

Decision Notice



Decision 139/2011 Brit Insurance and the Chief Constable of Tayside Police

Intrusions at a scrap yard

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www.itspublicknowledge.info

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Summary

Brit Insurance (through their legal representatives) asked the Chief Constable of Tayside Police (Tayside Police) for information about incidents involving intruders at a scrap yard in Dundee. Tayside Police withheld the information under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA), relating to investigations and law enforcement. Following a review, Brit Insurance remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that, for the most part, the exemptions cited by Tayside Police had been wrongly applied to the withheld information, and ordered its disclosure. However, he found that part of the information had been correctly withheld under section 34(1)(a) and (b) of FOISA.

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); 33(1)(b) (Commercial interests and the economy); 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement)

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 22 September 2010, a multi-part request was made to Tayside Police on behalf of Brit Insurance for information about incidents where intruders had gained access to a scrap yard in Dundee. This followed a fire at the premises in May 2010, which had spread to neighbouring flats. Brit Insurance asked for:
 - a) details of previous incidents, including mode of entry to the site, adequacy of security measures, and whether fire was involved;
 - b) details of the incident on 9 May 2010, including the police officers who attended, any actions taken, and any reports, documents, photographs, CCTV footage or other information;
 - c) details of the charges made against two individuals, in relation to the incident on 9 May 2010, and information about how the case was disposed of following a report to the Procurator Fiscal.
2. On 22 October 2010, Tayside Police responded to the request from Brit Insurance. All information covered by the request was withheld, under a number of exemptions in FOISA.
3. On 16 December 2010, Brit Insurance requested a review of the way in which Tayside Police had dealt with the first part of its request for information. Brit Insurance did not accept some of the reasoning put forward by Tayside Police in relation to the exemptions cited, and did not accept that Tayside Police had judged the balance of public interest correctly when deciding that the information should be withheld.
4. Brit Insurance did not request a review of the response to the second and third parts of its request.
5. On 20 January 2011, Tayside Police provided its response to the request for review from Brit Insurance, upholding the decision to withhold information covered by the first part of its request under section 34(1)(a) and (b), section 35(1)(a) and (b), and section 33(1)(b) of FOISA, for the reasons given in the original response.
6. On 21 February 2011, an application to the Commissioner was made on behalf of Brit Insurance, stating that it was dissatisfied with the way in which Tayside Police had dealt with the first part of its request and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Brit Insurance 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

8. On 7 March 2011, Tayside Police were notified in writing that an application had been received from Brit Insurance and were asked to provide the Commissioner with any information withheld from them. Tayside Police provided the information as requested, in the form of a table with summary information about relevant incidents. The case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted Tayside 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, Tayside Police were asked to explain why they were satisfied that the summary of incidents provided to the Commissioner included details of all incidents covered by the terms of the request from Brit Insurance. They were also invited to provide any additional arguments or supporting evidence in relation to the exemptions cited.
10. On 19 April 2011, Tayside Police provided the Commissioner with their response. The arguments and comments put forward by Tayside Police are considered in the next section of this decision.

Commissioner's analysis and findings

11. 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 Brit Insurance and Tayside Police, and is satisfied that no matter of relevance has been overlooked.

Section 33(1)(b) – Commercial interests

12. Tayside Police withheld all the information covered by the first part of the request from Brit Insurance under the exemption in section 33(1)(b) of FOISA.
13. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
14. The Commissioner's published guidance on the exemption in section 33(1)(b) of FOISA states:

“The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and



significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.

FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied.

Authorities should therefore disclose the information asked for unless it would be likely to cause real, actual and significant harm.¹

15. Tayside Police argued that disclosure of details of incidents at a specific location would lead directly to the assumption that the premises were in some way more dangerous or more of a target for criminals than other premises. The information could create a negative impression of the business' attempts to secure its premises and protect them from criminal acts.
16. Even if these arguments are accepted, the Commissioner does not consider that Tayside Police have demonstrated how disclosure of the withheld information would, or would be likely, to prejudice substantially the commercial interests of the scrap yard business operating from the premises in question. Tayside Police have not shown why the core business of acquiring and selling scrap metal would, or would be likely to, be adversely affected to a significant degree, even if the scrap yard's reputation for the security of its premises was to suffer following disclosure of the information requested.
17. The Commissioner takes the view that the arguments put forward by Tayside Police in relation to this exemption are speculative in nature, and notes that there is no indication that the scrap yard business occupying the premises was consulted on this point or shares the views put forward by Tayside Police.
18. As Tayside Police have not shown how disclosure of the requested information would, or would be likely to, cause real harm to the commercial interests of the scrap yard business in question, the Commissioner finds that the exemption in section 33(1)(b) of FOISA is not engaged and was wrongly applied by Tayside Police. He is not, therefore, required to go on to consider the public interest test.

Section 35(1)(a) and (b) – Law enforcement

19. Section 35(1)(a) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the prevention or detection of crime.
20. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. There is likely to be a considerable overlap between information relating to the apprehension or prosecution of offenders and that relating to the prevention or detection of crime.

¹ Briefing on Commercial Interests and the Economy:
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2583&SID=123>



21. These are qualified exemptions which are subject to the public interest test in section 2(1)(b) of FOISA, should they be found to apply in relation to the withheld information.
22. Tayside Police argued that releasing the information requested by Brit Insurance would discourage people from reporting any future incidents; in turn, this would make Tayside Police less efficient in preventing and detecting crime and in the subsequent apprehension or prosecution of offenders.
23. Tayside Police explained that individuals and businesses were encouraged to report any incidents of an anti-social or potentially criminal nature. The public were assured that any information they provided would be treated with sensitivity and would only be disclosed in the course of any subsequent legal proceedings, so there was an expectation of confidence.
24. Tayside Police stressed that the Police were very much reliant on receiving information from the communities they served in order to fulfil their obligations in relation to the prevention and detection of crime and the apprehension and prosecution of offenders. They saw incident reports as evidence of a good working relationship, whereby the owner or manager of the business sought to engage with the Police in tackling the issues at hand.
25. The Commissioner accepts that it is important to protect the process by which members of the public provide information in confidence to the Police, so that action can be taken in relation to criminal or anti-social activity. However, the Commissioner notes that, in this case, the information withheld gives no indication of its source. It is not possible to tell whether the incidents listed were reported by members of the public, the manager or owner of the business, or even by a police officer. The information withheld is brief and factual. The Commissioner does not accept that disclosure of the information withheld in this case would create concerns about confidentiality which would, or would be likely to, deter members of the public or business owners / managers from reporting future incidents.
26. Tayside Police also argued that a business owner or manager would be far less likely to report an incident if they believed that this could in some way have a negative impact on the reputation of their business. They argued that such individuals must not be discouraged from reporting incidents to the Police for fear that this tally of "police attention" could be publicly released and potentially used against them to give the impression that the premises were somehow dangerous, or a target for criminals. Tayside Police stated that a high number of incidents at a particular location did not necessarily mean that the location was any more dangerous or more of a target to criminals than any other similar location.
27. The Commissioner accepts that business owners or managers are unlikely to welcome disclosure of a list of incidents affecting their business premises, but he is not persuaded that this would be enough to deter them from reporting future incidents and seeking assistance from the Police. The Commissioner believes that business owners or managers would be likely to take into account the benefits of reporting incidents to the Police for investigation, and that this would be likely to outweigh any deterrent caused by disclosure of the information withheld in this case.



28. The Commissioner therefore does not accept that the exemptions in section 35(1)(a) and (b) of FOISA should be upheld on the basis of the arguments put forward by Tayside Police. Because the exemptions have not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Section 34(1)(a) and (b) of FOISA

29. Tayside Police also withheld all the information covered by the first part of the request from Brit Insurance under the exemptions in section 34(1)(a) and (b) of FOISA. These provisions state that 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.
30. The exemptions in sections 34(1) are described as "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 in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
31. As noted previously, Brit Insurance requested details of previous incidents at the scrap yard, including mode of entry to the site, adequacy of security measures, and whether fire was involved. The information withheld from Brit Insurance consists of brief information about each incident under five headings: date reference; type of incident; method of entry; whether there was a fire; comments on security.
32. The Commissioner understands that this information has been extracted from information recorded on the Tayside Police Command and Control system (Captor) and crime recording system (Unifi). He accepts that the information was held by Tayside Police in order to enable the investigation of intrusions into the scrap yard premises and to ascertain whether a person should be prosecuted for an offence in connection with those intrusions. The Commissioner is aware that some of the incidents included on the list have resulted in reports being made to the Procurator Fiscal.



33. The Commissioner therefore accepts (as did Brit Insurance in their application to the Commissioner) that the exemptions in section 34(1)(a) and (b) of FOISA apply to the withheld information. He will go on to consider whether the public interest in maintaining the exemption (and withholding the information) outweighs the public interest in disclosure, as required by section 2(1)(b) of FOISA.

The public interest test

34. As stated in previous decisions, the "public interest" 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.
35. Section 2(1)(b) of FOISA provides that (with the exception of the absolute exemptions listed in section 2(2)), the general entitlement in section 1(1) of FOISA applies to exempt information only where, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

Submission from Brit Insurance

36. In their application to the Commissioner, Brit Insurance queried whether Tayside Police had applied the correct test in assessing the balance of public interest in disclosing or withholding the information. Brit Insurance put forward arguments to counter those advanced by Tayside Police (which, for the most part, it did not consider applicable in the circumstances) and also identified the following factors supporting disclosure in the public interest:
- Public safety. The intrusion in May 2010 had led to a fire which spread to a neighbouring block of flats. The information requested would show whether and under what circumstances similar events had occurred before and therefore the likelihood of recurrence.
 - Public awareness. Disclosure would inform public awareness and debate around the antisocial crime which arose from having places like scrap yards, which it contended were attractive to youths, in the vicinity of residential housing.

Submission from Tayside Police

37. In its submission to the Commissioner, Tayside Police identified two reasons why disclosure of the information requested would be in the public interest:
- Firstly, they accepted that the public interest might be served by providing an applicant with information of particular reference to them and their situation; in this case, by assisting the applicant in pursuance of any legal matters relating to the fire which occurred on 10 May 2010.



- Secondly, they accepted that the public interest might be served by providing an applicant with information about how Tayside Police had fulfilled its function in relation to the recording and investigation of crime at that particular location.
38. Against this, Tayside Police put forward the following arguments:
- The public interest was never served by providing an applicant with information relating to specific investigations, except in circumstances where there were overwhelming public interest considerations favouring disclosure.
 - The public interest would not be served by disclosing information which would act as a deterrent to the public in providing information to the police; individuals must have confidence that such information would not be disclosed into the public domain.
 - Disclosure would impact on the current or future law enforcement role of Tayside Police.
 - The public interest would not be served by disclosing information which could jeopardise the interests of third parties. In this case, the release of the information requested could be used to form an inaccurate impression of the premises which, in turn, would have a negative impact on the proprietors of the business.
39. With the exception of the first point above, the Commissioner has already considered these arguments in relation to the exemptions cited by Tayside Police, and has not accepted that disclosure of the information in this case would lead to the consequences identified, at least at the level of substantial prejudice. However, in relation to the public interest test, he must consider whether harm at a level lower than substantial prejudice might be sufficient to warrant withholding the information in the public interest.
40. In relation to the second point above, as should be apparent from his consideration of the section 35 exemptions, the Commissioner finds that any deterrent effect on the provision of information to the police would be negligible. He does, however, acknowledge the potential for some negative impact on the reputations of affected proprietors should the information be disclosed, and has taken this into account in considering the fourth point above, when weighing up the competing public interests in disclosure and in withholding the information. However, in neither case does the Commissioner consider that the public interest in maintaining the exemption outweighs the public interest in disclosure, for reasons outlined in paragraph 43 below.



41. In relation to the first point in paragraph 38, the Commissioner accepts that there is a strong public interest in protecting the process of police investigation, so that justice can be done and crime prevented. However, he finds this argument to be of limited relevance in relation to the information withheld in this case. As noted previously, the information consists of a short factual summary of the circumstances in which each intrusion at the scrap yard took place, with in some cases comments from the Incident or Crime Reports on security (as requested by the applicant). There is no information about informants, suspects, or investigative action taken by Tayside Police. It is not evident to the Commissioner from the arguments put forward that disclosure of some of this information withheld, such as the date, type of incident, and whether it involved fire would affect any current or future investigation by Tayside Police, to the detriment of the public interest.
42. However, in relation to the third point in paragraph 38, the Commissioner accepts there are strong public interest reasons for withholding part of the information; the information in question being the comments on method of entry and security. These observations could assist in an understanding of whether there are vulnerabilities in security or some other weaknesses. However, the same information could also be of use to those who might want to commit crime. On balance it would appear that the public interest is served by not providing information which would affect the law enforcement function of the police, which is to discourage future criminal activity.
43. Having weighed up the arguments for and against disclosure in terms of the public interest, the Commissioner finds that the arguments for maintaining the exemption carry only limited weight when considered in relation to the information which has been withheld, with the exception of the information to which paragraph 42 above relates. Disclosure of the remaining information would reveal the number of intrusions at the scrap yard which have been reported to Tayside Police, which he accepts would increase public understanding of the extent to which this has been an ongoing problem. Given that the intrusion in May 2010 led to a major fire which affected many local residents, the Commissioner finds the availability of this information to be in the public interest. The Commissioner therefore finds that the public interest in disclosure of the remaining information outweighs the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA.

Conclusion

44. The Commissioner has found that Tayside Police were not entitled to apply the exemptions in section 33(1)(b) and section 35(1)(a) and (b) of FOISA to the information requested by Brit Insurance. He found that while the exemption in section 34(1)(a) and (b) of FOISA was engaged, the exemption could not be upheld for all of the information as the public interest in disclosure outweighed the public interest in maintaining the exemption. The Commissioner therefore requires Tayside Police to provide certain parts of the withheld information (excluding the comments on method of entry and security) to Brit Insurance.



The Commissioner finds that the Chief Constable of Tayside Police (Tayside Police) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Brit Insurance. Tayside Police wrongly applied the exemptions in section 33(1)(b), section 34(1)(a) and (b) (in part) , and section 35(1)(a) and (b) of FOISA, to the information withheld. He was, however, satisfied that Tayside Police had been correct to withhold the comments on method of entry and security under section 34(1)(a) and (b).

The Commissioner requires Tayside Police to provide Brit Insurance with certain parts of the withheld information (i.e. excluding the comments on method of entry and security), by 6 September 2011.

Appeal

Should either Brit Insurance or the Chief Constable of Tayside 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
13 July 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.

...



(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.

...

33 Commercial interests and the economy

(1) Information is exempt information if –

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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;

...

35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-



- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;
- ...