

## **Freedom of Information Act 2000 (FOIA)**

### **Decision Notice**

**Date:** 4 May 2022

**Public Authority:** Public Prosecution Service for Northern Ireland

**Address:** Belfast Chambers  
93 Chichester Street  
Belfast  
BT1 3JR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information, relating to several named individuals, in connection with a murder. The Public Prosecution Service for Northern Ireland (PPS) initially refused to disclose information relating to one individual under sections 30, 40(2) and 41 of FOIA, and refused to confirm or deny whether it held information relating to the other individuals under section 40(5) of FOIA. The PPS subsequently amended its position to refuse the entire request under section 12 of FOIA (appropriate limit).
2. The Commissioner's decision is that the PPS was entitled to refuse the request under section 12 of FOIA, since compliance with the request would exceed the appropriate limit.
3. The Commissioner does not require the public authority to take any further action in this case.

#### **Background**

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4. The complainant in this case is a family member of an individual murdered in 1981. At the time of issuing this decision notice no prosecutions were ongoing and no-one had been convicted of the murder.

5. A book was published in 1997 which claimed to provide information about the murder, and a television documentary has also been broadcast containing similar claims.

## Request and response

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6. On 2 June 2020, the complainant wrote to the PPS and requested the following information:

“Under FOIA I wish to access any Files or Records, you hold within your library and archive. on the following persons....

[Named individual 1].  
[Named individual 2].  
[Named individual 3].  
[Named individual 4].  
[Named individual 5].  
[Named individual 6].  
[Named individual 7].”

7. The PPS responded on 2 July 2020, advising that it could neither confirm nor deny (NCND) that it held the requested information, albeit citing the exemption at section 40(2) of FOIA rather than section 40(5).
8. The complainant requested an internal review on 20 July 2020, providing several arguments in support of his request. The complainant maintained that his family wanted to know as much as possible about the murder of their loved one. He pointed out that [Named individual 1] was deceased, and asked why the files had not been transferred to the Public Records Office of Northern Ireland (PRONI) as historical records.<sup>1</sup>
9. The PPS provided the complainant with the outcome of the internal review on 18 September 2020. The PPS confirmed that it held information relating to [Named individual 1] but refused to disclose it under section 40 (personal data), section 30 (investigations) and section 41 (information provided in confidence) of FOIA. The PPS

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[https://www.nidirect.gov.uk/sites/default/files/publications/guidance\\_for\\_the\\_transfer\\_of\\_official\\_to\\_the\\_public\\_record\\_office\\_of\\_northern\\_ireland\\_2013.pdf](https://www.nidirect.gov.uk/sites/default/files/publications/guidance_for_the_transfer_of_official_to_the_public_record_office_of_northern_ireland_2013.pdf)

maintained its NCND position with regard to the other named individuals.

10. The complainant wrote to the PPS again on 1 October 2020 to provide further arguments in support of his position. The complainant pointed out that the Historical Enquiries Team (HET)<sup>2</sup>, part of the Police Service of Northern Ireland (PSNI), had concluded that there remained an absence of evidence which could progress the case. Therefore the complainant believed that further prosecutions were unlikely and any relevant information ought to be disclosed to him.
11. The complainant referred the PPS to information in the public domain including a book and a documentary. He also asked for clarification of the PPS's response as to the historical status of the records.
12. The PPS responded to the complainant on 16 October 2020. It provided some further explanation of its position, and reminded him of his right to complain to the Commissioner.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 9 November 2020 to complain about the way his request for information had been handled. The complainant asked the Commissioner whether he would be entitled to access the requested information under the Court Files Privileged Access Rules (Northern Ireland) 2016.<sup>3</sup>
14. The Commissioner advised the complainant that he does not regulate these Rules, and that in any event they apply only to court files that have been transferred to PRONI. The PPS had confirmed to the complainant that it has retained the information it holds and has not transferred it to PRONI. Therefore it appeared to the Commissioner that the Rules would not assist the complainant in this case.
15. The Commissioner is mindful that the complainant in this case is a relative of an individual who was murdered. The Commissioner acknowledges that the complainant, as a family member, will have understandable personal reasons for seeking access to information

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<sup>2</sup> Replaced in 2015 by the Legacy Investigation Branch (LIB):  
<https://www.psnipolice.uk/inside-psni/our-departments/operational-support/legacy-investigation-branch/legacy-investigation-branch/>

<sup>3</sup> <https://www.legislation.gov.uk/nisr/2016/123/made>

about their loved one. However the Commissioner must stress that he can only make a decision under section 50 of FOIA. He can only require a public authority to disclose information under FOIA if it could be disclosed into the public domain, ie to any person who requested it.

16. The complainant has confirmed to the Commissioner that the scope of his request is limited to information relating to the murder of his family member. He is not seeking information that does not fall within this description. The Commissioner's investigation and decision therefore relates only to this information (whether or not it is held).
17. The Commissioner's representative visited the PPS's offices to inspect the requested information. At this point it became apparent that the PPS had not extracted the requested information from the documents containing it. The PPS advised that to do so would have taken extensive time and resources. The Commissioner therefore asked the PPS to confirm whether it was now seeking to rely on section 12 as opposed to the exemptions previously claimed.
18. The PPS subsequently confirmed that it was now seeking to rely on section 12 in order to refuse the request. It provided the Commissioner with a detailed submission regarding its change of position. It also provided the complainant with a copy of this submission.
19. The Commissioner acknowledges that public authorities may at any stage seek to rely on an exemption or exclusion not previously claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).<sup>4</sup>
20. In light of this the Commissioner's investigation in this case has focused on whether the PPS was entitled to rely on section 12 in order to refuse the request.

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<sup>4</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

## Reasons for decision

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### Section 12: compliance would exceed the appropriate limit

21. Section 12(1) of 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, also known as the cost limit.
22. A public authority may rely on section 12 in respect of the duty to confirm or deny that the requested information is held, or the duty to communicate information to the requester.
23. Section 12 of FOIA should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.<sup>5</sup> The "Fees Regulations" set the appropriate limit at £600 for central government and £450 for all other authorities. Regulation 4(4) states that authorities should calculate the cost of complying with a request by multiplying the time estimated by £25 per hour.
24. When estimating whether complying with a request would exceed the appropriate limit the public authority may only take into account the following activities:
  - (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.
25. If the authority considers that complying with the request would therefore cost more than the appropriate limit, it is not obliged to comply with the request. In the case of the PPS, the £600 limit applies, which equates to 24 hours.

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<sup>5</sup> <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

26. The Commissioner is mindful of the First-tier Tribunal's view in the case of *Randall v IC and MHPRA*<sup>6</sup> 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”.

27. The Commissioner considers that a sensible and realistic estimate must be informed by the circumstances of the case. The Commissioner's published guidance<sup>7</sup> recommends that public authorities consider a “search strategy” at the outset, so that any estimate of the cost of compliance 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.

### **Information held by the PPS**

28. For the purposes of the Commissioner's inspection the PPS identified seven boxes of information that were likely to contain information falling within the scope of the complainant's request, ie information relevant to the murder. The PPS emphasised that such information was likely to comprise a relatively small proportion of the information contained in the seven boxes. The PPS clarified that most of the information contained in the seven boxes was likely to fall outside the scope of the request.

29. The PPS described the seven boxes as containing information relating to a number of separate but linked matters. This information had been provided to the PPS by various parties, and included information relevant to the request, ie relating to the murder that was the subject of the request. The PPS confirmed that the requested information was held in hard copy only and had not been digitised. Nor had it been weeded or sorted at any stage.

30. The PPS confirmed that it had not in fact identified and extracted any of the requested information from the seven boxes. The PPS indicated that it would be excessively time consuming to do so. Instead the PPS had conducted a scoping exercise, ie it had gone through the information contained in three of the seven boxes to provide an

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<sup>6</sup> Appeal no EA/2006/0004

<sup>7</sup> [https://ico.org.uk/media/for-organisations/documents/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)

indication of the time required to identify information that may be relevant to the request.

31. The Commissioner's representative examined one of the seven boxes that had been reviewed by the PPS as part of the scoping exercise. She estimated that it contained a large volume of information in a mixture of formats (some bound pages and some loose leaves). The information contained in the box included statements, reports, records of exhibits, depositions and legally privileged material. The information did not appear to be indexed or organised in any particular way, and approximately 25-30 tabs had been applied to information scattered through the box. These tabs indicated information that the PPS had identified as likely to contain information relevant to the request. The remainder of the information contained in the box related to other matters and therefore fell outside the scope of the request.
32. The Commissioner's representative did not proceed to examine the other six boxes. Instead she considered it appropriate to invite the PPS to provide further details of its position that consideration of all seven boxes would exceed the appropriate limit of 24 hours.

### **The PPS's position**

33. The PPS subsequently confirmed to the Commissioner that it now sought to rely on section 12 as a basis for refusing the request. The PPS provided an estimate of the time taken up to the point of the Commissioner's inspection:
  - a) Searching databases for individuals/incidents and location and retrieval of physical files: 1.5 hours
  - b) Examination, identification and extraction of material contained in three of the seven boxes, estimated to comprise 3000 pages, at an average of 30 seconds per page: 25 hours.
34. The PPS also provided the Commissioner with a breakdown of its estimate of the time required to complete the activities allowed by the Fees Regulations as follows:
  - c) Examination/ identification and extraction of material in 4 boxes of material containing 2,500 pages at an average of 30 seconds per page = 21 hours
  - d) Examination and extraction of material in 140 albums = 4 hours

35. As set out at paragraph 31 above, the Commissioner's representative inspected one of the seven boxes. Based on her inspection of one box, and the PPS's scoping exercise of three boxes, the Commissioner is satisfied that it would be necessary to examine each of the seven boxes to check for relevant information. The Commissioner has seen nothing to indicate that the search could be limited to some boxes but not others.
36. Having regard to the unstructured format of the material contained in terms of subject matter, the Commissioner accepts that the PPS would need to consider the majority of pages if not every single page. For example, some of the information comprised multi-page reports stapled or otherwise affixed. The Commissioner considers that the PPS may be likely in some cases to be able to form a view on these reports from the first page since it would be likely to contain a title, summary or other indication of its likely contents. These reports could therefore be scoped in or out relatively quickly and the estimate of 30 seconds per page would not be likely to apply to each individual page. However it is equally possible that in other cases such reports may contain information relating to the murder that is the subject of this request.
37. The Commissioner must also take into account the time estimated to extract the information identified as relevant to the request. Since all of the information was held in physical files this would necessarily be a manual exercise. Each page containing relevant information would need to be removed and the relevant part or parts scanned or photocopied. The Commissioner considers that this activity constitutes extraction of the information as allowed by the Fees Regulations, and would be likely to take longer than 30 seconds per page.
38. Taking the two activities (identifying information and extracting that information) together, the Commissioner accepts that an estimate of an average of 30 seconds per page overall is reasonable.
39. The PPS estimated that the seven boxes contained approximately 5500 pages, which at 30 seconds per page would equate to 2750 minutes, or 48.3 hours. This clearly exceeds the appropriate limit of 24 hours. Given that the Commissioner accepts the PPS's explanation of its estimate, it follows that the Commissioner is satisfied that compliance with the request would exceed the appropriate limit.
40. As set out above the Commissioner recognises that the complainant has legitimate and understandable personal reasons for submitting his request. However FOIA does not allow for these reasons to be taken into account when considering whether compliance with the



request would exceed the appropriate limit. Therefore the Commissioner finds that the PPS was entitled to refuse the request under section 12 of FOIA.

### **Section 16: advice and assistance**

41. Under section 16 of FOIA a public authority is required to provide advice and assistance as to how a request could be refined where it exceeds the cost limit under section 12 of FOIA. If it is not possible to provide advice and assistance under section 16 as to how a request could be refined the authority should confirm this to the requester.
42. In a previous decision notice issued by the Commissioner under FS50503796, which was upheld by the Upper Tribunal in *Commissioner of the Metropolitan Police v Information Commissioner and Donnie Mackenzie* [2014] UKUT 0479 (AAC), the Commissioner found that the public authority had complied with its obligation under section 16 of FOIA by confirming to the complainant that it was unable to suggest a practical way to refine the request.
43. In this case the PPS has also confirmed to the complainant that it is unable to suggest a practical way in which the request could be refined in order to avoid exceeding the cost limit. Given the PPS's reasons for relying on section 12, and the detailed circumstances of this case, the Commissioner accepts that the PPS has complied with section 16.

### **Other matters**

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44. The Commissioner considers it unfortunate that the PPS did not fully explore section 12 of FOIA in its initial handling of the request. Given that the PPS ascertained at an early stage that the requested information would be held in physical files, and mixed in with voluminous non-relevant information, it would have been desirable to conduct a scoping exercise at this stage.
45. The Commissioner acknowledges that this would not have changed the outcome of this complaint. Nonetheless it would have provided the complainant, at an earlier stage, with a clear and robust explanation as to why his request was refused, rather than relying on exemptions from disclosure.
46. The Commissioner would not normally expect a public authority to hold information in the manner in which the PPS holds the requested information. He has therefore considered whether it is appropriate to make recommendations regarding records management practice.

47. Guidance for public authorities on good records management is provided by the section 46 Code of Practice.<sup>8</sup> The code provides guidance to public authorities on keeping, managing and destroying records. The Commissioner promotes observance of the code, in conjunction with The National Archives (TNA) and the Public Record Office of Northern Ireland (PRONI). In pursuance of this duty he has published guidance on the good practice public authorities should follow in records management.<sup>9</sup>
48. However the Commissioner is mindful of the unique circumstances in this case, including the age of the information and the fact that it is only held in physical format, as set out at paragraph 29 above. The Commissioner has seen no evidence to suggest that this is a wider issue, and concludes that it would not be proportionate to recommend that the PPS take any further action with respect to this particular case.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1010395/Freedom\\_Information\\_Code\\_Practice\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010395/Freedom_Information_Code_Practice_Web_Accessible.pdf)

<sup>9</sup> <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf#:~:text=Guidance%20for%20public%20authorities%20on%20good%20records%20management,Records%20Act%29%20on%20keeping%2C%20managing%20and%20destroying%20records.>

## Right of appeal

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49. 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](mailto:grc@justice.gov.uk)

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

50. 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.
51. 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 .....**

**Sarah O’Cathain  
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