

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 5 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 requested information from the Police Ombudsman for Northern Ireland (PONI) relating to a complaint it had investigated. PONI provided some of the requested information to the complainant but withheld other information under section 44 as it was subject to a statutory bar on disclosure. The Commissioner's decision is that PONI was entitled to rely on section 44 and requires no further steps to be taken.

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 investigated by PONI. The complainant had exchanged correspondence with PONI on this issue before making his information request.
3. On 1 January 2013, the complainant requested the following information from PONI:

"1. The name of the external organisation who have not provided the information requested by the Ombudsman?"

2. The rationale as to why this organisation was tasked, have they been used before, if so is this the normal level of service they provide?"

3. The date of initial contact made by the Ombudsman's Office and the external organisation?

4. The dates and full copies of all contacts and correspondence between the Ombudsman's office and the external organisation by whatever means including letters, emails, phone calls or face to face?

5. What actions the Ombudsman's office have taken to have the external organisation provide the information requested?

6. What is the precise task requested of the external organisation and could an alternative organisation be tasked?

7. The reason why this enquiry was not carried out during the initial investigation?"

4. PONI responded on 17 January 2014. It stated that the requested information was exempt from disclosure under sections 30(1)(i), and sections 31(2)(a), (b), (c) and (d) of the FOIA.
5. The complainant requested an internal review on 27 January 2013. He wrote to PONI on 14 March 2013 to complain that he had not received a response to this letter. PONI responded to the complainant on 22 March 2013 to provide further information about the handling of the complaint. In this correspondence PONI clarified that the "external organisation" was in fact an internal department within the PSNI.
6. On 29 April 2014 PONI provided the complainant with the outcome of its internal review. PONI advised the complainant that section 63 of the Police (Northern Ireland) Act 1998 (the Police Act) prohibited the disclosure of information contained in investigative files. PONI did not however cite any further exemptions under the FOIA.
7. Following further correspondence between the complainant and PONI, PONI confirmed on 27 June 2013 that its response of 29 April 2013 was its final response to the request for information.

Scope of the case

8. On 20 September 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. Although PONI did not cite any exemptions in its internal review letter, PONI later confirmed to the Commissioner that its reference to section 63 of the Police Act was intended as a reliance on the exemption at section 44 of the FOIA.

10. The Commissioner also notes that some of the requested information has in fact been provided to the complainant. Having examined the correspondence the Commissioner is satisfied that in its letter of 22 March 2013 PONI answered parts 1, 3, 5 and 6 of the complainant's request. PONI has also provided some of the information set out at part 4 of the request, namely the dates of contacts and correspondence between PONI and the PSNI. The complainant has not specified to the Commissioner that he is dissatisfied with any of the information provided by PONI. Therefore the Commissioner's investigation focused on parts 2, 4 (to the extent that information had been withheld) and 7 of the request.

Reasons for decision

Section 8: valid requests for recorded information

11. PONI advised the Commissioner of its view that some parts of the request were not seeking access to documentation, but rather the complainant was requesting an assurance that his complaint had been handled properly.
12. The Commissioner understands that the FOIA provides for access to recorded information. Requests for explanation, comment or opinion are not valid requests under section 8 of the FOIA, and public authorities are not obliged to comply with them.
13. The Commissioner is concerned that PONI did not at any stage advise the complainant of its view that some parts of the request were not valid requests for recorded information. Section 16 of the FOIA requires that public authorities provide advice and assistance to applicants and the Commissioner considers that this should include, where necessary, explaining why certain questions may not be considered valid under the FOIA.
14. The Commissioner agrees that parts 2 and 7 of the request were for explanation, rather than for recorded information. This is because these parts of the request ask *why* particular actions were taken. In order to answer the questions PONI would need to create information, ie a written explanation as to why these actions were taken, unless it already held recorded information that met the description specified in the request. The FOIA does not require public authorities to produce or generate recorded information in response to a request; the right of access only applies to recorded information held by the authority at the time a request is made.

15. However the Commissioner is of the view that part 4 of the request was for recorded information, and PONI was required to consider what recorded information it held which was relevant to this part of the request. The Commissioner notes that PONI provided some information to the complainant in response to part 4 of the request, and PONI's refusal to provide the withheld information itself is discussed below.

Section 44: statutory prohibition on disclosure

16. As explained at paragraph 10 and paragraph 15 above the Commissioner is satisfied that the only withheld information is the actual correspondence between PONI and the PSNI referred to in part 4 of the request. The Commissioner has inspected the information held by PONI and has identified the following documents as containing information relevant to part 4 of the request which has not been provided to the complainant:
- a) Correspondence from PONI to PSNI dated 4 September 2012
 - b) Correspondence from PONI to PSNI dated 22 November 2012
 - c) Correspondence from PSNI to PONI dated 15 January 2013
17. PONI has claimed that these three documents are exempt under section 44 of the FOIA. Section 44(1)(a) provides an exemption from disclosure under the FOIA for information which is prohibited from disclosure under any law or enactment. It is an absolute exemption, so if the statutory bar applies then the information is exempt and no public interest test is necessary.
18. PONI advised the Commissioner that section 63 of the Police Act provides a statutory prohibition on disclosure of information. The full text of section 63 is set out in the legal annex at the end of this notice, and 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..."*
19. The Commissioner notes that section 63 relates to the Police Ombudsman and to any officer of the Police Ombudsman. It provides that PONI is not permitted to disclose any information received in connection with its functions, except in very limited circumstances. These exceptions are also set out in the legal annex.
20. The Commissioner has inspected the withheld information in this case and has considered whether it was "received" by PONI as described by the Police Act. The Commissioner notes the Information Tribunal's

comments in the case of *Purser v Information Commissioner & Local Government Ombudsman*¹, where the Tribunal considered information generated by the investigating officer:

*"In the course of this investigation there was **the generation of information and analysis derived from the material supplied** (emphasis added) and the legal framework of the Ombudsman".*

21. In *Purser* the Tribunal accepted that such information met the test for having been "obtained" by the Local Government Ombudsman, and consequently, that this information would fall under the scope of the respective statutory prohibition on disclosure.
22. The Commissioner has inspected all the withheld information in this case. The Commissioner is satisfied that the information provided by the PSNI (ie the PSNI correspondence) was clearly received by PONI, and thus falls under the statutory bar. The Commissioner is also of the view that that the correspondence sent by PONI to the PSNI comprises information that meets the Tribunal's description at paragraph 27 above, since it is derived from the information provided by the complainant and the PSNI.
23. Therefore the Commissioner is satisfied that all the withheld information in this case was "received" by PONI in connection with its functions, ie the investigation of the complaint. The Commissioner is further satisfied that responding to an information request made under the FOIA is not one of the reasons for disclosure provided for in subsections a) – e) of section 63 of the Police Act. Therefore the Commissioner accepts that the information may not be disclosed to the complainant.
24. Accordingly, the Commissioner finds that PONI was entitled to rely on the exemption at section 44(1)(a) of the FOIA, by virtue of section 63 of the Act. As the Commissioner is satisfied that PONI was entitled to withhold the information listed at paragraph 16 above under section and 44(1)(a) he is not required to consider the other exemptions claimed by PONI.

Procedural requirements

Section 17: refusal notice

¹ Appeal no EA/2010/0188

25. 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.
26. In this case the refusal notice issued by PONI cited the exemptions at sections 30(1)(i), and sections 31(2)(a), (b), (c) and (d) of the FOIA. At internal review stage PONI sought to rely on section 63 of the Police (Northern Ireland) Act 1998, although it did not cite the relevant exemption (section 44(1)(a) of the FOIA). The Commissioner therefore finds that the refusal notice did not meet the requirements of section 17 of the FOIA.

Other matters

27. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

Internal review

28. The Commissioner has considered the quality of the internal review conducted by PONI. Paragraph 39 of the Code of Practice issued under section 45 of the Act advises that:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."
29. The Commissioner does not consider that PONI's letter to the complainant of 29 April 2014 demonstrates that an adequate review had been conducted. The letter apologised for the delay in responding to the request, but did not specifically address the provisions of the FOIA. The letter did not indicate whether the reviewer had considered PONI's reliance on the exemptions at sections 30(1)(i), and sections 31(2)(a), (b), (c) and (d) of the FOIA. In addition, although PONI advised that section 63 of the Police (Northern Ireland) Act 1998 (the Police Act) prohibited the disclosure of information contained in investigative files, it failed to explain that it was thus relying on the exemption at section 44(1)(a) of the FOIA.
30. The Commissioner is of the view that internal reviews should aim to rectify any procedural shortcomings in the original handling of the request. If a public authority wishes to change its position following an internal review it must ensure that the complainant is properly informed.

This includes relying on new exemptions, or deciding not to rely on an exemption previously claimed.

31. In light of his comments above the Commissioner expects that PONI will take appropriate action to review its procedures and improve the way it conducts, and communicates the outcome of, internal reviews to applicants.

Right of appeal

32. 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

33. 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.
34. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal annex

Section 63 of the Police (Northern Ireland) Act 1998 provides that:

“63(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 except—

- (a) to a person to whom this subsection applies;
- (b) to the Secretary of State;
- (c) to other persons in or in connection with the exercise of any function of the Ombudsman;
- (d) for the purposes of any criminal, civil or disciplinary proceedings;
or
- (e) in the form of a summary or other general statement made by the Ombudsman which—
 - (i) does not identify the person from whom the information was received; and
 - (ii) does not, except to such extent as the Ombudsman thinks necessary in the public interest, identify any person to whom the information relates.

(2) Subsection (1) applies to—

- (a) the Ombudsman; and
- (b) an officer of the Ombudsman.”