

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2022

Public Authority: Chief Constable Police Service Northern Ireland

Address: PSNI Headquarters

65 Knock Road

Belfast

BT5 6LE

Decision (including any steps ordered)

1. The complainant has requested information about the ballistic history of a weapon used in a specific crime. Police Service Northern Ireland (PSNI) refused to confirm or deny whether it holds the requested information.
2. The Commissioner's decision is that PSNI is entitled to rely on section 30(3) of FOIA to refuse to confirm or deny that it holds the requested information, and that the balance of the public interest favours maintaining the exemption. However, he finds that PSNI breached section 10(1) of FOIA as it failed to provide its response to the request within the statutory timeframe.
3. The Commissioner does not require PSNI to take any remedial steps.

Request and response

4. On 22 April 2021, the complainant wrote to PSNI in the following terms:
"I have previously requested that the PSNI (the data controller) supplies me with all available information regarding the weapon used in the abduction and torture of [redacted]. I have previously supplied you with information regarding this weapon which was in the

possession of Brian Nelson (Deceased) who was convicted of the abduction and assault on [redacted]:

Serial Number: XY9 3A11 (or 3411) .22 calibre weapon.

As you are aware Brian Nelson was a formerly a British soldier who became an agent and informer for the Force Research Unit (FRU) whilst being head of intelligence for the East Belfast UDA. During the criminal trial of Brian Nelson into the abduction and torture of [redacted] the trial judge in his summing up on 18 February 1974, said to him: "the gun was yours". This indicates that Brian Nelson was the owner of the weapon and its must therefore have been authorised by the RUC.

You have previously stated that you can Neither Confirm Nor Deny (NCND) that you hold information regarding this weapon.

I remind you NCND is not a legal principle as identified by May LJ in Mohamed Ahmed Mohamed and CF v Secretary of State for the Home Department [2014] EWCA Civ 559

"20. Lurking just below the surface of a case such as this is the governmental policy of "neither confirm nor deny" (NCND), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a Judgment Approved by the court for handing down. governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that the appellants or the public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety. It is for these fundamental reasons that I consider the appellants' principal ground of appeal is made out. The approach to their abuse of process applications was largely flawed. I make no comment on the merits of those applications."

5. On 19 July 2021 PSNI wrote to the complainant to clarify what information they were actually seeking, or whether they were in fact requesting an internal review of a previous FOIA request.
6. The complainant wrote to PSNI on 23 July 2021 and confirmed that they are seeking the disclosure of any ballistic history of the weapon.

7. PSNI responded on 14 October 2021. It stated that it could neither confirm nor deny that it holds the requested information. It relied on section 31(3) of FOIA, by virtue of section 31(1)(a), to do so.
8. Following an internal review PSNI wrote to the complainant on 4 March 2022. It upheld its reliance on section 31(3) to neither confirm nor deny that it holds the requested information.

Scope of the case

9. The complainant originally contacted the Commissioner on 22 December 2021 to complain that they had not received a response to their request for information.
10. PSNI forwarded a copy of its response from 14 October 2021, which the complainant had unfortunately not received when it was originally sent to them.
11. Following receipt of the response, along with the subsequent internal review outcome, the complainant informed the Commissioner that they wished to continue to pursue their complaint as they disagreed with PSNI's neither confirm nor deny response.
12. From the submissions provided to him, the Commissioner considers that PSNI should have cited section 30(3) to neither confirm nor deny if it holds the requested information, rather than section 31(3). This reasoning is explained below. Due to the close relationship between the two exemptions and the fact that the arguments already provided to him are applicable to both exemptions, the Commissioner considers that the proportionate way forward is to proceed as though the PSNI had relied on section 30(3), rather than section 31(3). The Commissioner considers that it would serve no useful purpose to dismiss section 31(3) on a technicality and order the PSNI to issue a confirmation or a denial, when section 30(3) would so clearly apply.
13. Therefore, the Commissioner considers that the scope of this case is to determine if PSNI is entitled to rely on section 30(3) of FOIA to neither confirm nor deny that it holds the requested information.

Reasons for decision

Section 30(3) – investigations and proceedings

14. A public authority can rely on section 30(3) to refuse to confirm or deny holding information which, if it were held, would have been held at any

point for the purposes of a criminal investigation carried out by that public authority.

15. PSNI explained:

"It is PSNI's view prejudice would occur if we confirm we hold or not a ballistic history of this weapon. By doing so this would confirm into the public domain if the weapon had been subject to a process of forensic examination. This could infer this particular weapon had been used in wider criminality. Whilst we acknowledge the role of Brian Nelson as an army agent is well documented and his activities subject to criminal sanction, forensic information (if held) may be used to establish links between crimes including those that may remain unsolved or where future evidential opportunity presents. Whilst we acknowledge these events happened some time ago and Mr. Nelson is now deceased prosecutions continue to be taken forward in relation to the investigation of 'Legacy' killings in Northern Ireland and PSNI continue to investigate legacy matters. We understand this is a unique policing role within the UK. Confirming or denying such specific forensic information is held would prejudice the law enforcement capacity of PSNI by undermining the integrity of investigations of crime."

16. Having had regard of the context of the information being sought by the complainant, and having duly considered the rationale set out by PSNI in its responses to the complainant and in its submissions to the Commissioner, he finds that section 30(3) of FOIA is engaged in this case.

17. The only reason why the PSNI would hold a ballistic history of a particular weapon would be for the purpose of a criminal investigation – whether that be for the purposes of an investigation into Mr Nelson or of others. Therefore, if this information existed and was held by the PSNI, it would have been held for the purpose of investigating criminal offences – putting it squarely within the scope of section 30 of FOIA.

18. For the avoidance of doubt, the Commissioner makes clear that PSNI has not confirmed whether or not any information within the scope of the request is held.

19. Since the Commissioner has established that the exemption is engaged, he will move on to consider the balance of the public interest arguments, which PSNI provided further clarification of in its submissions to the Commissioner during his investigation.

Public interest arguments in favour of confirmation or denial

20. PSNI acknowledges that there is a public interest in the transparency of effective law enforcement. Confirming or denying whether information is

held would provide an insight into the practices of PSNI by demonstrating if they hold complete records of the ballistic history of the weapon used in this case, and perhaps any links to additional persons or crimes. This would in turn provide the public with a better understanding of PSNI's methodology and its ability to investigate crimes.

Public interest arguments in favour of maintaining the exemption

21. PSNI argues:

"Confirming or denying that information is or is not held on the ballistic history of the weapon would have the effect of compromising PSNI's law enforcement tactics and methods used to gather information for an investigation which would prejudice that investigation and any possible future proceedings, as well as any possible connected investigations which may be linked to that weapon if the information is held. The use of this type of information would be of particular concern in light of the nature and extent of the prevailing terrorist/criminal threat. It would be of use to those involved in criminal activities in combination with other information they have gathered to try and prejudice law enforcement. This is true whether or not information is held. PSNI must therefore be consistent in its use of NCND in order to ensure that investigations are not hampered and criminal/terrorists are detected and crime prevented."

22. PSNI went on to explain that it remains committed to the investigation of so-called legacy related matters, many of which are now in excess of 40 or 50 years old. Whilst PSNI seeks to be open and transparent, it has a duty to ensure that both current and future investigations are not hampered by the inappropriate disclosure of information into the public domain as a result of confirming or denying that it holds the requested information.

Balance of the public interest

23. In reaching a view on where the public interest balance lies in this case, the Commissioner has taken into account the nature of the requested information as well as the views of both the complainant and PSNI.

24. He accepts that it is important for the general public to have confidence in the PSNI's investigative capabilities. Accordingly, there is a general public interest in disclosing or, in this case, confirming or denying whether a public authority holds information that promotes accountability and transparency in order to maintain that confidence and trust.

25. He also recognises that there is a very strong public interest in protecting the investigative capabilities of public authorities – especially

when investigations remain ongoing. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is in this case, the public interest in PSNI being able to effectively conduct its function of carrying out criminal investigations.

26. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of confirmation or denial do not equal or outweigh those in favour of maintaining the exemption. Accordingly, the Commissioner is satisfied that PSNI is entitled to rely on section 30(3) of FOIA.

Right of appeal

27. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

28. 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.
29. 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

Catherine Fletcher
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