

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

### **Decision notice**

**Date:** 13 September 2023

**Public Authority:** Northern Ireland Office  
**Address:** 1 Horse Guards Road  
London  
SW1A 2HQ

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

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1. The complainant requested access to 13 files held by the Northern Ireland Office (the NIO). The NIO refused the request in reliance on the exemptions at sections 22 (information intended for future publication), 23 (security services), 31 (law enforcement), 38 (health and safety) and 40(2) (third party personal data) of FOIA. During the course of the Commissioner's investigation the NIO withdrew reliance on the exemption at section 22.
2. The Commissioner's decision is that the NIO is entitled to rely on the exemptions at sections 23, 38 and 40(2) in respect of all of the remaining withheld information, ie the information that was not withheld solely on the basis of section 22 of FOIA.
3. The Commissioner requires the NIO to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with access to the requested information that does not fall within the scope of sections 23, 38 or 40(2) of FOIA.
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

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5. The complainant originally submitted his request to the NIO on 18 July 2019:

I am carrying out research into the so-called 'Stalker Affair' in 1986, when John Stalker, Deputy Chief Constable of the Greater Manchester Police, was removed from his inquiry into police shootings in Northern Ireland. I note from the Public Record's catalogue that the following files under the title "RUC: Stalker/Sampson inquiry, inquiry by John Stalker and Colin Sampson into police shootings in NI" have been retained:

CJ4/6274  
CJ4/6275  
CJ4/6276  
CJ4/6277  
CJ4/6278  
CJ4/6279  
CJ4/6285  
CJ4/6286

It is now more than 30 years since his inquiry, and I would like access to these files in order to complete my research. I would be grateful if this could be arranged.

6. The NIO issued a refusal notice citing section 22 and stating that the requested information would be transferred to The National Archive (TNA) "in due course".
7. However, the transfer did not take place and on 31 March 2021 the complainant re-asserted his request to the NIO. In this correspondence the complainant clarified that his request was limited to "the advice and correspondence relating to Stalker's removal and Sampson's appointments".
8. The NIO issued a refusal notice on 30 April 2021 confirming that it held the requested information, but refusing to disclose it. The NIO stated that it was still relying on the exemption at section 22 of FOIA. It also advised that some of the requested information "could be exempt" under sections 23 or 24 (national security). Finally the NIO stated that some information was exempt under section 40(2) of FOIA.
9. The complainant requested an internal review on 7 May 2021, and the NIO provided him with the outcome of that review on 7 June 2021. The NIO maintained its reliance on sections 22, 23, 24 and 40(2) of FOIA in respect of the requested information.

## Scope of the case

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10. The complainant contacted the Commissioner on 21 June 2021 to complain about the way the NIO had handled his request.
11. As is his usual practice, the Commissioner wrote to the NIO to seek access to the requested information, and for further details of the NIO's reliance on the exemptions claimed.
12. The NIO advised the Commissioner that it was unable to provide a substantive response to his enquiries until it had completed a consultation process with third parties. These included the Ministry of Defence (MOD), the Police Service of Northern Ireland (PSNI), the Crown Solicitor's Office for Northern Ireland (CSONI) and Police Scotland.
13. On 5 July 2022 the NIO contacted the complainant to advise that "a redacted release of all 13 files may be viable". The NIO said that it was liaising with external stakeholders to see if they would be content with this approach, but that estimated that this consultation process would take around six months.
14. On 17 July 2022 the complainant confirmed that he would prefer that the Commissioner continued to investigate his complaint.
15. In January 2023 the Commissioner undertook an initial inspection of the requested information. However the NIO advised that it was still awaiting a substantive response from PSNI, therefore it was unable to confirm which exemptions applied to each piece of information.
16. On 30 May 2023 the NIO confirmed that PSNI had now completed its consideration of the requested information. The NIO provided the Commissioner with a detailed submission on 28 July 2023, at which point the Commissioner undertook a further inspection of the withheld information.
17. At this point the NIO advised the Commissioner that it was no longer relying on section 22 of FOIA. It clarified that the bulk of the requested information would be made available for public viewing via TNA by December 2023.
18. The NIO maintained that very small portions of the requested information would not be made available by TNA. The NIO was of the position that this information was exempt from disclosure under FOIA by virtue of sections 23, 31, 38 and 40(2) of FOIA. The NIO did not seek to maintain reliance on the exemption at section 24.

## Reasons for decision

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### Section 22: information intended for future publication

19. Section 22(1) of FOIA provides that information is exempt information if:

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

20. The NIO originally maintained that section 22 was engaged in respect of the bulk of the requested information. However, during the course of the Commissioner's investigation the NIO withdrew its reliance on section 22.

21. The NIO had not relied on any other exemptions in respect of this information. Accordingly the Commissioner requires the NIO to make this element of the requested information available to the complainant.

### Section 23(1) – information supplied by or relating to bodies dealing with security matters

22. Section 23(1) of FOIA states:

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".<sup>1</sup>

23. To engage the exemption at section 23(1), a public authority need only demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3). There is no requirement on the public authority to demonstrate that

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

disclosure of the requested information would result in harm. The exemption is absolute, ie not subject to the public interest test.

24. The Commissioner has also inspected the specific information withheld under section 23, which forms a very small portion of the requested information. He is satisfied that the information in question does fall within the scope of section 23 on the basis that it relates to a section 23(3) body. The Commissioner cannot set out further detail in this decision notice since to do so would defeat the purpose of the exemption.
25. In light of the above the Commissioner finds that the NIO was entitled to rely on the exemption at section 23(1) of FOIA in respect of some of the requested information.

### **Section 38: health and safety**

26. Section 38(1)(b) of FOIA provides an exemption from disclosure where this would, or would be likely to endanger the safety of any individual.
27. In order to engage a prejudice based exemption such as section 38, there must be the likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
  - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
  - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
28. The public authority must also show that disclosure of the information in question would, or would be likely to, have a detrimental effect on the safety of any individual. The effect cannot be trivial or insignificant. In the context of section 38, even if the risk falls short of being more

probable than not, it needs to be such that there may very well be endangerment. The NIO set out that the information withheld under section 38 covered broad categories including informants, members of the Royal Ulster Constabulary (the RUC, the predecessor body to PSNI) and individuals who were allegedly linked with paramilitary organisations.

29. The NIO acknowledged the age of the requested information, but remained of the view that individuals in any of the above groups would still be at serious risk of reprisal if the information were to be disclosed into the public domain.
30. The Commissioner cannot provide full details of his consideration in this decision notice, since to do so would defeat the purpose of the exemption. However he can confirm that he has inspected the information withheld under section 38 and observes that, as with section 23, it comprises a very small amount of the requested information.
31. The Commissioner accepts the NIO's position that disclosure of the specific information withheld under section 38 engages the exemption. He is satisfied that there is a causal link between disclosure of the information, and endangerment of the safety of individuals relevant to the broad categories outlined above. Furthermore he accepts that the exemption applies at the higher level of prejudice, ie would, rather than would be likely.

### **Public interest in maintaining the exemption**

32. The NIO set out that there is an overwhelming public interest in avoiding the disclosure of information that would endanger any individual's safety.

### **Public interest in disclosure**

33. The NIO accepted that disclosure of the withheld information would assist the public's understanding of policing during the "Troubles", thus enabling and enriching public debate on the subject.
34. The complainant provided public interest arguments in favour of disclosure. He disputed that disclosure of the information would pose a threat at the time he submitted his request. Even if that were the case, he argued that harmful information could be redacted.

### **Balance of the public interest**

35. The Commissioner recognises that the exemptions provided by section 38 are qualified because there will be some circumstances where it is appropriate to disclose information even though the exemption is

engaged. However the Commissioner considers that such circumstances will be exceptional in nature. He is not persuaded that any such circumstances exist with regard to the specific withheld information in this particular case.

36. The Commissioner notes the complainant's argument about redaction. He is satisfied that the NIO has sought to withhold only the information that would cause harm were it to be disclosed into the public domain. The remainder of the requested information will be made available to the public, including the complainant.
37. Therefore the Commissioner finds that the public interest in maintaining the exemption at section 38(1)(b) of FOIA significantly outweighs the public interest in disclosure of the specific withheld information.

### **Section 31(1): law enforcement**

38. The NIO sought to rely on the exemptions at sections 31(1)(a), (b) and (c) in respect of some of the information caught by section 38. Given that the Commissioner finds that the NIO was entitled to rely on section 38 in respect of that information, he has not gone on to consider the NIO's reliance on section 31 in respect of the same information.

### **Section 40: personal information**

39. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
40. In this case the relevant condition is contained in section 40(3A)(a).<sup>2</sup> This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (the UK GDPR).
41. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) of the DPA.

42. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

43. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

45. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

46. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

47. In this case, the NIO has relied on section 40(2) in respect of information falling under the following broad categories:

- RUC officers
- Civilians and members of the public involved in various incidents
- Individuals who are alleged to have been members of paramilitary groups

48. The Commissioner is satisfied that this information clearly both relates to and identifies the individuals in question, therefore it falls within the definition of “personal data” in section 3(2) of the DPA. None of the individuals are the complainant, so it is third party personal data.

49. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The public authority is required to determine whether disclosure would contravene any of the DP principles.

50. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

51. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
52. The NIO argued that section 40(2) was engaged on the basis that disclosure of the third party personal data would be unlawful. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

53. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
54. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>3</sup>.
55. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

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<sup>3</sup> Article 6(1) goes on to state that:

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
- iv) The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

### **Legitimate interests**

- 56. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests.
- 57. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
- 58. The NIO recognised the general legitimate interest in providing a full and open account of government decision making. It also acknowledged the legitimate interest in reassuring the public that individuals found guilty of wrongdoing were held to account.
- 59. The complainant also argued that disclosure of the requested information would end conspiracy theories about John Stalker's removal, stop continuing allegations that there was something to hide and put paid to suggestions that officials were being protected from public scrutiny.

### **Is disclosure necessary?**

- 60. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

61. The Commissioner accepts the legitimate interest arguments put forward by both the NIO and the complainant. He also recognises the NIO's commitment to transferring the majority of the requested information to TNA to be made available to the public, albeit that this had not happened at the time of issuing this decision notice.
62. Having examined the information in question the Commissioner is not persuaded that it is necessary for the NIO to disclose it into the public domain. In the Commissioner's opinion the legitimate interest will be met by the information made available to the public. The information withheld under section 40(2) would not materially increase the public's understanding or ability to participate in public debate.
63. The Commissioner finds that the necessity test is not met, therefore the NIO would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the NIO was entitled to rely on the exemption at section 40(2) of FOIA in respect of the withheld personal data.

## **Other matters**

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64. The Commissioner recognises that the complainant in this case first made his request to the NIO in 2019. He observes that it has taken four years to get to a point where a decision may be made. The Commissioner does not consider this to be an acceptable timescale, especially in light of the fact that the NIO has always intended to disclose the vast majority of the requested information.
65. However the Commissioner acknowledges that the NIO was required to consult a number of third parties before it could make a decision as to the extent to which information could be transferred to TNA.
66. Nevertheless the Commissioner wishes to acknowledge the NIO's engagement with his Office in this case. In particular the NIO facilitated his inspection of the requested information and ensured that the information in question was fully marked up to indicate which exemptions had been applied to each piece of information. Whilst undoubtedly burdensome for the NIO, this work meant that the Commissioner was able to examine the information in the context of the NIO's arguments in an efficient manner. The Commissioner commends this as an example of good practice which assisted his consideration of this case.

## Right of appeal

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67. 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)

68. 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.
69. 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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