Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 30 January 2013

Public Authority: Public Prosecution Service for Northern Ireland
Address: Belfast Chambers
93 Chichester St
Belfast
BT1 3JR

Decision (including any steps ordered)

1. The complainant made an information request following a decision by the Public Prosecution Service for Northern Ireland (the PPS) that there was insufficient evidence to bring criminal proceedings in relation to a particular incident. The PPS said that it did not hold some information and refused the remainder of the request under sections 30(1)(c), 38, 40(2) and 41 of the FOIA. The Commissioner finds that the PPS responded appropriately and does not require the PPS to take any further steps.

Background

2. This case relates to an alleged kidnapping incident in 1991, of which the complainant was the victim. The Police Service of Northern Ireland (the PSNI) investigated and submitted a file to the PPS, who advised the complainant in October 2010 that there was insufficient evidence to prosecute any individual.

3. The complainant was unhappy with this decision and the PPS agreed to carry out a review according to the PPS Code for Prosecutors.

4. Subsequently the complainant made a number of information requests on this issue to the PPS which became the subject of complaints to the Commissioner. The requests were made on the following dates:

    a. 14 December 2010 (request 1.1)
    b. 19 January 2011 (request 1.2)
    c. 4 February 2011 (request 1.3)

d. 14 February 2011 (request 2.1)
e. 18 June 2011 (request 3.1)
f. 21 June 2011 (request 3.2)
g. 11 July 2011 (request 3.3)

5. This decision notice deals with request 2.1. Requests 1.1, 1.2 and 1.3 are dealt with in decision notice reference FS50426648, and requests 3.1, 3.2 and 3.2 are dealt with in decision notice reference FS50426636.

6. With regard to request 2.1, the Commissioner notes that the complainant made almost-identical requests to the PPS and the PSNI on the same day, and complained about both to the Commissioner. The Commissioner has already issued two decision notices in relation to the request made to the PSNI[1].

Requests and responses

Request 2.1

7. The complainant submitted his request to the PPS on 14 February 2011. The request comprised 20 questions relating to the PSNI's investigation of the alleged kidnapping, and correspondence between the PSNI and the PPS. The request is reproduced in full at Annex 1 at the end of this notice.

8. The PPS responded to the request on 7 March 2011 as follows:

   i. The PPS said it did not hold the information requested at part 1 of the request.

   ii. The PPS did not consider parts 2, 7 and 8 to be valid requests under the FOIA.

   iii. The PPS refused parts 3-6 and 9-20 under sections 30, 38, 40 and 41 of the FOIA.

9. The complainant requested an internal review of the PPS's response on 11 May 2011.

[1] Decision notice FS50393213, issued on 31 January 2012, and decision notice FS50433759, issued on 31 July 2012.

10. Following the Commissioner's intervention the PPS communicated the outcome of the internal review to the complainant on 17 April 2012.

Scope of the case

11. The complainant contacted the Commissioner on 1 December 2011 as he had not yet received the outcome of the internal review. The complainant was dissatisfied at the lack of response from the PPS, and in any event was of the view that he should have been provided with all the information he requested. The complainant also made various allegations about the PPS generally, which the Commissioner has not considered as they do not relate to the FOIA.

Data protection issues

12. On considering the correspondence it was apparent to the Commissioner that the complainant's request should have been considered under the Data Protection Act 1998 (the DPA) as well as under the FOIA. This is because the complainant requested information about the PSNI's investigation of an incident of which he was the victim. The Commissioner considered it likely that some of the requested information would be personal data relating to the complainant. Similarly, the information requested at part 1 of the request, which the PPS said it did not hold, would be personal data of the complainant if it were held. The PPS would have been entitled to refuse to confirm or deny whether it held the complainant's personal information under section 40(5) of the FOIA, but in any event should have considered the request under the DPA.

13. In light of the above the Commissioner firstly conducted an assessment under section 42 of the DPA into the PPS's compliance with that access regime. This was completed in September 2012, but does not form part of this decision notice, because a section 42 assessment is a separate legal process from a section 50 complaint.

FOIA issues

14. On completion of the section 42 assessment the Commissioner proceeded to investigate the FOIA element of the complaints namely, those parts of request 2.1 which did not relate to the complainant's personal information.

15. Although he considered the DPA elements of the complaint first, the Commissioner also wrote to the PPS on 10 February 2012 to remind it of its obligations under the FOIA with regard to the internal review. As the time taken to complete an internal review is not a section 50 matter it is

dealt with at Other Matters below and does not form part of the Commissioner's decision.

Reasons for decision

Not requests for recorded information

16. The PPS advised the complainant that it did not consider parts 2, 7 and 8 of request 2.1 to be requests for recorded information, therefore it was not obliged to answer them. These parts of the request were as follows:

"2. Please explain what the PPS mean by '...there is some indication ...' Were the fingerprints recovered or were they not."

"7. Are the PPS of the view that I was not in the flat. If so, please explain same."

"8. Are the PPS satisfied that I was in the flat. If so, please supply all information and documents they have concerning same."

17. The Commissioner notes that the FOIA provides for access to recorded information. Requests for explanation, comment or opinion are not valid requests under the FOIA, although of course public authorities may choose to answer them in full or in part.

18. In respect of part 2 of the request, the Commissioner appreciates that, although the complainant has asked the PPS to explain its position, the underlying question is what information the PPS holds which led it to adopt this position. However, having inspected the withheld information in this case, the Commissioner is satisfied that, if held, any relevant information falling within this part of the request would constitute forensic evidence, and would also fall under part 6 of request 2.1. This part of the request was refused under section 30(1) and is considered below.

19. Similarly, in respect of parts 7 and 8 of the request, the underlying question is what information the PPS holds which indicates whether or not the complainant was at the specified address. The wording of the request, and in particular part 9, suggests that the complainant is again focusing on forensic information. The Commissioner notes that information relating to the complainant would be exempt under section 40(1) as it would be his personal data. If the PPS held any relevant information which was not the complainant's personal data then it would fall under the other parts of request 2.1 which were for forensic information, for example parts 3, 6, 9 or 10 of the request. Again, the

Commissioner has considered these parts of the request in relation to the PPS's reliance on the exemption at section 30(1)(c)below.

20. The Commissioner is of the view that the PPS ought to have considered the wording of the request more fully when responding to the complainant. However the complainant arguably made the request more complicated by making separate requests with almost-identical wording and by asking for explanation and comment within his requests.

Section 30(1)(c) exemption

21. Section 30(1)(c) applies to information which has been (or would have been) held at any time by the public authority for the purposes of any criminal proceedings which the public authority has power to conduct. Information can fall under section 30(1)(c) if it relates (or would relate) to ongoing, completed or withdrawn criminal proceedings. However the information must relate to specific proceedings, not proceedings in general.

22. The PPS confirmed to the Commissioner that the requested information related to a specific investigation on which the PPS had decided that charges should not be brought. As explained above the PPS had advised the complainant of this decision in October 2010.

23. The Commissioner has considered the interpretation of section 30(1)(c), and is mindful that the exemption applies to information that has *at any time* been held by the authority for the purposes of criminal proceedings. The Commissioner is of the view that this includes information held for the purpose of *potential* criminal proceedings. The exemption is designed to protect information held by prosecuting authorities in specific cases, and such information is exempt even though no proceedings have in fact been commenced.

24. Parts 3-6 and 9-20 of request 2.1 were for detailed information relating to the PSNI investigation of the incident at paragraph 2 above, including information relating to forensic evidence obtained. The PPS advised the Commissioner that the PSNI provided information in order for the PPS to make a prosecutorial decision. Therefore the Commissioner accepts that the PPS would hold this information for the purposes of criminal proceedings.

25. Section 30(1)(c) is a class-based exemption. This means that it is not necessary to identify any 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. In this case the Commissioner is satisfied that the information was held for the purpose of criminal proceedings which the PPS has power to conduct. For the

reasons set out above, the Commissioner is satisfied that the requested information falls within the scope of the exemption at section 30(1)(c) of the FOIA.

Public interest test

26. Section 30(1)(c) provides a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the FOIA. Section 2(2)(b) provides that such an exemption can only be maintained where:

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

27. In considering where the public interest lies in this exemption, the Commissioner is guided by the Information Tribunal in the case of *Toms v Information Commissioner & Royal Mail*[2] where it stated that:

> *"..In striking the balance of interest, regard should be had, inter alia to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested".*

Public interest arguments in favour of disclosure

28. The PPS identified the following arguments in favour of disclosing the information exempt under section 30(1)(c):

- Disclosure may serve to increase the accountability and transparency of the PPS in the prosecution decision-making process by allowing individuals to understand the reasoning behind decisions made by the PPS which may affect their lives.

- Disclosure may further the interests of justice as it would improve the public's knowledge and understanding of the criminal justice process, thereby encouraging the participation of members of the public in that process.

29. The Commissioner understands that disclosure would inform the public as to the interaction between the PPS and the PSNI. This may better inform the public as to how the PPS makes prosecutorial decisions.

[2] EA/2005/0027 para 8

30. The complainant argued that, as the victim of the alleged kidnapping, he should be provided with information about the PSNI investigation and the PPS' views on the evidence gathered. The complainant saw no reason why this information should not be disclosed into the public domain.

Public interest arguments in favour of maintaining the exemption

31. The PPS argued that there were strong public interest arguments in favour of maintaining the exemption. The PPS argued that disclosure could adversely affect the working relationship between the PPS and the PSNI. The PPS was of the view that the public interest lay in protecting the ability of the two authorities to exchange information and opinions on cases, so that fully informed decisions could be taken.

32. The PPS told the Commissioner that the requested information was provided by the PSNI to the PPS solely for the purpose of deciding whether or not charges should be brought. The PSNI expected that information provided to the PPS would not be disclosed into the public domain, as this could harm the PSNI's ability to investigate. The Commissioner is mindful that to date no individual has been charged in relation to the alleged kidnapping, and he attaches significant weight to the public interest in protecting the PSNI investigation.

33. The Commissioner recognises that disclosure of the information could assist the perpetrators of the alleged kidnapping by informing them of PSNI and PPS opinions on the case and the evidence gathered. This would make it more difficult for the PPS to bring an effective prosecution in the future.

34. In addition the PPS argued that disclosure of the information would inhibit the future effectiveness of police investigations as information supplied by members of the public and police was provided in the expectation that it would only be used for the purpose of a criminal investigation. Disclosure could result in witnesses being less willing to supply information in relation to the investigation and prosecution of criminal activity. This would reduce the likelihood of successful investigations and prosecutions, which would not be in the public interest.

Balance of the public interest arguments

35. As the Commissioner has stated in previous decision notices, the Commissioner understands that the complainant in this case has personal reasons for pursuing this matter. He is frustrated that no-one has been charged with any offence arising out of the alleged kidnapping incident which happened over 20 years ago. For this reason the

complainant appears to be of the view that the public should be allowed full access to all the information held by the PPS in relation to the case. However the Commissioner has explained to the complainant on a number of occasions that FOIA is designed to allow for disclosure of official information into the public domain, and may not take account of the identity or motives of the requester. Therefore the Commissioner cannot consider the complainant's argument to carry significant weight in favour of disclosure.

36. The Commissioner acknowledges the complainant's frustration at what he perceives is the lack of progress in bringing those responsible to account. If the withheld information demonstrated any evidence of wrongdoing by the PPS or any other public body it might increase the weight attached to the public interest in disclosure. However, having inspected the information in question the Commissioner is satisfied that it does not contain any such indication.

37. The Commissioner has already found that the PSNI was entitled to refuse an almost-identical request where it had relied on the exemption at section 30(1)[3]. In other cases not involving this complainant the Commissioner has also consistently found that there will generally be a strong public interest in maintaining the exemption where investigations are still continuing. The Commissioner has recognised that it is in the public interest to safeguard the investigatory and prosecution processes, and the right of access should not undermine the investigation and prosecution of criminal matters. Nor should it dissuade other authorities or experts from assisting the PPS in fulfilling its duties. The Commissioner sees no reason why he should adopt a different approach simply because the information may be held by a different public authority, especially as the public interest inherent in section 30 is not confined to the authority holding the information.

38. The Commissioner is of the view that the need to protect the prosecutorial process does not itself mean that information which falls under section 30(1)(c) should never be disclosed. However, the Commissioner is of the view that the public interest in avoiding prejudice or harm to the PPS's ability to carry out its duties would carry considerable weight in favour of maintenance of the exemption.

39. For the reasons set out above the Commissioner considers that the arguments in favour of maintaining the exemption at section 30(1)(c) clearly outweigh the arguments in favour of disclosing the information.

[3] See decision notice FS50433759.

Therefore the Commissioner finds that the PPS was entitled to rely on the exemption at section 30(1)(c) of the FOIA.

40. As the Commissioner has found that the PPS was entitled to rely on section 30(1)(c) he has not considered the other exemptions claimed, namely sections 38, 40 and 41 of the FOIA.

Other matters

Internal review

41. Although it does not form part of this decision notice the Commissioner has considered the time taken to conduct the internal review. The Commissioner has already considered this in relation to earlier requests made by the complainant to the PPS, so it is inevitable that some analysis will be repeated here.

42. The complainant requested an internal review of request 2.1 on 11 May 2011. Despite extensive correspondence – and the Commissioner's intervention - the outcome of the internal review was not communicated to the complainant until 17 April 2012. This means that the PPS took almost one year to complete the internal review in relation to this request.

43. The FOIA does not provide a statutory timescale in relation to internal reviews, but the Code of Practice issued under section 45 of the FOIA provides guidance on this issue. Paragraph 42 of the Code states that:

"42. Authorities should set their own target times for dealing with complaints; these should be reasonable, and subject to regular review."

44. The Commissioner has also produced guidance[4] setting out his view that internal reviews should take no longer than 20 working days, or in exceptional circumstances, 40 working days.

45. The Commissioner is of the view that prompt internal reviews demonstrate a public authority's commitment to customer service. Delays in concluding an authority's internal complaints procedure can affect the relevance of information released as a result. It also increases

[4] http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf

the total time taken from the original request being refused, to the start of the Commissioner's investigation of a complaint.

46. The PPS accepted that the time taken to complete the internal reviews was excessive. The PPS explained to the Commissioner that it needed to consult with third parties, and given the nature of the case this took longer than would have been desired. The Commissioner acknowledges that there are certain complicating factors in this case. However, he is of the view that the PPS ought to have communicated more effectively with the complainant.

47. The Commissioner also notes that the complainant took two months to request a review, despite being in frequent correspondence with the PPS about his various requests. In addition the complainant did not explain clearly to the PPS why he was dissatisfied with its response. The Commissioner would remind complainants that they can help the public authority conduct a thorough review and address their specific concerns by providing an explanation of their dissatisfaction with the response to a request when asking for a review.

Right of appeal

48. 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

49. 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.

50. 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

Request 2.1 - submitted on 14 February 2011

"As a result of correspondence dated 1st Feb 2011 from the PPS I am requesting all information and documents under the FOIA and or any other rights of access as follows;

The PPS claim in their correspondence that;

"Enquiries have been made with the Royal Victoria Hospital and Musgrave Park Military Hospital. No records have been identified concerning your admission on 8th August 1991."

1. Please supply all information and or documents relating to all such requests and enquiries to both Royal Victoria Hospital and Musgrave Park Military Hospital and also all replies received.

And; "While there is some indication that fingerprints of three suspects were recovered at the scene it is by no means clear that these could now be proved to the requisite standard. The original exhibits are unavailable and it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis."

2. Please explain what the PPS mean by '...there is some indication ...' Were the fingerprints recovered or were they not.

3. Please list and supply full details concerning the '...original exhibits ...' which the PPS refer to and supply full details concerning all other exhibits recovered at scene.

4. Please supply full details, information and documents concerning all requests and enquiries, including all replies, for information relating to; 'The original exhibits are unavailable and it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis.'

5. Please supply all information concerning 'One of the suspects is thought to have been the tenant of the property at the time ...' as well as all information concerning; ' ... and the two other suspects were his associates.'

And; 'The fingerprints were on newspapers and books with no direct link to the alleged offence. There is, in short, no forensic evidence to support your account.'

6. Please supply all information concerning where all fingerprints were found, on which items, number of items and where were the said items recovered from.

7. Are the PPS of the view that I was not in the flat. If so, please explain same.

8. Are the PPS satisfied that I was in the flat. If so, please supply all information and documents they have concerning same.

9. Please detail all other forensic evidence which was recovered from the scene, inside and outside the flat.

10. Please supply all information relating to statements made by all other third parties which make reference to man jumping out of window.

11. Please supply full details concerning '...crime scene was held at [named address] and that an examination was carried out by a scenes of crime officer and a photographer.' What was the name of all officers involved. When did they, police first arrive at the crime scene and when did they leave the crime scene. Was anyone arrested at the scene on the day, 8th Aug 1991.

12, Please supply all detail, information or evidence which was recorded by the photographer concerning broken window(s) and or broken glass both inside and outside the flat, crime scene.

13, Please supply all information or detail concerning person(s) referring to man who's feet were tied and or man with no shoes on at the flat or nearby.

14, Please supply all information concerning my shoes, trainers and or the laces from them being recovered from inside or outside the flat.

15. When did Police first speak to the owner of the flat, what date, and how. How did the owner of the flat explain the events which took place in their home, flat. What explanation did the owner of the flat give concerning broken window(s), man found injured on ground outside, police and others treating the flat as a crime scene etc.

16. Please supply all detail or information concerning any reference relating to the flat having been taken over by anyone, including terrorists, by force, making threats or using intimidation.

17. What date were the PPS first made aware that; 'The original exhibits are unavailable ...' and by whom, name of officers who informed them. How was the information passed to the PPS. Please supply all documents and

information concerning same letters to PSNI and also their replies.

18. I'm being told; '...original exhibits are unavailable ...' Please supply all information and documents concerning all requests and enquiries made by the PPS concerning same including all replies. Please also give full details of when the PPS were first made aware, by whom, name of officer(s).

19. I'm also being told; '... it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis.' Please supply all information and documents concerning all requests and enquiries made by the PPS concerning same including all replies.

20. What date were the PPS first made aware that; '... it is not possible to identify the officers responsible for recovering the prints and supplying them for analysis.' What was the name of officers who informed the PPS. How was the information passed to the PPS. Please supply all documents and information concerning same letters to and from the PSNI as well as all information relating to same."