



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

11 May 2006

Public authority: The Police Service of Northern Ireland

Address: Police Headquarters
65 Knock Road
Belfast
County Antrim
BT5 6LE

Summary decision and action required

The Commissioner's decision in this matter is that the Police Service of Northern Ireland (the 'PSNI') has dealt with the Complainant's request in accordance with part 1 of the Act in that it properly concluded that the information was exempt information under the Act. However, the Commissioner's decision in this matter is that the refusal notice issued by PSNI did not comply with the requirements of Section 17. The Commissioner does not require any steps to be taken by the PSNI for the reasons set out below.

1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2 The Complaint

- 2.1 The complainant has advised that on 24 January 2005 the following information was requested from the PSNI in accordance with section 1 of the Act.

'the remaining persons interviewed in relation to the complaint'

'the covering report of [redacted]'

'A copy of the interview notes surrounding the interview of [redacted] or [redacted] after caution statement'

'the conclusion of [redacted] in directing no further action against [redacted].'

The PSNI issued the complainant with a refusal notice on 21 February 2005 stating that the information he had requested was exempt under Section 30(2)(a)(iii) and Section 30(2)(b). The complainant wrote to the PSNI on 21 February 2005 to request the PSNI review their decision. The PSNI issued the complainant with the internal review decision on 16 May 2005 stating that the use of Section 30(2)(a)(iii) and Section 30(2)(b) were not appropriate but that the information was in their view exempt under Section 30(1)(a)(i)(b), Section 31(1)(a)(g), Section 31(2)(a-d), Section 38(1)(a-b), Section 40(1)(2)(3)(a) and Section 41.

3 Relevant Statutory Obligations under the Act

- 3.1 **Section 1(1)** provides that –

"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."

3.2 **Section 17(1)** provides that –

A public authority which...is to any extent relying:

- *on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or*
- *on a claim that information is exempt information*

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that –

“A public authority...must...state the reasons for claiming –

(a) that, in all 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 authority holds the information, or

(b) that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

4. Review of the case

4.1 Scope of the review

The Commissioner considered whether or not the PSNI had complied with the requirements of Section 1(1) and in particular whether it had properly applied the exemptions cited. Furthermore, the Commissioner considered whether or not the PSNI had complied with the requirements of Section 17 of the Act when issuing their decision notice.

4.2 The Commissioner’s investigation

4.2.1 The Commissioner contacted the PSNI and requested that they provide copies of all the information that had been requested by the complainant with an explanation of the context of the investigation. In addition, the Commissioner asked the PSNI to provide an explanation

for their reliance on the exemptions. These related principally to establishing the prejudice that would be caused by disclosure of the information. The Commissioner specifically enquired into how law enforcement would be prejudiced and how the physical or mental health or safety of any individual would be endangered by the disclosure of the information. The Commissioner enquired which data protection principle and also how that principle would be breached by the disclosure of the information. The Commissioner also enquired into the factors that would give rise to an action for breach of confidence. In addition, the Commissioner asked the PSNI to reconsider the public interest test separately for each of the qualified exemptions and to comment on the fact that they had relied on the exemptions in both Section 30 and Section 31. In addition, the Commissioner advised the PSNI that the refusal notice issued did not satisfy the requirements of Section 17.

4.2.2 In response, the PSNI furnished the Commissioner with the following documents:

- 16 witness statements taken as part of the investigation
- A report in respect of policing in [redacted], referring in particular to allegations made.
- Conclusions and recommendations of the Investigating Officer and senior management arising from the investigation.

4.2.3 In response to the Commissioner's questions, the PSNI claimed that all the information requested forms part of an investigation file which was the culmination of investigations into allegations made and for which the PSNI, at that time, had the necessary statutory authority to conduct. The PSNI confirmed to the Commissioner that the investigation was initiated to establish whether criminal or disciplinary proceedings were appropriate. The PSNI claimed that the release of the information could prejudice the ability of the police to carry out such investigations in the future on the basis that the flow of information and evidence provided to them is likely to be less detailed and candid if potential witnesses are aware that information they provide could be disclosed. Additionally, the PSNI confirmed to the Commissioner that this would in turn hamper the investigation process.

4.2.4 The PSNI confirmed to the Commissioner that they are aware that Sections 30 and 31 are mutually exclusive. The PSNI have clarified to the Commissioner that the disclosure of the requested information would be likely to prejudice the functions of both the PSNI and the Police Ombudsman for Northern Ireland (PONI) who now, and at the date of request, has responsibility for investigating complaints against the police. The PSNI confirmed to the Commissioner that this is because the flow of evidence and information to the two bodies would be restricted if both officers and members of the public believe that this type of information is likely to be made publicly available. The PSNI confirmed that in their view this would hamper the investigatory

functions of both bodies and to that extent would prejudice law enforcement.

- 4.2.5 The PSNI have applied Section 38 of the Act to information which they assert might endanger the safety of individuals who provided the information. The PSNI have confirmed to the Commissioner that they have a statutory duty to protect life by virtue of Section 32 of the Police (Northern Ireland) Act 2000.
- 4.2.6 The PSNI have advised the Commissioner that the information requested contains personal information relating to the officer against whom the complaint was made and other persons interviewed in connection with the investigation and that the disclosure of the information would breach Principles 1 and 2 of the Data Protection Act 1998 (DPA). The PSNI also confirmed that the information requested by the applicant contains personal data relating to third parties. The PSNI have claimed that the data was obtained for an investigation conducted by the former Royal Ulster Constabulary (RUC), now the PSNI, and that disclosure of the personal data into the public domain would render the specific, lawful and compatible use of the personal data outside the control of the PSNI.
- 4.2.7 The PSNI have confirmed to the Commissioner that witness statements and reports were provided to them with an expectation that these would be held in confidence as part of the investigations file. The PSNI have claimed that they have a duty of care to confidential sources which can be the subject of court action if compromised. Furthermore, the PSNI have claimed that their relationship with confidential sources would be adversely affected if such information were to be made publicly available. The PSNI assert that disciplinary investigations can result in Misconduct Hearings which are held in private. The PSNI have claimed that all the information requested forms part of the disciplinary investigations and therefore attracts an obligation of confidence.

5. The Commissioner's Decision

The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with the following requirements of Part 1 of the Act for the reasons set out below:

- 5.1 **Section 1(1)** – in that the PSNI refused the Complainant's request by relying on the following exemptions:
- 5.2 Section 30(1)(a)(i) and section 30(1)(b)
- 5.2.1 *Section 30(1)(a)(i) provides that:*

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –*
 - (i) whether a person should be charged with an offence...*

Section 30(1)(b) provides that:

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute legal proceedings which the authority has the power to conduct.

5.2.2 The Commissioner is satisfied that the information requested falls within the exemption set out in Section 30(1)(b). The Commissioner has had sight of the information which consists of witness statements, reports and the final recommendations as to the outcome of the investigation. The Commissioner is satisfied that all information relates directly to the investigation and therefore falls within the class of information which is covered by this exemption.

5.2.3 However, the Commissioner is not satisfied that the information requested falls within the exemption set out in Section 30(1)(a)(i) of the Act. The Commissioner considers that the PSNI ought to have selected the appropriate provision within Section 30. The Commissioner considers that section 30(1)(a)(i) is not appropriate because the investigation conducted by PSNI could have resulted in a number of courses of action being taken against the individual who was the subject of the investigation. The Commissioner considers that this could have included responses in the range of criminal charges or possible disciplinary action.

5.3 Public interest factors

5.3.1 The Commissioner has considered the public interest factors for and against disclosure in the case of information covered by the Section 30(1)(b) exemption. The Commissioner has taken into account the general public interest in openness, in the public knowing the reasons behind decisions, the general public interest in the accountability of the decision-making process within public authorities and the public interest in individuals knowing the reasons for decisions that may affect them. The Commissioner has also considered the need for public authorities who have responsibility for the conduct of criminal investigations, such as the PSNI, to conduct investigations in confidence away from the public gaze in order to protect the integrity of the investigatory process.

- 5.3.2 The Commissioner is of the view that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information for the following reasons:
- 5.3.3 The Commissioner is mindful of the complainant's desire to ensure that the investigation was conducted thoroughly and properly by PSNI and in accordance with standard procedure. However, over and above this, the Commissioner is particularly aware of the need to protect the integrity of the investigatory process.
- 5.3.4 The Commissioner draws support for this view from the dicta from Lord Chief Justice Kerr in the Committee on the Administration of Justice & Anor, RE An Application for Judicial Review [2005] NIQB 25, paragraphs 38 and 39. In the application, Lord Chief Justice Kerr referred to the judgment of Taylor and others v Serious Fraud Office (1999) and held that:
- “These passages identify the public interest in maintaining confidentiality for police investigations unless the interests of justice require otherwise. Unless it can be demonstrated that there are compelling reasons for disclosing the contents of a police investigation file, it is vital confidentiality be preserved.”
- “I consider that these remarks hold true for the investigation of a complaint by the Ombudsman. It is not difficult to identify the public interest that is at stake here. The nature of the investigations conducted by the Ombudsman is such that great sensitivity may be required. Confidentiality can promote rather than detract from the effectiveness of an inquiry. If witnesses are aware that their statements will be inspected by other agencies, their incentive to candour is diminished.’
- 5.3.5 The Commissioner has had access to the documents identified above and has concluded that there is nothing in the papers to suggest that the interests of justice would require that the file was opened to public scrutiny.
- 5.3.6 In all the circumstances of the case, the Commissioner is of the view that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information, given the considerable public interest in the need to protect the integrity of the investigatory process.

5.4 Section 41

- 5.4.1 Section 41 provides that:

(1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

5.4.2 The Commissioner is satisfied that Section 41 is engaged for the following reasons:

1. The Commissioner has had sight of the information requested for which the Section 41 exemption has been claimed. This consists of:
 - a. witness statements
 - b. a statement made by the accused officer
 - c. a report submitted by the accused officer
 - d. the conclusions and recommendations of the investigating officer and senior management of the PSNI.

The Commissioner is satisfied that Section 41(1)(a) is engaged in respect of the information in a, b and c above as the information was obtained by the PSNI from another person, the other persons being the authors of the witness statements and report. The conclusions and recommendations of the investigating officer and senior management of the PSNI refer extensively to information obtained by the PSNI from other persons. The Commissioner is, therefore, satisfied that Section 41(1)(a) is engaged in respect of category d above.

2. The Commissioner is satisfied that Section 41(1)(b) is engaged for the following reasons:
 - a. To the extent that the information is not common knowledge, is not in the public domain and is, therefore, inaccessible, the information has, in the opinion of the Commissioner, the necessary quality of confidence about it.
 - b. The Commissioner is satisfied the individuals who provided the information, did so on the implied

understanding that the information would not be disclosed, unless in accordance with their wishes.

- c. The Commissioner is satisfied that there is no overriding public interest in disclosing the information for the reasons identified in paragraph 5.2.1 above.
- d. The Commissioner is satisfied that the disclosure of the information would constitute an actionable breach of confidence because the information has the necessary quality of confidence and because the providers of the information have the necessary legal standing to take an action.

5.5 Section 40(1), section 40(2) and section 40(3)(a)

5.5.1 *Section 40(1) provides that:*

(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.

Section 40(2) provides that:

(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.

Section 40(3)(a) provides that:

(3) The first condition is –

(a) in a case where the information falls within any of the 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.

5.5.2 The Commissioner is satisfied that some of the information requested falls within the definition of Section 40(1). The Commissioner draws support for this view from the case of *Durant v the Financial Services Authority* [2003] EWCA Civ 1746. The court identified two factors that may assist in determining whether information 'is information that affects [an individual's] privacy and, therefore, 'relates to' an individual:

‘The first is whether the information is biographical in a significant sense, that is, going beyond the recording of [the individual’s] involvement in a matter or an event which has no personal connotations...’

The second concerns focus. ‘The information should have the [individual] as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest.’

5.5.3 [Redacted paragraph]

5.5.4 Although not pertinent to the Commissioner’s decision in relation to this particular case, it is the Commissioner’s view, having considered the requested information, that it is likely that the information of which the complainant is the data subject would be exempt from the right of subject access contained in Section 7(1) of the Data Protection Act 1998 by virtue of Section 7(4) of the Data Protection Act 1998.

5.5.5 Where the information requested is personal data of which the applicant is not the data subject, Section 40(2) and Section 40(3) of the Act create an absolute exemption if disclosure would breach one or more of the Data Protection Principles or if the information would have been exempt from disclosure if it had been requested by the data subject.

5.5.6 The Commissioner is of the view that it is likely that Section 40(2) would apply to the requested information to the extent that disclosing personal data in breach of a duty of confidence is unlawful processing of personal data and, therefore, a breach of the first data protection principle. To the extent that the Commissioner is of the view that the information is exempt by virtue of Sections 30 and 41, it does not fall to the Commissioner to decide whether section 40 applies in this case.

5.6 Section 38(1)

5.6.1 *Section 38(1) provides that:*

(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

5.6.2 The Commissioner considers that it is unlikely that the information is exempt by virtue of section 38, given the real and significant likelihood of endangerment to the health or safety of any individual that is

required in order to engage the exemption. To the extent that the Commissioner is of the view that the information is exempt by virtue of sections 30 and 41, it does not fall to the Commissioner to decide whether section 38 applies in this case.

5.7 Section 1(1) – in that the PSNI wrongly relied on the following exemption.

5.7.1 Section 31(1)(a)(g) and Section 31(2)(a-d)

Section 31(1)(a)(g) provides that:

(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.

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)

The Act makes it clear that in cases where Section 30 applies it is neither necessary, nor permissible to make use of Section 31. The Commissioner is, therefore, satisfied that Section 31 does not apply by virtue of the fact that Section 30(1)(b) is applicable.

5.8 Section 17

5.8.1 The Commissioner is of the view that the decision notice issued by the PSNI in response to the information requested did not comply with the requirements of section 17 for the following reasons:

- All the exemptions eventually relied on by PSNI were not cited [section 17(1)(b)]
- The reasons why the exemptions applied were not stated [section 17(1)(c)]
- The reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information, were either not stated or were too vague to meet the requirements of section 17(3)(b).

5.8.2 The Commissioner is not ordering any steps in relation to the defective refusal notice for the following reasons:

- Ordering the PSNI to reissue a refusal notice to the complainant would not, in the view of the Commissioner, have any material effect on the outcome of this case.

- The PSNI in their response to the Commissioner during the investigation accepted that the refusal notice did not comply with the requirements of Section 17 and advised the Commissioner that their practice had now improved to achieve compliance with the requirements of the Act. The Commissioner will monitor this aspect of PSNI's compliance with section 17 in future cases.

6 Action Required

In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act, he does not require any steps to be taken by the PSNI.

7 Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0116 249 4326/4320/4295
Fax: 0116 249 4131
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 11th May 2006

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
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