confirming or denying information exists relevant to this request would lead to a better informed public and, demonstrates that PSNI gathers evidence appropriately and in line with current legislation in order to assist in criminal investigations.

Public interest arguments in favour of maintaining the exemption

23. PSNI stated there is a strong public interest in safeguarding the integrity of the Police Service to fulfil its core function of information held by a public authority. Whilst there is a public interest in the transparency of policing and providing assurance that the Police Service is/was appropriately and effectively dealing with crime, PSNI said there is a strong public interest in maintaining the section 30 exemption. PSNI explained this is in order to protect police methodologies and evidence gathering processes, which could be detrimental to any future prosecutions.
24. Although PSNI recognises there is a public interest in transparency of policing operations and reassurance that it is effectively and appropriately dealing with crime, it said there is also a strong public interest in safeguarding the integrity of police investigations.
25. PSNI further argued, "As much as there is a public interest in knowing that policing activity is appropriate and effective, this will only be overridden in exceptional circumstances. Release of information linked to any investigation could potentially compromise any possible future reviews and evidence gathering opportunities, therefore, evidential material must be preserved." PSNI stated that any disclosure, regardless of how generic, would undermine any trust or confidence individuals have in the PSNI. It is therefore of the opinion that for this request, the decision favours neither confirming or denying the information is held. PSNI added, this should not be taken as conclusive evidence that the information requested exists or does not exist.

Balance of the public interest arguments

26. In considering the balance of the public interest in this case, the Commissioner recognises there is a strong public interest in protecting public authorities' investigative capabilities.

27. The Commissioner also acknowledges the complainant's personal interest in confirmation or denial of the information requested. However, it is important to reiterate that confirmation or denial under FOIA is to the world at large, and not just a private communication between the public authority and the applicant.
28. The Commissioner's guidance states section 30(3) of FOIA;
"can only be maintained in the public interest, if confirmation or denial would interfere with the effective conduct of any investigations or proceedings. If no harm would arise, a public authority should not attempt to apply section 30(3) of FOIA."
29. Having taken into account PSNI's arguments, the Commissioner notes PSNI has not demonstrated that confirmation or denial would specifically cause the harm identified. The Commissioner does not consider any such harm would occur from confirming or denying whether the information is held in this case.
30. In the circumstances of this particular case, the Commissioner's view is the public interest lies in favour of confirming or denying whether the requested information is held. He therefore finds that PSNI was not entitled to rely on section 30(3) of FOIA.
31. PSNI should note that the Commissioner considers each case on its own merits and does not envisage that his conclusion in this matter sets a precedent for future requests.

Right of appeal

32. 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

33. 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.
34. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF