

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2018

Public Authority: Police Service of Northern Ireland

Address: foi@psni.pnn.uk

Decision (including any steps ordered)

1. The complainant requested the statements forming part of the inquest file relating to an investigation undertaken by the Historical Enquiries Team (HET), then part of the Police Service of Northern Ireland (PSNI). PSNI refused the request in reliance on sections 30(1)(a)(i) and 40(2). The Commissioner's decision is that PSNI was entitled to rely on section 30(1)(a)(i) and she does not require any steps to be taken.

Request and response

2. On 2 February 2017, the complainant wrote to PSNI to request the following information:

"copies of the statements forming part of the inquest file, as referred to by the HET in their report concerning the death of [named individual] at page 29, which states that they: 'recovered a police file which contains a significant number of statements forming part of the inquest file.'"
 3. PSNI responded on 28 February 2017 refusing the request on the basis that the withheld information engaged sections 30(1)(a)(i) and 40(2).
 4. Following an internal review PSNI wrote to the complainant on 23 May 2017 to confirm that it was satisfied that the exemptions cited in its original response were engaged.
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Scope of the case

5. The complainant contacted the Commissioner on 28 August 2017 to complain about the way his request for information had been handled outlining the following concerns:
 - The inquest into the death of the named individual was held in public so the complainant does not accept that the exemptions could apply to the evidence that was heard.
 - The content of the statements may be in the public domain by way of newspaper reports from the time of the inquest.
 - The personal data of those individuals is already in the public domain and if there exists legitimate concerns then extracts of statements could be redacted, if considered necessary.
 - The HET draft review refers to extracts from the statements, therefore he may already have some of the content from the statements requested.
 - The HET report states that *"there are no new lines of enquiry or investigative opportunities that could bring about a prosecution of those responsible for [named individual's] death."*
 - *The applicant could have received the statements from the PRONI had they had copies of them and been able to locate the inquest file. The PRONI has provided such statements in similar legacy cases in the past and continues to do so."*
6. The Commissioner notes that the requested information in this case was held by the HET set up by PSNI in 2005 and tasked with reviewing and/or investigating over 3000 deaths attributable to the security situation in Northern Ireland between 1968 and 1998. The HET also aimed to provide answers to the families of the deceased regarding the deaths of their relatives and generally produced a report in respect of each review, given to the family of the deceased.
7. On 30 September 2014 PSNI confirmed that the HET would be closed due to financial constraints and subsequently announced the establishment of a new Legacy Investigation Branch (LIB) to undertake the work carried out by the HET and murder cases prior to the establishment of the Crime Operations Department in 2004, albeit at a slower pace.
8. The Commissioner has dealt with a number of cases involving requests for information held in connection with reviews undertaken by HET. In

each case the applicant has had understandable personal reasons for seeking access to the information in question, often as a relative of the victim. However, the identity or motives of the applicant cannot generally be taken into account when deciding whether or not information should be disclosed under the FOIA. The Commissioner may only order the disclosure of information if it could be disclosed to any member of the public who requested it. The Commissioner cannot order a public authority to disclose information solely to a particular applicant, however legitimate their interest in the information.

9. In view of the above, the scope of the Commissioner's investigation is to determine whether PSNI was entitled to refuse to disclose the requested information in reliance on section 30(1)(a)(i) FOIA.

Reasons for decision

Section 30 – Investigations and proceedings conducted by public authorities

10. Before assessing whether the exemption is engaged, due to the age of the information in question, the Commissioner must firstly consider whether the information constitutes a 'historical record' for the purposes of the FOIA, as section 63 makes it clear that historical records cannot be exempt under a number of exemptions, including section 30(1).
11. Section 62 provides a definition of a historical record for the purposes of FOIA and states:

"...a record becomes a 'historical record' at the end of the period of thirty years beginning within the year following that in which it was created

Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records of that file... are to be treated for the purposes ...as having been created when the latest of those records was created."
12. The Commissioner is mindful that withheld information was created over 30 years ago, however notes that it forms part of a wider HET file which could not have been created before the establishment of the HET in 2005. She is satisfied therefore that it does not constitute an historical record.
13. Section 30(1)(a)(i) provides an exemption for information that has at any time been held by the public authority for the purposes of an

investigation that the public authority has a duty to carry out with a view to it being ascertained whether a person should be charged with an offence. Engaging the exemption requires the following tests to be satisfied.

14. Firstly, the information in question must have been held 'for the purposes of an investigation'. The Commissioner considers that this may be interpreted broadly in terms of the information itself, although it must be held for the purposes of a specific investigation, rather than investigations in general. The investigation in question however, does not need to be live.
15. Section 30 is a class-based exemption, therefore it is not necessary to identify any prejudice which may arise should the requested information be disclosed. It must simply be able to demonstrate that the requested information was held for the purposes of a particular investigation.
16. The Commissioner notes that the disputed information was held by PSNI for the purposes of the HET review, and has previously considered a number of cases for similar requests, including FS50373733 and FS50566057 issued on 16 November 2011 and 3 February 2016 respectively.
17. PSNI clearly has a duty to carry out investigations which fall under the exemption at section 30(1)(a)(i), and the HET functioned as part of PSNI.
18. However, the complainant does not accept that section 30(1)(a)(i) is engaged for a number of reasons previously outlined in paragraph 5 of this notice, including that the statements formed part of the inquest held in public into the death of his relative, the content of the statements may have been reported in newspaper reports at the time of the inquest, the HET report contains extracts of the statements therefore he already has some of those statements.
19. The Commissioner asked PSNI to comment on these arguments. Accordingly, it informed the Commissioner that in its view, the evidence heard at the inquest is not considered to be in the public domain, as it was only available to a limited audience. It has further added that it is not aware of any of the content of the statements being reported in the press at the time of the inquest and the HET report, as with similar reports, is not a public document, having been provided on a restricted basis to the family and next of kin of the deceased.
20. The Commissioner has considered the amount of information that was in the public domain at the time of the inquest and notes that it was reported in the newspapers at the time of the inquest, with some of the

information in the public domain. However, the Commissioner considers that a partial disclosure of information in the newspapers as a result of the inquest, is not the same thing as a full disclosure of the information by the public authority, particularly as the accuracy of newspaper reports is not guaranteed.

21. As PSNI clearly obtained this information for the purpose of an investigation, the details of which have not been placed in the public domain in their entirety, the Commissioner finds that section 30(1)(a)(i) is engaged. She has therefore gone on to consider the public interest test.

Public interest test arguments in favour of disclosing the requested information

22. PSNI has acknowledged that the release of these statements could provide the public with an insight into how crimes are investigated and a better understanding of police procedures, which would allow the public to make informed decisions in respect of its procedures and the money spent in this area.
23. The Commissioner would also point to the general public interest in disclosure of information which promotes transparency and accountability for decisions made by public authorities and their expenditure of public money.
24. The Commissioner also considers that disclosure would provide an increased level of public confidence and trust in the PSNI and the wider criminal justice system generally.
25. The complainant has also argued that the matter is not live referring to an extract from page 59 of the HET report which states:
26. *"...there are no new lines of enquiry or investigative opportunities that could bring about a prosecution of those responsible for [named individual's] death"*

Public interest arguments in favour of maintaining the exemption

27. In response to this, PSNI confirmed that although the HET had concluded that there were no new lines of enquiry, that the case remains open as it is subject to review by the more recently created LIB.
28. It further informed the Commissioner that in this particular case, the named individual was shot by a member of the military.
29. PSNI has further stated that it is not in the public interest for it to jeopardise any future reviews or investigations into the death of the

named individual, and considers that disclosure of witness accounts prior to the culmination of the review process has the potential to jeopardise the investigative process.

30. On a more general level, PSNI considers that to disclose information in respect of an investigation could have detrimental effects which would impact on the investigation. This in turn would impact on police resources which would lead to more crime being committed, placing individuals at risk with an investigation of the outcome of subsequent proceedings potentially being compromised.

Balance of public interest arguments

31. The Commissioner has considered both the factors in favour of disclosure and those in favour of maintaining the exemption and whilst she fully acknowledges the general public interest in transparency and accountability, and the disclosure of the type of information requested, she is mindful that the case is earmarked for future review and has placed considerable weight on PSNI's arguments that disclosure has the potential to jeopardise this future review.
32. The Commissioner is conscious of the sensitivity of the period in Northern Ireland's history from 1968 to 1998, with the strength of feelings on both sides remaining powerful. She is also mindful of the particular sensitivity around the state related deaths as in this case, compared to the non-state related deaths, and considers that the balance of public interest in any disclosure which has the potential to jeopardise a review of this nature is, in all the circumstances of this case, strongly weighted in favour of maintaining the exemption. She therefore finds that PSNI was entitled to rely on section 30(1)(a)(i) to refuse the requested information. As she has found the exemption at section 30(1)(a)(i) to be engaged, she has not gone on to consider its additional reliance on section 40(2) of the FOIA.

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: 0870 739 5836
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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**