

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 19 January 2016

**Public Authority:** Police Service of Northern Ireland

**Address:** 65 Knock Road  
Belfast  
BT5 6LE

#### Decision (including any steps ordered)

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1. The complainant requested information relating to an investigation undertaken by the Historical Enquiries Team (HET), then part of the Police Service of Northern Ireland (PSNI). PSNI refused the request in reliance on sections 30(1)(a)(i) and 40(2), and cited sections 23(5) and 24(2) in respect of the duty to confirm or deny that it held certain information. The Commissioner's decision is that the PSNI was entitled to rely on the exemptions claimed and he does not require any steps to be taken. However, the Commissioner also finds that the PSNI breached section 10 FOIA for failing to respond to the request within twenty working days.

#### Request and response

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2. The HET was an investigation team set up by the PSNI in 2005 to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998. In July 2013 Her Majesty's Inspectorate of Constabulary (HMIC) published a report relating to the HET.<sup>1</sup> On 30 September 2014 PSNI announced that the HET would be closed owing to financial constraints. Subsequently PSNI announced the establishment of a new Legacy Investigation Branch (LIB).<sup>2</sup> The LIB

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

<sup>2</sup> [http://www.psni.police.uk/police\\_announce\\_new\\_unit\\_to\\_investigate\\_the\\_past\\_-\\_legacy\\_investigation\\_branch](http://www.psni.police.uk/police_announce_new_unit_to_investigate_the_past_-_legacy_investigation_branch)

assumed responsibility for work previously undertaken by the HET in addition to cases involving murders that took place before the establishment of PSNI's Crime Operations Department in 2004. HMIC published a follow up report in June 2015.<sup>3</sup>

3. On 19 November 2014 the complainant made the following request to the PSNI:

*"I am writing to you to request a copy of the review and report relating to [named individual]"*

4. PSNI responded to the complainant on 18 December, although this was only received on 24 December 2014. PSNI advised the complainant that the case had been under review by the HET, but that the review had been suspended following the HMIC report in July 2013. PSNI explained that the LIB would complete the review commenced by the HET, although it was unable to give a timescale for completion of the review.

5. With regard to the requested information, PSNI said that disclosure under the FOIA was

*"...a release to the world in general and not just to the individual requesting the information".*

6. Consequently PSNI refused the request, citing the exemptions at sections 30(1)(a) and 40(2). PSNI also claimed reliance on sections 23(5) and 24(2) to refuse to confirm or deny whether any other information relevant to the request was held.

7. Following an internal review PSNI wrote to the complainant on 10 February 2015. The outcome of the internal review was that PSNI upheld its original decision to refuse the request.

## Scope of the case

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8. On 19 February 2015 the complainant asked the Commissioner to investigate the PSNI's response to her request. The complainant pointed out that PSNI had failed to meet the statutory time for compliance. The complainant also argued that she was entitled to receive the requested information as it related to the death of a family member. The

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<sup>3</sup> <http://www.justiceinspectorates.gov.uk/hmic/publications/follow-inspection-police-service-of-northern-ireland-het/>

complainant said that she had been advised that the review was complete and a “family report” had been prepared for the family. Therefore the complainant was of the view that PSNI ought to have disclosed the requested information to her.

9. The Commissioner has explained to the complainant, and must stress in this decision notice, that his duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The Commissioner is mindful that the complainant has understandable personal reasons for wanting disclosure of the requested information. However the Commissioner can only decide whether or not information ought to be disclosed into the public domain. He cannot require PSNI to disclose the requested information solely to the complainant. Nor can he take into account the fact that the HET has previously disclosed some information to some families outside the provisions of the FOIA.
10. Therefore the scope of the Commissioner’s investigation was to determine whether PSNI was entitled to refuse to disclose the requested information, and whether PSNI was entitled to refuse to confirm or deny that it held some information.

## **Reasons for decision**

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### **Section 30 - investigations**

11. Section 30(1)(a)(i) provides an exemption for information that has at any time been 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. The PSNI clearly has a duty to carry out investigations which fall under the exemption at section 30(1)(a)(i).
12. In order for the exemption at section 30(1)(a)(i) to be engaged, the information in question must have been held for the purposes of an investigation. The Commissioner considers that “for the purposes of an investigation” may be interpreted broadly in terms of the information itself, although it must be held for the purposes of a particular investigation, rather than investigations in general. The phrase “at any time” means the investigation the information relates to can be ongoing, closed or abandoned, it does not need to be live.
13. 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, ie the requested information must be held for the purposes of a particular investigation.

14. The Commissioner has previously found that information held by PSNI for the purposes of a HET review will engage the exemption at section 30(1)(a)(i).<sup>4</sup> In this case the Commissioner is similarly satisfied that the information was held by PSNI for the purposes of a HET review, and will be subject to a further review by the LIB. Therefore the Commissioner finds the exemption at section 30(1)(a)(i) engaged and has gone on to consider the public interest.

### **Public interest arguments in favour of disclosing the requested information**

15. PSNI recognised that disclosure of the requested information would reassure the public that it was “effectively engaging with its investigative role”. PSNI also recognised there is a public interest in ensuring public funds are spent appropriately.
16. The complainant’s arguments focused on the fact that she had engaged with the HET as a family member of the deceased. The complainant was concerned that other families had received family reports in their cases, but her family had not. The complainant argued that her family was similarly entitled to know how the HET had reviewed the case and what it had found. As indicated above the Commissioner acknowledges the complainant’s position and reasons for making the request, however, he cannot take this into account when considering where the public interest lies. The Commissioner can only decide on the basis of relevant factors whether the requested information ought to be disclosed into the public domain.

### **Public interest arguments in favour of maintaining the exemption**

17. PSNI said in its refusal notice that the requested information related to an “ongoing investigation”. PSNI acknowledged that it was unable to provide a timescale indicating when the LIB might complete, or even commence, its review. However PSNI argued that disclosure of the requested information would “seriously compromise and undermine” this investigation, which would not be in the public interest.
18. PSNI further explained that the purpose of the review to be conducted by the LIB was:

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<sup>4</sup> ICO case ref FS50373733, issued 16 November 2011

*"...to identify and bring forward any new or potential evidential opportunities to ascertain whether any evidence exists as to whether any person should be charged with any offence."*

19. PSNI argued that, if the requested information was disclosed into the public domain, it could discourage potential witnesses from providing valuable information. PSNI also argued that disclosure of information relating to a live investigation could also undermine the right to a fair trial if charges were brought against any individual in the future.

### **Balance of the public interest arguments**

20. In considering where the public interest lies, the Commissioner is guided by the Information Tribunal in the case of *Toms v Information Commissioner & Royal Mail*<sup>5</sup> 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".*

21. The complainant disputed PSNI's indication that the review was not complete. She said that she had been advised by a former member of PSNI staff that the HET investigation had been completed and a family report produced for issue to the family. PSNI strongly disputed this, stating that the HET had confirmed to the complainant that there was no final approved family report. PSNI also stated that the HET had apologised for any misunderstanding given by HET staff who have since left the PSNI. PSNI also stressed that it could not disclose information to the complainant under the FOIA, that it could not disclose into the public domain.
22. The complainant also referred to a letter sent to her by the HET in December 2014. This letter stated:

*"You may also be aware that Her Majesty's Inspectorate of Constabulary identified concerns about the basis on which the HET carried out a number of reviews of investigations into deaths caused by soldiers. The then Chief Constable, Matt Baggott, instructed that all such military cases be examined or re-examined in accordance with new practices."*

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<sup>5</sup> EA/2005/0027 para 8

*This included those cases where reviews had been completed and reports delivered to families.*

*Your case falls into this group."*

23. The complainant interpreted this letter as confirming that the review had been completed. However the Commissioner interprets the letter as stating that the complainant's case falls within the category of investigations into deaths caused by soldiers. The Commissioner does not interpret the letter as providing a conclusive statement as to the status of the review in the complainant's case.
24. In correspondence with the complainant, and with the Commissioner, PSNI did not accept that the review, or the report, had been completed at the time of the complainant's request. PSNI pointed out that the work of the HET had been suspended in July 2013 and that the complainant's case had been suspended pending implementation of the recommendations contained in the HMIC report.
25. Although the Commissioner acknowledges the complainant's frustration he accepts PSNI's position that the review was not complete at the time of the complainant's request. Whether or not other families had received reports, it remains the case that PSNI had not issued the family report to the complainant in this case. The FOIA does not prevent PSNI from disclosing such information as it considers appropriate, and the Commissioner is mindful that PSNI has disclosed HET reports to families in other cases. However the Commissioner understands that these disclosures were made outside of the FOIA. Therefore the Commissioner cannot take these disclosures into account when making a decision in this case. The Commissioner further notes that the complainant's case will be re-examined by the LIB.
26. The Commissioner has considered several cases relating to live investigations, including HET investigations. The Commissioner acknowledges that the exemption for information that has been held for the purposes of an investigation is qualified, therefore Parliament was of the view that there may well be occasions where the public interest is sufficiently strong to overturn the application of section 30. However the Commissioner has consistently found that significant weight should be attached to the public interest in maintaining the exemption at section 30(1)(a)(i) so as to protect information in such circumstances.
27. The Commissioner recognises that PSNI, like other police forces, requires protection from public scrutiny that might inadvertently prejudice an investigation. There is a strong public interest in protecting PSNI's ability to investigate effectively, and this extends to the review

carried out by the HET, as well as the review that will be carried out by the LIB.

28. In conclusion, the Commissioner finds that there is a more compelling public interest in maintaining the exemption than in disclosing the requested information into the public domain. The Commissioner therefore finds that PSNI was entitled to refuse to disclose the requested information under section 30(1)(a)(i).
29. Since the Commissioner has found that PSNI was entitled to rely on section 30(1)(a)(i) in respect of the information it confirmed it held, he is not required to make a decision in respect of the exemption at section 40(2) in respect of the same information.

**Section 23: information provided by or relating to security bodies**  
**Section 24: national security**

30. Although PSNI confirmed that it held some information relevant to the request, it also sought to rely on sections 23(5) and 24(2). This was because PSNI considered it appropriate to neither confirm nor deny that it held information that would fall within the scope of these exclusions. PSNI referred to the ICO's guidance on this point.

31. Section 23(5) provides that:

*"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)".*

32. Section 24(2) provides that:

*"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".*

33. The Commissioner recognises that in some circumstances it will be appropriate for a public authority to rely on sections 23(5) and 24(2) without stating which of the two exemptions actually applies. In relation to requests touching on issues of national security they can be claimed jointly in order to obscure the involvement or otherwise of one of the security bodies designated at section 23(3) of the FOIA.
34. The Commissioner is mindful that a decision notice is a public document. He must therefore be careful to avoid including any information that might confirm or deny that information is held. Thus the Commissioner's analysis cannot reflect in detail the discussions held with PSNI on the

application of sections 23(5) and 24(2). The Commissioner can however state that PSNI engaged with his staff and provided sufficient explanation for the Commissioner to make an informed decision in this case.

35. The PSNI investigation in this case related to a death involving the armed forces in Northern Ireland. In the Commissioner's view it is reasonable to assume that such an investigation would be likely to involve close working with security bodies and sharing of information and intelligence. PSNI (and its predecessor, the Royal Ulster Constabulary) had responsibility for national security in Northern Ireland until the Security Service (MI5) took over that area in 2007. The Security Service is one of the bodies designated at section 23(5). Therefore the Commissioner accepts that there is clearly potential for relevant information which might be held by PSNI to relate to the involvement of one or more of the security bodies designated at section 23(3) of the FOIA.
36. "National security" is not defined in the FOIA, but the Commissioner has established through previous cases that it will include the security of the United Kingdom and its people. Therefore the Commissioner accepts that PSNI's investigation of the incident in this case would clearly be relevant to safeguarding national security. Confirming or denying that relevant information was held would inform terrorist organisations as to the level of interest taken by PSNI and other bodies, as well as the level of resource allocated. This would assist such terrorist organisations in attempting to evade detection.
37. The Commissioner accepts that confirming or denying that relevant information is held in this particular case would itself provide intelligence as to the scope, stage and focus of the PSNI investigation, as well as the involvement or otherwise of other security bodies. As indicated above he Commissioner cannot provide a more detailed assessment of PSNI's arguments in this regard as to do so would risk the inadvertent disclosure of exempt information. However the Commissioner can confirm that he is satisfied that refusing to confirm or deny that this information is held is indeed required for the purposes of safeguarding national security.
38. Therefore, for the reasons set out above the Commissioner is satisfied that PSNI was entitled to apply the exemptions at sections 23(5) and 24(2) in respect of its refusal to confirm or deny that the requested information is held.
39. 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 PSNI holds relevant information.

### **Public interest arguments in favour of confirming or denying that information is held**

40. PSNI accepted that confirming or denying that the requested information was held would inform the public as to how PSNI investigated, and the HET reviewed matters such as this case. PSNI also acknowledged the general public interest in openness and transparency, particularly in terms of value for money.

### **Public interest arguments in favour of maintaining the refusal to confirm or deny that information is held**

41. The Commissioner has consistently found in previous cases<sup>6</sup> 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.
42. PSNI was of the view that it would not be in the public interest to confirm or deny whether it held relevant information, as section 24(2) was clearly engaged and there was a very limited public interest in disregarding this exemption. PSNI maintained that the public interest lay in ensuring no inferences could be drawn as to the information held.
43. PSNI argued that the public interest would not be served by confirming or denying that information was held where this could enable terrorists to gauge the extent to which their activities may have been detected. Rather PSNI was of the view that the public interest clearly lay in safeguarding national security and avoiding disclosures which would have a detrimental effect on bringing terrorists to justice.

### **Balance of the public interest**

44. The Commissioner appreciates that this is a difficult case for the complainant as a family member of an individual whose death fell to be considered under the remit of the HET and now the LIB. The Commissioner is mindful of the difference between information provided outside of the FOIA, and information disclosed under its access provisions. The Commissioner must stress that he has no power to

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<sup>6</sup> See decision notices FS50394912 and FS50433759

compel a public authority to take any steps outside the requirements of the FOIA.

45. The Commissioner recognises that there is a substantial inherent public interest in safeguarding national security. Although section 24(2) is qualified, the Commissioner believes that there would need to be truly exceptional circumstances in order to override national security considerations which justify the exclusion from the duty to confirm or deny that information is held. The Commissioner acknowledges the complainant's frustration that she has not received the same level of information as some other families. However the Commissioner cannot find that this creates an overriding public interest in confirming or denying that information is held.
46. In conclusion, the Commissioner accepts that there is a substantial public interest in maintaining the exclusion from the duty to confirm or deny that information is held in this case. The Commissioner acknowledges the complainant's personal reasons for making her request, but is not satisfied that there is an overriding public interest in favour of setting aside the exclusion in this case.

### **Section 10 – time for compliance**

47. Section 10 of the FOIA requires that a public authority must respond promptly to a request for information and in any event not later than the twentieth working day following the date of receipt.
48. In this case the PSNI received a request for recorded information which met the requirements of section 8 of the FOIA. The request was made on the 19 November 2014 and the PSNI issued its response on 18 December 2014, which was twenty one working days following receipt of the request.
49. On the facts of the case the Commissioner has decided that PSNI contravened section 10 by failing to respond within twenty working days, however, he also notes that the PSNI acknowledged this point in its internal review response and apologised to the complainant.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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