

Office of the Information Commissioner (Ireland)

Ms X and The Department of Justice and Equality (FOI Act 2014)

Case Number: 160520

Whether the Department was justified under sections 32, 33 and 35 of the FOI Act in refusing access to a Garda report regarding a named individual or any other Metropolitan police officers suspected or known to have visited Ireland while working undercover

Conducted in accordance with section 22(2) of the FOI Act by Elizabeth Dolan, Senior Investigator, who is authorised by the Information Commissioner to conduct this review

Background

In a request dated 16 August 2016, the applicant sought access to information provided to the Department by An Garda Síochána regarding a named individual or any other Metropolitan police officers suspected or known to have visited Ireland while working undercover. In a belated decision 18 October 2016, the Department identified three records as falling within the scope of the request. Access to records 1 and 2 was granted in full. Access to the third record, a Garda report relating to the alleged activities of the named individual dated 23 March 2011, was refused under various provisions of the FOI Act. The applicant immediately sought an internal review of the Department's decision to refuse access to the Garda report dated 23 March 2011. In a decision dated 14 November 2016, the Department affirmed its original decision. On 24 November 2016, the applicant applied to this Office for a review of the Department's decision.

I have now completed my review in accordance with section 22(2) of the FOI Act. In carrying out my review, I have had regard to the contents of the record at issue and to the submissions made by the applicant and the Department. I have decided to conclude this matter by way of a formal, binding decision.

Scope of the Review

This review is concerned solely with the question of whether the Department's decision to refuse access to the Garda report dated 23 March 2011 was justified under the FOI Act.

Analysis and Findings

Section 22(12)(b) of the FOI Act provides that a decision to refuse to grant access to a record "shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified." It should also be noted that a review by this Office under section 22 of the FOI Act is de novo in that it is based on the circumstances and the law as they apply on the date of the decision.

I note that the individual named in the applicant's FOI request is a former officer in the London Metropolitan Police who allegedly operated undercover for a number of years in Ireland and elsewhere in connection with environmental campaigns such as the Shell to Sea campaign in County Mayo. His alleged activities have received extensive media attention and are the subject of an inquiry in the United Kingdom (UK). In answer to a Parliamentary Question on 20 January 2011 (record 2), the then Minister explained that he sought the report at issue from the Garda authorities in light of the reports regarding the activities of the individual that had come to his attention.

The Department's position

In its decision on internal review, the Department referred to the need for An Garda Síochána to maintain effective working relationships with its international counterparts, particularly in relation to intelligence gathering for the purpose of combatting serious crime and safeguarding the security of the State. The Department stated that confidentiality is crucial to the integrity of such relationships. The Department explained that it must on occasion seek information from the Garda authorities in respect of "sensitive operational matters" and that communications received "in this context must be treated with the required degree of confidentiality in order to support the maintenance by An Garda Síochána of its relationships with international counterparts". The Department considered that the release of the report would have an adverse effect on the confidentiality required, "could have the real effect of prejudicing" the giving of sensitive information in the future, and "could have a real prejudicial effect on ongoing co-operation by An Garda Síochána and its international counterparts". For these reasons, the Department refused access to the report under sections 32(1)(a)(i), 32(1)(a)(iii), 33(1)(a), 33(1)(d), and 35(1)(a) of the FOI Act.

The Department has supported its decision with a belated submission received on 28 February 2017 in which it emphasises that arrangements made for intelligence-gathering co-operation with other police services are operational matters for the Garda authorities, to be carried out in accordance with their functions as set out in the Garda Síochána Acts 2005-15. According to the Department, the Garda Commissioner has made it clear that confidentiality is a primary consideration in order for intelligence-gathering measures to remain effective. "To disclose details about such arrangements would impair the ability of An

Garda Síochána to enter such arrangements where needed and would have implications for An Garda Síochána's working relationships with its international counterparts." The Department also claims that any damage to the integrity of the relationships between An Garda Síochána and its international counterparts, which rely on ongoing co-operation and trust, would also affect matters relating to the security of the State.

The Department further explains that, while it occasionally requires information from An Garda Síochána regarding the nature of certain operational matters in the context of its governance functions, any such information is provided on an understanding of confidence. "The need to protect that confidentiality extends beyond the need to keep confidential the immediate substance or purport of a specific document into the wider area of the necessity to maintain, preserve and ensure the integrity of secure information channels generally and being seen to do so." The Department stresses that it is following the advice of the Garda authorities in adopting the view that the release of the report at issue would adversely affect the capacity of the Gardaí to operate the relevant intelligence-gathering co-operation techniques, where necessary, because of the impact on the relationship of trust with partner services that would result.

The applicant's position

The applicant argues that there is a strong public interest in understanding the basis upon which an officer from another jurisdiction, who is now the subject of a policing ethics investigation in the UK, was operating in Ireland. She notes that, following her request, the Minister summarised "selected . . . aspects of the report" in response to Parliamentary Questions in the Dáil, and she considers that there was a reasonable expectation that the report would be published. She states:

"The [G]ardaí are unique in this matter. The Scottish and Northern Irish police forces have come out and expressed shock and confusion that the same officers in [the named individual's] unit were in both jurisdictions without the state police's knowledge.

The Irish police force seems to be going to great lengths to refuse to confirm if it had some kind of arrangement with the Metropolitan police.

There is an incredibly strong public interest here. For five years, the [G]ardaí and the Department of Justice [have] refused to clarify if the state sanctioned British spies coming and working in the Republic of Ireland. These same spies are now the subject of the Pitchford Inquiry in the UK because of the unethical tactics used."

Sections 32(1)(a)(i) and (iii)

Section 32(1)(a) provides, in pertinent part, that a request may be refused if access to the record sought could reasonably be expected to prejudice or impair - (i) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of such matters; or (iii) lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property. Although section 32 relates to law enforcement and public safety matters, it is not a class-based exemption even where Garda reports are at issue. Rather, where an FOI body relies on section 32(1)(a), it should, firstly, identify the potential harm to the functions covered by the exemption that might arise from disclosure and, having identified that harm, consider the reasonableness of any expectation that the harm will occur. To justify its decision to refuse access to a record under section 32(1)(a), the FOI body must show how or why releasing the record concerned could reasonably be expected to cause the harm which it has identified.

In addressing the Department's claims in this case, I note that section 25(3) requires that I take all reasonable precautions to prevent the disclosure of information contained in an exempt record or matter that, if it were included in a record, would cause the record to be exempt. However, I do not believe that I would be revealing exempt information in violation of section 25(3) of the Act by making the following observations about the report. The first part of the report refers to the presence of the named individual in Ireland but does not disclose any information that has not already been publicly disclosed by the current Minister herself in response to Parliamentary Questions and also by the media. The remainder of the report provides background, in very general terms, about an acknowledged method of cooperation between An Garda Síochána and its international counterparts, but it does not discuss whether this method was employed in relation to the named individual; neither does it provide any other operational details of a sensitive nature. In other words, the report does not in fact provide the type of sensitive information or detail that the Department describes as harmful to arrangements for intelligence-gathering in its decision and submission. The Department does not claim that the method of cooperation is itself a confidential matter. I also find no basis for concluding that the general background provided regarding the terms and conditions of such arrangements is of a confidential nature.

On the contrary, I note that the Minister revealed the following information about the report on 16 September 2016 in response to Parliamentary Questions on the matter:

"It may be helpful to inform the House that in March 2011 my Department received a report from the Garda Commissioner in the light of media coverage and

Parliamentary Questions to the then Minister on the alleged activities of the person to whom these questions primarily relate.

In relation to the general question of the possible presence of undercover officers from another jurisdiction, the then Garda Commissioner explained that the assistance of police officers from other jurisdictions is a recognised and necessary tactic in the special circumstances where external activists with a track record of violence and whose identities are unknown to local police seek to shape and control violent protest actions. He explained that agreement on such deployments would be made between the police forces involved as an operational matter and that An Garda Síochána would insist in relation to any such deployment that no criminal or agent provocateur activities would be allowed or undertaken. Any such officer so deployed would be focussed on reporting on the actions and intentions of external activists rather than domestic protestors. He indicated that the use of such deployments can be crucial to the prevention of wide-scale public disorder, destruction of property and violence.

The then Commissioner's report also stated that the capacity of An Garda Síochána to enter into such arrangements was vital in the interests of national security. The maintenance of confidentiality was an essential feature of those arrangements and the Commissioner indicated his belief that, notwithstanding the public attention which had been given to the case of the person in question, that for An Garda Síochána to disclose whether the person in question acted as an under cover agent in the context which was outlined would impair the ability of An Garda Síochána to enter into such arrangements and to protect the security of the State. In the circumstances the report to my Department did not indicate whether the person in question had acted in such a capacity here."

Thus, it seems that the true essence of the Department's position is that any report sought from the Garda authorities relating to arrangements for international cooperation must be treated as confidential, regardless of content, in order to maintain the required "relationship of trust" with the international counterparts.

As indicated above, and as stated by the Commissioner in Case 120291 (Mr. X and The Department of Justice and Equality), available at www.oic.ie, the FOI Act does not exempt Garda reports to the Department as a class. If the record at issue in this case truly contained confidential details about arrangements made for intelligence-gathering co-operation with other police services or other information about such "sensitive operational matters", I would find merit to the Department's claims for exemption under section 32(1)(a)(i) and (iii), provided the measures concerned were shown to be lawful. However, having regard to the contents of the report and the Minister's own statements before the Dáil, I find no basis for

concluding that the Department's expectation of harm is reasonable. I am therefore not satisfied that section 32(1)(a)(i) or (iii) applies.

Section 33(1)

Section 33(1) of the FOI Act provides, in pertinent part, that a request may be refused if access to the record sought could reasonably be expected to affect adversely - (a) the security of the State, or (d) the international relations of the State. Like, section 32(1)(a), it is a harm-based exemption. Thus, an FOI body relying on section 33(1) must identify the potential adverse effect on the relevant interests covered by the exemption and, having identified that adverse effect, and how it might occur, consider the reasonableness of any expectation of that the adverse effect occurring from disclosure of the record.

Again, I note that, if the record at issue in this case truly contained confidential details about arrangements made for intelligence-gathering co-operation with other police services or other information about such "sensitive operational matters", I would find merit to the Department's claims for exemption. However, having regard to the contents of the report and the Minister's own statements before the Dáil, I find no basis for concluding that the Department's expectation of an adverse effect is reasonable. I am therefore not satisfied that section 33(1)(a) or (d) applies.

Section 35(1)(a)

Section 35(1)(a) provides for the protection of information given to a public body in confidence. For the exemption to apply, it is necessary to show the following;

- that the information was given to an FOI body in confidence,
- that the information was given on the understanding that it would be treated by the FOI body as confidential,
- that disclosure of the information would be likely to prejudice the giving to the body of further similar information from the same person or other persons, and
- that it is of importance to the body that such further similar information should continue to be given to the body.

Section 35(1)(a) does not apply if the public interest would, on balance, be better served by granting rather than by refusing to grant the request (section 35(3) refers).

I accept that, at the time, the report was given to the Department in confidence and on the understanding that it would be treated as confidential. However, as the Commissioner explained in Case 120291, it is not plausible in light of section 41 of the Garda Síochána Act 2005 that the release of a Garda report would be likely to prejudice the giving of further

similar information to the Department in future if it were important to the Department to have access to the such information. I am therefore not satisfied that the third requirement of section 35(1)(a) has been met. Accordingly, I find that section 35(1)(a) does not apply.

I wish to emphasise, however, that I am not suggesting by any means that a report containing information about sensitive operational matters would necessarily be subject to disclosure under FOI. On the contrary, other provisions of the FOI Act provide ample protection for sensitive information relating to policing, security, international relations and other such matters. The determinative factor in this case is that no such information is contained in the report at issue. In the circumstances, I alternatively find that the public interest in openness and transparency in relation to the Department's governance functions over An Garda Síochána outweighs any public interest to be served by withholding the report.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby annul the decision of the Department and direct the release of the record concerned.

Right of Appeal

Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.

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