

Decision Notice



Decision 018/2009 Mr B and the Chief Constable of Strathclyde Police

Allegations made to the police and subsequent actions

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Summary

Mr B requested from the Chief Constable of Strathclyde Police (Strathclyde Police) information about allegations of an offence and action taken in relation to these allegations. Strathclyde Police responded by stating that the information was not held. Following a review, in the course of which Strathclyde Police reviewed their interpretation of the request and (on one possible interpretation) withheld any information held under a number of exemptions in FOISA, Mr B remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, where the interpretation of Mr B's request was examined, it became apparent that some of the information sought had been the subject of a previous decision and did not require to be considered again. In relation to the remaining information, the Commissioner found that Strathclyde Police had been entitled either (depending on the interpretation applied to the request) to conclude that no relevant information was held or to withhold any information held under section 34(1) of FOISA on the basis that it was information held for the purposes of carrying out a criminal investigation.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6)(General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information not held) and 34(1)(a)(i) 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 12 April 2008, Mr B wrote to Strathclyde Police requesting the following information:
"Please provide a timeline noting the dates, nature and purpose of each stage of Strathclyde Police Force's involvement in the crimes committed against me since the laying of false allegations [description provided] by [a named individual] in 2003, and the consequent false allegations by [others] until the present."
2. Strathclyde Police responded on 15 May 2008 that it did not hold any of the information requested and issued a formal notice to that effect in terms of section 17 of FOISA.



3. On 19 May 2008 Mr B wrote to Strathclyde Police, requesting that they review their decision as it was his belief that they had rejected his request and thereby failed to properly address it.
4. Strathclyde Police notified Mr B of the outcome of their review on 24 June 2008. They confirmed that the information requested, as the request had been interpreted originally, was not held. Due to the circumstances of Mr B's case, however, Strathclyde Police also considered it possible to apply a broader interpretation whereby the request could include the criminal investigation conducted by Strathclyde Police and leading to Mr B's conviction. On this basis, they took the view that the information sought could be that held within the associated crime report/police report, in which case the exemptions in sections 34(1)(a) and (b), 35(1)(a) and (b), 38(1)(a) and (b) and 39(1) of FOISA would apply.
5. On 11 July 2008 Mr B 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.
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. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer contacted Strathclyde Police on 12 September 2008, 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 submit copies of the withheld information, together with a schedule specifying the exemptions which were considered to apply to each document or part of a document.
8. In response to this letter, Strathclyde Police provided a copy of the police report referred to in paragraph 4 above, together with documentation relating to their handling of Mr B's request. They confirmed their reliance on the exemptions cited in paragraph 4. In subsequent correspondence, they summarised their reasoning for applying the exemptions and provided a copy of the crime report referred to in paragraph 4.
9. Mr B was also asked to clarify the basis of his request. This aspect will be considered further in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

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

Section 17 – information not held

11. Initially Strathclyde Police gave Mr B notice in terms of section 17 of FOISA, arguing that they did not hold the information he had requested. In their view, the request reflected Mr B's own characterisation of their involvement in the case, which they did not share and did not consider to be supported by fact. They submitted that they had not been involved in crimes committed against Mr B and that therefore there could be no information held by them falling within that (literal) interpretation of his request. This conclusion was upheld by Strathclyde Police on review. They also considered, however, that it was possible to interpret the request in a broader way, as seeking information held in connection with the criminal investigation which led to Mr B's conviction.
12. On a literal interpretation of Mr B's request, the Commissioner considers it to have been entirely appropriate for Strathclyde Police to respond as it did. In all the circumstances of this case, having considered the submissions made to him and the information withheld by Strathclyde Police in this and the case which led to *Decision 138/2008* (see below), the Commissioner does not consider that Strathclyde Police could reasonably have been expected to accept Mr B's premises as to their involvement in the criminal process which led to his conviction. Consequently, he does not accept that they could reasonably have been expected to acknowledge that relevant information was held on such an interpretation.

Alternative interpretation of the request

13. On the other hand, the Commissioner has noted the broader potential interpretation applied to Mr B's request on review. Taking account of Mr B's submissions to the Commissioner, both in his application and subsequently, it appears clear that he is seeking information relating to Strathclyde Police's involvement in his case and is unhappy with that involvement (and in particular the adequacy of the process leading from the receipt of allegations to his prosecution for certain offences). In the circumstances, the Commissioner considers it to have been appropriate for Strathclyde Police to attempt to identify what underlay Mr B's request and, having considered all relevant submissions, concludes that the broader interpretation actually applied by Strathclyde Police at review stage was an entirely reasonable one in the circumstances.



14. It may be helpful at this stage to comment on the police report and the crime report referred to in paragraph 4 above. These cover the same basic subject matter. While the layout and headings in the two documents differ slightly, their content is the same in terms of the events and dates covered. Both reports include the names of officers, complainers and witnesses, together with details of the allegations made and other aspects of the investigation process, including dates. The Commissioner accepts Strathclyde Police's conclusion that this is the information held by them corresponding most closely to the "timeline" sought by Mr B.
15. The investigating officer checked the correspondence supplied by Mr B in response to requests for clarification, together with the previous applications from Mr B. It became apparent that the information being sought in this case was likely to overlap to some extent with that previously requested by Mr B, in a request already considered by the Commissioner in *Decision 138/2008 Mr B and the Chief Constable Strathclyde Police*. In the light of this, the Commissioner must first decide whether (and to what extent) the information requested in this case is the same information and, consequently, whether this application raises any new issues requiring investigation.
16. The basis of *Decision 138/2008* was a request for various items, listed "a" to "h" inclusive in that Decision. Items "a", "b", "c" and "d" sought confirmation of actions taken by Strathclyde Police in the course of their investigations into the allegations referred to by Mr B in this present case. Item "e" related to any other steps taken by Strathclyde Police officers in relation to the investigation of these allegations. Items "f" and "g" were requests for the names of the officers taking statements and the officer in charge of the investigation respectively. Item "h" was a request for guidelines setting out the steps to be taken by Strathclyde Police officers in relation to the allegations.
17. Having considered the terms of the requests in *Decision 138/2008*, the Commissioner then looked at the information in the police report and crime report withheld in this case. It is clear that the content of these documents overlaps to some extent with the information withheld in that earlier case, in that these two reports contain dates, officers' names, and records of statements made. The reports also outline the process followed by Strathclyde Police officers during the course of their investigations.
18. Having taken account of Mr B's submissions and all other relevant circumstances, including the passage of time, the Commissioner can identify no basis for revisiting the conclusions reached in *Decision 138/2008*. He acknowledges, however, that the information considered in that earlier case does not embrace the whole set of information contained in the police and crime reports under consideration here, and therefore must consider the application of the exemptions claimed by Strathclyde Police in relation to the content of these reports, at least to the extent that the information in question was not dealt with in that earlier decision.
19. When considering the broader interpretation outlined above, Strathclyde Police took the view that the crime and police reports should be withheld under a number of exemptions in FOISA, listed in paragraph 4 above. Of these, the Commissioner will consider the exemptions in section 34(1)(a)(i) and (b) of FOISA first.



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

20. In terms of section 34(1)(a)(i) of FOISA, information is exempt information if it has at any time been held by a Scottish public authority for the purposes of an investigation the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence. The exemption in section 34(1)(b) applies to information held by the authority at any time for the purposes of an investigation conducted by it, which in the circumstances may lead to the authority making a report to the procurator fiscal to enable a decision to be made as to whether criminal proceedings should be instituted.
21. The scope of section 34(1)(a)(i) is potentially very broad in that it could cover any information held by the police where they consider a criminal offence might have been committed. The exemption is not time limited in that it applies to information held "at any time". Further, in order for information to fall within the scope of this exemption the police do not need to have "identified" the person that should be prosecuted. Where the police consider a criminal offence might have been committed and carry out an investigation into this, all information held for the purpose of that investigation will fall within the scope of section 34(1)(a)(i).
22. The exemptions contained in section 34(1)(a)(i) and (b) are "class-based" exemptions. 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, so the Commissioner is not required (or permitted) to consider the effects of disclosure in determining whether either exemption applies. Each of these exemptions is, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
23. Strathclyde Police applied the exemptions in section 34(1)(a)(i) and (b) on the basis that the information contained within the police and crime reports was gathered for the purposes of an investigation which Strathclyde Police had a duty to conduct, to ascertain whether a person or persons should be prosecuted for an offence. This had led to the case being reported to the procurator fiscal and to Mr B's subsequent trial and conviction. Having considered these submissions and the withheld information, the Commissioner is satisfied in the circumstances that the information falls within the classes of information considered exempt under section 34(1)(a)(i) and (b) of FOISA.

Consideration of the public interest test

24. As indicated above, the exemptions in section 34(1) are subject to the public interest test laid down by section 2(1)(b) of FOISA. This means that, although the information in these documents is exempt, it can only be withheld under the relevant exemption if, in all the circumstances of the case, the public interest in disclosing it is not outweighed by the public interest in maintaining the exemption.
25. As stated in previous decisions, the "public interest test" is not defined in FOISA, but has been 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 must serve the interests of the public.



Arguments in favour of withholding the information on public interest grounds

26. In *Decision 138/2008*, the Commissioner made known his awareness of the concerns surrounding disclosure of information falling within section 34(1), in particular as to the need to avoid “trial by media” rather than subject to the safeguards afforded through due criminal process. He referred to Parliamentary debates on this exemption in which it was argued “[W]e should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons”.
27. In their submissions in this case, Strathclyde Police presented arguments for maintaining confidentiality in respect of reports by the police and other investigating agencies, on public policy grounds. Referring to judicial authority, they asserted that there was a recognised need for absolute candour in the making of such reports and that in the view of the courts the most important safeguard of this was an absolute guarantee against publication. To disclose such information, they argued, would jeopardise the candour and freedom with which the police were able to gather relevant evidence and report such matters to the procurator fiscal.

Arguments in favour of disclosure of the information

28. In *Decision 138/2008*, the Commissioner also recognised the general public interest in releasing information which may lead to an increase in the accountability and scrutiny of public officials’ actions. In general, he considers there to be a number of reasons why disclosure of this kind of information could be in the public interest, one of them being enhancing the scrutiny of decision making processes and thereby improving accountability.
29. In his application to the Commissioner, Mr B commented on his dissatisfaction that the information he is seeking “remains hidden from scrutiny”. He has also contended that those persons making allegations about him “have no legitimate expectation of privacy” and repeated his assertion that Strathclyde Police made no investigation of what he characterises as “these false allegations”. He also asserted that individuals were not in fact discouraged from giving information for fear of being identified.

Conclusions on the public interest

30. Whilst the Commissioner accepts that there is a public interest in scrutinising the actions of Strathclyde Police and also in ensuring that, where allegations of criminal offences are made, investigations are carried out thoroughly with all relevant matters being taken into account, he is also of the view that there are stronger public interest arguments as to why information gathered during an investigation falling within the scope of section 34(1)(a)(i) and (b) should be afforded some protection.
31. Given the subject matter of the allegations in this particular case, the Commissioner is satisfied in the circumstances that there is a genuine and strong public interest in ensuring that the flow of information and evidence to and from the police in relation to criminal investigations is not deterred or inhibited: if it were, the police would not be in a position to investigate fully whether and by whom a crime had been committed, one of their core duties.



32. Having considered the information withheld and the arguments for and against disclosure, the Commissioner finds in this case that the public interest in maintaining the exemptions in section 34(1)(a)(i) and (b) outweighs that in disclosure in this case and accordingly finds that Strathclyde Police were correct to withhold the information under these exemptions.
33. Having reached this conclusion, the Commissioner has not found it necessary to go on to consider the application of the other exemptions relied on by Strathclyde Police.

DECISION

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

Appeal

Should either Mr B or the 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.

Margaret Keyse
Head of Enforcement
20 February 2009



Appendix

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 –

...

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

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...



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
 - ...