



Making Northern Ireland Safer For Everyone Through Professional, Progressive Policing

FREEDOM OF INFORMATION REQUEST



Request Number: F-2010-00940

Keyword: Complaints/Discipline

Subject: Substance Misuse Process and Subsequent Allegations

Request and Answer:

I am writing to confirm that the Police Service of Northern Ireland has now completed its search for the information.

I have today decided to:

- disclose records in answer to question 6 in full;
- partially exempt records in answer to question 11 pursuant to the provisions of section 21 of the Freedom of Information Act 2000 (the Act);
- neither confirm nor deny that the PSNI hold records in answer to questions 1 to 5 and question 10 pursuant to the provisions of sections 40 and 30 of the Act; and
- neither confirm nor deny that the PSNI hold records in answer to questions 7 to 9 pursuant to the provisions of sections 40, 30 and 31 of the Act.

Question 1

A complaint of Unlawful Imprisonment and Assault against my person was investigated by (a named police officer). This incident having occurred at (a named) police station on (a specified date) 2009. I request the following information to be released under the Freedom of Information Act.

All records of any communication/conversation/meetings between (a named police officer) and the Public Prosecution Service in respect of my complaint.

Question 2

Any documentation in relation to the decision of the Public Prosecution Service not to proceed with the complaint.

Question 3

All documentation including statements, notebook entries, photographs etc that were taken in relation to the above investigation conducted by (a named police officer).

Question 4

Record of any documentation held by (a named police officer) and any other person within PSNI Legal Services Department in respect of my complaint.

Question 5

Copies of any internal correspondence relevant to the above investigation.

Answer

In accordance with the Act, this letter represents a Refusal Notice for these particular questions. The Police Service of Northern Ireland can neither confirm nor deny (NCND) that it holds the information you have requested.

Section 1 of the Freedom of Information Act 2000 (FOIA) places two duties on public authorities. Unless exemptions apply, the first duty at Section 1(1)(a) is to confirm or deny whether the information specified in the request is held. The second duty at Section 1(1)(b) is to disclose information that has been confirmed as being held.

Where exemptions are relied upon Section 17 of FOIA requires that we provide the applicant with a notice which

- a) states that fact,
- b) specifies the exemption(s) in question and
- c) states (if that would not otherwise be apparent) why the exemption applies.

The Police Service of Northern Ireland (PSNI) can neither confirm nor deny that it holds the information relevant to your request as the duty in Section 1(1)(a) of the Freedom of Information Act 2000 does not apply by virtue of the following exemptions :

Section 40(5)(a) and (b) – Personal Information
Section 30(3) - Investigations

Section 40(5) – Personal Information

The release of information under Freedom of Information is a release into the public domain, and not just to an individual. To confirm that the PSNI hold the requested information would in fact confirm whether or not a complaint of Unlawful Imprisonment and Assault was reported to and investigated by the PSNI. This would amount to a release into the public domain, of personal information about individuals involved in an alleged incident, either as a victim, a suspect, or as being involved in any potential investigation. The individuals would have no expectation that these details would be released into the public domain, therefore their data protection rights would be breached by release.

Although Section 40 is an absolute class-based exemption, a Public Interest Test is required for the purposes of NCND

Section 30(3) - Investigations

This is a class based and qualified exemption. If the information were held it must fit into the class of information covered by this exemption and if it were held it would be held for the purposes of an investigation to determine whether an offence has been committed and therefore would clearly fall within the class of information provided by this exemption.

Confirming or denying that the PSNI holds any information in relation to investigations it may or may not have conducted would undermine any such investigation by alerting those who are suspected of offences and giving them the opportunity to and means to influence the outcome of any such investigation or subsequent Court proceedings, including any subsequent potential appeal or retrial.

As section 30 is qualified exemption a public interest test is necessary.

PUBLIC INTEREST TEST

Factors Favouring Confirmation Or Denial – Section 40

Confirming or denying whether the PSNI hold this information would aid accountability in that the public could see what action is or is not taken by police when an incident such as this is reported by a member of the police service.

Factors Against Confirmation Or Denial – Section 40

The breach of any individual's data protection rights would be caused by confirmation or denial. This is so whether or not the information is held.

Balance Test – Section 40

Confirmation or denial of whether the PSNI hold information of this nature would amount to a release of personal data, ie whether or not the individuals concerned were employed by the PSNI, whether or not they were involved in such a complaint/investigation, etc. Whilst the PSNI would always wish to be transparent and accountable, no release under FOI should be made where an individual's data protection rights would be breached. Not only would this be a breach of Data Protection legislation by the PSNI, but it would also leave the PSNI open to action against it by individuals concerned. The Public Interest therefore must favour neither confirming nor denying that the information is held.

Factors Favouring Confirmation Or Denial – Section 30

Confirming the existence of information would show that the PSNI conducted an investigation, which the public would expect.

Factors Against Confirmation Or Denial – Section 30

An investigation or the outcome of subsequent proceedings could be compromised.

Balance Test – Section 30

At this time the potential harm to current and/or future investigations outweighs any public benefit in knowing if any information is, or is not held. Police Officers are held to public account for their actions, including how matters are investigated, by the PSNI Code of Ethics and/or in some cases by the Police Ombudsman for Northern Ireland. There is no further tangible community benefit in complying with section 1(1)(a) of the Act at this time.

None of this however, should not be taken as conclusive evidence that the information you requested exists or does not exist.

Question 6

Copies of the relevant sections of the PSNI/PPS Protocols with regard to the completion of and submission of investigations to the Public Prosecution Service for decision as to prosecution. This also to include the process to seeking prosecutorial advice. In clarification you confirmed that the offence types to which this question refers are False Imprisonment and Common Assault, and the offender type is adult. Also that the protocols in question are PSNI/PPS protocols concerning criminal offences and police procedures/protocols in respect of police obtaining pre prosecutorial advice from PPS.

Answer

In relation to the offence types, False Imprisonment and Common Assault, Police should submit a file to the PPS in all cases, which meet the submission criteria, where evidence exists, however weak, as a result of a police criminal investigation, that an identifiable person has committed a criminal offence.

General Rule - Prosecutorial Advice

In accordance with the provisions of the Justice (Northern Ireland) Act 2002, advice on any prosecutorial issue may be requested by the investigator at any stage of an investigation. Pre-Charge advice is a specific example of prosecutorial advice which occurs when advice is sought by police about the specific charges, if any, which should be preferred against any person suspected of committing a criminal offence.

PROSECUTORIAL ADVICE

Prosecutorial Advice is a service offered by the PPS to police, which they are actively encouraged to use.

What is Prosecutorial Advice?

Prosecutorial advice is guidance provided by the Prosecution Service to investigators. The provision of advice by the prosecution service to investigators is to do with an indication of what likely significance would be given to elements of evidence; what aspects required to be underpinned by further evidence; what is the likely legal position on admissibility of particular proofs and matters of that sort. Advice can also be sought on appropriate charges, in specific cases, using the facility of Pre-charge Advice.

Police are encouraged to seek advice from prosecutors if they require guidance on prosecutorial matters such as:

- the quality or the admissibility of particular evidence;
- the elements of potential charges which would need to be secured by specific admissible evidence;
- the specific charges, if any, that should be preferred against any person; and
- the appropriateness of a High Court Restraint Order.

Prosecutorial advice is simply a facility to tap into the mind of the prosecutor. It can help by suggesting the sort of proofs the PPS would expect in order to prove specific offences but it cannot be a substitute for taking direction on investigation from supervisory officers. Neither can it be a substitute for advice on legal obligations and constraints from in-house lawyers. Prosecutorial advice cannot be used as a substitute for the formal submission of papers for a prosecution decision to be taken. In other words, if evidence, no matter how weak, is available that a living identifiable individual has committed a crime then, except where Fixed Penalty Notices are to be issued or police discretion is exercised in relation to minor infringements or Road Traffic Collisions or Community based restorative justice is an option or an Immediate Adult Caution is recommended, then a crime file must be submitted in accordance with the formats and timescales detailed in these protocols. Authority will not be given, through prosecutorial advice, not to do so.

Advice should be sought promptly whenever a potential problem or difficult issue is identified.

Scope of Service Provision

Prosecutorial and Pre-Charge advice is available from 9:00 hrs. to 17:00 hrs. (Monday to Friday excluding Public Holidays). In exceptional circumstances, arrangements for 'out-of-hours' access to prosecutorial advice services may be requested by Police if, for example, it is known that an operation is planned which might require difficult issues to be resolved at short notice. Such requests should be made to the relevant Regional Prosecutor or Assistant Director within the PPS.

Who can request prosecutorial advice?

There are a range of internal PSNI sources of advice and guidance available to the investigator which need to be consulted prior to lodging an advice request with the PPS – these sources include:

- Supervisor – the officer's supervising officer should always be consulted for advice and guidance prior to contacting the PPS;
- Senior Investigating Officer (SIO) – on major investigations, it will be incumbent on the SIO to review advice requests prior to their submission to the PPS;
- Disclosure Officer – disclosure issues should initially be raised with the disclosure officer.
- Disclosure Unit – all disclosure issues with regard to sensitive material should be initially addressed to the PSNI Disclosure Unit at Knocknagoney;
- Police Liaison – any issues relating to these protocols should be raised with the relevant Police Liaison team, who are collocated with the PPS.

Prosecutorial advice may only be sought by Police Officers with the approval of their Supervisor.

Police Submission of Requests for Advice

Requests for advice must be made in one of the following ways:

- submitting a request for prosecutorial advice via Causeway; or
- using a standard report titled 'Request for Prosecutorial Advice where Causeway is not available or is not an appropriate mechanism; or
- by directly contacting the relevant Regional Prosecutor or Senior Assistant Director to request a meeting in cases of particular complexity, sensitivity or urgency. This would typically apply to cases dealt with by Crime Operations Department within PSNI.

There is a strict necessity for all requests for prosecutorial advice to be properly documented so that all parties know what advice is being given on precisely what representation as to the facts. In extremis, advice will be given orally where it is urgently required. Where that is done, the officer seeking the advice will immediately follow it up by producing a written note of all that passed between the parties and this will be submitted to the prosecutor, within 24 hours, for his approval as a true record. Police must on every occasion submit a PPS advice request via Causeway even if there has been a verbal agreement

Where seeking Prosecutorial Advice police must provide the PPS with all relevant information to ensure that the advice is accurate and focussed. For example, when advice is sought on the strength of the evidence against a particular individual, it is essential that all relevant material, including that which undermines the prosecution case or is likely to assist the defence, should be provided to the prosecutor. This will include, in an identification case, all descriptions given by witnesses, whether immediately at the scene or otherwise.

PPS Responses to Requests for Advice

The Duty Prosecutor must respond to a request for Pre-Charge Advice within two hours. Therefore, any requests for pre-charge advice must be received by the prosecutor more than two hours before the end of the period of detention. The Police should, at all times, consider this time constraint when making requests for pre-charge advice.

The Duty Prosecutor must respond to a request for Prosecutorial Advice within two working days.

Responses to requests for advice will be made in the following ways:

- Electronically via the Causeway system; or
- By hard copy using the standard 'Request for Prosecutorial Advice Form' when a request has been made using this the request and response must be retained for audit.
- Orally in the course of a meeting requested by Police. This would typically be in complex and serious cases or where a specific operation is at the planning stage. In those circumstances, the meeting will be followed up with a formal note of the meeting.

The response to an advice request may be:

- A full response detailing the prosecutorial advice as requested;
- A request for any further information that the prosecutor decides is required before prosecutorial advice can be provided; or
- A target date by which prosecutorial advice will be provided if, for example, the material that needs reviewed in order to provide the prosecutorial advice is complex; a consultation is required or the Duty Prosecutor has requested specialist advice from another prosecutor. In such cases, the prosecutorial advice may be provided direct to police by the specialist prosecutor.

Police file recommendations following prosecutorial advice

Where police have sought Prosecutorial Advice and the response is that, on the facts and information available, the prosecution test is not met, or that the evidence only supports lesser specific offences, then it would be expected that when, as must be, a crime file is submitted, police recommendations would reflect that advice. Where the position is otherwise, then reasons for that divergence must be included.

Question 7

Copies of any journal entries or other documentation/minutes held by (named senior officers and a senior civilian employee), in relation to the testing process carried out in respect of myself on (a specified date) 2009 under the Substance Misuse Policy inclusive of any part of the two appeal processes that were held. I would be grateful if this could also include any information of any of the above and any other member of the Senior Management Team, E District/Professional Standards Department who hold any information whether it be in writing, email etc.

Question 8

Copies of any information/intelligence that justified the process under the Substance Misuse Policy being carried out as "Due Cause" (where intelligence indicates).

Question 9

Any documentation held in relation to the involvement of JMJ Testing Agency on (a specified date) 2009.

Answer

Question 7 in so far as it relates to Professional Standards Department, question 8 and question 9 were referred to the Access to Information Unit, Professional Standards Department who have provided the following response;

Section 1 of the Freedom of Information Act 2000 (FOIA) places two duties on public authorities. Unless exemptions apply, the first duty at s1(1)(a) is to confirm or deny whether the information specified in a request is held. The second duty at s1(1)(b) is to disclose information that has been confirmed as being held. Where exemption are relied upon section 17 of FOIA requires that we provide the applicant with a notice which:

- a) states that fact
- b) specifies the exemption(s) in question and
- c) state (if that would not otherwise be apparent) why the exemption applies.

This letter should therefore be treated as a refusal notice in relation to your request.

The Police Service of Northern Ireland can neither confirm nor deny that it holds the information relevant to your request as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply by virtue of the following exemptions:

Section 40(5)(a) and (b) Personal Information
Section 30(3) Police Investigations
Section 31(3) Law Enforcement

Section 40 is a class based and absolute exemption. As a release under Freedom of Information is release to the world in general, such information, would lead to the identity of individuals. There is no need to identify harm or to conduct a public interest test.

Section 30 is a class based qualified exemption. Such information, if held would be held for the purposes of police investigations. There is no need to identify harm. However a public interest test is necessary. Details of the public interest test can be found below.

Section 31 is a prejudiced based and qualified exemption. The prejudice must be identified and this must be challenged by a public interest test. The harm and public interest test can be found below.

HARM TEST

A disclosure under Freedom of Information is a release of information to the world in general and not an individual applicant. The police service would not want to confirm to the world that it had received intelligence in relation to the illegal use of drugs as such a disclosure would reveal the focus of police enquiries and indicate the existence of otherwise of such intelligence, which would be useful to individuals engaged in unlawful activity e.g. drug taking.

Disclosures by confirming or denying the existence of such information could dissuade people from providing information to the police in the future. The public must have confidence that their information is treated sensitively and appropriately. A lack of confidence will result in a reduced flow of information to the police as persons will be reluctant to provide information if there is a risk of that information if there is a risk of that information being released or their identity compromised.

Disclosing information that could compromise the identity of an individual to the world would breach the data protection rights of that person, and display an attitude that the police service is reckless as to the consequences of such a disclosure. At best it could attract unwanted media attention and at worse actually place an individual at risk for example an informant involved in a sensitive operation.

PUBLIC INTEREST TEST

Favouring confirming or denying that such information is held

There is a general public interest in the way that police work and for public bodies to be accountable for their actions. Information, which enables the efficiency and effectiveness of a force to be scrutinised will be of benefit to the community. The behaviour of Police Officers and how they are dealt with is always high on the public agenda. Confirming that we hold or do not hold the information would give the public an insight into how such information is dealt with.

Confirming or denying that such information is held could assist the public debate into the use of intelligence.

Favouring neither confirming or denying that the information is held

A disclosure under Freedom of Information is a release of information to the world in general and not an individual applicant. The police service would not want to confirm to the world that it had received intelligence in relation to the illegal use of drugs as such a disclosure would reveal the focus of police enquiries and indicate the existence or otherwise of such intelligence which would be information that would be useful to individuals engaged in unlawful activity. eg. drug taking.

Balance Test

Irrespective of whether the information exists or does not exist the need to protect the flow of information from the public is of paramount importance. Disclosures by confirming or denying the existence of such information could dissuade people from providing information to the police in the future. The public must have confidence that their information is treated sensitively and appropriately.

Therefore at this time the balance of public interest favours maintaining our stance in being unable to confirm or deny that such information exists. No inference can be taken from this refusal that the information you have requested does not exist.

In relation to question 7 in so far as it relates to information other than that held by Professional Standards Department; the response to questions 1 to 5 above is also applicable to this question.

Question 10

Copies of JMJ Protocols and Policy in respect of the testing process in respect of myself on (a specified date) 2009.

Answer

Please see my response to questions 1 to 5 above as it is also applicable to this question.

Question 11

A copy of the PSNI Policy in relation to the taking of hair samples under the internal Substance Misuse Policy 11/08.

Answer

Pursuant to the provisions of Section 21 of the Freedom of Information Act 2000 it has been decided to refuse access to some the information you have requested. Section 21 of the Act provides that information which is reasonably accessible to the applicant by other means is exempt information.

Some of the information you have requested is available from the Police Service of Northern Ireland's Publication Scheme. To access some of this information on our Publication Scheme please visit our website at http://www.psni.police.uk/index/about-us/publications/publications-by-category/our_policies_and_procedures/policies.htm

In addition the following is a copy of the PSNI Policy in relation to the taking of hair samples under the internal Substance Misuse Policy 11/08 which is not on our Publication Scheme;

Pre-appointment Tests

Pre-appointment tests for external candidates will usually be undertaken by collection of a hair sample. The only exception to this will be where the PSNI accepts that there is a valid objection to providing a hair sample. In these instances a different biological sample will be used.

Hair sampling for pre-appointment will be undertaken by an approved qualified external contractor using appropriate sample collection kits and observing industry and evidential standard chain of custody procedures.

All hair samples will be split into two by the contractor in the presence of the individual being tested. All hair samples will be forwarded to the approved laboratory. One sample will be used for testing purposes and the other retained by the laboratory facilitate independent testing following dispute or appeal of laboratory findings.

Pre-appointment tests for internal candidates will usually be undertaken by collection of a urine sample as detailed above; however where deemed appropriate hair testing as per above may be used.

'With Cause' Tests

'With Cause – intelligence led' tests will be undertaken without prior notice and may be undertaken by either trained PSNI staff or an approved qualified external contractor using either urine and/or hair sampling methodologies. In all cases samples will be collected using appropriate sample collection kits observing industry and evidential standard chain of custody procedures.

APPEALS

Where analysis of the second sample results in a negative result, a further test will be arranged. This test will be undertaken by collection of a hair sample. In the event that this second test returns a negative result the initial positive result will be regarded as a false positive. Where a false positive is recorded the PSNI will reimburse any costs associated with analysis of the second sample.

In so far as Section 40(5)(a) applies to any requested information, ie any information that constitutes personal data of which the applicant is the data subject, I enclose a DAT1 subject access form which should be completed when an individual seeks access to his or her own personal data. It should be noted however that the provision of this form is not confirmation that any relevant information is held and that if any information is held, it may be subject to exemptions under the Data Protection Act.

If you have any queries regarding your request or the decision please do not hesitate to contact me on 028 9070 0164. When contacting the Freedom of Information Team, please quote the reference number listed at the beginning of this letter.

If you are dissatisfied in any way with the handling of your request, you have the right to request a review. You should do this as soon as possible, or in any case within two months of the date of issue of this letter. In the event that you require a review to be undertaken, you can do so by writing to the Head of Freedom of Information, PSNI Headquarters, 65 Knock Road, Belfast, BT5 6LE or by emailing foi@psni.pnn.police.uk.

If following an internal review, carried out by an independent decision maker, you were to remain dissatisfied in any way with the handling of the request you may make a complaint, under Section 50 of the Freedom of Information Act, to the Information Commissioner's Office and ask that they investigate whether the PSNI has complied with the terms of the Freedom of Information Act. You can write to the Information Commissioner at Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. In most circumstances the Information Commissioner will not investigate a complaint unless an internal review procedure has been carried out, however the Commissioner has the option to investigate the matter at his discretion.

Please be advised that PSNI replies under Freedom of Information may be released into the public domain via our website @ www.psni.police.uk

Personal details in respect of your request have, where applicable, been removed to protect confidentiality.