

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2023

Public Authority: Police Ombudsman for Northern Ireland
Address: New Cathedral Buildings
St Anne's Square
11 Church Street
Belfast
BT1 1PG

Decision (including any steps ordered)

1. The complainant requested correspondence exchanged between the Police Ombudsman for Northern Ireland (PONI) and the producers of the documentary "No Stone Unturned". PONI refused to disclose the requested information, relying on section 44(1)(a) of FOIA (statutory prohibitions on disclosure).
2. The Commissioner's decision is that PONI was not entitled to rely on section 44(1)(a) in respect of the requested information.
3. The Commissioner requires PONI to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
 - If PONI wishes to withhold any third party personal data it must issue an appropriate refusal notice to the complainant.
4. The public authority must take these steps 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 FOIA and may be dealt with as a contempt of court.

Background

5. In 1994 six people were killed and five wounded in an attack which was subsequently referred to as the Loughinisland Massacre. To date no-one has been convicted of the murders.
6. In 2011 the then Police Ombudsman for Northern Ireland, Al Hutchinson, published a report into the police investigation of the Loughinisland Massacre. That report was subject to legal challenges and was quashed by the High Court in 2012.
7. The subsequent Police Ombudsman, Michael Maguire, commissioned a new investigation and published a further report in 2016.¹ The report was also subject to legal challenges, but the Court of Appeal declined to quash its findings.
8. The request in this case relates to "No Stone Unturned", a documentary released in 2017. The documentary examined the Loughinisland Massacre, the police investigation and subsequent PONI investigations. It included an interview with Dr Maguire as the Police Ombudsman at the time.
9. For the purposes of this decision notice the Commissioner has used the term "PONI" to refer to the office of the Police Ombudsman for Northern Ireland, and the term "Police Ombudsman" to refer to the individual in post.

Request and response

10. On 4 February 2021 the complainant requested the following information from PONI:

"Can you please provide the following information relating to the Police Ombudsman's involvement with the makers of the film No Stone Unturned.

1. What date did Dr Maguire receive the initial request inviting him to cooperate with the film-makers or their representatives?
2. What date did Dr Maguire first correspond with the film-makers?

¹ <https://www.policeombudsman.org/PONI/files/ad/adf5cc39-8bdf-4ea4-8e93-111ee162b8f4.pdf>

3. Can you please provide a copy of any correspondence/e-mails sent to the film-makers by the Ombudsman that relate to his potential contribution, either to the research behind the production or on camera?
 4. What steps did PONI take to establish how the confidential material used by the film-makers found its way into the hands of unauthorised persons?
 5. If steps were taken to establish how this happened, on what date did those enquiries begin?"
11. PONI responded to the request on 23 March 2021, and the complainant submitted a number of queries regarding this response on 24 March 2021.
 12. PONI treated the complainant's queries as a fresh request for information and responded on 2 June 2021. In this correspondence PONI also informed the complainant that it held correspondence between a member of PONI staff and the producers which related to the documentary.
 13. PONI stated that this information was exempt from disclosure by virtue of section 44(1)(a) of FOIA, citing section 63 of the Police (Northern Ireland) Act 1998 (the Police Act 1998).
 14. The complainant requested an internal review on 3 June 2021, and submitted a further request for information:

"I request a copy of all correspondence between anyone acting on behalf of PONI and anyone representing the makers of No Stone Unturned."
 15. PONI responded to the complainant on 31 August 2021. It confirmed that it held the requested information but stated that it was exempt from disclosure by virtue of section 44(1)(a) of FOIA, again citing section 63 of the Police Act 1998. PONI also confirmed that the public interest in maintaining this exemption outweighed the public interest in disclosing the information. It stated that there is a strong public interest in maintaining the confidentiality of PONI information related to the exercise of its functions.

Scope of the case

16. The complainant contacted the Commissioner on 1 September 2021 to complain about the way his request of 3 June 2021 had been handled by PONI.
17. The complainant asked the Commissioner to investigate whether PONI was entitled to rely on the exemption at section 44(1)(a) of FOIA to refuse his request of 3 June 2021.
18. The Commissioner will not normally accept a complaint as eligible for investigation unless the complainant has exhausted any internal review procedure provided by a public authority. However in this case PONI had informed the complainant that it held certain information that he had not in fact requested (as set out at paragraph 12 above), and stated that it was exempt. The complainant subsequently requested this information on 3 June 2021, at which point PONI issued an internal review letter.
19. The Commissioner considers that PONI's correspondence of 31 August 2021 is a refusal notice in respect of the request of 3 June 2021. The Commissioner did not consider it necessary to ask PONI to conduct a further internal review at this stage since it had advised the complainant of its position twice.

Reasons for decision

Section 44: statutory prohibition on disclosure

20. Section 44(1)(a) of FOIA provides an exemption from disclosure of information which is prohibited from disclosure under any law or enactment (known as a statutory prohibition or statutory bar). Although PONI referred to a public interest test in its refusal notice of 31 August 2021, section 44 provides an absolute exemption and no public interest test is necessary.
21. PONI advised the complainant that section 63 of the Police Act 1998 provides a statutory prohibition on the disclosure of information. The relevant provision is as follows:

"(1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies..."

22. This means that the Police Ombudsman and their staff are not permitted to disclose any information received in connection with PONI's functions, except in very limited circumstances.
23. The complainant has argued that the requested information does not fall within the scope of the statutory prohibition on disclosure. Specifically he has argued that the requested information is not held in connection with PONI's functions.
24. The Commissioner has published guidance to assist in the interpretation and application of section 44 of FOIA.² This guidance sets out the Commissioner's view that "functions" should be interpreted broadly, but should only extend to activities specifically entrusted to it, as opposed to general obligations on all public authorities.
25. The Commissioner asked PONI to clarify the relevant function for the purposes of the statutory prohibition, and PONI responded that the relevant functions are set out at section 51(4) of the Police Act 1998:

"The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure—

(a) the efficiency, effectiveness and independence of the police complaints system; and

(b) the confidence of the public and of members of the police force in that system."

26. PONI also referred to the power to issue public statements regarding the exercise of the Police Ombudsman's functions, set out at section 62 of the Police Act 1998:

"The Ombudsman may, in relation to any exercise of his functions under this Part, publish a statement as to his actions, his decisions and determinations and the reasons for his decisions and determinations."

27. The Commissioner observes that section 73(1) of the Police Act 1998 provides that any word or expression defined in the Police (Northern Ireland) Act 2000 (the Police Act 2000) shall have the same meaning in

² <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

the Police Act 1998. Section 77(1) of the Police Act 2000 provides that "functions" includes powers and duties.

28. The Commissioner further observes that section 62 of the Police Act 1998 sets out a specific power. Accordingly he accepts that information received by PONI in connection with the exercise of this specific power may be caught by the statutory prohibition. However he is of the view that section 51(4) of the Police Act 1998 does not describe a specific function or power. Rather, it describes how the Police Ombudsman shall exercise the powers and functions entrusted to them under Part VII of the Police Act 1998. Therefore the Commissioner does not consider that section 51(4) of the Police Act 1998 is of particular assistance in determining this case.
29. The requested information in this case comprises correspondence exchanged between PONI and the film-makers. The Commissioner has examined the information provided by PONI. Having done so he is of the view that some of the information provided does not in fact fall within the scope of the request. This is because it dates from 2011 and does not appear to relate to the documentary. The Commissioner has therefore excluded this information from his investigation.
30. With regard to the information that does fall within the scope of the request, the Commissioner has considered two questions:
 - To what extent was the information received by PONI; and
 - In respect of the information that was received by PONI, to what extent does that information relate to the exercise of PONI's functions?

Information received by PONI

31. PONI maintained that the statutory prohibition provided by section 63 of the Police Act 1998 must be interpreted as relating to information both received and generated by PONI. PONI argued that if this were not the case, then section 63 would only relate to information received by PONI. This would create the situation where information generated by PONI itself would be protected by the statutory prohibition, but information generated by PONI and shared with others in the course of an investigation would not be protected. PONI was of the view that this was "clearly not the intention of parliament in its inclusion of section 63".
32. The Commissioner respectfully disagrees. He considers that section 63 explicitly limits its extent to information received by PONI. The Commissioner accepts that information generated by PONI may in some cases include or be drawn from information received by PONI, and such information would be caught by the statutory prohibition.

33. However, in the Commissioner's opinion the correct interpretation of section 63 does not extend to information that is purely generated by PONI, such as responses to correspondence. If this were the case then PONI could refuse to respond to correspondence or media enquiries on the basis of the statutory prohibition. The fact that the then Police Ombudsman agreed to be interviewed by the film-maker would also appear to be inconsistent with PONI's position on this issue.
34. The Commissioner is mindful that the statutory prohibition relates to information rather than documents. For example, if PONI corresponds with a third party, and the correspondence contains information that was received by PONI in the exercise of PONI's functions, only the information received by PONI will fall within the scope of the statutory prohibition. The remainder of the communication would not be information that was received by PONI in the exercise of PONI's functions, therefore the statutory prohibition will not apply to it.
35. In any event the Commissioner would point out that there are a number of exemptions from disclosure provided by FOIA which PONI could seek to rely on, depending on the nature of the information in question. He does not consider that the limit of section 63 prevents PONI from protecting information where it should not be disclosed into the public domain under FOIA.
36. In light of the above, the Commissioner is satisfied that section 44(1)(a) will be engaged in respect of information received by PONI, albeit only to the extent that it has an appropriate connection to the exercise of PONI's functions, namely the investigation and the issuing of the public statement.
37. The Commissioner is not persuaded that the remainder of the information contained in correspondence from PONI to the film makers, such as administrative information, arranging meetings, etc, falls within the scope of the statutory prohibition. The Commissioner finds that PONI may not rely on section 44(1)(a) in respect of information that was not received by PONI.
38. In respect of the information which was received by PONI, the Commissioner has gone on to consider the extent to which it relates to the exercise of PONI's functions.

To what extent does the requested information relate to the exercise of PONI's functions?

39. PONI referred the Commissioner to the statement³ published in 2016 following the publication of the report referred to at paragraph 7 above. PONI explained that the Police Ombudsman subsequently met with a range of media outlets to explain that public statement.
40. PONI argued that its contact with the documentary makers (and the media generally) related to PONI's powers and functions, ie the discretion in the exercise of the Police Ombudsman's functions.
41. The Commissioner does not accept that liaising with the media is in itself a function or power entrusted to PONI. In the Commissioner's opinion it represents an unduly broad interpretation of "function", since liaising with the media is clearly a non-statutory activity shared by most if not all public authorities and other organisations.
42. The Commissioner does accept that the issue of a public statement is a function under section 62 of the Police Act 1998. Information received which relates to the public statement will fall within the scope of the statutory prohibition, and the Commissioner finds that PONI would be entitled to rely on section 44(1)(a) in respect of such information.
43. However the Commissioner is of the opinion that none of the requested information in this case relates to the investigation or the issue of the public statement. A large proportion of the requested information is administrative and anodyne, and does not contain any reference to the public statement. As indicated at paragraph 37 above the Commissioner observes that this information mainly comprises exchanges of emails checking availability.
44. The Commissioner notes that the requested information contains some information which refers to the documentary, but he is of the opinion that there is insufficient connection between this information and the exercise of PONI's functions.

³ <https://www.policeombudsman.org/Investigation-Reports/Historical-Reports/The-murders-at-the-Heights-Bar-in-Loughinisland-Po>

45. Consequently the Commissioner finds that the information held by PONI which does not refer to, or contain any information relating to, the public statement, does not fall within the scope of the statutory prohibition on disclosure. It follows that PONI is not entitled to rely on section 44(1)(a) in respect of this information.
44. The Commissioner notes that PONI has not cited any other exemptions under FOIA in respect of the requested information. Therefore the Commissioner requires PONI to disclose the requested information to the complainant.
45. However, the Commissioner is mindful that some of the requested information is third party personal data. Accordingly he considers it appropriate for PONI to issue a refusal notice citing section 40(2) in respect of any third party personal data, where disclosure of that information would contravene any of the data protection principles or the right to object.

Right of appeal

46. 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

47. 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.

48. 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
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**