

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 29 March 2023

Public Authority: Police Service of Northern Ireland
Address: Police Headquarters
65 Knock Rd
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant requested information relating to British Army activity in Belfast in 1971. The Police Service of Northern Ireland (PSNI) refused the request under section 12 of FOIA (appropriate limit). PSNI said that to confirm or deny that the requested information was held would take longer than 18 hours and would therefore exceed the appropriate limit.
2. The Commissioner's decision is that PSNI was not entitled to refuse the request under section 12 of FOIA. The Commissioner is not satisfied that PSNI has demonstrated that confirming or denying that the requested information is held would exceed the appropriate limit.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that does not cite section 12 of FOIA in respect of the duty to confirm or deny that the requested information is held.
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.

Request and response

5. On 26 April 2021 the complainant requested the following information from PSNI:

"This request for information relates to a covert British Army operation in the vicinity of the McGurk's Bar bombing of 4th December 1971 and a negligent discharge at it a few hours before.

This follows advice and guidance from the British Ministry of Defence to contact Police Service Northern Ireland with the request for information. For your own guidance this refers to MoD FOI2020/08805. I have attached the MoD Internal Review for your convenience.

British Military files prove that there was a covert British Military "ambush OP" at York Street on the night of the explosion and that a Fusilier discharged his weapon by mistake there. I have attached this file for your convenience too. Subsequently, MoD has admitted that it has the surname of this Fusilier.

May I request information in police repositories relating to this previously undisclosed covert operation and negligent discharge, please? This includes a search of any databases given to the PSNI by the British Army relating to its Operation Banner.

For the record, the British soldiers deployed for this covert British military operation, including the named soldier, may have been witness to the McGurk's Bar massacre, events leading up to it or thereafter, although their statements were not included in previous historical investigations. The families were told by the police, Office of the Police Ombudsman and Historical Enquiries Team that there were no British Army units in the area whatsoever although we now know this to be untrue."

6. PSNI issued a refusal notice on 8 September 2021 which cited section 12(2) of FOIA. PSNI stated that it would exceed the "appropriate costs limit" to determine whether or not it held the requested information.
7. The complainant requested an internal review on the same day, and PSNI communicated the outcome of that review to him on 30 September 2021. PSNI maintained its reliance on section 12(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 22 October 2021 to complain about the way PSNI had refused his request.
9. The Commissioner's decision in this case is limited to whether or not confirming or denying that the requested information is held would exceed the appropriate limit. The Commissioner cannot make any finding as to whether or not PSNI holds the requested information.

Reasons for decision

Section 12: appropriate limit

10. 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, known as the cost limit (£600 for central government, £450 for all other authorities). A public authority may rely on section 12 in respect of the duty to confirm or deny that the requested information is held (by virtue of section 12(2), as claimed in this case), or the duty to communicate information to the requester.
11. Section 12 of FOIA should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ (the "Fees Regulations"). Regulation 4(4) states that authorities should calculate the cost of confirming or denying that the requested information is held by multiplying the time estimated by £25 per hour.
12. When estimating whether confirming or denying that the requested information is held 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

¹ <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

(d) extracting the information from a document containing it.

13. If the authority considers that confirming or denying that the requested information is held would cost more than the appropriate limit, it is not obliged to comply with the request. In the case of PSNI, the £450 limit applies, which equates to 18 hours of work undertaking the above activities.

The complainant's position

14. The complainant argued that PSNI ought to be able to locate the requested information relatively easily because it should have been identified and collated in the course of other investigations.

PSNI's position

15. PSNI advised the complainant that it estimated it would take over 100 hours to identify whether it held information relevant to his request. The information held by PSNI relating to the McGurk's Bar bombing included electronic records, microfiche records and 11 boxes of material contained within storage. However PSNI did not hold an inventory of the information, therefore it would require manual searches to be conducted.
16. PSNI confirmed that the complainant had made several related requests for information. In dealing with the current request PSNI took into account the manual correspondence as well as the detail it had considered in previous requests to support its application of "cost exemptions".
17. PSNI also confirmed that it had previously undertaken scoping exercises in respect of the material it held. In one instance PSNI completed a high-level inventory of three of the 11 boxes, and had estimated that it would take 10 working days to complete a detailed inventory of all 11 boxes.
18. In 2015 PSNI examined four of the 11 boxes in relation to a request for different information. As a result of this exercise PSNI estimated that it would likely take over 22 hours to search the four boxes in detail. PSNI provided the Commissioner with records of this search, including breakdowns of the time estimated to be required to examine the contents of each of these boxes.
19. In response to the request which is the subject of this decision notice PSNI re-examined the boxes which had been scoped, in order to ascertain whether compliance with the request might be feasible within the cost limit. PSNI advised that it had spent three working

days examining this information in more detail, but did not locate any information relevant to the request. PSNI considered that the three working days, equivalent to 24 hours' work, demonstrated that compliance with the request would exceed the cost limit.

20. PSNI also said that it had also consulted internal business areas regarding archive and microfiche material. PSNI estimated that it would take at least two weeks to retrieve any archive materials where relevant information would likely be. PSNI would then need to extract relevant information, if held. PSNI estimated that microfiche searches would take several weeks to review.
21. PSNI advised that it would need to carry out a search of its IT systems which it estimated would take between 16 and 24 hours. It did not provide any explanatory detail of this search.
22. Finally, PSNI said that it would need to consult with the Ministry of Defence (MOD) to see if it could assist with searches.

The Commissioner's position

23. In the context of section 12 of FOIA, the Commissioner is mindful of the First-tier Tribunal's view in the case of *Randall v IC and MHPRA*.² The Tribunal commented 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".

24. The Commissioner considers that a sensible and realistic estimate must be informed by the circumstances of the particular case. The Commissioner's published guidance³ 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 records would need to be searched in order to identify and locate the requested information if this is not in fact necessary.
25. The Commissioner has first considered the wording of the request as set out at paragraph 5 above. He notes that the complainant has requested information relating to "a covert British Army operation", and a "negligent discharge" from a firearm. The complainant believes

² Appeal no EA/2006/0004

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

that PSNI holds relevant information in the context of the McGurk's Bar bombing and in the Commissioner's opinion he has set out a broad request in order to try to capture such information within its scope.

26. As per his guidance the Commissioner has considered PSNI's search strategy. PSNI appears to have focused on the information it holds regarding the McGurk's Bar bombing, and has set out that it would need to search several business areas in case they held relevant information. PSNI has not however explained how it has identified these business areas as relevant to the request, or how it has calculated the probability that any of them may hold information falling within the scope of the request.
27. In response to the Commissioner's enquiries, PSNI declined to provide information relating to its consultation with internal business areas. PSNI stated that it considered this information to be "covered by legal privilege as per S. 51 (5) (a) FOIA 2000".
28. The Commissioner observes that section 51 of FOIA provides that he may issue a public authority with an "information notice" requiring it to provide information in the context of an application for a decision. Section 51(5)(a) states the following:

"(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of –

 - (a) Any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act..."
29. The Commissioner accepts that PSNI cannot be required to provide information that falls within the scope of section 51(5)(a). However, this does not affect the public authority's responsibility to demonstrate to the Commissioner that it has complied with the requirements of FOIA. In the absence of such evidence, the Commissioner is of the opinion that he has not been provided with sufficient information to assess whether PSNI's search strategy in this regard is appropriate or proportionate.
30. The Commissioner also notes that PSNI has not provided any explanation of its estimates with regard to the various business areas. For example, PSNI has not offered an explanation as to how or why it would take two weeks to retrieve archive materials that may

contain relevant information. The Commissioner cannot therefore assess whether this estimate is reasonable.

31. Similarly, PSNI has stated that searches of its IT systems would take between 16 and 24 hours. However it has not offered any detail as to how such searches would be conducted, or indeed why the estimate covers such an extensive window of time. Again, the Commissioner has not been provided with sufficient information to examine the estimate.
32. PSNI did provide the Commissioner with a more detailed explanation with regard to the information held in 11 boxes as set out at paragraphs 15-17 above. In one case PSNI estimated that it would take 10 working days to search all 11 boxes, and in another case it estimated that it would take over 22 hours to search four boxes. In respect of the request that is the subject of this decision notice, PSNI stated that it spent three days (which the Commissioner takes to equate to 24 hours) to complete a "detailed search and reading of the materials in the three boxes".
33. The Commissioner is concerned that PSNI has assumed that it is necessary to examine the contents of the boxes in detail in order to determine what material may be in scope of the request. In the Commissioner's opinion a public authority is not required to produce an inventory of the information held if such a record does not already exist. This is not a permitted activity under the Fees Regulations and may not therefore contribute to the estimate of time required to comply with a request.
34. Similarly, it appears to the Commissioner that PSNI's estimate of the time required to examine the contents of each box may be excessive. PSNI's estimates of the four boxes set out at paragraphs 18 and 19 above indicated that PSNI considered it necessary to examine different drafts of reports as well as information relating to the HET investigation which reported in 2008. The Commissioner does not accept that PSNI would need to examine these categories of information in detail since they could reasonably be expected to duplicate or reproduce information contained elsewhere, such as original investigation files. Therefore the Commissioner considers that PSNI ought to have scoped out these types of information from its search, and they ought not to have been included in the estimate. Consequently the Commissioner does not accept that the three days of searching already undertaken by PSNI relate to an appropriate search strategy, and therefore cannot reasonably be relied on.

35. The Commissioner is mindful that the onus is on public authorities to demonstrate that they have complied with the requirements of FOIA. The Commissioner's decision is based on the information provided to him by the complainant and the public authority. Accordingly, the Commissioner expects authorities to ensure that they provide full details of any information or arguments they wish the Commissioner to take into account, and be mindful that the Commissioner cannot make assumptions in the authority's favour.
36. The Commissioner has carefully considered the information provided by PSNI. However, on the basis of this information he cannot be satisfied that PSNI is entitled to rely on section 12 of FOIA in order to refuse the complainant's request. The Commissioner finds that PSNI has failed to demonstrate that its search strategy is appropriate and proportionate; and it has failed to demonstrate that confirming or denying that the requested information is held would be likely to take more than 18 hours' work.

Section 17: refusal notice

37. Section 17(5) of FOIA states:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

38. In this case the request was submitted on 26 April 2021, but PSNI did not issue a refusal notice until 8 September 2021. This clearly exceeded the 20 working days for compliance; therefore the Commissioner finds that PSNI failed to comply with section 17(5) of FOIA.

Right of appeal

39. 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

40. 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.
41. 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**