



Scottish Information
Commissioner

**Decision 076/2005 - Mr David Laing and the Chief
Constable of Fife Constabulary**

Information relating to a road traffic accident

Applicant: Mr David Laing

Authority: The Chief Constable of Fife Constabulary

Case No: 200501149

Decision Date: 15 December 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 076/2005 – Mr David Laing and the Chief Constable of Fife Constabulary

Request for information relating to a road traffic accident – information exempt under section 25 (Information otherwise available) – information exempt under section 26(a) (Prohibitions on disclosure) – information exempt under section 34(1)(a) (Investigations by Scottish public authorities) – information exempt under section 38(1)(b) (Personal information).

Facts

Murray Donald and Caithness, solicitors, asked Fife Constabulary for information relating to a road accident in which their client, Mr David Laing, had been involved. Fife Constabulary replied that the information was exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA). Some of the information was available through Fife Constabulary's publication scheme in the form of a police accident report, while other information was held to be exempt from disclosure under sections 26(a) and 34(1)(a) of FOISA.

Outcome

The Commissioner found that Fife Constabulary were justified in withholding the information requested by the applicants. However, he found that Fife Constabulary were wrong to have included police accident reports in their publication scheme and to have withheld the information in those reports under the exemption in section 25 of FOISA.



Appeal

Should either Mr Laing or the Chief Constable of Fife Constabulary wish to appeal against my decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 2 June 2005 Murray Donald and Caithness, acting on behalf of Mr David Laing, asked Fife Constabulary for information relating to a road traffic accident in which their client had been involved. They asked for:
 - The name and address of both the owner and driver of the motor car which collided with their client
 - The names and addresses of all witnesses spoken to by the Police and the information they provided
 - Confirmation whether or not the driver was to be referred to the Procurator Fiscal for prosecution
2. Fife Constabulary replied on 3 June 2005. In relation to the third point, its letter confirmed that there were no criminal proceedings pending as a result of the accident. The letter also stated that the names and addresses requested were available in the police accident report, which could be obtained for a fee of £51. This information was therefore deemed to be exempt under section 25 of FOISA ("Information otherwise accessible").
3. The letter went on to say that the release of third party names and addresses outwith the normal business process (i.e. the purchase of a police accident report) would contravene the Data Protection Act 1998 (DPA) and would therefore be exempt under section 26 of FOISA ("Prohibitions on Disclosure").
4. Fife Constabulary also informed the applicant that the witness statements requested had been withheld on the grounds that these constitute information held for the purposes of an investigation to ascertain whether or not a person should be prosecuted for an offence. As such, the information was considered to be exempt under section 34 of FOISA ("Investigations by Scottish public authorities").



5. On 6 July 2005 Murray Donald and Caithness asked for a review of this reply. They pointed out that information was not “reasonably obtainable” in terms of section 25 of FOISA simply because it was available on request, arguing that the information must be made available in accordance with the authority’s publication scheme. Any payment required should be specified in or determined in accordance with the publication scheme. They disputed Fife Constabulary’s application of the DPA and questioned why it would breach the DPA to provide certain information free of charge while providing the same information for a charge of £51 would be lawful.
6. After reviewing its reply, Fife Constabulary wrote to Murray Donald and Caithness on 18 July 2005, upholding its decision to withhold the information.
7. The police argued that section 35(2) of the DPA allows information to be released for legal or prospective legal proceedings, at the discretion of the Data Controller. In practice, this meant that the name and address of the owner and driver of the vehicle involved in the accident could be obtained as part of a normal business process by applying for a copy of the police accident report and paying the associated fee. The police continued to assert that this information was exempt under section 25 of FOISA.
8. The police also upheld the decision to withhold witness statements under section 34 of FOISA, but pointed out that by obtaining a copy of the police accident report “under the normal business practice”, Murray Donald and Caithness would obtain contact details for the witnesses.
9. On behalf of Mr Laing, Murray Donald and Caithness applied to me for a decision on 22 July 2005. The case was allocated to an investigating officer.

The investigation

10. The application from Murray Donald and Caithness was validated by establishing that the request had been made to a Scottish public authority, and that an appeal had been submitted to me only after Murray Donald and Caithness had asked Fife Constabulary to review its response to the request.
11. A letter was sent to Fife Constabulary on 24 August 2005, informing the authority that an appeal had been received and that an investigation into the matter had begun.



12. Fife Constabulary was asked to supply a copy of the relevant police accident report. The police were also asked:
 - Why it would breach the DPA to supply the names and addresses of the owner and driver of the car involved in the collision and the names and addresses of witnesses, as requested by Murray Donald and Caithness, whereas no breach would occur if this information was purchased in the form of a police accident report.
 - Whether police accident reports would be made available for purchase to anyone requiring one, or whether this option was only open to insurers and legal agents of the parties involved.
 - To supply copies of the government guidance on recommended charges for Road Accident Reports, as referred to in the “Charging Policy” section of the online version of Fife Constabulary’s publication scheme.
13. Fife Constabulary was also asked to comment on the fact that the online version of its publication scheme differed from the model scheme approved by me during 2004 and were asked at what point the police accident reports had been added to the “Charging Policy” section of the publication scheme.
14. Fife Constabulary supplied:
 - A copy of the relevant police accident report
 - Copies of a Scottish Office Home & Health Department Police Circular (No. 2 of 1982) and a list of charges agreed by the ACPOS Finance Standing Committee on behalf of all Scottish police forces for the year commencing 1 September 2004.
 - An explanation that section 35(2) of the DPA allows for the release of information for legal or prospective legal proceedings, at the discretion of the Data Controller. The Data Controller for each police force is the Chief Constable. All forces have an agreement that copies of police reports will be made available to legal agents and insurers upon payment of a fee set nationally by the ACPOS Finance Standing Committee.
 - Confirmation that police accident reports would only be supplied to legal agents and insurers.
15. Fife Constabulary informed the investigating officer that the additions to the publication scheme had been made in July 2005, in an attempt to explain the position regarding police accident reports to users of the scheme.



The Commissioner's Analysis and Findings

16. In reaching a decision on this matter I have considered the following issues:
- a) Whether police accident reports can legitimately be included in a police force publication scheme
 - b) Whether Fife Constabulary correctly applied the exemptions in sections 25, 26 and 34 of FOISA, as cited in correspondence with Murray Donald and Caithness.

Police accident reports and Fife Constabulary's publication scheme

17. Police accident reports are only made available to legal agents and insurers. I do not consider that such reports should be included in Fife Constabulary's publication scheme. Section 23 of FOISA makes it clear that a publication scheme relates to the publication of information by the authority, and that it must specify the classes of information which the authority publishes. In my view, "publish" means to make generally available: this view is supported by section 23(2)(c) which states that the scheme must show "whether the published information is, or is intended to be, *available to the public* free of charge or on payment" (my italics).
18. In addition, I have borne in mind that by virtue of section 25(3), information available in accordance with an authority's publication scheme is, by definition, reasonably obtainable other than by making a request under section 1 of FOISA and is therefore exempt from disclosure under section 1: this would not make sense unless the information were available to the world at large as opposed to any more restricted group of recipients.
19. It is clear that police accident reports would not be made available to the general public even on payment of the specified fee, and therefore these reports cannot be said to be "published" by Fife Constabulary. I have asked Fife Constabulary to remove the reference to police accident reports from their publication scheme and I note that this has already been done.
20. I do not wish to comment further on the inclusion of police accident reports in the Fife Constabulary publication scheme, beyond reminding public authorities that section 24(2) of FOISA states that, in relation to model publication schemes, "the approval of the Commissioner is required in relation to any modification of the scheme by an authority".
21. By making it clear that police accident reports are not "made available in accordance with the authority's publication scheme", it follows that I do not accept that the exemption in section 25 of FOISA applies to this information.



If police accident reports are not exempt under s.25, should the information be released?

22. The original request submitted by Murray Donald and Caithness on 2 June 2005 did not refer to a police accident report, but instead asked for the names and addresses of the owner and driver of the car involved in the accident, the names and addresses of witnesses, and the information provided to Fife Constabulary by witnesses.
23. The purpose of this Decision Notice is to consider whether the information requested by Murray Donald and Caithness on behalf of Mr Laing should be released under FOISA. As such, I cannot take into account the fact that Murray Donald and Caithness are acting as legal agents for one of the parties involved in the accident. If the information is not exempt from disclosure under FOISA then it must be provided to any applicant, no matter who they are; effectively, the information enters the public domain.
24. However, if the information within a police accident report is held to be exempt from disclosure under FOISA the police are not necessarily prevented by this from releasing the information to a legal agent such as Murray Donald and Caithness under the restricted conditions set out in section 35(2) of the DPA, should they consider that provision to apply. Where release of information takes place outside the provisions of FOISA the public authority providing the information can set its own charges and other conditions for releasing the information, subject to any other legal restrictions that may apply.

Is the information requested exempt from disclosure under FOISA?

25. The police have argued that to release the names and addresses outside the “normal business procedure” of providing a copy of the police accident report for a set fee would breach the DPA, and therefore the information is exempt under section 26 of FOISA. Section 26(a) permits authorities to withhold information if disclosure is prohibited by other legislation.
26. The police did not cite the exemption in section 38(1)(b) of FOISA, which allows authorities to withhold information if it is personal data and if disclosure would contravene any of the data protection principles laid down in the DPA. As disclosure under FOISA is potentially disclosure to the world at large rather than the more restricted disclosure possible under the DPA (as outlined in paragraph 23 above), I believe that it would have been more appropriate to cite section 38(1)(b) than section 26 in this instance and to consider the specific issues of whether release of the information under FOISA would contravene any of the data protection principles.
27. I accept that the names and addresses of the car owner and driver and the witnesses to the accident constitute “personal data” in terms of the DPA.



28. The first data protection principle relates to fair and lawful processing. The Information Commissioner has provided guidance on factors to take into account when considering a request under FOISA for the release of personal data about a third party. In thinking about “fairness”, consideration should be given to whether the information relates to the private or public life of the individual. Information about an individual’s home life is likely to deserve protection and the Commissioner’s guidance states: “information such as home addresses...would not normally be disclosed”.
29. I therefore accept that it would breach the provisions of the DPA to release the names and addresses requested, and in that sense I uphold Fife Constabulary’s decision to withhold the information under section 26(a), although it would have been more appropriate to cite section 38(1)(b) which refers specifically to personal data.
30. As I have noted in paragraph 23, although I accept that the names and addresses requested are exempt from disclosure under FOISA, it remains open to Murray Donald and Caithness to purchase a copy of the police accident report made available to them, as legal agents, under section 35(2) of the DPA.

Witness statements

31. Murray Donald and Caithness also asked for the information provided to the Fife Constabulary by witnesses of the accident. This information is not included in the police accident report, and the police withheld it under section 34 of FOISA.
32. Fife Constabulary considered that “information provided by witnesses constitutes information held for the purposes of an investigation to ascertain whether or not a person should be prosecuted for an offence”. Section 34(1)(a) permits public authorities to withhold information held for these purposes if the authority has a duty to conduct such an investigation.
33. I accept that the police have a duty to investigate whether persons involved in a road accident should be prosecuted for an offence. However, section 34 is subject to the public interest test, which requires an authority to consider whether the public interest is best served by releasing or withholding the information.



34. Fife Constabulary has confirmed that in this case there is no prospect of any party being prosecuted. However, the exemption in section 34 of FOISA applies in perpetuity to information falling under its scope. In my view there are strong reasons to uphold this exemption, even when the information is no longer part of an ongoing investigation: for instance, there is significant public interest in maintaining public willingness to co-operate with the criminal justice system through providing witness statements, and this willingness might well be compromised if witness statements were regularly released under FOISA.
35. Having examined the witness statements in this case I consider that, even if the personal data in those statements was to be deleted (see paragraph 29 above), there is insufficient general public interest in the details of those statements to outweigh the public interest in maintaining the exemption. I therefore accept that Fife Constabulary was justified in applying the exemption in section 34(1)(a).

Decision

I find that the Chief Constable of Fife Constabulary has generally dealt with Mr Laing's request for information in accordance with section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paragraphs 22 – 34 above and that, where information has been withheld under exemptions in FOISA, the police were generally justified in doing so.

I find that the Chief Constable of Fife Constabulary was wrong to exempt information in police accident reports on the grounds that these are available through the authority's publication scheme, as explained in paragraphs 17 – 21 above. Fife Constabulary has already removed the reference to police accident reports from the publication scheme and I therefore do not require any further steps to be taken on this point.

Kevin Dunion
Scottish Information Commissioner
15 December 2005