

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 May 2022

Public Authority: Police Service of Northern Ireland
Address: Police Headquarters
65 Knock Rd
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant requested an information sharing document held by the Police Service of Northern Ireland (PSNI) relating to domestic abuse. PSNI provided some information and withheld the remainder in reliance on the exemptions at sections 31(1)(a), 31(1)(b), 38(1)(a), 38(1)(b) and 40(2) of FOIA.
2. The Commissioner's decision is that PSNI was entitled to rely on the exemptions claimed. No steps are required.

Request and response

3. The Multi Agency Risk Assessment Conference (MARAC) was established to provide an effective multi agency response to domestic abuse in Northern Ireland.¹ It aims to increase safety and well-being of individuals who are at risk, and to share relevant information to support those individuals.

¹ <https://belfastdvp.co.uk/themainevent/wp-content/uploads/MARAC-Professionals-A5-Booklet.pdf>

4. On 8 January 2020 the complainant asked PSNI for a copy of its MARAC information sharing agreement.
5. Following a number of holding emails and exchanges with PSNI the complainant contacted the Commissioner on 19 October 2020 to complain that they had not received a substantive response to their request.
6. On 17 November 2020 PSNI confirmed to the complainant that it held the requested information but refused to disclose it in reliance on the exemptions at sections 31(1)(a), 31(1)(b), 38(1)(a), 38(1)(b), and 40(2) of FOIA.
7. The complainant requested an internal review on 17 November 2020 and PSNI provided them with the outcome of that review on 14 December 2020. At this point PSNI referred to a similar request made by the same complainant in 2019 and advised that its position had not changed. Accordingly PSNI refused the request under sections 31, 38 and 40 of FOIA.

Scope of the case

8. The complainant advised the Commissioner on 16 February 2021 that they remained dissatisfied with the way their request for information had been handled. By way of context the complainant advised the Commissioner that several public authorities had a MARAC protocol and some were published online.
9. During the course of the Commissioner's investigation PSNI provided the Commissioner with a copy of the withheld information. On consideration of this information the Commissioner wrote to PSNI asking it to reconsider the request. The Commissioner provided examples of public authorities² that had published similar information and asked PSNI to check that it was only seeking to withhold information that it specifically considered to be exempt.

²For example <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/partnership-working-and-multi-agency-responses/>

<https://west-midlands.police.uk/services/marac/>

https://www.richmond.gov.uk/media/16099/marac_information_sharing_protocol.pdf

10. Following the Commissioner's intervention PSNI reconsidered the request and disclosed a large amount of the requested information to the complainant. However the complainant remained dissatisfied. Accordingly the Commissioner's decision in this case relates solely to the remaining withheld information. The Commissioner understands that PSNI is relying on the exemption at section 40(2) in respect of personal information contained in the withheld information. He further understands that PSNI is relying on the exemptions at sections 31(1)(a), 31(1)(b), 38(1)(a) and 38(1)(b) of FOIA in respect of all the remaining withheld information.

Reasons for decision

Section 40 personal information

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (the UK GDPR).
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

³ As amended by Schedule 19 Paragraph 58(3) of the DPA.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

19. In this case, PSNI has relied on section 40(2) in respect of names, job titles, email addresses and signatures of a number of individuals. The Commissioner is satisfied that this information clearly both relates to and identifies the individuals in question, since it reveals who they are and where they work. The withheld information therefore falls within the definition of “personal data” in section 3(2) of the DPA. None of the individuals are the complainant, so it is third party personal data.

20. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The public authority is required to determine whether disclosure would contravene any of the DP principles.

21. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

22. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.

23. PSNI argued that section 40(2) was engaged on the basis that disclosure of the third party personal data would be unfair. This is a valid consideration, but the Commissioner’s view is that public authorities should consider lawfulness first. If disclosure is not lawful it cannot be fair.

24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

25. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

26. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁴.

27. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

⁴ Article 6(1) goes on to state that:

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

iv) The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests.
29. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The Commissioner is of the opinion that there is a legitimate interest in the public being informed about the way PSNI and other organisations address domestic abuse. It is an issue of significant public importance because of the impact it can have on individuals, families and society as a whole. Therefore the Commissioner finds that there is a legitimate interest in PSNI publishing information about MARAC.

Is disclosure necessary?

31. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. The Commissioner considers that there is a legitimate interest in informing and educating the public about the MARAC process. The Commissioner recognises that, albeit as a result of his intervention, PSNI has disclosed the bulk of the requested information. In the Commissioner's opinion the information that has been disclosed will serve the legitimate interest identified. The Commissioner also notes that the organisation each individual represents is included in the disclosed information, further informing the public about who is involved.

33. In light of the above the Commissioner is not persuaded that it is necessary for PSNI to disclose the names, job titles, email addresses and signatures of the individuals concerned. The Commissioner finds that the necessity test is not met, therefore PSNI would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that PSNI was entitled to rely on the exemption at section 40(2) of FOIA in respect of the withheld personal data.

Section 31: law enforcement

34. Sections 31(1)(a) and (b) of FOIA provide an exemption from disclosure where this would, or would be likely to prejudice (a) the prevention or detection of crime, or (b) the apprehension or prosecution of offenders.

35. In order to engage a prejudice based exemption such as section 31, there must be the likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:

- first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

36. The Commissioner's published guidance⁵ recognises that section 31(1)(a) will cover all aspects of the prevention and detection of crime. In the Commissioner's opinion the exemption may be used to withhold information that could make anyone more vulnerable to crime. He further accepts that there may well be an overlap with section 31(1)(b) given the subject matter of the subsections.
37. PSNI set out that the MARAC process was established to provide an effective multi-agency response to high risk victims of domestic abuse and any associated children or vulnerable persons. It does this by sharing relevant information on victims, alleged perpetrators and families. The MARAC definition of high risk is "at risk for further serious harm or homicide". The alleged perpetrator is not informed that they will be discussed at the MARAC as this would raise the risk level of the victim and families.
38. PSNI maintained that disclosure of the information withheld under sections 31(1)(a) and 31(1)(b) would alert perpetrators to the process and agencies involved, and would increase the risk to victims and families. It would increase awareness of the range of processes and protective measures which may be used by PSNI to obtain information and evidence, and to provide support to victims.
39. PSNI expressed concern that perpetrators would use any detailed knowledge of the MARAC process to circumvent safety planning, or continue abuse through malicious allegations resulting in victims being referred as perpetrators. PSNI set out that perpetrators of domestic abuse would be very likely to use any knowledge of the MARAC process and methodology to circumvent safety planning, or continue abuse through malicious allegations. PSNI identified a "very real risk" that this could put victims at increased risk of harm (for example, if a perpetrator became suspicious of an intervention or support plan being provided by a MARAC partner).
40. Consequently PSNI was of the view that publishing the full details of the MARAC information sharing agreement into the public domain may alert perpetrators to the process and put victims at greater risk of harm. This would also result in a public loss of confidence in the MARAC process.

⁵ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

41. The Commissioner accepts PSNI's argument that disclosing the specific withheld information would provide perpetrators, or potential perpetrators, with valuable insight into how the MARAC process shares and uses information to reduce risk. This insight would clearly assist individuals in circumventing the risk reduction measures, and would make it more difficult to prevent abuse.
42. There was no specific criminal offence of domestic abuse at the time this request was originally refused, although perpetrators could be prosecuted for criminal offences such as assault and harassment.^{6 7} Therefore the Commissioner accepts that PSNI's arguments relate to the prevention and detection of crime.
43. The Commissioner further accepts that a detailed knowledge of MARAC procedures would clearly assist perpetrators in taking action to evade detection and apprehension.
44. In light of the above, and having particular regard to the specific withheld information, the Commissioner is satisfied that the prejudice identified by PSNI is relevant to the particular interests that sections 31(1)(a) and 31(1)(b) are designed to protect. He is also satisfied that PSNI has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and 31(1)(b) are designed to protect.
45. In relation to the level of prejudice, PSNI confirmed to the Commissioner that it was relying on the higher threshold, ie disclosure would have the prejudicial effect identified. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge than that relating to the lower threshold (would be likely). In either case the likelihood of prejudice occurring must be more than a hypothetical possibility. Rather, there must be a real and significant risk.

⁶ <https://www.ppsni.gov.uk/domestic-violence-and-abuse>

⁷ The Commissioner also observes that that the Domestic Abuse and Civil Proceedings Act (Northern Ireland) came into effect in February 2022 and created a new, specific offence of domestic abuse in Northern Ireland.

46. Again, the Commissioner is mindful of the subject matter of the request, and the detailed nature of the withheld information. He accepts that prejudice would be more likely than not, therefore he is satisfied that PSNI was entitled to rely on the higher threshold of "would" prejudice.

Public interest in maintaining the exemption

47. PSNI argued that there was a clear public interest in maintaining the exemption, because there is a clear public interest in protecting the public and holding perpetrators of domestic abuse to account. PSNI's ability to fulfil these functions is dependent on MARAC operating effectively. In deciding that the exemption is engaged PSNI has argued that prejudice, or harm, would be caused by disclosure of the withheld information. PSNI set out that it would not be in the public interest to allow this prejudice to occur.
48. In addition to the direct impact on MARAC, PSNI pointed to the impact disclosure would have on public confidence. The disclosure of information that would hamper PSNI's ability to combat domestic abuse would have a detrimental impact on the trust and confidence of victims and partners, and the public as a whole. If public trust or confidence in the integrity of the process is lost and PSNI is perceived as unable to provide effective safeguarding services, this would negatively impact information sharing and reduce the volume of information available to PSNI to safeguard victims, investigate incidents and identify and hold perpetrators to account.
49. PSNI was of the strong view that the public interest lay very clearly in favour of maintaining the exemption with regard to the specific withheld information.

Public interest in disclosure

50. PSNI acknowledged that disclosure of the withheld information would promote transparency and openness. It would improve the public's knowledge and understanding in relation to this type of crime.
51. The complainant reminded the Commissioner that other public authorities have published their MARAC protocols in full. He considered that disclosure of the information withheld by PSNI would provide him with evidence regarding his concerns about breaches of his own personal data. The complainant also suggested that, since he had requested a policy document, there should be no need to redact information from it.

Balance of the public interest

52. As set out at paragraph 29 above, the Commissioner recognises the legitimate public interest in the public being informed about the way PSNI and other organisations address domestic abuse. The Commissioner is mindful of the devastating impact domestic abuse has on victims and their families. In the Commissioner's opinion it is vital that the public is assured that PSNI and other organisations are able to take effective, timely action to protect individuals and bring perpetrators to account.
53. The Commissioner also observes that the remaining withheld information is specific and detailed. It goes beyond the general information published by other public authorities, and that disclosed to the complainant during the course of the Commissioner's investigation. The Commissioner is satisfied that PSNI has now properly distinguished between information that is truly sensitive, and information which will inform the public without causing harm. The Commissioner is not persuaded that there is any significant public interest in disclosing information which would harm the effectiveness of the MARAC process. Therefore he finds that the public interest in maintaining the exemptions at sections 31(1)(a) and 31(1)(b) of FOIA unquestionably outweigh the public interest in disclosure of the specific withheld information.

Section 38: health and safety

54. Sections 38(1)(a) and (b) of FOIA provide an exemption from disclosure where this would, or would be likely to endanger (a) the physical or mental health of any individual, or (b) endanger the safety of any individual.
55. In order to satisfy the Commissioner that this exemption is engaged, the public authority must consider the prejudice test as set out at paragraph 34 above. It must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual. The effect cannot be trivial or insignificant. In the context of section 38, even if the risk falls short of being more probable than not, it needs to be such that there may very well be endangerment.
56. PSNI's arguments with regard to section 38 were similar to those provided in respect of section 31 of FOIA, set out at paragraphs 36 to 39 above. They focused on the risk of perpetrators, or potential perpetrators, gaining valuable insight into how the MARAC process shares and uses information to reduce risk. This insight would clearly assist individuals in circumventing the risk reduction measures, and would make it more difficult to prevent domestic abuse. PSNI also

confirmed that it was applying the higher threshold of “would”, as opposed to “would be likely to”, cause endangerment.

57. The Commissioner acknowledges that domestic abuse causes significant harm to victims and their families. This harm often manifests itself in both physical and psychological terms, and it is clearly more than trivial or insignificant. Therefore the Commissioner has no difficulty accepting that the exemptions at sections 38(1)(a) and 38(1)(b) are engaged with regard to the specific information withheld under these sections. He is satisfied that there is a causal relationship between the disclosure of the information at issue and the harm that sections 38(1)(a) and 38(1)(b) are designed to protect.
58. In relation to the level of prejudice, PSNI confirmed to the Commissioner that it was relying on the higher threshold, ie disclosure would have the prejudicial effect identified. Given the nature of domestic abuse the Commissioner also accepts that endangerment would be more likely than not to occur.

Public interest in maintaining the exemption

59. As with section 31, PSNI argued that there was a clear public interest in maintaining the exemption at sections 38(1)(a) and 38(1)(b) on the basis of the public interest in protecting the public and holding perpetrators of domestic abuse to account. The harm that would be caused by disclosure was not in the public interest because it would result in a real risk of endangerment to individuals’ health or safety.
60. PSNI also highlighted the public interest in protecting the trust and confidence of victims and partners, and the public as a whole, in addition to individuals’ health and safety.

Public interest in disclosure

61. In order to avoid repetition, the Commissioner accepts that the arguments set out at paragraphs 49 and 50 are equally relevant here.

Balance of the public interest

62. Again the Commissioner wishes to avoid repetition. However he considers it appropriate to emphasise the impact of domestic abuse on victims and their families. By the time an individual seeks help it is likely that they have already suffered considerably, whether physically, mentally, or both. There is therefore an overwhelming public interest in protecting PSNI’s ability to support and protect individuals.

63. The Commissioner recognises that the exemptions provided by section 38 are qualified because there will be some circumstances where it is appropriate to disclose information even though the exemption is engaged. However the Commissioner considers that such circumstances will be exceptional in nature. He is not persuaded that any such circumstances exist with regard to the specific withheld information in this particular case.
64. Therefore the Commissioner finds that the public interest in maintaining the exemptions at sections 38(1)(a) and 38(1)(b) of FOIA significantly outweigh the public interest in disclosure of the specific withheld information.

Right of appeal

65. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.
67. 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

**Sarah O’Cathain
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