

Decision Notice



Decision 138/2008 Mr B and the Chief Constable of Strathclyde Police

Request for information relating to allegations made to the Police

Reference No: 200800427

Decision Date: 27 October 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr B requested information about an investigation carried out by the Chief Constable of Strathclyde Police (Strathclyde Police) into allegations that he had committed an offence. Strathclyde Police responded by stating that the information was exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which Strathclyde Police upheld their decision to withhold the information, Mr B remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had been entitled not to disclose the information to Mr B. He found that the disclosure of the information was exempt under section 34(1) of FOISA on the basis that it was information held for the purposes of carrying out a criminal investigation. The Commissioner also found that the public interest lay in withholding this information. In addition, the Commissioner found that the information was exempt under section 38(1)(a) of FOISA on the basis that it was Mr B's own personal data.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(i) (Effect of exemptions); 34(1)(a)(i) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 38(1)(a) (Personal information)

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions) (definition of "personal data")

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 13 December 2007, Mr B wrote to Strathclyde Police requesting the following:
 - a. Confirmation that officers from Strathclyde Police took a statement from a named person, and whether this statement was preserved (Request 1);



- b. Confirmation that officers took a statement from second named person, and whether this statement was preserved (Request 2);
 - c. Confirmation that officers established the authenticity of these statements by identifying the radio programme, which led to the statements being made (Request 3);
 - d. Confirmation that officers obtained a copy, transcript or other accurate record of the content of that radio programme, and retained the copy (Request 4);
 - e. Whether officers took any steps, other than those set out above, to ascertain the veracity of the statements and of the specified radio programme and, if so, to be provided with precise details of this (Request 5);
 - f. Who took the statements from the persons named in Requests 1 and 2 (Request 6);
 - g. Who was the officer in charge of this stage of Strathclyde Police's investigation (Request 7);
 - h. Guidelines setting out the steps to be taken by Strathclyde Police officers on receipt of the statements referred to in Requests 1 and 2 (Request 8).
2. Strathclyde Police responded on 18 January 2008 and, in terms of section 16 of FOISA, issued a refusal notice stating that the information held in relation to Requests 1 to 7 was exempt from disclosure in terms of section 38(1)(b) of FOISA. However, Strathclyde Police provided an answer to Request 8.
 3. On 27 January 2008, Mr B wrote to Strathclyde Police requesting a review of their decision. In particular, Mr B disputed that the statements contained personal data or that information about the radio programme could be personal data. Mr B also commented that requests 6, 7 and 8 were about police procedure and that the identity of personnel involved should not be withheld.
 4. Strathclyde Police notified Mr B of the outcome of their review on 3 March 2008. The review panel upheld the application of section 38(1)(b) of FOISA, but also decided that section 18 of FOISA applied. (Section 18 of FOISA allows a public authority to refuse to confirm or deny whether information is held in certain limited circumstances.) The Police also upheld their reliance on the exemption in section 38(1)(b).
 5. On 16 March 2008, Mr B wrote to the Commissioner, stating that he was dissatisfied with the outcome of Strathclyde Police's review and applying to him for a decision in terms of section 47(1) of FOISA. Mr B again disagreed with Strathclyde Police's definition of personal data and strongly argued that the information should be disclosed.
 6. The application was validated by establishing that Mr B had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

7. On 28 March 2008, Strathclyde Police were notified in writing that an application had been received from Mr B. The case was subsequently allocated to an investigating officer.
8. The investigating officer subsequently contacted Strathclyde Police, providing them with an opportunity to submit comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, Strathclyde Police were asked to justify their reliance on the provisions of FOISA they considered applicable to the information requested.
9. Strathclyde Police responded on 23 April 2008 and confirmed that they believed that section 18 of FOISA applied to the information, and that if information were held, it would be exempt from disclosure by virtue of section sections 34(1)(a), 34(1)(b), 35(1)(a), 35(1)(b) and 39(1) of FOISA.
10. A further submission was sought from Strathclyde Police on 14 May 2008. The investigating officer questioned the use of section 18 in this case, given that Strathclyde Police had already issued Mr B with a refusal notice, and by doing so had effectively confirmed the existence of some information. Strathclyde Police were also asked to provide their reasons for considering the information to be exempt from disclosure under the exemptions listed paragraph 9.
11. On 10 June 2008 Strathclyde Police provided a further submission on the application of those exemptions, including their views on the public interest for and against disclosure of the information. At this stage, Strathclyde Police also confirmed that they wished to rely on the exemption in section 38(1)(a) to withhold the information.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all the information and submissions presented by both Mr B and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Consideration of section 34(1) - Investigations by a Scottish Public Authority

13. Strathclyde Police applied the exemptions in section 34(1)(a)(i) and (b) of FOISA on the basis that the information has been held for the purposes of an investigation into allegations made, to ascertain whether a person should be prosecuted for the alleged offence and to decide whether a report should be submitted to the procurator fiscal.



14. The information held was gathered during an investigation which Strathclyde Police had a duty to conduct to ascertain whether a person, namely Mr B, should be prosecuted for an offence. This investigation resulted in a report being made to the procurator fiscal and the subsequent conviction of Mr B.
15. The exemptions in sections 34(1)(a) and (b), set out in full in the Appendix, are class-based exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test; the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure. The exemptions are, however, subject to the public interest test required by section 2(1)(b) of FOISA.
16. Having considered the information to which these exemptions have been applied, the Commissioner is satisfied that the information to which these exemptions were applied relates to information which was at some point held for the purpose of an investigation which Strathclyde Police had a duty to conduct in order to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i)), and which in the circumstances had the potential to lead to Strathclyde Police deciding to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b)).

Consideration of the public interest test

17. As noted above, the exemptions in section 34(1) are subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors both in favour of disclosure and in favour of maintaining the exemption. The Commissioner must then carry out a balancing exercise. Unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers that the information is exempt under one or more other exemptions in FOISA).
18. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been variously described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. it serves the interests of the public.



Arguments in favour of withholding the information on public interest grounds

19. The Commissioner is aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on this exemption, the then Justice Minister, Jim Wallace, argued that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecutions and investigations and the role of the criminal proceedings as the forum for bringing information into the public domain. He also said: "We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."
20. In their submissions, Strathclyde Police argued that it is not in the public interest to inhibit the provision of information to the police and that members of the public could be discouraged from providing information if they were aware that information could be later released without a compelling reason.
21. Strathclyde Police also argued that it is not in the public interest for the roles of the police to be compromised by the release of information about how information is gathered and how investigations are undertaken as this would make it difficult for the police to carry out investigations to the highest standard. Strathclyde Police also considered that the confidentiality of police reports is essential and release of such information would prejudice substantially the freedom with which the police gather information and report to the procurator fiscal.

Arguments in favour of disclosure of the information

22. In many decisions to date, the Commissioner has pointed out that there is a general public interest in releasing information which may lead to an increase in accountability and scrutiny of public officials' actions. In general, the Commissioner considers that there are a number of reasons why disclosure of this kind of information could be in the public interest. There is a general public interest in information being accessible, because this enhances scrutiny of decision making processes and thereby improves accountability. Mr B made such submissions in his application to the Commissioner.
23. In their submissions, Strathclyde Police acknowledged that factors in favour of disclosure would include allowing the public to assess whether they were fulfilling their duties effectively and understanding more fully how investigations are carried out.

Conclusion on the public interest

24. The Commissioner accepts that there is a public interest in scrutinising the actions of Strathclyde Police and in ensuring that investigations into alleged criminal offences are carried out thoroughly and that all relevant matters are taken into account.



25. Nonetheless, the Commissioner considers that there are stronger public interest arguments why information gathered during an investigation falling within the scope of section 34(1)(a)(i) and (b) should be afforded some protection.
26. The Commissioner considers that there are strong reasons for upholding this exemption in this case; in particular, there should be no inhibitions or deterrence to the flow of information and evidence to and from the police in relation to criminal investigations. Were this flow of information to be impeded, the police would find it difficult to investigate crime, one of their core duties.
27. Having considered the information withheld and the arguments for and against disclosure, the Commissioner finds that the public interest in maintaining the exemptions outweighs that of disclosure in this case and accordingly finds that Strathclyde Police correctly applied this exemption to the documents under consideration.

Consideration of section 38(1)(a) – personal information of the applicant

28. Strathclyde Police also submitted that the information included that which would fall within section 38(1)(a) of FOISA. Mr B, in his application to the Commissioner, particularly questioned the extent to which Strathclyde Police had referred to personal data.
29. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. It is therefore not subject to the public interest.
30. The definition of "personal data" is set out in section 1(1) of the DPA, and is reproduced in the Appendix.
31. There exists a right for individuals to make a request for their own personal data (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA does not deny individuals a right of access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
32. The Commissioner has considered the terms of Mr B's requests. The Commissioner is satisfied that the information held by Strathclyde Police includes data which relate to Mr B who can be identified from those data, and which accordingly are his personal data.
33. Although Mr B's request seeks specific information relating to a part of an investigation, as the Commissioner has said in previous decisions, the context of such information would mean that it relates to Mr B. As such, the Commissioner does not agree with Mr B that information does not relate to him and would not be his personal data. Whilst such information may include information about other individuals, such as who was involved in the case, or record events in which Mr B did not directly participate, the information has Mr B as its focus and is biographical in a significant sense.



34. The Commissioner is satisfied that Strathclyde Police was entitled to cite this exemption during the investigation and that the information which comprises Mr B's personal data is exempt from disclosure in terms of section 38(1)(a) of FOISA.
35. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld.

Conclusions on the exemptions

36. Having considered the information, the Commissioner has found it to be exempt on the basis of one or more of the following exemptions:
 - Section 38(1)(a) – to the extent that the information is Mr B's own personal data.
 - Section 34(1)(a)(i) and (b) – to the extent that the information has been held at any time for the purposes of one or more relevant investigations.
37. Having reached the conclusions set out above, the Commissioner has not gone on to consider the application of the other exemptions quoted by Strathclyde Police.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr B on the basis that the information is exempt from disclosure under Part 2 of FOISA.

Appeal

Should either Mr B or Chief Constable of Strathclyde Police wish to appeal against this 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
27 October 2008



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and

...

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or



...

- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject;

...

Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...