

Decision Notice



Decision 121/2008 Mr W and the Chief Constable of Strathclyde Police

Information relating to a criminal investigation

Reference No: 200800022

Decision Date: 23 September 2008

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr W asked the Chief Constable of Strathclyde Police (Strathclyde Police) for a range of information relating to the investigation of a crime for which he had been convicted. Strathclyde Police provided a limited amount of information but informed him that other information covered by his request was either not held or exempt from disclosure. Initially, Strathclyde Police cited only the exemption in section 38(1)(a) and (b) of FOISA (Personal information).

Mr W did not accept that all the information he had asked for was personal data, or was not held by Strathclyde Police. He asked for a review of the response. On review, Strathclyde Police upheld the application of sections 38(1)(a) and (b) without modification, but confirmed that they had been wrong to advise him that they did not hold some of the information he has asked for.

Mr W then applied to the Commissioner for a decision. During the investigation of his application Strathclyde Police advised that the information withheld was also considered to be exempt under section 34(1)(a)(i) and (b), and section 35(1)(a) and (b). Strathclyde Police identified an additional document which was supplied to Mr W.

The Commissioner found that the information withheld was exempt from disclosure under section 34(1)(a)(i) and (b), and that the public interest in maintaining the exemption outweighed any public interest in disclosure.

However, the Commissioner found that Strathclyde Police had failed to comply with section 21(5), by failing to include explanation of their modified decision when communicating the outcome of the review. The Commissioner required Strathclyde Police to provide a statement of their reasons for this decision to Mr W.

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); 21(4) and (5) (Review by Scottish public authority); 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 23 September 2007, Mr W wrote to Strathclyde Police requesting information about the investigation of a crime for which he had been convicted. Mr W's request comprised 14 separate questions about the way in which DNA samples had been collected, identified and recorded, and about the guidelines, policy and practice directives which had informed the process. A copy of his request is found in Appendix 2.
2. On 27 September 2007, Strathclyde Police wrote to Mr W to seek further information before proceeding with the request. Mr W was asked to provide additional details concerning the case to which he was referring. Strathclyde Police also advised him that FOISA does not provide access to an applicant's own personal data, and invited him to provide identification which would allow the police to treat parts of his request as a subject access request under the DPA. Mr W was asked to resubmit those parts of his request which dealt with recorded, non-personal information, including as much detail as possible to allow the location of that information. He was advised that the time allowed for responding to his request under FOISA would start on receipt of the additional information.
3. Although he disputed that his request was for personal information, Mr W provided Strathclyde Police with the personal details requested on 4 October 2007. He did not resubmit or reformulate his request, and his letter made clear that he did not accept that there was any need for him to do so.
4. On 7 November 2007 Strathclyde Police provided a response to Mr W's request for information, as submitted on 23 September 2007. Strathclyde Police provided him with some information relating to his request, including an extract from the Force Procedures Manual which outlined procedures for the taking of DNA samples for inclusion on the national DNA database. Mr W was told that the other information he had asked for was either not held, or was exempt from disclosure under section 38(1)(a) or (b) of FOISA.
5. On 14 November 2007 Mr W asked Strathclyde Police to review its response to his request. He again disagreed that some of the information he sought was personal data. He also disputed the statement that Strathclyde Police did not hold some of the information he had asked for. He did not find that the information supplied from the Force Procedures Manual answered his questions, and queried whether the extract supplied represented all relevant guidelines and policy and practice directives covered by his request.
6. Strathclyde Police carried out a review of its response, and wrote to Mr W on 13 December 2007 with the outcome. The review panel upheld the original response with some modification. The application of the exemptions in section 38(1)(a) and 38(1)(b) of FOISA were upheld, but the review panel did not consider that section 17 (Information not held) was applicable (no reasons for this decision were given in the letter sent to Mr W). Strathclyde Police reiterated that information which was Mr W's own personal data might be made available under the DPA.



7. On 3 January 2008 Mr W wrote to the Commissioner, stating that he was dissatisfied with the response from Strathclyde Police and applying for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr W had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.

Investigation

9. On 10 January 2008, Strathclyde Police were notified in writing that an application had been received from Mr W, and were asked to provide the Commissioner with information required for the purposes of the investigation. On 1 February 2008 Strathclyde Police provided the information requested with some background information about the case. Strathclyde Police advised that exemptions in section 34 and section 35 of FOISA were also considered to apply to the information. The case was then allocated to an investigating officer.
10. The investigating officer contacted Strathclyde Police on 14 February 2008, inviting comments on the application (as required by section 49(3)(a) of FOISA) and seeking additional comments on certain aspects of the arguments put forward by Strathclyde Police.
11. Strathclyde Police responded on 17 March 2008. They explained why they had taken the view that the majority of the information sought by Mr W should be regarded as his own personal data. Strathclyde Police stated that section 18 of FOISA (which allows a public authority to refuse to confirm or deny whether information is held in certain circumstances) was also applicable, and that if information was held, it would be exempt from disclosure by virtue of section 34(1)(a)(i) and (b) and section 35(1)(a) and (b) of FOISA.
12. A further submission was sought from Strathclyde Police on 6 May 2008. The investigating officer advised that section 18 could not be applied in this case, as Strathclyde Police had already issued Mr W with a refusal notice, and by doing so had effectively confirmed the existence of the information. Strathclyde Police were asked to provide their reasons for considering the information to be exempt from disclosure under section 34(1)(a)(i) and (b) and section 35(1)(a) and (b) of FOISA.
13. On 23 May 2008 Strathclyde Police provided a further submission on the application of those exemptions, including their views on the public interest for and against disclosure of the information.
14. Mr W was advised that Strathclyde Police had cited sections 34(1)(a)(i) and (b) and 35(1)(a) and (b), and was asked whether he wished to provide any additional comments on the public interest in disclosure of the information. Mr W provided his views on 3 June 2008: his comments are summarised later in this decision notice.



Commissioner's analysis and findings

Information not held

15. Strathclyde Police initially advised Mr W that no information was held in relation to parts 6, 7, and 12 of his request, citing section 17 of FOISA (Notice that information is not held). He had asked:
- (6) Please identify all of the steps Strathclyde Police took to identify all of the DNA retrieved from the pretend victim.
 - (7) Who else was involved in this process?
 - (12) Please provide all of the guidelines, policy and practice directives, which informed each of the decisions taken in these respects, at each and every stage of the process.

It is understood that the guidelines, policy and practice directives requested in part 12 were those relating to the whole process of DNA collection and identification.

16. After advising Mr W that no information was held in relation to these questions, Strathclyde Police went on to explain that all DNA samples are submitted to the Scottish Police DNA Database for profiling and comparison, and the "identification" process is not carried out by Strathclyde Police. Mr W was sent an excerpt from the Forces Procedures Manual which detailed the procedures to be adopted in taking DNA samples for inclusion on the National Database.
17. At the review stage Strathclyde Police found that section 17 should not have been applied in relation to parts 6, 7 and 12 of Mr W's request and determined that this should be rectified in the response to be sent to him.
18. The letter sent to Mr W on 13 December 2007, communicating the outcome of the review, simply stated:

"...the Panel did not consider that Section 17 – Information not held was applicable in these circumstances."

No further explanation of the Panel's decision or the particular circumstances to which they referred was made available to Mr W. Nor did Strathclyde Police explain to Mr W why, if information covered by parts 6, 7 and 12 was now considered to be held, it was exempt from disclosure.

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19. As noted, the initial response from Strathclyde Police (7 November 2007) explained, in relation to the decision that certain information was not held, that all samples of DNA are submitted to the Scottish Police DNA Database in Dundee. On reviewing Mr W's case the Strathclyde Police Review Panel felt that additional relevant information might in fact be held, given the historical relationship between Strathclyde Police Force, the Forensic Science Laboratory and the DNA Admin Section. The Review Panel undertook to have the Force Disclosure Unit conduct a further search with the DNA Admin Section/Forensic Science Laboratory based at Strathclyde Police Headquarters (the latter are now part of the Scottish Police Services Authority (SPSA)).
20. Unfortunately, the Force Disclosure Unit was never tasked with this request and it was not until several weeks later that this oversight was noticed (during which time Strathclyde Police had been notified that Mr W had applied to the Commissioner for a decision). At this point, further searches were carried out by the SPSA forensic scientists who had knowledge of the case and the procedures in place at the time the allegations against Mr W were investigated. The searches revealed another guidance document relevant to Mr W's request; this was forwarded to him by Strathclyde Police on 8 July 2008.
21. After investigation, the Commissioner accepts that Strathclyde Police have now supplied Mr W with all relevant guidelines, policy and practice directives covered by part 12 of his request. However, the Commissioner would ask Strathclyde Police to take steps to ensure that where a review panel finds that additional action is required in relation to an information request, this is taken forward and not overlooked.
22. During the Commissioner's investigation, Strathclyde Police confirmed that information covered by parts 6 and 7 of Mr W's request was exempt from disclosure under section 34(1)(a)(i) and (b), section 35(1)(a) and (b), and section 38(1)(b) of FOISA. Accordingly, the Commissioner has included consideration of this information in his decision on the application of these exemptions (as detailed later in this decision notice).

Breach of section 21(5) of FOISA

23. The letter Mr W received from Strathclyde Police on 13 December 2007 informed him that Strathclyde Police had modified the response to his request, but provided no explanation of the reasons behind this decision. Section 21(5) of FOISA requires that a public authority includes within the notice specifying the outcome of its review, a statement of its reasons for the outcome of its review. The Commissioner finds that, by failing to provide a statement of their reasons for modifying their decision in relation to parts 6, 7 and 12 of Mr W's request, Strathclyde Police did not comply with section 21(5) of FOISA.
24. During the review of Mr W's case, Strathclyde Police had identified that the procedure described in their letter to Mr W of 7 November 2007 was not the full procedure. Given that that Strathclyde Police had originally attempted to explain the procedure, but had inadvertently included inaccurate information, the Commissioner finds that in responding to Mr W's request for review it would have been reasonable to provide an amended account of the procedure to help him understand fully what information might be available to Strathclyde Police.



25. The Commissioner requires Strathclyde Police to provide Mr W with a statement of its reasons for no longer considering section 17 of FOISA to be applicable in this case. This statement should include an amended description of the process in place for administering DNA samples at the time of the investigation into his case, and the agencies involved in this process, as outlined in the review log supplied to the Commissioner by Strathclyde Police.

Information withheld

26. For the most part, Mr W sought information about the way in which DNA samples relating to the crime for which he was convicted had been collected, identified, and recorded, and information about the persons involved in this process. He also asked whether any steps had been taken since his trial to identify the DNA with defence witnesses or other persons. Additionally, as already discussed, Mr W asked Strathclyde Police to provide all of the guidelines, policy and practice directives which informed each of the decisions taken at every stage of the process.

Section 34(1)(a)(i) & (b)

27. Strathclyde Police applied the exemptions in section 34(1)(a)(i) and (b) of FOISA to all the information withheld. Section 34 exempts information if it has at any time been held by a Scottish public authority for the purposes of certain investigations: 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)); and an investigation which may lead to a decision to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b)).
28. Strathclyde Police explained that the information requested by Mr W is contained in the statements, reports, and analysis of evidence gathered during the investigation of the crime for which he was eventually convicted. Strathclyde Police submitted that they had a duty to conduct this investigation, and that the case was reported to the Procurator Fiscal.
29. Strathclyde Police advised that the investigation has the potential to result in a further report to the Procurator Fiscal and court proceedings in relation to another culprit who remains untraced.
30. If information has been held by a Scottish public authority for the purposes of an investigation covered by section 34(1) of FOISA, it automatically falls under that exemption. The Commissioner is satisfied that, with the exception of guidelines, policy and practice directives, all the information requested by Mr W was held for the purposes of a criminal investigation which Strathclyde Police had a duty to conduct, and is therefore information covered by section 34(1)(a)(i) and (b).
31. However, the exemptions in section 34(1) are subject to the public interest test required by section 2(1)(b) of FOISA and the Commissioner must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



Public interest – submission from Mr W

32. Mr W has put forward a number of arguments to support his view that there is a strong public interest in disclosure of the information he asked for. These can be summarised as follows:
- disclosure would show that Strathclyde Police had acted unlawfully in filleting, hiding, and misrepresenting evidence so that an individual could be singled out and falsely prosecuted.
 - disclosure would allow proper public scrutiny of Strathclyde Police's policies and practices.
 - disclosure would allow public scrutiny of short-comings in the justice system.
 - disclosure would serve the public good and support the vision and ethos of an open society embodied in FOISA.

Public interest – submission from Strathclyde Police

33. Strathclyde Police accepted that considerations such as justice to the individual might show there would be public interest in disclosure, but they believed that the balance of public interest lay in withholding the information.
34. Strathclyde Police argued that a high degree of confidentiality has traditionally been attached to police reports and all relevant information both before and after criminal proceedings. They stated that 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 interest of justice requires it.
35. Strathclyde Police argued that the rationale for maintaining confidentiality in respect of reports by the Police and other investigating agencies is centred on public policy grounds. They stated that the Crown continues to decline to produce such reports and resists efforts to recover them on grounds of public interest immunity. In this regard the Crown relies on inter alia the statement of principle by Lord President Cooper in *McKie - v - Western Scotland Motor Traction Company* (1952, SC206), namely that, "the only method of securing absolute candour and freedom in the making of such reports...is an absolute guarantee against publication". He also stated, "It seems to me to be indispensable to the efficient working of the system of detection and prosecution of crime in Scotland that the officers making such reports or communications should know when they are making them that they are protected by absolute immunity from the risk of subsequent disclosure." Strathclyde Police found this position recognises the need for absolute candour in the making of such reports, and stated that the courts have indicated that the most important safeguard is an absolute guarantee against publication.
36. Finally, the Police take the view that disclosure of the information requested under FOISA could result in a serious miscarriage of justice.



Public interest test – the Commissioner's view

37. The Commissioner has carefully considered all the public interest arguments put forward by Mr W and Strathclyde Police.
38. The Commissioner notes that information about the collection and analysis of Mr W's DNA was provided as evidence in the case against him and would therefore have been made available to him and his solicitor.
39. The Commissioner finds there is a strong public interest in maintaining the exemptions contained in section 34 of FOISA in relation to police reports and other information about the investigation of a crime. It is unquestionably in the public interest that the public remains willing to co-operate with the criminal justice system by providing witness statements and other assistance to police in the course of their investigations. The Commissioner is satisfied that such willingness would be diminished were witness statements to be routinely disclosed under FOISA.
40. Additionally, in this case there is the potential for further criminal proceedings involving another person. Disclosure of the information requested by Mr W could prejudice the outcome of any future trial. The Commissioner finds this to be another strong argument for maintaining the exemption rather than disclosing the information.
41. The Commissioner is not convinced that disclosure of the information withheld would have the consequences indicated by Mr W (see paragraph 32 above). He does not find that the information withheld by Strathclyde Police reveals or implies any unlawful actions on their part, or provides evidence of any shortcomings in the justice system.
42. The Commissioner finds that the arguments for withholding the information in the public interest outweigh any public interest in its disclosure. The Commissioner therefore upholds the decision of Strathclyde Police to withhold the information in question under section 34(1)(a)(i) and (b) of FOISA.
43. The Commissioner does not exclude the possibility that in other cases, the balance of public interest may favour disclosure of information falling under section 34(1)(a)(i) and (b), and his decision in this case does not imply an absolute guarantee that information from police investigation reports will never be disclosed, where this is in the public interest. However, in this case the Commissioner accepts that there is a greater public interest in maintaining the exemption and withholding the information than would be served by its disclosure.
44. Because the Commissioner finds that the exemption in section 34(1)(a)(i) and (b) should be upheld, and that, on balance, the public interest favours the maintenance of these exemptions, it is not necessary for him to go on to consider the other exemptions cited by Strathclyde Police.

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DECISION

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

The Commissioner finds that Strathclyde Police were justified in withholding information requested by Mr W under section 34(1)(a)(i) and (b) of FOISA.

The Commissioner finds that the review response sent by Strathclyde Police failed to comply with the provisions of Part 1 and, in particular, section 21(5) of FOISA, in failing to provide a statement of the reasons for substituting a different decision. The Commissioner requires Strathclyde Police to provide Mr W with a statement of the reasons for its amendment to its decision. This should include further explanation of the procedures for processing DNA samples, as outlined in paragraph 25 of the decision notice.

This information must be provided no later than 10 November 2008.

Appeal

Should either Mr W 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 Investigations
23 September 2008



Appendix 1

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.

...

21 Review by Scottish public authority

(...)

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

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;
- ...
- (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;

...



Appendix 2

Mr W's information request of 23 September 2007:

1. Who identified the DNA taken from the pretend victim? Where and when?
2. Who identified my DNA? Where, when and how was I identified? (Specific dates please)
3. Please specify the number of DNA samples retrieved from the pretend victim.
4. How many of these samples have been identified?
5. How many have not been identified?
6. Please identify all of the steps Strathclyde Police took to identify all of the DNA retrieved from the pretend victim.
7. Who else was involved in this process?
8. Was there a decision, or decisions taken not to identify any DNA samples?
9. Who took any such decision or decisions?
10. What steps have been taken since the false trial to identify DNA with defence witnesses, or any other persons?
11. Are any of these DNA samples extant?
12. Please provide all of the guidelines, policy and practice directives, which informed each of the decisions taken in these respects, at each and every stage of the process.
13. At what date was my DNA first recorded on your database?
14. Was, or has my DNA profile been recorded on any other database whatsoever?