

Keeping People Safe



FREEDOM OF INFORMATION REQUEST



Request Number: FOI-2022-00284

Keyword: Organisational Information/Governance

Subject: Miami Showband Legal Action

Request and Answer:

Your request for information under the Freedom of Information Act 2000 (FOIA) has now been considered and we apologise for the delay in reverting to you. PSNI holds information in relation to your request number 1 and has provided a response to you below. In regard to requests 2-5 PSNI is Neither Confirming Nor Denying (NCND) it holds information, as to the specific detail you seek. PSNI considers NCND provisions at section 32 (3) of the FOIA in relation to Court Records and Section 42 (2) in regard to information to which a claim to Legal Professional Privilege could be maintained apply in this case. In considering your requests PSNI has considered that guidance issued by the Information Commissioner's Office in regard to Court Records which is available at the following link:

<https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

We also considered the Information Commissioner's Office Guidance in relation to Legal Professional Privilege which can be accessed at the link below:

https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

Requests

You sought the following information from PSNI:

"In relation to the settlement agreed by both the MOD and PSNI in the Miami Showband civil action in December 2021, can you please answer the following:

Request 1

Why was the PSNI co-joined with the MOD when there is no clear evidence of wrong-doing by any police officer?

Request 2

What percentage of the compensation was paid by the PSNI?

Request 3

Has the NI Department of Justice had any briefing from the Chief Constable on why it was necessary for a

portion of the PSNI's budget to be paid in damages in this case?

Request 4

If so, when did this briefing take place?

Request 5

If the damages were paid due to unsubstantiated claims that Robin Jackson was both a police agent at the time and involved in the atrocity, were the Special Branch records located and examined before any payment from the public purse was made?"

Answer

Request 1

The two survivors of the Miami Showbands attack and the families of two of the deceased victims brought civil claims against both the MOD and Chief Constable for damages arising out of the July 1975 attack. PSNI was a Defendant in these civil claims as it received service of a Claim Form and Particulars of Claim issued by the Claimants in this matter.

Requests 2-5

A settlement was reached between the parties in this case and no admission of liability was made by either MOD or PSNI in relation to any of the allegations. This particulars of the settlement lodged with the court are confidential and form a part of the court record in this case.

Your requests 2-5 ask PSNI to confirm certain particulars which if held (or not) would be capable of disclosing confidential information. PSNI is therefore Neither Confirming or denying it holds the specific detail you seek in requests 2-5. In doing this PSNI is relying on exemptions at section 32 (3) of the FOIA which relate to Court records and section 42 (2) which provides an exemption from the duty to confirm nor deny if information is held if disclosure would involve information (whether or not already recorded) in respect of which a claim could be maintained in legal proceedings.

The full text of exemptions can be found at www.legislation.gov.uk and further guidance on how they operate can be located on the Information Commissioners Office website www.ico.org.uk.ady recorded) in respect of which such a claim could be maintained in legal proceedings.

Section 32 (3)

Section 32 of the FOIA provides an exemption which relates to the protection of court records. The Information Commissioner's Office guidance at section states:

"In effect, section 32 ensures that FOIA can't be used to circumvent existing court access and discovery regimes. Also, public authorities won't be obligated to disclose any information in connection with court, inquiry or arbitration proceedings outside those proceeding". The full text of the exemption is as follows:

32.—(1) *Information held by a public authority is exempt information if it is held only by virtue of being contained in—*

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.”

Section 1(1) (a) of FOIA requires a public authority to confirm whether it holds the information that has been requested. However section 32(3) provides an exclusion from this duty where the information falls under sections 32(1) or 32(2). In this case PSNI is issuing a Neither Confirm nor deny response in terms of those particulars if held (or not) about the settlement lodged in this case. Section 32 is an absolute exemption under the FOIA and there is no requirement on PSNI to demonstrate prejudice or conduct a public interest test.

Section 42 (2) FOIA

PSNI also considers requests 2-5 attract a Neither Confirm nor Deny exemption designed to protect Legal Professional Privilege

Section 42 (2) of the FOIA states:

“(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Section 1(1) (a) FOIA requires PSNI to confirm or deny whether or not it holds information. Section 42(2) removes the duty to confirm or deny, if to do so would involve the disclosure of any legally privileged information. It is subject to a public interest test.

Your requests ask for specific detail, which confirmed by PSNI as being held (or not) would undermine legal privilege and the confidentiality of legal proceedings, legal documents and legal advices provided to the Chief Constable in this civil action. PSNI considers that Legal Professional Privilege protects the confidentiality of communications between a client and their legal adviser, but what it specifically protects is the substance of those communications. This interpretation is supported by the comment of Mr Justice Mann in *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch), that *“The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice”* (paragraph 20). The fact of whether a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications.

You have asked PSNI for very specific information which whether if held or not by PSNI could be seen as revealing confidential information about legal proceedings. This confirmation or denial that information is held would in and of itself disclose legally privileged information.

There is no requirement to demonstrate any prejudice or adverse effect when applying s42, since it is a class-based exemption: i.e. there is no need to show that any harm would occur from disclosure of the information. However, Section 42 (2) carries a public interest test. PSNI must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. There general public interest inherent in this exemption will always be strong due to the importance of the principle being Legal Professional Privilege. PSNI considered the following public interest factors:

Public Interest Test

Factors Favouring Confirmation or Denial

Public authorities should be accountable for the quality of their decision making process and there is a public interest in confirming or denying in the interests of transparency and informing the public

Factors Against Confirmation or Denial

Decisions by public authorities should be made in a fully informed legal context. There is a strong public interest in protecting communications if held or not between a lawyer and a client which are confidential and to protect the ability for PSNI to be able to seek out legal advice. Without recourse to such advice a public authority's decision making may be compromised because it will not be fully informed.

Decision

The decision to issue a 'neither confirm nor deny' response is not affected by whether PSNI does or does not hold the particular details you seek at Requests 2-5 but relates to the consequences of confirming or denying the information is held. The starting point and main focus in most cases will be theoretical considerations about the consequences of confirming or denying that a particular type of information is held. The decision to neither confirm nor deny is separate from a decision not to disclose information and needs to be taken entirely on its own merits. In this case PSNI considers the balance of the public interest favours maintaining its NCND position.

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 Corporate Information Branch, 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 Corporate Information Branch, 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 remain dissatisfied with the handling of your request, you may make a complaint to the Information Commissioner's Office, under Section 50 of the Freedom of Information Act, 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', or use the ICO self-service portal available at www.ico.org.uk/make-a-complaint/officialinformation-concerns-report/official-information-concern/

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 their 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.