

Decision Notice



Decision 078/2008 Mr Ian Caldwell and the Scottish Ambulance Service Board

Copy of an internal audit report produced by Deloitte & Touche LLP

**Reference No: 200700985
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Summary

Mr Ian Caldwell requested a copy of an internal audit report (the report) from the Scottish Ambulance Service Board (the Board). The Board responded by advising Mr Caldwell that it was withholding the report in terms of section 34(1)(b) of FOISA. Mr Caldwell was not satisfied with this response and asked the Board to review its decision. The Board carried out a review and, as a result, notified Mr Caldwell that it upheld its previous decision to withhold the report in terms of section 34(1)(b) of FOISA and that it also now considered the report to be exempt in terms of section 30(c) of FOISA. Mr Caldwell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Board had dealt with Mr Caldwell's request for information in accordance with Part 1 of FOISA. He did not require the Board to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions) and 34(1)(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 8 January 2007, Mr Caldwell wrote to the Scottish Ambulance Service Board (the Board) requesting the following information:
A paper copy of a report by Deloitte and Touch LLP concerning an allegation of impropriety commissioned by the Chairman of the Scottish Ambulance Service, Mr William Brackenridge.
2. The Board responded to Mr Caldwell's request for information on 2 February 2007. The Board advised Mr Caldwell that it considered the report sought to be exempt in terms of section 34 of FOISA, as the report was held for the purposes of an investigation which the Board has a duty to conduct to ascertain whether a person should be prosecuted for an offence. The Board did not specify which exemption in section 34 was being relied upon at this stage.



3. Mr Caldwell wrote to the Board requesting a review of its decision on 7 February 2007. In particular, Mr Caldwell queried whether the report was held for the purposes of an investigation as described in section 34 of FOISA. Mr Caldwell also argued that disclosure of the report was in the public interest.
4. On 27 February 2007, the Board wrote to notify Mr Caldwell of the outcome of its review. The Board advised Mr Caldwell that it considered it had been correct to withhold the report from him in terms of section 34 of FOISA, and that it additionally considered the report to be exempt in terms of section 30(c) of FOISA, on the basis that its disclosure would prejudice the effective conduct of public affairs.
5. On 9 July 2007, Mr Caldwell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Board's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Caldwell 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 14 September 2007, the Board was notified in writing that an application had been received from Mr Caldwell and was asked to provide the Commissioner with a copy of the report for the purposes of the investigation. The Board responded with the information requested and the case was then allocated to an investigating officer.
8. On 30 October 2007, the investigating officer contacted the Board and invited it to provide comments on the matters raised by Mr Caldwell, and on the application as a whole, in terms of section 49(3)(a) of FOISA. The Board was asked to confirm which exemption under section 34 was being relied upon. It was asked to provide detailed reasons for its reliance upon the exemptions cited, and on its consideration of the public interest test.
9. The Board responded to this letter, confirming that it was applying the exemption in section 34(1)(b). Further information and comments to assist the Commissioner's consideration of this exemption and that in section 30(c) of FOISA were sought from the Board in November 2007 and February 2008.
10. In February 2008, the investigating officer wrote to Mr Caldwell to summarise the arguments put forward by the Board, and to invite him to make further comments on the case. He was invited in particular to set out his views on why the public interest favoured the disclosure of the report. Mr Caldwell provided his comments in a letter dated 10 March 2008.
11. The Commissioner will consider the submissions made by both the Board and Mr Caldwell in his analysis and findings below.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr Caldwell and the Board and he is satisfied that no matter of relevance has been overlooked.
13. Before going on, it should be noted that the Commissioner's decision must consider whether the Board responded to Mr Caldwell's information request in line with Part 1 of FOISA at the time of its review of the request in February 2007. When reaching his decision, the Commissioner has not been able to take into consideration any information regarding the individuals named in the report which has been placed into the public domain since that time.

The report requested by Mr Caldwell

14. The internal audit report under consideration in this case was commissioned as a result of allegations (made by Mr Caldwell) that there had been criminal activity and financial impropriety on the part of the Board and/or its employees. Mr Caldwell had submitted his allegations to the Scottish Ministers who then directed the Board to make appropriate enquiries. Subsequently, the Board instructed Deloitte and Touche LLP (the Board's auditors) to carry out an investigation into the allegations and report to the Chair of the Board. It is this report that is sought by Mr Caldwell.
15. The Board has claimed that this report is exempt from disclosure under sections 34(1)(b) and 30(c) of FOISA. The Commissioner will first consider the exemption in section 34(1)(b).

Section 34(1)(b) of FOISA

16. Section 34(1)(b) of FOISA provides that information is exempt information if it has at any time been held by a Scottish public authority for the purposes of 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.
17. The exemption in section 34(1)(b) of FOISA does not cease to apply once an investigation has been concluded. Information gathered for the purposes of the investigation still falls under the exemption, without limit of time. In addition, in order for the exemption to apply, it is not necessary for the procurator fiscal to have brought proceedings as a result of the investigation, or even for a report to have been made to the procurator fiscal. All that is required is for the information to have been held at some point for the purposes of an investigation which may lead the authority to decide to make a report to the procurator fiscal, to enable it to be determined whether criminal proceedings should be instituted.



18. The Board has argued that the report is entirely exempt from disclosure in terms of section 34(1)(b) as the totality of the information within the report is concerned with a detailed investigation into Mr Caldwell's allegations. The Board has also argued that the report would have formed the basis of a report to the procurator fiscal had any criminal activity been identified. On this basis, the Board contends that section 34(1)(b) applies to the report.
19. The Commissioner has considered the content of the report and the circumstances surrounding its creation. He notes that the Board has responsibility for making reports to the procurator fiscal where fraud is concerned. In this case, the report was prepared by Deloitte and Touche, but it is clear that they were acting under instructions from the Board and so the investigation should still be considered as having been "conducted by the authority".
20. It is clear that the report was commissioned and prepared as a result of Mr Caldwell's allegations of impropriety by the Board and/or members of its staff. The content of the report is focused on the allegations of impropriety and fraud and sets out the evidence gathered and the conclusions reached by Deloitte and Touche in relation to each of the allegations. Although the report was never submitted to the procurator fiscal, the Commissioner is satisfied that it was prepared for, and was held by the Board for, the purposes of an investigation which may have led to a decision by the authority to make a report to the procurator fiscal in order to determine whether criminal proceedings should be instituted.
21. The Commissioner is therefore satisfied that the tests set out in the exemption are met and that the report is exempt from disclosure under section 34(1)(b) of FOISA.

Consideration of the public interest

22. The exemption in section 34(1)(b) is a qualified exemption and is therefore subject to the public interest test laid down in section 2(1)(b) of FOISA. This means that where public authorities find that this exemption applies to the information requested, they must go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
23. Mr Caldwell has submitted that the public interest lies with release of the report, as its disclosure would facilitate independent scrutiny of the allegations made against the Board, and would reveal whether the investigations that underpin the report were sound.



24. The Board has submitted that if Mr Caldwell's allegations had been substantiated, the contents of the report would have been a matter of public interest and would have been passed to the procurator fiscal to determine whether or not a prosecution should take place. The Board has noted that any prosecution arising from the investigation and report would then have been conducted publicly. However, the Board has argued that the actual content and detail of the investigation is not information of a quality which would make it of genuine public interest. The Board has asserted that the investigation reveals nothing of general or universal interest to the public, and that its content is specific to the individual employees involved, the events of a particular evening and the concerns of Mr Caldwell. The Board acknowledged that it may be in the interests of Mr Caldwell (as a relative of a former employee involved in the events investigated by Deloitte and Touche) for the report to be disclosed to him, but that this was not sufficient for disclosure to be argued in terms of the general public interest.
25. The Board has also argued that disclosure of this report may compromise the integrity of any future internal investigations and that, if this occurred, it would be contrary to the public interest. It submitted that internal audits require the full co-operation of interviewed staff and rely on full and honest disclosure. It has argued that if individuals knew that a report, containing a full account of their evidence and involvement in an incident, would be disclosed, then future cooperation in such investigations would be compromised. The Board has also argued that an external body, such as an auditor in this case, should be permitted to carry out its investigations and provide a report to a public authority with some assurance that it will normally remain confidential. The Board further argued that an auditor should be free to make a full and frank assessment of the position and to advance recommendations without pressure or fear of repercussion from any individuals or other bodies who may be criticised in the report.
26. The Commissioner acknowledges that there is a compelling argument for maintaining confidentiality where an investigation is ongoing and no conclusions have been drawn. However, in this particular case, the investigation which the auditors had been conducting had been concluded at the time of the request. Consequently, the harm envisaged by the authority is not to this particular investigation, but to the potential impact on similar investigations in the future. It is more difficult to judge what would be the future impact, not least because it would be inappropriate to suggest to those supplying information that such information would always be kept confidential, given the requirements of FOISA.
27. However, having considered the specific information in this case, the Commissioner considers that it is fair to conclude that the frankness of the information contained within the prepared report might be replaced by more guarded or reticent responses (on behalf of those interviewed) in future investigations if this information were released.
28. Even so, it may be in the public interest to order the information to be disclosed, if the public benefits in release outweigh the negative consequences of release. The Commissioner has therefore considered the nature and the contents of the report in question and the context in which it was prepared. In his view, the disclosure of the contents may be of interest to Mr Caldwell, but is not of wider, general public interest. Even so, it may be appropriate to satisfy the interest of an individual if this will meet wider public interest values such as ensuring fairness or establishing, for example, whether a public authority with regulatory responsibilities is adequately discharging its functions.



29. The Commissioner has concluded that, while release may assist Mr Caldwell, the wider public interest benefits in release are not strong enough to outweigh the benefits in maintaining the exemption. The Commissioner is aware that Mr Caldwell has already been provided with a summary of the report. He has compared the summary given to Mr Caldwell with the actual audit report and he considers that Mr Caldwell has received an accurate summary. In addition, the Commissioner considers that Mr Caldwell has received far more information from the Board than could have ever been released under FOISA.
30. It is clear to the Commissioner that the report was never intended to be released and that the audit could never have been carried out in the way it was if there had been any suggestion that the report would be put into the public domain. The report contains personal data relating to a number of individuals, some of which is very sensitive, and includes detailed references to disciplinary action taken against an employee. Additionally, at the time of Mr Caldwell's request for information and subsequent appeal to the Commissioner, an Employment Appeal Tribunal (EAT) involving one of the individuals named in the report was pending. It is the Commissioner's view that disclosing the audit report so shortly before the EAT took place could have prejudiced its proceedings and that this would not be in the public interest.
31. The Commissioner would like to make it clear here that although he is satisfied that the information that has been withheld from Mr Caldwell does come within the scope of the exemption in section 34(1)(b) of FOISA, and that the public interest lies in maintaining the exemption, he is not seeking to indicate that all information of this kind would be treated in the same way. The Commissioner considers all applications to him on a case by case basis.
32. The Commissioner finds, therefore, that the public interest in maintaining the exemption in section 34(1)(b) in this case outweighs the public interest in the disclosure of the report.
33. Given his findings in relation to section 34(1)(b), the Commissioner has not found it necessary to consider the application of the exemption contained within section 30(c) of FOISA.



DECISION

The Commissioner finds that the Scottish Ambulance Service Board acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Caldwell.

Appeal

Should either Mr Caldwell or the Board 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
10 July 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.

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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-

...

- (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

...