

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 4 August 2015

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

Decision (including any steps ordered)

1. The complainant has requested two reports relating to a murder that took place in 1952. The Police Service of Northern Ireland (PSNI) said that it was unable to confirm or deny that it held the requested information since to do so would exceed the appropriate limit at section 12 of the FOIA. The Commissioner's decision is that PSNI has incorrectly relied on section 12.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that does not cite section 12 of the FOIA in respect of the duty to confirm or deny that the requested information is held.
3. The public authority must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. This complaint follows a request for information relating to the murder of Patricia Curran in Northern Ireland in 1952. Iain Hay Gordon, then aged 20, was charged with the murder and found "guilty but insane" in March 1953. Mr Gordon was detained in a psychiatric hospital for 7 years, and was then released. He applied to the Criminal Cases Review Commission (CCRC) in 1998, and in 2000 the CCRC referred the case

back to the Court of Appeal. The Court subsequently quashed the verdict.

5. On 5 May 2014, the complainant requested the following information from PSNI:

"I request permission to be able to consult 2 documents that are held by the Police with regard to the murder of Patricia Curran in 1952.

1. *Report from Inspector Kennedy to Sir Richard Pym undated but endorsed 'prior to the arrest of Iain Hay Gordon.*
2. *Report from Inspector Kennedy to Sir Richard Pym dated 29th January 1953".*

6. PSNI issued a refusal notice on 2 July 2014. This stated that the cost of complying with the request would exceed the appropriate limit under section 12 of the FOIA. PSNI said that it held 13 boxes which may contain the relevant information, and that it would take approximately 90 hours to examine these boxes.
7. The complainant requested an internal review on 4 July 2014 and the PSNI advised him of the outcome on 31 July 2014. The PSNI upheld its refusal on the basis of section 12 of the FOIA.

Scope of the case

8. On 8 August 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant said that he would have expected there to be a catalogue and index of the material, and he did not understand how it could take PSNI 90 hours to locate the information he had requested.
9. The Commissioner considers the scope of this case to be PSNI's reliance on section 12. As explained below, PSNI clarified its position that it is unable to confirm or deny that the requested information is held, since to do so would exceed the appropriate limit. Therefore the Commissioner is required only to decide whether or not PSNI could confirm or deny to the complainant that it holds the requested information within the appropriate limit. The Commissioner is not required to determine whether the requested information is in fact held, and (if it is held) whether it should be disclosed to the complainant.

10. The complainant has pointed out that the information he requested is listed as having been used as source material for a book.¹ However the Commissioner notes that the author of that book acknowledges that one of the individuals involved in the appeal allowed him to access certain case materials, as opposed to the information having been put into the public domain by PSNI. Nor does the book provide any evidence that PSNI actually held the requested information at the time of the request. Therefore the Commissioner does not consider the book to be of assistance in determining whether PSNI was entitled to refuse the complainant's request.

Reasons for decision

11. Section 12(1) of the FOIA provides that a public authority is not obliged to comply with a request for information if the authority estimates that complying with the request would exceed the appropriate limit, known as the cost limit (£600 for central government, £450 for all other authorities). A public authority may rely on section 12 in respect of the duty to confirm or deny that the requested information is held (by virtue of section 12(2), as claimed in this case), or the duty to communicate information to the applicant.
12. Section 12 of the FOIA should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. In estimating whether complying with a request may cost more than the cost limit, a public authority can consider the time taken in:
- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
13. Regulation 4(4) states that the authority should calculate the cost of complying with a request by multiplying the time estimated by £25 per hour. If the authority considers that complying with the request would

¹ Hostettler, J, *The Colour of Injustice: The Mysterious Murder of the Daughter of a High Court Judge*, 2013, Waterside Press

therefore cost more than the appropriate limit, it is not obliged to comply with the request. In the case of PSNI, the £450 limit applies, which equates to 18 hours.

14. The Commissioner is mindful of the Information Tribunal's view in the case of *Randall v IC and MHPRA*² that a reasonable estimate, in relation to the costs of complying with a request, is one that is

"...sensible, realistic and supported by cogent evidence".

15. The Commissioner considers that a sensible and realistic estimate must be informed by the circumstances of the case.

16. In its correspondence PSNI advised the complainant that:

"The file in relation to this murder consists of 13 boxes none of which are indexed or marked. In addition, the individual folders within these boxes are only generally marked with a description eg. 'miscellaneous reports'...".

17. PSNI said that to confirm whether it held the requested information, ie the two reports, would require a search of every page contained in each of the 13 boxes, which would take 90-180 hours. This equates to approximately 7-14 hours per box and clearly would exceed the cost limit. PSNI's internal review letter provided a slightly more detailed explanation of the estimate and advised that the internal reviewer had consulted the record owner who provided the original estimate. However PSNI did not clarify whether the estimate itself had been reviewed, either by the record owner or the internal reviewer.

18. In support of its position PSNI provided the Commissioner with a note of a scoping exercise undertaken by an assistant investigator, which is reproduced at annex 1 at the end of this decision notice. This note indicated that each of the 13 boxes had been opened in order to ascertain their contents, and that this initial appraisal had taken three hours. The note stated that each box contained 15-25 individual files, and each file contained 200-500 pages. The assistant investigator noted that the paper was thinner than would be used today, and estimated that in total the 13 boxes comprised approximately 260 files containing up to 65,000 sheets of paper. The assistant investigator was of the opinion that it would take 5-10 seconds to examine each page, and

² Appeal no EA/2006/0004

calculated that the total examination time would therefore be 90-180 hours.

19. The Commissioner's published guidance³ recommends that a public authority consider its "search strategy" before producing an estimate of the cost of compliance, so that the estimate is based on an appropriate search. For example, it should not be based on the assumption that all records would need to be searched in order to obtain the requested information if this is not in fact necessary.
20. The note provided by PSNI indicated an assumption that each piece of paper contained in each of the 13 boxes would need to be individually examined in order to comply with the request. In the Commissioner's opinion this search strategy would be likely to result in relevant information being identified. However the Commissioner must consider whether the search would be appropriate, ie whether it is actually necessary to examine each piece of paper within each box. If it is not necessary to do so then the search would be disproportionate and therefore not an appropriate search strategy.
21. The Commissioner was of the opinion that that the explanation provided by PSNI, including the note of the scoping exercise, was insufficiently detailed to satisfy him that PSNI had properly considered the request. In addition the complainant had expressed concern at the lack of supporting evidence for PSNI's estimate of 90 hours. The Commissioner observed that the note of the scoping exercise was extremely brief (ie only four paragraphs, each comprising 2-3 sentences). The note stated that the papers were *in "individual files and are generally marked with a description..."*. The note also stated that *"...statements have been located in other files and reports have been located out of place"*. However PSNI did not provide any further detail or explanation to support these assertions.
22. Consequently the Commissioner considered it appropriate to conduct an inspection of the information held by PSNI, ie the the 13 boxes identified by PSNI as relevant to the request. The Commissioner would stress that the purpose of this inspection was not to attempt to locate the requested information. Rather, the purpose was to clarify how information was held by PSNI, and to ascertain whether or not PSNI's strategy of searching each piece of paper in each box was in fact necessary and proportionate.

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

23. Seven of the 13 boxes were labelled as containing original case papers and six boxes were marked as containing files pertaining to the review conducted by the Criminal Case Review Commission (CCRC) in 2000. The Commissioner opened six of the 13 boxes as a sample to ascertain how the information contained was stored. The Commissioner inspected five of the seven boxes containing original case papers and one of the six CCRC boxes. The inspection took approximately one hour and 40 minutes.
24. The Commissioner has included more detail of his inspection in a confidential annex to this decision notice. The confidential annex is provided to the public authority but not to the complainant, and unlike the decision notice will not be published by the Commissioner. This is because it necessarily contains descriptions of the information inspected by the Commissioner, who is mindful that it relates to a murder investigation for which the only conviction was quashed. As explained above the Commissioner is not required to decide whether any information should be disclosed into the public domain, therefore it would not be appropriate to discuss the content of the information inspected in a decision notice.
25. Following the inspection the Commissioner wrote to PSNI to request further details of its position, pointing out that the explanation provided to date was insufficient to satisfy him that section 12 had been correctly applied. The Commissioner noted that the request was for two specific reports produced before the trial, which took place in 1953. It appeared to the Commissioner that the two reports would have formed part of the original investigation files, having been created before the trial took place. With this in mind the Commissioner suggested that, if the reports were held at all by PSNI, they would be more likely to be contained in the boxes marked original case papers, than in the CCRC review files which had been created over 40 years after the trial. Therefore the Commissioner was of the view that PSNI could reasonably have confined its search to the seven boxes marked original case papers.
26. PSNI did not accept the Commissioner's suggestion and maintained that all 13 boxes needed to be examined in case information had been misfiled. PSNI reiterated its argument that the boxes were not sufficiently labelled in order to indicate what the contents of each box might comprise. PSNI reminded the Commissioner that the information held was not indexed and "*...not archived using records management standards currently in practice in modern policing operations today*".
27. PSNI also provided additional information about the role of the CCRC and its powers to obtain documents. PSNI argued that the CCRC's "wide remit" meant that it was not unreasonable to include the CCRC boxes in the search, as the requested information may have come within the

scope of the CCRC review and may therefore be contained in the CCRC boxes. PSNI advised the Commissioner that it had re-inspected the CCRC box as examined by the Commissioner. PSNI pointed out that this box contained "copy material clearly from the original investigation", and argued that this meant that the CCRC boxes could not be scoped out as the Commissioner had suggested.

28. However PSNI did not suggest that the CCRC box contained any original material, nor did it argue that the requested information might only have come into its possession as part of the CCRC review. PSNI did not provide any evidence or arguments to suggest that the requested information would not be held within the original case papers. In terms of mis-filed information, PSNI gave the example that one of the boxes inspected contained a document explaining how to use carbon paper in a typewriter.
29. The Commissioner accepts that the requested information may have been considered by the CCRC within its review. Therefore it is possible that copies or duplicates of the requested information may be contained within the CCRC boxes. However the Commissioner does not believe that this means the requested information would be likely to be contained only in the CCRC boxes and not in the boxes containing the original case papers. The Commissioner considers it logical to expect that all information produced as part of the original investigation which is held by PSNI would be held within boxes marked "original case files". The Commissioner has seen no evidence to suggest that any original case papers have been removed from the "original case files" boxes and stored elsewhere.
30. Further, the Commissioner considers that information that has been clearly mis-filed can be clearly discounted as irrelevant. As pointed out by PSNI, the document explaining how to use carbon paper is clearly irrelevant to the investigation. In the Commissioner's view it would take very little time to reach this conclusion following a cursory inspection of the document, and it could easily be discounted on that basis. PSNI has provided no other, more relevant, examples of mis-filed information that would need to be examined.
31. The Commissioner acknowledges PSNI's point that copies of original material were contained within the CCRC box inspected. However, as PSNI itself has stated, this comprised copies of information, not the original information itself. The Commissioner considers it reasonable to expect that the CCRC might copy relevant information for consideration, and that copies of information might be stored in the CCRC boxes. However he has seen no evidence to indicate that any original documents were removed from the original case files and placed in the CCRC boxes, as opposed to copies being made for this purpose.

Therefore the Commissioner remains of the view that it would be reasonable to scope out the CCRC boxes on the basis that they would be unlikely to contain the original investigation documents.

32. Within the seven boxes marked original case files, the Commissioner suggested that PSNI could have excluded files where it appeared likely that the information contained would not be relevant to the request. PSNI argued that a file with a specific title that did not indicate it contained internal reports of the description set out in the request, would nonetheless need to be checked in case it did contain this information. However, again PSNI provided no detailed evidence to support this argument. During the inspection the Commissioner examined a number of files with specific titles (for example one was marked "Press Clippings", another indicated that it contained specific witness statements and lines of enquiry). In each of the files inspected by the Commissioner, the file contained information corresponding to its title. The Commissioner accepts that there was no comprehensive index of files, but finds that the contents of the boxes were more structured than PSNI had indicated in that there was no evidence that any relevant information had been misfiled.
33. Accordingly the Commissioner is of the view that it may not be necessary to examine every piece of paper within a file in order to conclude that the entire file need not be examined in detail. For example, a file marked "media clippings" would appear unlikely to contain the requested information and could thus be scoped out on the basis that it would not be appropriate to spend time examining it. This strategy would reduce quite considerably the time required to complete the search. In contrast a file that did not contain a title could not reasonably be excluded from consideration and would need to be examined. The Commissioner noted that there were in fact a number of folders without titles, and folders titled "miscellaneous reports", etc. However, a cursory examination of the documents contained in a folder should be sufficient to allow PSNI to ascertain whether it contained information meeting the description in the request. Furthermore, a file marked "miscellaneous reports" would merit inclusion in a search since it would be more reasonable to expect that the requested information, ie two reports, might be filed in this manner.
34. Again PSNI did not accept the Commissioner's suggestion. Rather, PSNI argued that

"As there are no indexes or chronologies or indeed descriptors on the covers of files which would indicate the exact content of each file it is not possible to simply assume the documents requested may or may not be within a file."

35. The Commissioner agrees that some folders do not have any useful markings, but would point out that he did observe during his inspection that many of the folders were in fact titled. The Commissioner remains of the view that it is not necessary to examine in detail every single piece of information contained within every folder on the assumption that a document may have been misfiled. The Commissioner notes that the First Tier Tribunal recently commented that:

*"The established test on whether or not relevant information is deemed to have been held by a public authority at the relevant time is based, not on absolute certainty, but on the balance of probabilities."*⁴

36. PSNI has not provided evidence to justify its assertion that information has been misfiled. Therefore, in the Commissioner's view it would not be reasonable to expect PSNI to extend its search to cover locations in which the requested information would not reasonably be expected to be found. Such an approach would create an unnecessary burden on any public authority and the Commissioner does not consider it proportionate or necessary. If PSNI had reason to believe that the requested information had been misfiled then it may be acceptable to direct the search accordingly, but it has not provided the Commissioner with evidence of this being the case.

37. If PSNI was required to examine every piece of paper in each box then it would be unlikely that PSNI could ascertain whether or not the requested information was held, without exceeding the cost limit. However, for the reasons set out above the Commissioner is satisfied that PSNI could confine its search to the seven boxes marked original case files. The cost limit of 18 hours would allow 2.5 hours per box, which in the Commissioner's view would be sufficient time to go through its contents, ascertain which folders or files could be scoped out on the basis of being unlikely to contain the requested information and conduct an appropriate search of the contents of the remainder. Again the Commissioner would stress that the object of this exercise would be to ascertain whether or not the requested information is held, rather than to make any judgement as to whether any information ought to be disclosed.

38. Having inspected five of the seven boxes marked 'original case files' within an hour and forty minutes, the Commissioner is satisfied that PSNI ought to be able to examine the contents of all seven boxes within 18 hours. Therefore the Commissioner finds that PSNI was not entitled

⁴ Illingworth v IC, appeal no EA/2014/0153

to rely on section 12 as a basis for refusing to confirm or deny that the requested information is held.

Procedural requirements

39. Section 17 of the FOIA states that a public authority wishing to refuse any part of a request must issue a refusal notice within the statutory time for compliance (ie 20 working days).
40. In this case the refusal notice was issued after 39 working days, therefore the Commissioner must find that PSNI failed to comply with section 17(5) of the FOIA.

Other matters

Records management

41. The Commissioner notes that PSNI has claimed reliance on section 12 on the basis that it would take too long to confirm or deny that it holds the requested information. The effectiveness of any access to information regime is dependent on the organisation in question following good practice in records management. The Commissioner would therefore have concerns about a public authority being unable to comply with a valid request on the grounds of poor records management.
42. However the Commissioner is mindful that the requested information in this case relates to a murder that took place some 63 years ago. PSNI has advised that "*the specific time purposes of the period*" explain why the information is not held "*using records management standards currently in practice in modern policing operations today*".
43. The Commissioner acknowledges that PSNI has particular challenges in dealing with historical records, given the context and history of Northern Ireland. Therefore he would stress that his decision in this case only relates to the request in question. The Commissioner has not made recommendations to PSNI on the subject of records management in response to this case.

Right of appeal

44. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

45. 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.
46. 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

Alexander Ganotis
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Wycliffe House
Water Lane
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Annex 1: PSNI note of scoping exercise

Patricia Curran Murder

FOI REQUEST

This file consists of a total of 13 boxes. Each box is almost full of papers and they are grouped in no particular order. None of the boxes are indexed or marked.

Each box contains between 15 and 25 individual files. All files contain a minimum of approximately 200 pages and up to 500 pages. The paper used in 1952/3 was significantly thinner than what we would use today. I estimate that we hold a total 260 files containing up to 65000 individual sheets of paper.

Whilst the papers are in individual files and are generally marked with a description such as statements, Cleared, Miscellaneous Reports, Psy Nurs Cleared to name but a few. Consider too that there is not consistency in what is contained as statements have been located in other files and reports have been located out of place.

I have opened the original boxes and carried out an initial appraisal of what searches will be required to see if we hold the information requested in the FOI request. The initial appraisal took 3 hours. In my opinion to examine each the pages would take around 5-10 seconds. A total examination time of between 90 and 180 hours.

[Name redacted by ICO]
Assistant Investigator
C2 Serious Crime Branch