

Decision Notice



Decision 168/2011 Mr S and the Chief Constable of Strathclyde Police

Information relating to an alleged complaint

Reference No: 201100977

Decision Date: 16 August 2011

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Scottish Information Commissioner

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Summary

Mr S asked the Chief Constable of Strathclyde Police (Strathclyde Police) for information relating to guidance on the investigation of certain criminal offences and details of an alleged complaint made against Strathclyde Police. Strathclyde Police responded by providing some information to Mr S and advising him that some information was exempt from disclosure in terms of section 38(1)(b) of FOISA. Following a review, Strathclyde Police no longer sought to apply the exemption in section 38(1)(b), and instead refused to reveal whether certain information requested by Mr S existed or was held. Mr S remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had generally complied with Part 1 of FOISA in responding to Mr S's request. In particular, the Commissioner was satisfied that Strathclyde Police were entitled to rely on the provisions of section 18(1) of FOISA in responding to certain parts of Mr S's request, did not breach the timescales in section 10(1) in responding to the request and had dealt with Mr S's requirement for review in accordance with section 21.

However, the Commissioner also found that Strathclyde Police failed to comply with the technical requirements of section 16(1) of FOISA in responding to Mr S's information request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance); 16(1) (Refusal of request); 18 (Further provision as respects responses to request); 19 (Content of certain notices); 21(1), (4) and (5) (Review by Scottish public authority) and 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

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 6 December 2010, Mr S wrote to Strathclyde Police requesting the following information:
 - 1) A copy of any written guidance, standards or policy to be applied by Strathclyde Police in the investigation of rape allegations insofar as this applied at any time during the currency of the investigation of the complaint against Mr S by [a named individual] and related to the treatment and interviewing of the complainer, potential witnesses and suspects and the gathering of forensic or other forms of evidence and the progression of the case.
 - 2) A copy of any such complaint against Strathclyde Police, and any details pertaining thereto, as referred to by [the named individual] in their evidence at Mr S's trial and full details as to the outcome of any such complaint.
2. Strathclyde Police wrote to Mr S on 20 December 2010 advising him that, having considered the terms of his request, they could not identify the exact information that he was seeking. In relation to request 1), Strathclyde Police asked Mr S to clarify whether the information that he was seeking was
 - a. guidance, standards and policy relating the investigation of sexual assaults, and particularly to the treatment and interviewing of the victim, witnesses and suspects, and the use of forensic evidence in that process, or
 - b. guidance standards and policy on the investigation of sexual assaults in general.In relation to request 2), Strathclyde Police asked Mr S a number of questions to allow it to correctly interpret his request.
3. On 31 December 2010, Mr S wrote to Strathclyde Police stating that he did not consider his requests required any clarification as he considered them to be clear and unequivocal. Mr S did, however, provide some clarification of his request in response to the points made by Strathclyde Police in their letter of 20 December 2010.
4. Strathclyde Police responded on 3 February 2011, advising Mr S that his letter of 31 December 2010 had been received on 6 January 2011. In relation to request 1), Strathclyde Police provided some information to Mr S comprising procedural documents and, in relation to request 2), advised Mr S that they considered the information to be exempt from disclosure in terms of section 38(1)(b) of FOISA.



5. On 10 February 2011, Mr S wrote to Strathclyde Police requesting a review of their decision. Mr S did not consider that Strathclyde Police had indicated whether they held any relevant information falling within the scope of request 2). Additionally, he did not consider that the exemption in section 38(1)(b) would apply to all of the information sought in request 2). Mr S also indicated that he considered Strathclyde Police had failed to adhere to the timescale for responding to a request laid down in FOISA, again noting his dissatisfaction with their decision to seek clarification of his initial requests. Mr S did not express any dissatisfaction with Strathclyde Police's substantive response to request 1).
6. Strathclyde Police notified Mr S of the outcome of their review on 10 March 2011. Strathclyde Police substituted their initial decision to apply the exemption in section 38(1)(b) of FOISA, instead giving a notice in terms of section 18 of FOISA. Section 18 gives Scottish public authorities the right to refuse to reveal whether information exists or is held by them, where they consider that to do so would be contrary to the public interest and, if it did exist and was held by the authority, the information could be withheld under any of a number of specified exemptions. Strathclyde Police stated to Mr S that exemptions in sections 34 and 35 of FOISA would apply if the requested information did exist and was held by them.
7. In relation to Mr S's dissatisfaction with the time taken to respond to his initial request, Strathclyde Police advised Mr S that they considered they had been justified in asking him for clarification of his initial request and had responded to him within 20 working days of receiving that clarification.
8. On 27 May 2011, Mr S wrote to the Commissioner, stating that he was dissatisfied with the outcome of Strathclyde Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr S 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. The case was then allocated to an investigating officer.

Investigation

10. The investigating officer subsequently contacted Strathclyde Police, giving them an opportunity to provide 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 any provisions of FOISA they considered applicable to the information requested.
11. Mr S was also invited to provide his comments on this case and, in particular, on the public interest in confirming whether or not the information he had requested exists or is held by Strathclyde Police. Mr S provided comments as requested.



12. The submissions made by both Mr S and Strathclyde Police are summarised (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr S and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Section 18 of FOISA

14. Following their review, Strathclyde Police refused to confirm or deny whether they held the information sought by part 2 of Mr S's information request. This sought information relating to a complaint which Mr S understood to have been made by a particular individual regarding the conduct of the police.
15. Section 18 of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:
- (a) a request has been made to the authority for information which may or may not be held by it;
 - (b) if the information were held by the authority (and it need not be), the information could be withheld under any of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and
 - (c) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
16. Where a public authority has chosen to rely on section 18, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters, which could have the effect of indicating whether the information existed or was held by the public authority.
17. Strathclyde Police provided a number of arguments as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. They submitted that, in general terms, confirming or denying the existence of this type of information could be harmful to the interests of an individual and to the investigative role of the police.



18. Mr S submitted that he was seeking to establish whether such a complaint had been made, and the status of the complaint. He suggested that confirmation as to whether such a complaint had been made or not may provide evidence as to whether an individual had committed perjury. Accordingly, he believed there was a public interest in Strathclyde Police disclosing whether a complaint had been made against them by the named individual in request 2).
19. While the Commissioner is unable to summarise all of the comments made to him in this case, he has considered them fully. Having considered these, he is satisfied in the circumstances that it would be contrary to the public interest for Strathclyde Police to reveal whether the relevant information requested by Mr S exists or is held by them.
20. The Commissioner then went on to consider the exemptions put forward by Strathclyde Police in conjunction with their use of section 18. Strathclyde Police submitted that, if the information sought by Mr S existed and was held by them, it could be withheld under the exemptions in sections 34(1) and 35(1)(b) and (g) of FOISA.
21. Having reviewed Strathclyde Police's submissions, the Commissioner considers those in section 34(1)(a) and (b) to be most relevant in this case and so has focused on these below

Section 34 of FOISA

22. Section 34(1)(a) and (b) of FOISA provide that information is exempt from disclosure if it is held for the purposes of:
 - an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii)); or
 - 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 (section 34(1)(b)).
23. The Commissioner accepts that if the requested information in this case existed and was held by Strathclyde Police, it would be held for the purposes of an investigation they had a duty to conduct for the purposes specified above. The Commissioner accepts, therefore, that such information would fall within the exemptions in section 34(1)(a) and (b) of FOISA.
24. These exemptions are subject to the public interest test and the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information (if it existed and if it was held by Strathclyde Police) would be outweighed by that in maintaining the exemptions under section 34(1).



25. In their submissions, Strathclyde Police argued that the disclosure of such information would jeopardise the interests, and fair treatment, of both complainers and accused persons. They argued that individuals provide information to the police in the expectation that details of the incident, or confirmation of their involvement, will not be supplied to anybody who is not directly involved with the investigative or prosecution process. Strathclyde Police submitted that individuals would be less willing to provide information to the police in the knowledge that such information could enter the public domain via FOISA. They argued that there was no discernible public interest in releasing information under FOISA that would result in any willingness of the public to assist the police during the investigation of alleged criminal conduct.
26. Mr S argued that release of the information would be in the public interest as there was a public interest in the administration of justice and ensuring the scrutiny of evidence in criminal proceedings.
27. Having carefully considered all of the arguments presented by Strathclyde Police and by Mr S (and again noting that he is not able to summarise all of these in this decision), the Commissioner has concluded that in all the circumstances the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA would outweigh the public interest in the disclosure of the information, if it existed and was held.
28. Accordingly, the Commissioner is satisfied in the circumstances that Strathclyde Police were entitled under section 18 of FOISA to refuse to reveal whether the information requested by Mr S existed or was held.

Section 1(3) of FOISA

29. Section 1(3) of FOISA provides that, if an authority requires further information in order to identify and locate the requested information and has told the applicant so (specifying what the requirement for further information is), then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.
30. As noted above, Strathclyde Police contacted Mr S on 20 December 2010 explaining that they were unable to identify the exact information that he was seeking and seeking clarification on a number of matters relating to his requests. This mainly related to whether Mr S was seeking specific information about the handling of specific complaints, or the investigation of criminal allegations in general.
31. In their submissions to the Commissioner, Strathclyde Police stated that it was not clear to them whether Mr S was seeking information relating generally to the investigation of such criminal matters or specifically to the case to which he had referred in his request. They also noted that it was not clear which additional complaint was being referred to in the second part of Mr S's request.
32. In his application to the Commissioner, Mr S submitted that his requests were clear and there was no need for Strathclyde Police to have sought clarification.



33. Having considered the terms of Mr S's requests, the Commissioner can accept that they were open to more than one interpretation and, in the circumstances, it was not unreasonable for Strathclyde Police to have reverted to Mr S to seek further information in order to identify and locate the requested information.
34. For the reasons set out above, the Commissioner has concluded that the request by Strathclyde Police to Mr S to clarify his request was reasonable for the purposes of section 1(3) of FOISA.

Section 10(1) of FOISA

35. In his application to the Commissioner, Mr S has argued that Strathclyde Police did not comply with the timescale laid down in FOISA in responding to his initial response, notwithstanding that issues of clarification were raised by them
36. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to the exception in section 10(1)(b) which provides that, in a case to which section 1(3) applies (where an authority requires further information in order to identify and locate the requested information), the authority must comply within 20 working days after the receipt of the further information.
37. As noted above, Mr S wrote to Strathclyde Police on 31 December 2010, providing additional information. The response to Mr S's request was sent on 3 February 2011.
38. Strathclyde Police submitted that, as they had not received Mr S's letter providing clarification until 6 January 2011, they had not failed to comply with the requirements of section 10(1) of FOISA.
39. Strathclyde Police supplied the Commissioner with a copy of the letter which it had received from Mr S. This was date stamped as having been received by the Force Disclosure Unit (to which the letter had been addressed) on 6 January 2011. Strathclyde Police explained that the Force Disclosure Unit does not have a log of incoming correspondence; any correspondence is date stamped and added to a newly created or ongoing file.
40. Having considered Strathclyde Police's submissions and, taken account of the fact that the period between Mr S sending his letter and its receipt by Strathclyde Police included a weekend and two public holidays, the Commissioner is satisfied that the letter in question was received on 6 January 2011. 3 February was the twentieth working day following 6 January 2011.
41. Accordingly, the Commissioner is satisfied that Strathclyde Police did respond to Mr S within the timescale laid down in section 10(1) of FOISA after receiving the additional information which they required in order to identify and locate the requested information.



Section 16 of FOISA

42. In his application to the Commissioner, Mr S expressed dissatisfaction with Strathclyde Police's response of 3 February 2011, arguing that it failed to comply with the requirements of section 16 of FOISA by failing to explain which information contained within his requests was held by them.
43. In their submissions, Strathclyde Police argued that their initial response had attempted to explain to Mr S that any information held which comprised personal data would be exempt from disclosure under section 38(1)(b) of FOISA. Strathclyde Police noted that the provisions of section 18 of FOISA could only be applied in tandem with the exemptions in sections 28 to 35, 39(1) or 41 of FOISA, but not the provisions of FOISA relating to personal information. Strathclyde Police pointed out that this is at variance with the provisions of the Freedom of Information Act 2000 which allows an authority to neither confirm nor deny that information is held where that information comprises personal data.
44. Strathclyde Police also noted that, in any event, they had substituted their original decision following Mr S's requirement for review.
45. The Commissioner has noted the requirements of section 16(1) of FOISA. This states that where an authority seeks to withhold information by virtue of an exemption in Part 2 of FOISA, it must give the applicant a notice in writing confirming that it holds the information, specifying which exemption is being applied, and why (if it is not clear) the exemption applies. In this case, Strathclyde Police's initial response to Mr S did not disclose that they held any personal information to which the exemption in section 38(1)(b) would apply. Accordingly, the commissioner finds that Strathclyde Police did not meet the requirements of section 16(1)(a) of FOISA in their response to Mr S's information request.
46. The Commissioner notes that Strathclyde Police substituted their original decision on review by applying section 18 of FOISA, and he has found that they were entitled to do so. Accordingly, he does not require Strathclyde Police to take any action in respect of this breach in response to this decision.

Strathclyde Police's review

47. In his application to the Commissioner, Mr S stated that, in their response to his requirement for review, Strathclyde Police had upheld their original decision. However, he was not satisfied that a proper review had been carried out.
48. Section 21(4) of FOISA states that, on receipt of a requirement for review, an authority may do the following in respect of the information request to which it relates:
 - a. confirm a decision complained of, with or without such modifications as it considers appropriate;
 - b. substitute for any such decision a different decision; or
 - c. reach a decision, where the complaint is that no decision had been reached.



49. In this case, as noted above, Strathclyde Police substituted their original decision of 3 February 2011 with a different decision which was notified to Mr S on 10 March 2011.
50. The Commissioner's view is that Strathclyde Police have exercised their right under section 21(4)(b) of FOISA to substitute an earlier decision with a different decision (as it is entitled to do) and correctly notified Mr S of the outcome of its review in terms of section 21(5). Accordingly, the Commissioner is satisfied that Strathclyde Police have complied with the provisions of section 21 of FOISA in dealing with Mr S's requirement for review.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr S.

The Commissioner finds that Strathclyde Police were entitled to apply the provisions of section 18 of FOISA in responding to the second part of Mr S's information request and, in doing so, complied with Part 1 of FOISA.

The Commissioner finds that Strathclyde Police were entitled to ask Mr S for further information in order to identify and locate the requested information in terms of section 1(3) of FOISA. Since Strathclyde Police responded to Mr S's request on the twentieth working day following receipt of that clarification, they did not breach the timescales in section 10(1) in responding to Mr S's request.

The Commissioner also finds that Strathclyde Police dealt with Mr S's requirement for review in accordance with section 21 of FOISA.

However, the Commissioner finds that by failing to specify in their response to Mr S's request whether they held the information to which the exemption in section 38(1)(b) of FOISA was being applied, Strathclyde Police failed to comply with Part 1 of FOISA, in particular, section 16(1).

However, the Commissioner does not require Strathclyde Police to take any action in response to this failure.



Appeal

Should either Mr S or 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.

Margaret Keyse
Head of Enforcement
16 August 2011



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.

...

- (3) If the authority –

- (a) requires further information in order to identify and locate the requested information; and
- (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-



- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).



...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

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
 - (ii) prosecuted for an offence is guilty of it;
 - (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

...