

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2016

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) for information concerning the shooting of Annette McGavigan in Derry in 1971. The MOD initially withheld all of the information on the basis of the exemptions contained sections 31(1)(a) to (c) (law enforcement) and section 40(2) (personal data) of FOIA. During the course of the Commissioner's investigation the MOD provided the complainant with some of the information falling within the scope of her request. The Commissioner is satisfied that the remaining information is exempt from disclosure on the basis of sections 31(1)(a) to (c), or section 40(2), of FOIA.

Request and response

2. The complainant submitted a number of requests to the MOD on 13 June 2014. This complaint focuses on the request read as follows:

'We specifically request access, on behalf of our client, to any materials which refer to or touch upon in anyway the shooting of our client's [relative], Annette McGavigan, in 1971'

3. The MOD responded to this request on 2 December 2014 and confirmed that it held information falling within the scope of this request but considered it to be exempt from disclosure on the basis of section 31 of FOIA, the law enforcement exemption. This was on the basis that the Police Service of Northern Ireland (PSNI) had advised the MOD that the death of Annette McGavigan remains an open case and disclosure of the withheld material could result in a detrimental effect on the police's enquiries.

4. The complainant contacted the MOD on 9 January 2015 in order to request an internal review of this decision.
5. The MOD informed her of the outcome of this review on 27 May 2015. The review upheld the decision to withhold the requested information and explained that the specific exemptions being relied upon were those contained at sections 31(1)(a) to (c) (law enforcement) of FOIA. The MOD also confirmed that some of the requested information was also exempt from disclosure on the basis of section 40(2) (personal data) of FOIA. The MOD emphasised that disclosure of information under FOIA is disclosure not just to the requester but to the public at large and disclosure decisions, including the consideration of exemptions and any public interest assessments, have to take this fully into account.
6. On 4 January 2016, during the course of the Commissioner's investigation, the MOD provided the complainant with redacted copies of some of the information which fell within the scope of the request. The MOD explained that this information was being disclosed because following further discussions with the PSNI it was concluded that its disclosure was unlikely to have a detrimental effect on any future investigations. The information disclosed consisted of 'log entries' and 'signals' which were recorded at the time of Annette McGavigan's death. A copy of the post mortem was also disclosed. The MOD explained that some of the information in the documents was being redacted as it did not relate to Annette McGavigan and thus fell outside the scope of the request. The MOD also explained that a small portion of information had been redacted on the basis of section 40(2) of FOIA. For the avoidance of doubt, the MOD also confirmed that it held further information which fell within the scope of the request which was being withheld on the basis of sections 31(1)(a) to (c) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 25 September 2015 to complain about the MOD's decision to withhold information falling within the scope of her request. She provided detailed submissions to support her view that the material the MOD withheld should be disclosed and these are discussed below.
8. Following disclosure of the material to the complainant on 4 January 2016, the remaining withheld information consists of soldiers' witness statements and an intelligence document naming a particular individual of potential interest to any subsequent investigation. This is being withheld on the basis of sections 31(1)(a) to (c).

Reasons for decision

Section 31 – law enforcement

9. Sections 31(1)(a) to (c) of FOIA state that:

'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,*
- (b) the apprehension or prosecution of offenders,*
- (c) the administration of justice'*

10. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

The MOD's view

11. The MOD emphasised that the PSNI had confirmed that the investigation into Annette McGavigan's death remained ongoing. Furthermore the MOD explained that it was satisfied that disclosure of the remaining withheld information would be likely to undermine the ability of the PSNI to conduct its investigation.

12. More specifically the MOD explained that any future investigation will need to gather evidence from witnesses and forensic information and the withheld information will be part of that process to allow the PSNI to determine the factual basis of what took place. The MOD suggested that disclosure of the soldiers' witness statements under FOIA could result in potential witnesses providing inaccurate statements to an investigation simply to 'disprove' the soldiers' versions of events. Furthermore, any investigation would also consider the actions of the soldiers themselves and the witness statements taken at the time are a vital historical record of the events and would provide an insight into the consistency of past statements and future accounts of events. Disclosure of the witness statements therefore has the potential to frustrate any subsequent investigation.
13. With regard to the intelligence document, the MOD explained that the individual named in it may be a person who any investigation wishes to interview either as a suspect or a witness. Disclosure of the information would allow that individual to know that they are likely to be the subject of a future investigation and indeed help that individual establish an alibi for that period. Moreover, given the time elapsed between the incident and the date of the intelligence report it could also potentially identify the source of the information. The MOD acknowledged that it was impossible to predict with any accuracy what this individual named in the document may do, but releasing it would in its view certainly increase the likelihood of any investigation being frustrated.

The complainant's view

14. In her submissions to the Commissioner the complainant made the following points which questioned whether the exemptions contained at section 31 were engaged:
15. Firstly, she noted that in reaching its decision to cite section 31 of FOIA, the MOD relied on the advice and objections of PSNI. Indeed in the complainant's view, the MOD had effectively delegated their decision making to the PSNI and she argued that the delegation of this matter to the PSNI is 'unlawful'. The complainant argued that this was particularly the case given the concerns about the police investigation conducted at the time of Annette McGavigan's death and the fact that, after consideration of available existing documents regarding the investigation of the death, it is reasonable to infer that relevant materials relating to the case were either withheld or not provided to the coroner at the time of the original inquest on 25 January 1972. The complainant suggested that this raised real questions about the 'independence' of the PSNI and the appropriateness of it having any role in determining the disclosure of the information by the MOD under FOIA. In such circumstances, the

complainant argued that the involvement in the PSNI in denying access to the records was a matter of serious concern.

16. Secondly, the complainant argued that the assertion that providing access to the records to the next-of-kin may prejudice future PSNI investigations is nothing more than assertion. The complainant argued that it was significant that the MOD had not explained *how* the release of the records to the next-of-kin would compromise any investigation by the PSNI.
17. Thirdly, the complainant argued that the evidence available to date suggested that it was ammunition fired from a high velocity rifle of the type used by soldiers deployed by the British Army that killed Annette McGavigan. She also noted that she had previously been in correspondence with the Northern Ireland Office about this case and its responses suggested that the unit of British Army 'involved' was the 2nd Battalion Royal Green Jackets. In light of this the complainant suggested that it was most unlikely that the next-of-kin might be in any position to compromise any PSNI investigation into the death.

The Commissioner's view

18. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice which the MOD envisages would be likely to occur if the withheld information was disclosed relates to the interests which the exemptions contained at sections 31(1)(a) to (c) are designed to protect.
19. With regard to the second criterion, the Commissioner accepts that as the PSNI's case into the death of Annette McGavigan remains open it is logical to argue that the disclosure of information associated with the case could potentially impact on the effectiveness of its investigation. The Commissioner therefore accepts that there is some causal relationship between disclosure of the withheld information and the interests which the exemptions contained at sections 31(1)(a) to (c) are designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MOD believes would be likely to occur is one that can be correctly categorised as one that would be real and of substance.
20. In relation to the third criterion, having considered the MOD's submissions, the Commissioner is persuaded that disclosure of the withheld information represents more than a hypothetical risk of prejudice occurring. Rather, disclosure of such information would present a real and significant risk. He has reached this conclusion given the clear and specific ways the MOD has described how disclosure of both the witnesses' statements and intelligence document would be

likely to undermine the effectiveness of any PSNI investigation. The Commissioner finds such submissions to be logical and reasonable and provide a sound basis for concluding that harm would be likely to occur to the interests described at sections 31(1)(a) to (c).

21. In reaching this conclusion the Commissioner acknowledges that the MOD had not previously provided the complainant with a detailed explanation to support its reliance on the exemptions. Consequently, the Commissioner is sympathetic to the complainant's ground of complaint which focused on the MOD's failure to explain exactly why the exemptions were engaged. However, in light of the MOD's rationale provided to the Commissioner (and summarised at paragraphs 12 and 13 above), and for the reasons set out in the preceding paragraph, the Commissioner is satisfied that the exemptions are engaged.
22. With regard to the complainant's other points, the Commissioner is not persuaded that they provide any basis to dispute the engagement of the exemptions. At several points the complainant emphasises that the consequences of disclosure of the information to Annette McGavigan's next-of-kin would not be harmful. However, as the MOD noted in its internal review response, the disclosure of information under FOIA is considered to be disclosure to the public at large and thus the consequences of any member of the public accessing such information have to be considered when determining the application of any exemptions.
23. In terms of the MOD's liaison with the PSNI, the Commissioner notes that the Code of Practice issued under section 45 of FOIA specifically addresses circumstances where a public authority who receives a request should consider consulting a third party. Such circumstances include where *'disclosure of information is likely to affect the interests of persons other than the applicant or the authority'*. The Code of Practice also notes that *'in some cases it will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested'*. In light of this the Commissioner is satisfied that it was appropriate for the MOD to consult the PSNI with regard to this request given that it is the PSNI which has responsibility for conducting any criminal investigation into the killing of Annette McGavigan.
24. Finally, in terms of the point of complaint summarised at paragraph 17, the Commissioner understands that the rationale of the complainant's argument is that there is already a not insignificant amount of information about the British Army's involvement in the incident in the public domain. However, having had the benefit of reviewing the withheld information the Commissioner is satisfied that its disclosure would result in the disclosure of information not previously disclosed and

moreover would be genuinely prejudicial to any PSNI investigation for the reasons advanced by the MOD.

Public interest test

25. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the withheld information

26. The complainant argued that there was a public interest in the disclosure of the withheld information for the following reasons:
27. The complainant argued that by refusing to disclose the withheld information on the basis that the PSNI's investigation technically remains live, then effectively the PSNI's objection to the disclosure of the information under FOIA will operate as an obstruction to families obtaining access to material about the circumstances in which their next-of-kin died and prevent them from pursuing other remedies which are likely to be more effective. The complainant argued that depriving families of access to this information operates to obstruct families, both in their search for knowledge about the circumstances in which their next-of-kin and also, in this case, obstructs their access to justice by denying them access to material that should assist in achieving this objective.
28. In the complainant's view the MOD's approach was contrary to the object and purpose of FOIA. This was particular so as her client sought access to the information in order to facilitate making an application to the Attorney General seeking his direction that a coroner conducts a fresh inquest into her relative's death.

Public interest in maintaining the exemption

29. The MOD acknowledged that disclosure of the withheld information would provide some insight into the events surrounding the murder of Annette McGavigan and would provide some background detail on the investigations conducted at the time. Consequently, the MOD accepted that there is an obvious interest in such matters for Annette McGavigan's family. However, the MOD emphasised that disclosure of information under FOIA was considered to be a disclosure to the wider public and it is the wider public interest which must be taken into account. The MOD argued that the principal wider public interest in disclosure of the information in this case is the need to ensure public accountability for the various aspects of the conduct of police investigations. However, the MOD argued that there was a very strong

public interest in protecting the law enforcement capabilities of public authorities, in this case the PSNI and their ability to fulfil their functions unhindered by the public release of information. In the circumstances of this case the MOD therefore concluded that given the weight of this public interest, the exemption should be upheld.

Balance of the public interest test

30. The Commissioner agrees with the MOD that as disclosure of information under FOIA is to the public rather than to an individual, it is the wider public interests that are relevant to determining the balance of the public interest rather than the private interests of the requester. In the Commissioner's opinion the wishes of the complainant's client to access the withheld information in order to facilitate her application for a fresh inquest into her relative's death is essentially a private interest.
31. However, in the circumstances of this case, the Commissioner accepts that is in the wider public interest for the families who lost members in the Troubles to be able to explore, as easily as possible, potential legal remedies beyond simply the potential of a criminal investigation and possible prosecution brought by the PSNI. In other words, there is in the Commissioner's view some crossover between the *private* interests of the McGavigan family and a wider *public* interest. Moreover, the Commissioner believes that this wider public interest should not be dismissed lightly given the importance of bereaved relatives being able to understand more about the circumstances of their loved ones' deaths as part of the wider reconciliation process in Northern Ireland. Furthermore, the Commissioner agrees with the MOD that disclosure of the withheld information would also contribute to the accountability of the police's actions when the initial investigation into Annette McGavigan's death took place. Again, given the concerns about this investigation raised by the complainant, such an argument cannot be ignored.
32. Nevertheless, despite the weight attributed to such arguments, the Commissioner is firmly of the view that the public interest favours maintaining the exemption. He has reached this conclusion because of the significant, and ultimately compelling, public interest in protecting the effectiveness of any PSNI investigation into Annette McGavigan's death. He believes that the public interest in maintaining the exemptions attracts particular weight given that the MOD has identified specific ways in which disclosure of the information could harm any such investigation.

Section 40 – personal data

33. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

34. Personal data is defined in section (1)(a) of the DPA as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

35. The MOD redacted a small portion of information contained in the documents disclosed to the complainant on the basis of section 40(2) of FOIA. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as it relates to identifiable individuals.

36. The MOD argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

37. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;

- any particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
38. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
39. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
40. The MOD argued that the individuals in question would have no expectation that their involvement in these matters would be publically confirmed. Therefore the MOD argued that to disclose the information would be unfair.
41. The Commissioner accepts that the individuals in question would have no expectation that their names would be disclosed. In light of this expectation and indeed given the passage of time since the events in question, the Commissioner is satisfied that disclosure of the information would be unfair. Disclosure would therefore contravene the first data protection principle. The MOD is therefore entitled to withhold the redacted information on the basis of section 40(2) of FOIA.

Right of appeal

42. 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

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

43. 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.
44. 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

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