



## FREEDOM OF INFORMATION REQUEST



**Request Number:** F 2011 02432

**Keyword:** Crime

**Subject:** Murders

### Request and Answer:

I am writing to request the following information relating to the murders of David McIlwaine and Andrew Robb on February 19, 2000 in Tandragee, Craigavon:

#### Question 1

All photographs, videos and maps made by the Armagh RUC of the murder scene. It is understood that at 10.35am, 19 February 2000, SOCO .....took this evidence on the Druminure Road.

#### Question 2

All photographs, videos, casts and measurements of tyre tracks found at the scene on 19 February 2000.

#### Question 3

Any forensic evidence gathered by the Special Branch.

#### Question 4

Any forensic evidence (or otherwise) relating to a footprint found on the trousers of David McIlwaine. It is understood that the footprint was formed by a pair of Nike trainers. Were these trainers ever located?

As the criminal proceedings are now concluded in this case, the above information can be released.

#### Answer to question 1 and 2

Your request for information has now been considered and the decision has been taken not to supply the information you have requested.

Section 17 (1) of the Freedom of Information Act 2000 requires the Police Service of Northern Ireland (PSNI), when refusing to provide such information (because the information is exempt) to provide you the applicant with a notice which:

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

The exemptions, as well as the factors the Department considered when deciding where the public interest lies, are listed below:

The information requested would have been gathered for the purposes of an investigation and therefore the following exemptions are engaged:

#### Absolute Exemptions

Section 40 (2) Personal Information

Section 44 (1) (a) Information covered by Prohibitions on Disclosure

#### Qualified Exemptions

Section 30 Investigations (1)(a)(b)(c) (2) (a) (i)(ii)(iii)

Section 38 Health and Safety (1) (a)(b)

Sections 40 (2) and 44 (1) (a) are absolute exemptions and they do not require the public interest to be considered.

Section 40 (2) - Public authorities are in general, exempt from the Act's duty to provide access to 'personal data' (as defined in the Data Protection Act 1998).

Where an application for information is made by someone other than the 'data subject' disclosure of that information will often constitute a breach of the Data Protection Act and consequently the public authority will usually be exempt from its duties under the Act as a result of Section 40 (2).

Section 44 (1) - Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment e.g. the Human Rights Act (1998).

Section 30 (1)(a)(b)(c) (2) (a) (i)(ii)(iii) is a class based qualified exemption which means that the legislators have identified that the public interest considerations need to be evidenced however, Section 38 (1) (a)(b) is a prejudice based qualified exemption which means that the legislators have identified that both the harm (prejudice) in disclosure as well as the public interest considerations need to be evidenced and articulated to the applicant.

## **HARM**

The release of information, under FOI, is a release to the world and not just to you the individual.

The essence of the work undertaken by the PSNI is to protect both individuals and society as a whole. It has an important role in countering the many threats against society. Release of the requested information could set precedence and undermine any other investigation, as it would enable individuals/groups to become aware of police interest. This in turn would help any subjects avoid detection, and inhibit the prevention and detection of crime and therefore undermine the PSNI's ability to protect the community it serves.

Damage could be caused by the release of the requested information as it could assist individuals in establishing what information PSNI may or may not hold therefore increasing the risk of damage to any future investigation. Additionally, any released information could be interpreted alongside other information (eg current media stories) to damaging effect.

#### Section 30 – Investigations

A public authority is exempt from the duty to communicate information where that information has, at any time been held for the purposes of any investigation, which the public authority has a duty to conduct. As has been addressed above, the release of this material would seriously jeopardise the future prevention and detection of crime for the Police Service as a whole.

It could be argued that there is a public interest in the transparency of investigations carried out by the police to ensure they are being conducted appropriately and in line with current investigative guidelines. However, the Police Service has a duty of care to all individuals involved in any investigation to ensure effective law enforcement and the prevention and detection of crime. The Police Service will not disclose information which could compromise any investigations.

There is an expectation that information relating to any investigation will remain within the domain for which they were provided i.e. in confidence. Release of this type of information into the public domain could impact on any investigations and this would be a breach of this confidentiality.

Taking on board this argument it is considered the harm in releasing the information would also undermine the PSNI's overall ability to conduct any investigation that it has the power to conduct.

Section 38 of the Freedom of Information Act 2000 also protects an individual's physical health and mental wellbeing whether the harm is real or perceived. Therefore the PSNI consider that by releasing the information you have requested relating to the investigation around the murders of David McIlwaine and Andrew Robb on February 19, 2000 in Tandragee, Craigavon may still have the potential to identify different person/s and would not be in keeping with the Act. Release could result in significant distress being caused to family members, etc., of the victims.

Additionally, where an application for information is made by someone other than the 'data subject', disclosure of that information will often constitute a breach of the Data Protection Act and consequently the PSNI will be exempt from its duties under the Act as a result of Section 40 (2).

#### Public Interest Test

The public interest test is as follows: -

#### Section 30 Factors Favouring Disclosure

Disclosure could promote public trust in providing transparency, demonstrating openness and accountability into how the investigation took place. It could allow the public to be satisfied that the investigation has been conducted efficiently and appropriately. Disclosure would also show that public funds were being used effectively and appropriately.

#### Section 30 Factors Favouring Non-Disclosure

Information released into the public domain could undermine any investigation. It would therefore not be in the public interest to release information that may still be of assistance to the PSNI in relation to any investigation and therefore hinder the detection of crime.

It is the Association of Chief Police Officers approach that information relating to an investigation will rarely be disclosed under the provisions of the Freedom of Information Act. Whilst information may be released if it provides a tangible community benefit, for example to prevent or detect crime or to protect life or property, it is hard to see how the information here will do so.

#### Section 38 – Health & Safety Factors Favouring Disclosure

The public are entitled to know how the police service allocate public funds therefore by disclosing this information, could lead to better informed public awareness and debate. Disclosure of the information would assist communities to be more aware of the level of resources that are afforded to investigations of this nature.

#### Section 38 – Health & Safety Factors Favouring Non-Disclosure

Public safety is of paramount importance to the PSNI and must always be considered so that the PSNI's ability to fulfil its core function of law enforcement is protected. PSNI would not wish to endanger the health and safety of any individual or cause any further distress and anxiety to any individual including surviving family members. If PSNI were found to have caused distress to any

person as a result of release of information, we could be held liable in damages.

### Balancing Test

Whilst it is important that the PSNI are open and transparent, in this case although an individual has been brought to justice there is no benefit to the public in the release of the requested information as damage may be caused to any other investigation/s that the PSNI has the power to conduct. Therefore, currently, it is the PSNI's opinion that in relation to the above issues that the balancing test for non disclosure in relation to law enforcement and investigations is stronger than the argument for disclosure in relation to better public awareness and informed debate. Therefore, in relation to this request this case for disclosure is not made out.

### Answer to question 3

There is no information held as evidence was gathered by Scenes of Crime Officers.

### Answer to question 4

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 (1) 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 PSNI can Neither Confirm Nor Deny that it holds the information relevant to question 4 as the duty in Section 1(1)(a) of the Freedom of Information Act 2000 does not apply by virtue of the following exemptions:

#### Absolute Exemption

Section 44 (2) Information covered by Prohibitions on Disclosure (Human Rights Act 1998)

#### Qualified Exemption

Section 30 (3) Investigations

Section 44 (2) is an absolute exemption and does not require the public interest or harm to be evidenced and articulated to the applicant.

Section 30 (3) is a qualified exemption which means PSNI are required to conduct a public interest test in relation to their usage in neither confirming nor denying the existence of any information.

#### Section 30 (3) Investigations.

##### Factors favouring confirmation or denial

The public interest will always be in providing appropriate information that police investigations are being carried out efficiently and effectively. Confirmation of information held in this case could promote public trust in providing transparency, whilst demonstrating openness and accountability into the level of information the PSNI may or may not be aware of.

##### Factors not favouring confirmation or denial:

Routine confirmation or denial about the level of information/evidence held in any police investigation could seriously undermine the investigation and prejudice the detection of crime and prosecution of offenders. This would lead to the investigation being prejudiced and would effect the PSNI's future law enforcement capabilities if such information was released.

Despite the fact that there have been substantial media comments concerning this case the PSNI consider the release of any information which would or would not identify what information they may or may not hold other than those already in the public domain would hinder investigations. Such a release could also undermine the right to a fair trial should any person be subsequently charged with any offence connected to your request.

#### Balance Test :

I am obliged to weigh up the above factors in order to determine whether the public interest lies in maintaining a neither confirm nor deny stance. In this case, the public benefit in being more aware of what information PSNI may or may not hold in relation to the murders of David McIlwaine and Andrew Robb is outweighed by the potential risk to investigations.

The PSNI has therefore determined that in all the circumstances of the case the public interest in maintaining the exclusion of the duty to neither confirm nor deny outweighs the public interest in confirming whether or not information is held.

However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.

Furthermore, PSNI can neither confirm nor deny that any further information under sections 23(5) and 24(2) as the duty in Section 1(1) (a) of the Freedom of Information 2000 does not apply by virtue of the following exemptions:

#### Absolute Exemption

Section 23(5) Information Supplied by or relating to Security Bodies

#### Qualified Exemption

Section 24 (2) National Security

Section 23 is a classed based absolute exemption and therefore there is no need to explain the public interest considerations in this area. However, it is required that PSNI articulate the public interest considerations for the use of NCND within the section 24 exemption. To the extent that Section 24 applies, PSNI have determined that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether PSNI holds the information.

No inference can be taken from this refusal that any relevant section 23(5) or section 24(2) information you have requested does or does not exist.

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](mailto: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](http://www.psni.police.uk)

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