

Decision Notice



Decision 040/2010 Mr Colville and the Chief Constable of Strathclyde Police

Refusal to confirm or deny that information is held

Reference No: 200901630
Decision Date: 11 March 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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St Andrews KY16 9DS
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Summary

Mr Dave Colville (Mr Colville) requested from the Chief Constable of Strathclyde Police (Strathclyde Police) verification of whether or not Strathclyde Police held specified information. Strathclyde Police responded by indicating that some of the information requested was not held, and by refusing to reveal whether the certain other information requested by Mr Colville existed or was held by it. Following a review, Mr Colville remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Mr Colville's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). He did not require Strathclyde Police to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 17(1) (Notice that information is not held); 18 (Further provision as respects responses to request); 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 9 June 2009, Mr Colville wrote to Strathclyde Police requesting a range of information relating to an alleged offence, procedures followed and equipment used in the detection of that offence. Mr Colville requested further information on 22 June 2009.
2. Strathclyde Police responded to both requests on 22 July 2009 and provided Mr Colville with some general information relating to procedures for detecting offences of the relevant type, equipment and some relevant statistical information.
3. However, Strathclyde Police notified Mr Colville in terms of section 17 of FOISA that it did not hold some of the information he had requested in relation to a specified piece of police equipment.



4. In relation to the information requested by Mr Colville in relation to a particular alleged incident, Strathclyde Police gave notice under 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.
5. On 28 July 2009, Mr Colville wrote to Strathclyde Police requesting a review of their decision.
6. Strathclyde Police notified Mr Colville of the outcome of their review on 31 August 2009. They upheld their previous decision in full.
7. On 8 September 2009, Mr Colville wrote to the Commissioner, stating that he was dissatisfied with the outcome of the review by Strathclyde Police and applying for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Colville 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

9. The investigating officer contacted Strathclyde Police on 10 November 2009, 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. Strathclyde Police responded with their comments on 2 December 2009. Further comments and clarification on the issues raised by this case were later requested and provided in additional correspondence with Strathclyde Police.
10. Mr Colville was 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 Colville provided his comments as requested.
11. The submissions made by both Mr Colville and Strathclyde Police are summarised (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

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



Information not held

13. This part of the decision considers only the information requested which relates to a specified piece of police equipment.
14. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, it must give an applicant notice in writing that it does not hold the information.
15. As noted above, Strathclyde Police gave notice to Mr Colville that they did not hold some of the information he had requested.
16. In order to determine whether Strathclyde Police dealt with Mr Colville's request correctly in this respect, the Commissioner must be satisfied as to whether, at the time it received his request, Strathclyde Police held any information which would fall within the scope of that request.
17. The investigating officer asked Strathclyde Police a range of questions, including details of any searches which they had carried out to determine whether any relevant information was held.
18. Strathclyde Police explained that they had already provided Mr Colville with one item of documentary information which they held which related to the specified piece of equipment and Mr Colville's requests concerning this. Beyond this, however, Strathclyde Police explained that the underlying activity relating to this part of Mr Colville's information request was not in fact carried out by Strathclyde Police, and accordingly that the information requested which related to the specified piece of police equipment was not held by them.
19. Strathclyde Police went on to provide details of how the activity in question was carried out externally to the Force, by whom it was carried out, and the procedures involved in so doing. Strathclyde Police added that they had carried out internal consultations amongst officers in the relevant unit in reaching this conclusion.
20. These internal consultations had confirmed that the information relating to the specified piece of police equipment was not, and had never been, held by Strathclyde Police. Strathclyde Police also provided an explanation of the legal duties and background to the information in question. This explanation supported their stated position that the information in question was not held by them.
21. Having considered the submissions and explanations before him, the Commissioner is satisfied that adequate steps have been taken by Strathclyde Police to determine whether they held the information in question.



22. The Commissioner is satisfied that the information in question is not held by Strathclyde Police, and was not held at the time when Mr Colville's information request was received. He is accordingly satisfied that Strathclyde Police were correct to give Mr Colville notice in terms of section 17(1) of FOISA that they did not hold the information (other than that which had already been disclosed to Mr Colville) relating to a specified piece of police equipment.
23. The Commissioner will now go on to consider the application of section 18 of FOISA to the remaining withheld information, which related to a specific alleged offence.

Section 18 of FOISA

24. 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.
25. 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 public 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.
26. 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 requested by Mr Colville existed or was held. They submitted that, in general terms, confirming or denying the existence of this type of information could be harmful both the individuals' interests and the law enforcement role of the police.
27. Mr Colville argued that it was very much in the public interest that Strathclyde Police confirm whether or not the information he had requested existed or was held. He maintained that the police need to be seen to handle matters with honesty, openness and integrity.
28. 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 Colville exists or is held by it.



29. 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 Colville existed and was held by it, it could be withheld under exemptions within section 34(1) of FOISA.
30. The Commissioner has noted that Strathclyde Police have referred to the exemptions in section 34 or 34(1) in general terms in its communications with Mr Colville and the investigating officer. Having reviewed Strathclyde Police's comments, the Commissioner considers those in section 34(1)(a) and (b) to be most relevant in this case and so has focussed on these below.

Section 34 of FOISA

31. 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)).
32. The Commissioner accepts that if the requested information existed and was held by Strathclyde Police, it would be held for the purposes of an investigation it had a duty to conduct for the purposes specified above. The Commissioner accepts, therefore, that such information would therefore fall within the exemptions in section 34(1)(a) and (b) of FOISA.
33. These exemptions are subject to the public interest test and therefore the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and if it was held by Strathclyde Police) would be outweighed by that in maintaining the exemptions under sections 34(1).
34. Strathclyde Police acknowledged that there was some public interest in disclosure of the information sought by Mr Colville, but noted that this related to a particular alleged offence. They considered that disclosure of such information could be detrimental to individuals and also to the investigation and prosecution of crime generally.
35. In presenting their arguments, Strathclyde Police emphasised that release of information under FOISA is effectively a release to the world at large. They submitted that disclosure of the information sought by Mr Colville, if it existed and was held, could prejudice the investigation of crime and assist offenders by weakening the general expectation in society that police work would remain confidential.

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36. Strathclyde Police concluded that, if the information existed and was held, the public interest would strongly fall in favour of maintaining the exemptions.
37. Mr Colville argued that release of the information would be in the public interest, as the police need to be seen to be handling matters with honesty, openness and integrity, failing which in his view the public would be unable to have faith in the justice system.
38. Having carefully considered all of the arguments presented by Strathclyde Police and by Mr Colville (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.
39. 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 Colville existed or was held.

DECISION

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

Appeal

Should either Mr Colville 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
11 March 2010



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.

...

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.

...

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.

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;

...