

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 15 May 2012

Public Authority: Police Service of Northern Ireland
Address: 65 Knock Road
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant requested information relating to the appointment of two individuals to oversee a police investigation into paramilitary-related crime. The Police Service of Northern Ireland (the PSNI) refused to disclose relevant information it confirmed it held under sections 30(1), 31(1), 38(1), 40(2) and 41 of the FOIA. In addition, the PSNI refused to confirm or deny whether it held any other relevant information in reliance on sections 23(5) and 24(2) of the FOIA.
2. The Commissioner's decision is that the PSNI was entitled to rely on section 30 of the FOIA to refuse to disclose relevant information it held and on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any other relevant information.
3. The Commissioner does not require any steps to be taken.

Request and response

4. This complaint relates to Operation Stafford, a PSNI investigation into a number of murders and other criminal activity by loyalist paramilitaries in north Belfast. Operation Stafford was a continuation of Operation Ballast, an investigation carried out by the Police Ombudsman for Northern Ireland. The Police Ombudsman published a report into Operation Ballast in January 2007¹. Operation Ballast was originally

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<http://www.policeombudsman.org/publicationsuploads/BALLAST%20PUBLIC%20STATEMENT%202022-01-07%20FINAL%20VERSION.pdf>

transferred to the PSNI Historical Enquiries Team, and it was renamed Operation Stafford when the PSNI Serious Crime Branch took over the investigation in 2010. On 18 November 2010 the PSNI announced that a special panel had been established to receive "regular and comprehensive briefings on the progress of the investigation" (the press release is reproduced at Annex 1 at the end of this notice).

5. On 29 November 2010 the complainant made the following request to the PSNI:

"I wish to request copies of the internal papers relating to the decision to appoint Baroness O'Loan and Richard Harvey to oversee an investigation into murders and other serious crimes committed by the UVF in North Belfast, the terms of reference for these two people or panel and their powers, and any public statements by the PSNI at the time of the appointment of this panel.

I asked by email for a copy of such statement and received no reply and would like also to see any records relating to this request."

6. On 29 December 2010 the PSNI wrote to the complainant to advise that it would not be able to respond to his request within the statutory timescale. The PSNI estimated that it would provide a full response to the complainant by 26 January 2011.
7. On 26 January 2011 the PSNI provided the complainant with a refusal notice in response to his request. The PSNI provided the complainant with a copy of a press release in respect of the last part of his request, but refused to disclose the remainder of the relevant information it held. The PSNI cited the exemptions at sections 30, 31, 38, 40 and 41 of the FOIA in relation to the withheld information. The PSNI also relied on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any further relevant information.
8. Following an internal review the PSNI upheld its decision to refuse the request.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant did not raise any issues with the information provided by the PSNI.
10. The Commissioner considers the scope of the case to be the PSNI's application to information it held of the exemptions at sections 30, 31, 38, 40 and 41 of the FOIA. With regard to the application of sections

23(5) and 24(2), the Commissioner is only required to consider whether the PSNI was correct to refuse to confirm or deny whether it held any further relevant information.

Reasons for decision

Section 30 - Investigations

11. Section 30(1)(a)(i) provides an exemption for information that was at any time held by the public authority for the purposes of an investigation that the public authority has a duty to carry out with a view to it being ascertained whether a person should be charged with an offence. By applying this exemption the PSNI has implicitly confirmed that it holds relevant information within the scope of the request. The PSNI clearly has a duty to carry out investigations which fall under the exemption at section 30(1)(a)(i).
12. The complainant has stressed to the Commissioner that he is not requesting information gathered by the PSNI as part of the investigation. The complainant has advised that he merely wishes to understand the remit and powers of the oversight panel, he does not wish to receive any information about the progress of Operation Stafford. Therefore the complainant has questioned whether the exemption at section 30 can apply to the information he has requested.
13. In order for the exemption at section 30(1)(a)(i) to be engaged, the actual withheld information must be held for the purposes of an investigation. The Commissioner considers that "for the purposes of an investigation" may be interpreted broadly. For example, the information does not have to be held exclusively for the purposes of a relevant investigation. However, for the exemption to apply the information must be held for the purposes of a particular investigation, rather than investigations in general.
14. The requested information in this case relates to the oversight panel which was established during the course of the Operation Stafford investigation. The PSNI has explained that the panel was established following discussions with the families of some of the victims of the incidents under investigation. In agreeing to set up the panel the PSNI hoped that it would increase confidence in the investigation, and thus encourage families to co-operate with the investigation.
15. Therefore, while understanding the complainant's position, the Commissioner is satisfied that the panel was established for the purposes of the Operation Stafford investigation, and he considers that

information relating to the panel will be therefore be held for the purposes of that investigation.

16. Section 30(1)(a)(i) is a class-based exemption. This means that it is not necessary to identify some prejudice that may arise as a result of disclosure in order to engage the exemption. All that is required is for the information to fall under the class in question. The Commissioner is satisfied that the withheld information in this case is held for the purposes of the Operation Stafford investigation. Therefore, the Commissioner finds that the exemption at section 30(1)(a)(i) of the FOIA is engaged in relation to the withheld information.

Public interest arguments in favour of disclosing the requested information

17. The complainant argued that there was a strong public interest in the public being informed about how serious and complex investigations were monitored. The complainant stressed to the Commissioner that his interest lay in the establishment of the panel in terms of the powers and responsibilities of panel members, rather than details of the investigations themselves.
18. The PSNI also recognised that disclosure of the withheld information could “promote public trust in providing transparency, demonstrating openness and accountability”.

Public interest arguments in favour of maintaining the exemption

19. The PSNI provided the Commissioner with a number of detailed arguments in favour of maintaining the exemption. The PSNI advised the Commissioner that, at the time the request was made, Operation Stafford was clearly a live investigation. At the time of issuing this decision notice the Commissioner notes that a number of prosecutions have been brought, and the investigation is still open. The PSNI continues to investigate and it is possible that further action will follow. Therefore the PSNI is of the view that it was essential to prevent disclosure of any information which might assist offenders in evading justice.
20. The Commissioner has considered several cases relating to live investigations, and has generally found that considerable weight should be attached to the public interest in maintaining the exemption at section 30(1)(a)(i) so as to protect information relating to live investigations.
21. The PSNI also argued that there was a strong public interest in encouraging the public to engage with the investigation, and that disclosure of information relating to the panel may result in individuals

being less willing to co-operate. Given the complex and sensitive nature of Operation Stafford it was vital to ensure that the public had confidence in the investigation. The PSNI maintained that disclosure of the withheld information would have a detrimental impact on the level of engagement, which in turn could hamper the investigation. The PSNI considered that the public interest therefore lay in encouraging, rather than discouraging, engagement and participation.

Balance of the public interest arguments

22. The Commissioner notes that in agreeing to set up the panel the PSNI hoped that it would increase confidence in the investigation, and thus encourage families to co-operate with the investigation. The Commissioner considers there to be a strong public interest in protecting the PSNI's ability to encourage and maintain confidence in the investigation.
23. The Commissioner appreciates that the complainant says he does not wish to see information relating to the investigation. However, given the circumstances of this particular case the operation of the panel is inextricably linked to the investigation. If the PSNI were to disclose the exempt information in this case, it would reveal to the public (including those under investigation) the PSNI's investigative approach to a continuing police operation, including the way in which information is provided to the panel. The Commissioner is therefore satisfied that the PSNI can not separate information relating to the panel without harming its ability to protect a high-profile, sensitive and complex investigation that remains live at the time of issuing this decision notice.
24. As indicated above the Commissioner has found in previous cases that there is a strong and significant public interest in protecting live investigations. The Commissioner considers in this particular case that the public interest in maintaining the exemption at section 30(1)(a)(i) outweighs the public interest in disclosing the requested information.

Section 23: Information provided by or relating to security bodies

Section 24: National Security

25. Section 1(1)(a) of the FOIA states that a public authority is obliged to advise the applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, public authorities may refuse to confirm or deny in reliance on certain exemptions under the FOIA.
26. In this case the PSNI refused to confirm or deny whether it held information relevant to the request in reliance on sections 23(5) and/or 24(2) of the FOIA. Section 23(5) states that:

"... (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)".

27. Sections 24(2) states that:

"(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".

28. In terms of refusing to confirm or deny, the Commissioner recognises that in some circumstances it will be appropriate for a public authority to rely on both provisions without stating which of the two exemptions actually applies. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. In relation to requests touching on issues of national security they can be claimed jointly in order to mask the involvement or otherwise of one of the designated security bodies.

29. The PSNI did not provide the complainant with any explanation as to why it had relied on sections 23 and 24 to neither confirm nor deny whether it held any further relevant information. However the PSNI did provide the Commissioner with a detailed submission in support of its position. The PSNI drew the Commissioner's attention to the fact that Operation Stafford was investigating the activities of loyalist paramilitaries. Therefore the PSNI was of the view that confirming or denying that any further relevant information was held would jeopardise national security as terrorists would be able to identify whether their activities had been detected. Section 24 would therefore apply to any further information which might be held.

30. The Commissioner also notes that the Operation Ballast report which led to the transfer of Operation Stafford to the PSNI contains some discussion of the role of Special Branch in handling informers. The Commissioner recognises that the nature of the work of Special Branch involves close working with security bodies and sharing of information and intelligence. The Commissioner also notes that the PSNI (and its predecessor, the Royal Ulster Constabulary) had responsibility for national security in Northern Ireland until MI5 took over that area in 2007. There is therefore clearly potential for any further relevant information which might be held by the PSNI to relate to one of the designated security bodies. This would bring any such information within the scope of section 23, as well as section 24.

31. Section 23(5) provides an absolute exclusion, but section 24(2) is qualified. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the PSNI holds relevant information.

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

32. The Commissioner appreciates that there is a clear public interest in issues relating to Operation Stafford, as it is a high profile investigation into paramilitary activity. There is a public interest in understanding the implications for national security and for the security of the people of Northern Ireland of knowing whether the PSNI holds further information which is relevant to the request made.
33. The Commissioner also notes that section 24(2) is not an absolute exemption. Therefore Parliament recognised that some circumstances might arise where the public interest would favour confirming or denying that information was held, even though exclusion from this duty was required for the purposes of safeguarding national security.

Public interest arguments in favour of maintaining the refusal to confirm or deny

34. The PSNI was of the strong view that the refusal to confirm or deny should be upheld, particularly given the fact that Operation Stafford was a live investigation involving terrorist activity.
35. The Commissioner understands that section 24(2) contains an inherently strong public interest argument in favour of maintaining the refusal to confirm or deny, given that the exemption is only engaged if it is required to safeguard national security. The Commissioner is also mindful that the current threat level in Northern Ireland is "severe", which means that a terrorist attack is considered highly likely. The PSNI was of the view that it would not be in the public interest to confirm or deny whether it held information which would make it more difficult for the PSNI to fulfil its duties in relation to national security.

Balance of the public interest arguments

36. The Commissioner recognises that section 24(2) provides a qualified exemption, but having considered the PSNI's detailed submission he considers that there are strong arguments in this particular case for maintaining the refusal to confirm or deny whether any further relevant information is held. There is clearly a very great public interest in safeguarding national security. Therefore the Commissioner concludes that in this case the public interest in maintaining the exclusion of the

duty to confirm or deny outweighs the public interest in disclosing whether the PSNI holds any further relevant information.

Procedural requirements

Section 17: refusal notice

37. Section 17(1) of the FOIA states that:

"A public authority which, in relation to any request for information, 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".*

38. The time for complying with section 1(1) is 20 working days from the day after the request is received. In this case the original request was made on 29 November 2010. The PSNI advised the complainant on 29 December 2010 that it would not be able to respond to his request within the statutory timescale. The refusal notice was issued on 26 January 2011.

39. When asked about the time for response the PSNI advised the Commissioner that it required additional time to consult with "interested parties". The PSNI also indicated that it needed to consider the public interest test.

40. Section 17(2) of the FOIA allows a public authority to extend the time limit where it is still considering the public interest as long as certain measures are taken. Section 17(2) states that the refusal notice:

"must indicate that no decision ... has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached".

41. The effect of this is that a public authority must reach a decision about whether or not a qualified exemption is engaged within twenty working days. If it determines that the exemption is engaged, then a refusal notice that complies with section 17(1) must be issued within 20 working days. The public authority therefore is only permitted to extend the time for compliance in order to consider the public interest test

under an exemption which has been applied – and communicated to the requestor – within 20 working days of the request.

42. The Commissioner has published guidance in relation to the application of the public interest test². The Commissioner considers that public authorities should aim to conduct the public interest test within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken should in no case exceed 40 working days from the date of the request. In any event, the public authority is still obliged to issue a refusal notice containing details of the exemption or exemptions that it wishes to rely on, with an explanation that it requires more time to consider the public interest test.
43. In this case the PSNI failed to identify its grounds for refusing the request until 26 January 2011, 40 working days after the request was received. The Commissioner also considers that the PSNI failed to explain adequately why any of the exemptions cited were applicable. Accordingly the Commissioner finds that the PSNI to be in breach of section 17(1) of the FOIA.

Other matters

44. Although it does not form part of this decision notice the Commissioner wishes to highlight the following matter of concern:

The internal review

45. The Commissioner has considered the quality of the internal review conducted by the PSNI. Paragraph 39 of the Code of Practice issued under section 45 of the FOIA advises that:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_applications/internal%20reviewsv1.pdf

46. The Commissioner does not consider that the PSNI's letter to the complainant of 2 March 2011 (following its internal review) was reflective of an adequate review having been conducted. The letter did not address any of the issues raised by the complainant in his request for an internal review, nor did it acknowledge the procedural failings in the PSNI's handling of the request outlined above.

Right of appeal

47. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

PSNI Press Release – 18th November 2010

“The Police Service of Northern Ireland has a dedicated team of experienced detectives within Serious Crime Branch conducting a complex and substantial inquiry, named Operation Stafford, into a series of murders and other serious crimes by the UVF in north Belfast. PSNI took over this work from the Historical Enquiries Team earlier this year. In the exceptional circumstances of this investigation and at the request of some of the affected families, a special panel has been set up which will receive regular and comprehensive briefings on the progress of the investigation. This panel is in addition to the existing levels of scrutiny and accountability provided within the criminal justice system.

The Police Service has agreed to the establishment of the panel to address issues of confidence around the progress of the investigation and to demonstrate in good faith the scale and extent of the investigative work which is being undertaken.

GUIDANCE: Membership of the panel was agreed with victims and relatives. The members are Baroness Nuala O'Loan and barrister Mr Richard Harvey.”