



Making Northern Ireland Safer For Everyone Through Professional, Progressive Policing

FREEDOM OF INFORMATION REQUEST



Request Number: F-2012-00710

Keyword: Crime

Subject: Fatal Shooting of Marine Adam Gilbert.

Request and Answer:

Question

Please can you supply a copy the case notes or any information you have on the death of Royal Marine Adam Gilbert who died on the 15/06/1989 on the Antrim Rd Belfast whilst on operation banner?

Answer

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

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, 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 exemption/s, as well as the factors the Department considered when deciding where the public interest lies, are listed below:

Section 40(2)(a)&(b) by virtue of Section 40(3)(a)(i) – Personal Information

Section 30 (1) (a) Investigations and proceedings conducted by the public authority

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

Section 40 is an absolute class-based exemption, therefore it is not necessary to evidence the harm caused by disclosure. The data protection rights of a third party would be breached by disclosure. Section 40(2) is an Absolute exemption and therefore a Public Interest Test is not necessary. This is so because personal data is governed by other law (The Data Protection Act 1998).

Section 30 is a class based qualified exemption which means that the legislators have identified that the public interest considerations need to be evidenced and articulated to the applicant.

Section 38 is a prejudice based qualified exemption which means that the legislators have identified that the harm (prejudice) in disclosure as well as the public interest considerations need to be evidenced and articulated to the applicant.

The information you have requested contains personal data that relates to individuals who may be identified from this data. Details of the persons named and contained within the case papers have therefore been exempted pursuant to the provisions of Sections 40 (2) (a) (b) of the Freedom of Information Act.

This is an absolute exemption, which means there is no requirement to consider whether there is a public interest in disclosure. This is so because personal data is governed by other law (The Data Protection Act 1998). There are a number of elements to the Section 40 exemption and the second element is relevant in this instance. It is engaged if the request is for the personal data of someone other than the applicant.

Personal Data is regulated under the principles of the Data Protection Act 1998 and when information contains personal data about a third party it can only be refused if disclosure would breach any of the data protection principles.

I examined whether the information you requested is personal data as defined within the provisions of the Data Protection Act and I particularly focused on the following: -

- Does this data relate to, or focus on, or is it about a living individual?
- Could someone be identified from that data?
- As an incidental consequence could you learn something about an identifiable individual?
- Does the data impact on their privacy either in their work or family life?

In this instance I am satisfied the information is personal data as it is about living individuals and what they witnessed at this particular time. If this data were to be released as a public disclosure I have no doubt it would impact on the privacy of the individual concerned in their private life.

As already highlighted, any disclosure under FOIA is a public disclosure and release of the personal data of an individual relating to their actions, would breach principles 1 & 2 of the Data Protection Act 1998.

Principle (1) - that personal data is processed lawfully and fairly. Personal data of this nature is initially imparted and recorded for the purposes of investigation or review of an incident by the PSNI. It will be treated in a highly confidential manner. Any public disclosure will be unlawful if there is a breach of that law of confidentiality.

Principle (2), that personal data is processed for a specific purpose and not further processed in any manner incompatible with that purpose. As previously mentioned, personal data in this instance was gathered and is processed for a specific investigation. Once personal data has been publicly disclosed, it will in many cases be used for a purpose other than for what it was initially obtained.

These individuals do not expect their personal data to be used for another purpose. If released into the public domain it may be used for a totally incompatible purpose, which could lead to intrusive attention from others.

All requests made under FOIA are applicant blind. A request must be treated as such and a public authority will always view any disclosure as into the public domain and not just to an individual.

A summary of the Harm for Section 38 along with the Public Interest Tests for Sections 30 and 38

are provided below. I have also commented on how release of this information would prejudice our investigation if disclosed.

HARM

The release of information at this time could jeopardise the well being physically and mentally of witnesses or potential witnesses and the family of the victim.

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 an ongoing investigation or review.

There is an expectation that statements will remain within the domain for which they were provided and are made in confidence. Release of this type of information into the public domain while an investigation is still ongoing and/or unresolved would be a breach of this confidentiality.

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 death may have the potential to identify different person/s and would not be in keeping with the Act.

Section 30 (1) - 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. Even though a considerable amount of time has passed since the death the fact that individuals may still be identified, could mean that any further investigation could be compromised.

Public Interest Test

Section 30 - Factors favouring disclosure

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

Section 30 -Factors favouring non disclosure

The information requested relates to an incident into which the Historical Enquiries Team may in future conduct a review.

If the details of the investigations were to be released, the ability of the HET review teams to progress enquiries would be hampered and undermined if new witnesses or new information were identified in these or other cases being reviewed by the HET. Release of details may affect the confidence of witnesses in other cases to engage with the HET. Confidence in the HET by victim's families could also be severely dented if its ability to interview witnesses were to be reduced.

It would therefore not be in the public interest to release information that may still be of assistance to the PSNI or HET.

Section 38 - Factors favouring 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

Section 38 - Factors favouring non disclosure

Release of information that could identify witnesses may lead to factions within the community identifying the witnesses. Some witnesses are also members of the public and it would not be in their

interests to expose them to the risk of identification. There still exists a situation in Northern Ireland whereby others could use this information to intimidate or cause physical harm to witnesses if their identity was disclosed.

By disclosing the information the risks to individuals would be significant and there would be a loss of confidence in the police service to protect individuals.

Balance Test

The requirement to withhold information relating to a criminal investigation or review into the death together with personal information, the release of which may affect the health and safety of individuals, must take precedence over the important issues of public accountability and transparency. This means that, at this time, it would not be in the public interest to release that information.

Section 1 of the Freedom of Information (FOI) Act 2000 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.

In relation to any other information that may or may not be held the PSNI can Neither Confirm nor Deny whether such information is held pursuant to the provisions of Sections 23 (Information relating to Security Bodies) and 24 (National Security).

The PSNI can Neither Confirm Nor Deny that it holds any other information as the duty in Section 1(1)(a) of the FOI Act 2000 does not apply by virtue of the following exemptions :

Section 23 (5) Information relating to security bodies.
Section 24 (2) National Security.

Section 23 is an absolute exemption and therefore I am not required to comment any further.

The other exemption is qualified which means I am required to conduct a public interest test in relation to the usage in neither confirming nor denying the existence of any information.

Sec 24(2) National Security

Factors favouring confirmation or denial :

Any confirmation or denial that the PSNI holds such information would allow the public to gauge the appropriate use of public funds in carrying out their national security investigations. In addition it would provide appropriate transparency and reassurance that investigations have been effectively carried out.

Factors not favouring confirmation or denial:

Confirmation or denial in this particular case would present a high risk in that the terrorist organisations responsible for incidents at the time, and who still remain undetected, would be able to act on the information released thereby jeopardising the security or infrastructure of the United Kingdom as they would be able to identify whether links have or have not been made with previous incidents and previous information which may have been released. Sections 23(5) and 24(2) are therefore cited in conjunction to protect the involvement or non-involvement of security bodies.

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 other information 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.

This is because the FOI Act 2000 places a legal obligation on public authorities to confirm in response to a request whether or not any information exists. Therefore without even disclosing the information, the application of an exemption would identify that information was held. A good example would be a simple question such as “*Is John Smith a criminal?*” To confirm no information is held would tell the world he is not one but to exempt the information would disclose that he is. In all such cases the only way to protect John Smith is to neither confirm nor deny whether the information does or does not exist.

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

The HET considers that until all the deaths attributable to The Troubles are investigated, further investigative opportunities may exist and investigative opportunities may be severely hampered by the release of any of this material until the reviews are complete. Release could also jeopardise possible judicial process.

Section 16 Advice and Assistance

Information regarding the deaths which occurred during this period may be available to view at the Public Records Office Northern Ireland at:-

<http://www.proni.gov.uk/>

Public Record Office of Northern Ireland

2 Titanic Boulevard

Titanic Quarter

Belfast

BT3 9HQ

[Email PRONI](mailto:proni@dcalni.gov.uk) at proni@dcalni.gov.uk

Telephone: (+44) 028 90 534800

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.psnipolice.uk

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