



Scottish Information
Commissioner

**Decision 232/2007 Cornelius Forsyth and the Chief Constable
of Strathclyde Police**

Investigation report

Applicant: Cornelius Forsyth
Authority: Chief Constable of Strathclyde Police
Case No: 200701135
Decision Date: 20 December 2007

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
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Decision 232/2007 Cornelius Forsyth and the Chief Constable of Strathclyde Police

Request for investigation report relating to a complaint about the conduct of police officers – report withheld on the basis of the exemptions in sections 35(1)(g) (Law enforcement) of FOISA – upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions) and 35(1)(g) and (2)(b) (Law enforcement)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Forsyth requested a copy of a report relative to the conduct of police officers from the Chief Constable of Strathclyde Police (Strathclyde Police). Strathclyde Police responded by refusing his request, citing the exemptions in sections 35(1)(g) (Law enforcement) and 38(1)(a) and (b) (Personal information) of FOISA. Following a review, as a result of which Strathclyde Police upheld their initial refusal, Mr Forsyth remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Mr Forsyth's request for information in accordance with Part 1 of FOISA and, in particular, had properly exempted the report in question on the basis that its release would, or would be likely to, prejudice substantially the exercise of their functions in relation to the proper conduct of their officers.



Background

1. Following an incident involving Strathclyde Police early in 2007, Mr Forsyth made a complaint against them, which resulted in a Detective Inspector carrying out an internal investigation in terms of the Police (Conduct) (Scotland) Regulations 1996.
2. On 30 May 2007, Strathclyde Police received a letter from Mr Forsyth, requesting a copy of the report by the Detective Inspector. He clarified which report he was seeking in a letter dated 7 June 2007.
3. On 3 July 2007, Strathclyde Police wrote to Mr Forsyth in response to his request for information. They informed him that while they held the information requested, they considered it to be exempt in terms of sections 38(1)(b), (Personal information) and 35(1)(g) (Law enforcement) of FOISA.
4. Mr Forsyth requested a review of Strathclyde Police's decision on 17 July 2007. In particular, Mr Forsyth stated the only thing he was interested in was what the police officers involved had to say.
5. Strathclyde Police wrote to notify Mr Forsyth of the outcome of their review on 15 August 2007. The review upheld the earlier decision, but added section 38(1)(a) to the exemptions claimed, on the basis that some of the personal information held related to Mr Forsyth. He was, however, informed of his right to make a subject access request in relation to that information under the Data Protection Act 1998.
6. On 21 August 2007, my Office received an application from Mr Forsyth in terms of section 47(1) of FOISA, expressing his dissatisfaction with the outcome of Strathclyde Police's review. Following further correspondence, the application was validated by establishing that Mr Forsyth had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.



The Investigation

7. On 11 September 2007, Strathclyde Police were notified in writing that an application had been received from Mr Forsyth and were asked to provide my Office with copies of information withheld from Mr Forsyth. The Police responded with the required items of information and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Strathclyde Police asking them to provide comments on the application and to respond to specific questions on the application.
9. Strathclyde Police confirmed that they were relying on the exemptions in sections 35(1)(g) (read with section 35(2)(b)), 38(1)(a) and 38(1)(b) of FOISA to withhold information. I will consider their arguments further in my analysis and findings below.

The Commissioner's Analysis and Findings

10. In coming to a decision on this matter, I have considered all of the information and submissions that have been presented to me by both Mr Forsyth and Strathclyde Police and am satisfied that no matter of relevance has been overlooked.

Prejudice to law enforcement – Section 35(1) (g)

11. Section 35(1)(g) of FOISA allows Scottish public authorities to withhold information if its disclosure would, or would be likely to, substantially prejudice their ability (or that of another public authority) to carry out their functions for any of the purposes listed in section 35(2). Strathclyde Police believe that the disclosure of the information withheld from Mr Forsyth would, or would be likely to, prejudice substantially their ability to “ascertain whether a person is responsible for conduct which is improper”, which is the purpose listed under section 35(2)(b).
12. In this case, Strathclyde Police have argued that the content of the report by the Detective Inspector in question was gathered during an investigation into allegations about the conduct of their officers and therefore that it is exempt in terms of section 35(1)(g) as outlined above.



13. Investigations into allegations of misconduct by police officers below the level of Assistant Chief Constable are governed by the Police (Conduct) (Scotland) Regulations 1996 (the Conduct Regulations). It is clear from the Conduct Regulations that their application in relation to officers of Strathclyde Police is a “function” of Strathclyde Police, a required condition before the exemption in section 35(1)(g) can be applied.
14. Strathclyde Police state that where a complaint is made against a police officer which alleges misconduct or criminality, it is subject to a robust and thorough examination in terms of the Conduct Regulations. In the course of such an investigation, the police interview and gather evidence from any person who may be in a position to assist them. There is an acceptance that information gathered will not be disclosed to a third party other than in the course of proceedings under the Conduct Regulations. To do so, they argue, would be to undermine this expectation and deter those subject to wrongdoing by police officers from assisting the police in the future. This would hamper such investigations and would, or would likely to, prejudice substantially the function listed in section 35(2)(b).
15. In addition, Strathclyde Police argue that such reports will include the opinion of the investigating officer on the matter under investigation and opinion as to the outcome. Such opinions are claimed to be essential in reaching a decision as to the disposal of the case and officers must be free to express these opinions with candour, in the knowledge that they will not be disclosed. To do so would inhibit such candour and would, or would likely to, prejudice substantially the function listed in 35(2)(b).
16. Having considered these arguments and the content of the report in question, I accept Strathclyde Police’s argument that the release of the report could reasonably be expected to prejudice the effectiveness of future investigations. Such an outcome could reasonably be expected to have a significant adverse effect on the performance of Strathclyde Police’s function of carrying out such investigations.
17. I do not accept that reports of investigations under the Conduct Regulations should be treated as a class of documents which is exempt from disclosure under FOISA, however. In any event, FOISA always requires the public interest to be considered before information can be withheld under section 35(1)(g).



The Public Interest Test

18. The exemption in section 35(1)(g) is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, even although I am satisfied that the disclosure of the report would, or would be likely to, prejudice substantially the carrying out by Strathclyde Police's of its function in section 35(2)(b), I must still order the report to be disclosed unless I am satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
19. In considering the public interest test, Strathclyde Police looked at the public interest in disclosing the information and the public interest in maintaining the exemption.
20. Factors advanced in favour of release include;
 - Accountability — Release of the information would hold Strathclyde Police accountable for the quality of the investigation into the alleged misconduct.
 - Justice to an Individual — The applicant is pursuing a complaint against the police. Release of the information may assist him to understand the circumstances surrounding his complaint.
 - Public Debate — The disclosure of the information requested would allow public debate with regard to Strathclyde Police investigations in relation to complaints against their officers. Strathclyde Police contend, however, that the public interest in this matter would not be served by releasing the report as this is of interest solely to Mr Forsyth.

Mr Forsyth appears to have alluded to the first two factors in his own submissions to me.

21. Factors advanced against release include;
 - Criminal Investigations — Details of criminal investigations (such as the incident which gave rise to Mr Forsyth's initial complaint against the police) are exempt under the Act. (e.g. sections 34 (Investigations by Scottish public authorities ...) and 38 (Personal information))
 - Exemption Provisions — The applicability of the above exemptions gives rise to a public interest favouring non disclosure.
 - Interests of Third Parties — The report contains unsubstantiated allegations against the police officers concerned, and could jeopardise their careers or personal privacy if released.



- Efficient /Effective Conduct of Service/Force — In the course of an investigation such as this, the police interview and gather evidence from any person who may be in a position to assist them. There is an acceptance that the information gathered, will not be disclosed to a third party other than in the course of criminal proceedings or proceedings under the Conduct Regulations. To do so would undermine this expectation and may deter victims or witnesses from assisting the police in future. This would impact upon the future investigation of such complaints and would result in the Force being unable to investigate them effectively.
 - Existing Case Law – A high degree of confidentiality has traditionally been attached to police reports and statements, both before and after criminal proceedings. The courts in Scotland have placed great weight on the assertion of the Lord Advocate that it is not in the public interest for certain documents to be disclosed except when, in particular circumstances, the interests of justice require it. This position recognises the need for absolute candour in the making of such reports and the courts have indicated that the most important safeguard in this regard is an absolute guarantee against publication. To disclose such information would jeopardise the candour and freedom with which the police report to the Procurator Fiscal.
22. On balance, Strathclyde Police considered that the public interest in disclosing the information is outweighed by that in maintaining the exemption. This decision also takes cognisance of the role of Her Majesty's Inspectorate of Constabulary in independently reviewing complaints against the police and the observation in my *Decision 018/2005 Mr Robert Bennett and the Chief Constable of Grampian Police*, which concludes that "I will consider the public interest in releasing police reports on a case by case basis. Arguments based on the public interest in disclosure will have to be specific and strongly persuasive to allow me to conclude that particular police reports should be released".
23. Notwithstanding the arguments in favour of release listed at paragraph 20 above, in this case I can identify no general public interest in the release of the information withheld and (while I do not accept all of the public interest arguments advanced by Strathclyde Police in their entirety) I accept that the public interest arguments in favour of withholding the information are strong and, on balance, should prevail. Consequently, I am satisfied that Strathclyde Police were justified in withholding the information under section 35(1)(g) of FOISA.



24. Having decided that the information withheld from Mr Forsyth is exempt in terms of section 35(1)(g) and that it is in the public interest for this exemption to be maintained, I do not propose to consider whether the exemptions under section 38 relied on by Strathclyde Police also apply to the information withheld.

Decision

I find that Strathclyde Police acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Forsyth, in that they were correct to apply the exemption in section 35(1)(g) of FOISA to the information withheld from him.

Appeal

Should either Mr Forsyth 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.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
20 December 2007



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 –
 - (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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



35 Law enforcement

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

(...)

(g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

(...)

(2) The purposes are-

(...)

(b) to ascertain whether a person is responsible for conduct which is improper;

(...)