



Scottish Information
Commissioner

Decision 010/2008 Mr Allan McLeod and Chief Constable of Northern Constabulary

Date of an arrest of a named individual

**Applicant: Mr Allan McLeod
Authority: Chief Constable of Northern Constabulary
Case No: 200700968
Decision Date: 22 January 2008**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 010/2008 Mr Allan MacLeod and Chief Constable of Northern Constabulary

Request for date of arrest of a named individual – refusal to confirm or deny whether information is held – Commissioner found that Northern Constabulary acted in accordance with Part 1 of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1) (Effect of exemptions); 18 (Further provisions as respects response to request); 34(1)(c)(Investigations by a Scottish Public Authority and proceedings arising out of such investigations)

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 Allan McLeod (Mr McLeod) requested the date on which (in his understanding) a named individual was arrested, from the Chief Constable of Northern Constabulary (Northern Constabulary). Northern Constabulary responded by advising Mr McLeod that it considered the information exempt in terms of section 38(1)(b) of FOISA and specifically stated that this response could not be taken as confirmation or denial that the information was held. Mr McLeod was not satisfied with this response and asked Northern Constabulary to review its decision. Northern Constabulary carried out a review and, as a result, notified Mr McLeod that it withdrew its earlier application of section 38(1)(b) and now refused to confirm or deny whether the information sought existed or was held in terms of 18 of FOISA. Mr McLeod was dissatisfied with this response and applied to the Commissioner for a decision.

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



Background

1. On 22 May 2007, Mr McLeod wrote to Northern Constabulary requesting the date on which a named individual was arrested. His request was made in the understanding that this person had been arrested in the circumstances described in his request.
2. On 24 May 2007, Northern Constabulary wrote to Mr McLeod in response to his request for information. Northern Constabulary stated that the information sought by Mr McLeod was exempt from release by virtue of section 38(1)(b) of FOISA but also stated that its response should not be taken as confirmation or denial that the information sought was held by it.
3. Mr McLeod wrote to Northern Constabulary on 18 June 2007 requesting a review of its decision. In particular, Mr McLeod drew Northern Constabulary's attention to his belief that the named individual was now deceased and therefore the information could not be considered personal data in terms of the Data Protection Act 1998 (for information to fall within the definition of personal it must, amongst other things, relate to a living individual).
4. Northern Constabulary notified Mr McLeod on 4 July 2007 of the outcome of its review. Northern Constabulary acknowledged the change in circumstance highlighted by Mr McLeod and rescinded its reliance on section 38(1)(b) of FOISA. Northern Constabulary now refused to confirm or deny whether the information sought was held by it in terms of section 18 of FOISA.
5. On 6 July 2007 Mr McLeod wrote to my Office, stating that he was dissatisfied with the outcome of Northern Constabulary's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr McLeod 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 27 July 2007, Northern Constabulary was notified in writing that an application had been received from Mr McLeod and was asked to provide my Office with specified items of information required for the purposes of the investigation. Northern Constabulary responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Northern Constabulary, asking it to provide comments on the application and to respond to specific questions on the application.
9. The investigating officer invited Mr McLeod to provide reasons as to why he was of the view that the information he had requested (and which he believed to be held by Northern Constabulary) should be provided on public interest grounds.
10. Both Northern Constabulary and Mr McLeod responded by providing their comments on the case and further background information.

The Commissioner's Analysis and Findings

11. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr McLeod and Northern Constabulary and I am satisfied that no matter of relevance has been overlooked.
12. Section 18 gives public authorities the right to refuse to confirm or deny whether information is held by them in limited circumstances. Those 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 would be exempt under one 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.



13. Northern Constabulary submitted that if it did hold the information sought by Mr McLeod that it would be exempt under sections 34(1)(c) and 39(1) of FOISA.
14. Where a public authority has chosen to rely on section 18(1) of FOISA, I must establish whether the authority is justified in issuing a refusal notice on the basis that to reveal whether the information exists or is held would be contrary to the public interest; and also to establish that if the information existed and was held, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
15. In so doing, I must ensure that my 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 I will be unable to comment in any depth on the reliance by the public authority on one of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information exists or is held by the public authority.
16. In general, however, the application of section 18 can be explained as a "Neither Confirm Nor Deny" (NCND) policy where the public interest would be harmed if the authority were to confirm or deny that certain information was held.
17. Northern Constabulary provided details of the reasoning behind its application of the public interest test. I have taken this into consideration along with Mr McLeod's arguments in respect of the public interest, and his arguments that the information requested (which he believes to be held) should be supplied to him. However, on the basis of the information that has been submitted to me by Northern Constabulary, I am in agreement that it would be contrary to the public interest for Northern Constabulary to reveal whether the information requested by Mr McLeod exists or is held by them.
18. I will now consider the exemptions put forward by Northern Constabulary in conjunction with the use of section 18 of FOISA.
19. Section 34(1)(c) exempts information if it has been held by a Scottish public authority for the purposes of criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal (the full text of this section is reproduced in the Appendix to this decision).
20. Northern Constabulary considered that, in general terms, the disclosure of information confirming the existence of the information of the kind specified in Mr McLeod's request would, if held, be exempt under section 34(1)(c) of FOISA, as it would relate to a crime being committed and hence a police report being submitted to the Procurator Fiscal.



21. I am satisfied that, if it existed and was held by Northern Constabulary, the information requested by Mr McLeod would fall within the scope of this exemption. I am also satisfied that if the information existed and was held, the public interest in maintaining this exemption would outweigh the public interest in the disclosure of the information.
22. Northern Constabulary also argued that section 39(1) of FOISA would apply to the information if it existed and was held. Given that I have already agreed that the information, if it was held, would be exempt under section 34(1)(c) of FOISA, I do not intend to consider this additional exemption.
23. On the basis of the above, I am satisfied that Northern Constabulary acted in accordance with Part 1 of FOISA by refusing to confirm whether the information requested by Mr McLeod exists or is held by it.

Decision

I find that the Chief Constable of Northern Constabulary acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McLeod.

Appeal

Should either Mr McLeod or Northern Constabulary 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
22 January 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 –
- (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.

[...]

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-

[...]

(c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.