

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 23 June 2014

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 has requested information from the Police Ombudsman for Northern Ireland (PONI) relating to a complaint he submitted. PONI provided some information, advised that some information was not held, and refused to provide the remainder of the requested information. The Commissioner's decision is that PONI was entitled to respond that it did not hold some of the requested information, and PONI was entitled to withhold other information under section 40(2) of the FOIA. The Commissioner does not require any steps to be taken in relation to this request.

Request and response

2. PONI investigates complaints made about police officers in the Police Service of Northern Ireland (PSNI). The complainant in this case made a complaint to PONI and was not happy with the way his complaint was handled by PONI.
3. On 24 April 2013, the complainant requested the following information from PONI:

"1. Have any of the Investigators involved in my complaint been members of the Royal Ulster Constabulary (RUC) or Police Service of Northern Ireland (PSNI) or both.

2. *Have any of the investigators if previously members of either the RUC or PSNI or both been members of the Criminal Investigation Department (CID) of either of these organisations.*
 3. *Have any of the investigators involved in my complaint worked with [named PSNI officer] in these organisations.*
 4. *Do any of the investigators involved in my complaint know personally or socialise with [named PSNI officer].*
 5. *The name and position of [named PONI official]'s line manager with whom he delivered his finding to at the end of February 2013.*
 6. *The exact date that [named PONI official] delivered his findings to his line manager."*
4. PONI responded to the complainant on 27 June 2013. PONI advised that it would not be appropriate to disclose information relating to PONI staff, and confirmed that it did not hold information relating to question 6. No FOIA exemptions were cited at this stage.
 5. The complainant requested an internal review on 27 June 2013.

Scope of the case

6. On 20 September 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant advised the Commissioner that he had not yet received the outcome of the internal review he had requested on 27 June 2013.
7. On 7 October 2013 the Commissioner advised PONI of his view that the response of 27 June 2013 did not comply with the procedural requirements of the FOIA. The Commissioner requested that PONI complete its internal review and ensure that the procedural issues were addressed.
8. On 8 November 2013 PONI communicated the outcome of the internal review to the complainant. PONI confirmed that it held information relating to previous employment of the investigators specified, but that it did not hold information about previous working relationships or personal associations. Again, no FOIA exemptions were cited but PONI did cite section 31(2)(a)(iii) of the Data Protection Act 1998 (the DPA) as a basis for not disclosing information about the employment history of its staff.

9. The complainant remained dissatisfied and asked the Commissioner to investigate. The scope of the case was to consider PONI's claim that it did not hold the information requested at parts 3, 4 and 6 of the request, and PONI's refusal to provide the information requested at parts 1, 2 and 5 of the request. During the course of the Commissioner's investigation PONI agreed to disclose the information requested at part 5 of the request to the complainant, therefore the Commissioner has not considered it further.

Reasons for decision

Information not held

10. PONI has stated that it does not hold the information requested at parts 3, 4 and 6 of the complainant's request. Parts 3 and 4 were for confirmation as to whether certain PONI staff had worked or socialised with a named PSNI officer. Part 6 was for the exact date a PONI official had delivered his findings (in relation to the complaint about the PSNI submitted by the complainant) to his line manager.
11. In considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities. This approach has been supported by the Tribunal in a number of previous cases.
12. The Commissioner asked PONI to explain how it concluded that it did not hold this information. PONI confirmed to the Commissioner that it does hold information relating to previous employment of its staff, as this would have been provided during the recruitment process. However PONI advised that it does not hold information relating to previous working relationships, or any social relationships, between its staff and other organisations or their staff. PONI explained that it had no business reason to collect or hold such information. For completeness PONI consulted with its personnel department to ascertain whether any relevant information was in fact held. It was subsequently confirmed that no relevant information was held by the personnel department. PONI did not consult with any other business area as it did not consider it likely that any such information would be held.
13. The complainant has not provided the Commissioner with evidence that PONI does hold the information it claims not to hold. The complainant is however of the view that there is a public interest in the public being informed of any relationships, whether professional or social, that may be perceived as affecting the independence of PONI's investigations.

14. The Commissioner understands the complainant's concerns, but is mindful that the FOIA does not require public authorities to collect or retain any information. The FOIA merely provides for access to recorded information that is held at the time of a particular request. The Commissioner has seen no evidence to suggest that PONI does hold any relevant information. He also accepts as reasonable PONI's explanation that it has no reason to hold information relating to such relationships, and notes that PONI did consult the business area most likely to hold information if such information was held.
15. The Commissioner has also considered whether, if he were to uphold the complaint, he could specify any steps that PONI could be required to take. The Commissioner notes that the search conducted was limited to PONI's personnel department. However as explained above the Commissioner accepts that PONI has no business reason or other requirement to hold the requested information. Given the nature of the requested information the Commissioner accepts that if PONI held the information it would be most likely to be held by the personnel department. Therefore the Commissioner does not consider it necessary to require PONI to conduct a wider search for information that it has no business reason to hold. The Commissioner is also mindful that the FOIA does not require PONI to obtain or collect information in order to answer a request. Therefore the Commissioner concludes that there is nothing more he can oblige PONI to do in relation to the complainant's request. On the balance of probabilities the Commissioner is satisfied that PONI does not hold the information requested at parts 3 and 4 of the request.
16. With regard to part 6 of the request, the Commissioner understands that PONI confirmed to the complainant that the individual in question delivered his findings to his line manager at the end of February 2013. PONI advised the Commissioner that there was no formal record of the date the individual delivered his findings to his line manager. PONI was able to confirm the date that the individual completed his report (15 March 2013) but pointed out that this does not necessarily mean that the findings were delivered to the line manager on this date. The complainant has not provided the Commissioner with any evidence that PONI does in fact hold an exact date, and in the absence of any such evidence the Commissioner again accepts PONI's explanation as reasonable. Therefore the Commissioner finds that PONI does not hold the information requested at part 6 of the request.

Section 40(2): personal information

17. Section 40(2) of the FOIA states that the personal data of a third party is exempt from disclosure if to do so would contravene any of the data protection principles or section 10 of the DPA. "Personal data" is defined at section 1(1) 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 is likely to come into the possession of, the data controller.

18. Although it did not refer to section 40(2) in its correspondence with the complainant, PONI confirmed to the Commissioner that it sought to rely on this exemption in respect of parts 1 and 2 of the complainant's request. These parts of the request were for information relating to the previous employment of the PONI staff who had investigated the complaint made to PONI by the complainant. As indicated above PONI confirmed that it did hold this information as it would have been provided by individuals as part of the recruitment process.
19. The complainant argued to the Commissioner that he was not seeking information relating to individuals, but was concerned that one or more of the individuals investigating his complaint may have worked with the individual who was the subject of his complaint. The Commissioner is satisfied that information relating to previous employment, to the extent that it is held, will constitute personal data of the individuals concerned. This is because it would identify individuals as having worked for particular organisations.

Would disclosure of the withheld information breach any of the data protection principles?

20. The Commissioner has produced guidance to assist public authorities when handling requests for personal information of their employees¹. The Commissioner has also had regard to previous decision notices in which he has considered complaints about requests for this type of information.²
21. The data protection principles are set out at Schedule 1 to the DPA. The Commissioner's general approach to cases involving personal data is to consider the first data protection principle, and in particular its requirement that personal data be processed fairly. If the Commissioner finds that processing the personal data (in the form of disclosing it into the public domain) would be fair he will then move on to consider the

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

² For example

http://ico.org.uk/~media/documents/decisionnotices/2012/fs_50431587.ashx

other elements of the first data protection principle. In considering this case the Commissioner has taken account of the following factors:

- The individuals' reasonable expectations of what would happen to their personal data;
 - The consequences of disclosure; and
 - The balance between the rights and freedoms of the data subjects and the legitimate interests of the public.
22. The view of the Commissioner is that there is an expectation that an employee in a public authority will have a certain amount of information about them disclosed, for example their name and job title. However, the complainant has asked for information relating to employment history.
23. The Commissioner considers that many employees, whether employed by public authorities or elsewhere, will have a reasonable expectation of privacy in relation to their employment history. The Commissioner is mindful that this alone is not a compelling argument against disclosure, but it is useful in the context of considering disclosure of personal data.
24. In relation to the consequences of disclosure, whilst the FOIA is applicant and motive blind the Commissioner is aware of PONI's concerns in this case that disclosure of this information may have on the individuals involved. The Commissioner notes that the nature of PONI's work includes conducting high profile and sensitive investigations into the conduct of police officers. The Commissioner notes that PONI has in the past disclosed general information about the number of former police officers it has employed at any particular time. However the Commissioner accepts that disclosing details of individual investigators' previous employment could potentially cause unnecessary and unjustified distress to those individuals.
25. Notwithstanding the above, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. The Commissioner must therefore weigh the public's legitimate interest in receiving the information against the prejudices to the rights, freedoms and legitimate interests of the members of staff concerned. The Commissioner has considered whether there is a legitimate interest in the public (as opposed to the private interests of the complainant) accessing the withheld information. The complainant has argued that there is a strong public interest in terms of the transparency and accountability of PONI as a regulator. The complainant has further argued that disclosure of the requested information would inform the public as to possible conflicts of interest in the investigation of his complaint.

26. However, the Commissioner does not consider that in this case any legitimate public interest extends to disclosure of the employment histories of the investigators requested by the complainant. The Commissioner accepts PONI's argument that disclosure of this information would not increase accountability and transparency of the work of PONI. The fact that a particular investigator did or did not previously work for the PSNI would not inform the public as to the quality of an investigation that an individual conducted. Nor would it enable the public to reach any kind of educated conclusion about the possibility of a conflict of interest. The Commissioner considers that concerns about the perceived independence of PONI staff are better dealt with by established complaints procedures, rather than subjecting individuals to excessive public scrutiny by disclosing their personal data into the public domain.
27. Based on the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds PONI's application of the exemption at section 40(2) of the FOIA.

Procedural requirements

Section 17: refusal notice

28. Section 17(1) of the FOIA states that if a public authority wishes to rely on any exemption it must issue a refusal notice. The refusal notice must state which exemption applies, and why, and contain details of the public interest test in relation to qualified exemptions. The refusal notice must also contain details of the right of appeal.
29. In this case PONI's response dated 27 June 2013 did not constitute an adequate refusal notice. Although it advised the complainant that some information was not held this letter did not address the complainant's request under the FOIA. No exemptions were cited, and the complainant was not informed of his right of appeal.
30. As indicated above the Commissioner wrote to PONI on 7 October 2013 and offered it an opportunity to remedy these deficiencies. However PONI's letter of 8 November 2013 cited an exemption under the DPA which was not relevant to the complainant's request. PONI did not cite any exemptions under the FOIA.

31. PONI has explained to the Commissioner that it considered it had already advised the complainant of its position in separate correspondence, and did not think it would be helpful to repeat this to the complainant. However PONI has accepted that it is required to respond to any written request for recorded information in accordance with the procedural requirements of the FOIA.
32. In light of the above the Commissioner finds that PONI's refusal notice did not meet the requirements of section 17 of the FOIA. The Commissioner notes PONI's acknowledgement of its inadequacies in responding to the request, and expects PONI to take steps to ensure that such deficiencies do not recur.

Right of appeal

33. 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: 0116 249 4253
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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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