

Decision Notice 166/2020

Investigation report

Applicant: The Applicant

Public authority: The Chief Constable of the Police Service of Scotland

Case Ref: 202000662



Scottish Information
Commissioner

Summary

Police Scotland were asked for the report into the investigation of a specific death. Police Scotland refused to disclose the information as it related to information gathered for the purpose of making a report to the procurator fiscal respecting the cause of death of a person.

Following investigation, the Commissioner accepted Police Scotland were entitled to withhold information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 34(2)(b)(ii) (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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 10 March 2020, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was “a full copy of the report into the investigation Annie Kristina Borjesson who was found dead on 4 December 2005 on Prestwick beach”.
2. Police Scotland responded on 18 March 2020. Police Scotland stated that the information was exempt from disclosure in terms of section 34(2)(b)(ii) of FOISA, on the basis that it was gathered for the purpose of making a report to the procurator fiscal respecting the cause of death of a person. It also applied section 39(1) of FOISA, on the basis that disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual. For each exemption, Police Scotland concluded that the public interest favoured withholding the information requested.
3. On 6 April 2020, the Applicant wrote to Police Scotland, requesting a review of their decision as he believed the public interest favoured disclosure.
4. Police Scotland notified the Applicant of the outcome of their review on 22 June 2020. Police Scotland upheld the original response, with further explanation that disclosure of the requested information would be detrimental to any future reviews or investigations which might be undertaken. They stated it was essential that information pertaining to certain investigations be disclosed at the correct time, where appropriate, to ensure that the release of specific details would not prejudice any future enquiries.
5. On 22 June 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland’s review because the investigation had been completed, noting that the Swedish authorities had disclosed information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 10 August 2020, Police Scotland were notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were asked to send the Commissioner the information withheld from the Applicant and invited to comment on this application. They were asked to answer questions, relating to their application of any provisions or exemptions in FOISA and with specific reference to their application of the exemptions claimed in responding to the Applicant.
9. Police Scotland provided the Commissioner with the information that had been withheld from the Applicant.
10. Following discussion with the investigating officer, Police Scotland provided the Applicant with information previously disclosed via Media appeals during the investigation into the death in question. Police Scotland maintained that the remaining information was exempt from disclosure in terms of both sections 34(2)(b)(ii) and 39(1) of FOISA.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first of all consider the exemption contained in section 34(2)(b)(ii) of FOISA, going on to consider the exemption in section 39(1) only if he is satisfied that the first exemption is not engaged in this case.

Section 34(2)(b)(ii) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations

13. Police Scotland withheld the information they held and which fell within the scope of the Applicant's request under the exemption in section 34(2)(b)(ii) of FOISA, which provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation being carried out for the purpose of making a report to the procurator fiscal as respects the cause of death of a person.
14. The exemptions in sections 34 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. Such exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.

15. In this case, having reviewed the information withheld and the submissions presented by Police Scotland, the Commissioner is satisfied that the withheld information has been held by Police Scotland for the purposes of an investigation covered by section 34(2)(b)(ii) of FOISA.
16. The Commissioner therefore accepts that the exemption in section 34(2)(b)(ii) of FOISA applies to the withheld information. As noted above, however, this exemption is subject to the public interest test in section 2(1)(b) of FOISA. Consequently, unless the Commissioner is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed.

Public Interest test

17. 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. disclosure must serve the interests of the public.

Submission from the Applicant

18. In his correspondence with Police Scotland and the Commissioner, the Applicant submitted that he believed it was in the public interest that the information be disclosed. He commented that, given that the investigation has been concluded, he failed to see how Police Scotland could refuse to disclose the information. He also referred to a press article from 2014, which reported on Police Scotland's refusal to re-open the investigation.

Submission from Police Scotland

19. Police Scotland recognised a public interest in understanding of the processes involved in police investigations. Disclosure would also enhance accountability regarding the actions of the service and officers and the use of public funds.
20. Police Scotland acknowledged that limited information regarding the death of an individual may be disclosed as part of an investigative strategy, and decisions to disclose this information are taken by the Senior Investigating Officer in consultation with the Crown Office and Procurator Fiscal Service. They stated that information pertaining to certain investigations is disclosed at the correct time, where appropriate.
21. However, in this case, Police Scotland submitted that disclosure of the information withheld would hamper their ability to conduct such inquiries in the future, as it would be known exactly what type of enquiries would be made to establish whether any criminality was involved. If any new information/evidence would come to light which insinuated criminal activity, then those who had been involved would be aware of the evidence the police had and might be able to evade detection/capture.
22. Police Scotland submitted that the information was gathered for the purposes of an investigation and, as the interests of third parties would be affected by disclosure, the public interest test favoured withholding the information requested. They stated that those who engage with the Police do so with an expectation that their information will remain confidential, and would not expect that details of incidents would be disclosed to anybody not directly connected with the case – and certainly not to be publicly disclosed, during their lifetime or on their death.

23. Should such information be disclosed, Police Scotland submitted that it would affect the flow of information, with individuals being less willing to engage with the Police in the knowledge that such information would enter the public domain. They stated there was no public interest in releasing information that would result in any reduction in the willingness of the public to engage with Police Scotland, either generally or specifically as regards matters of public protection and vulnerability. The breakdown of this relationship would be seriously detrimental to the ability of Police Scotland to gain the trust of individuals, which it considered to be of critical importance.
24. Police Scotland concluded that, while the Applicant might have a genuine interest in the information requested, this must be balanced with the wider public interest considerations of protecting the statutory role of the Police service and preserving the relationship between the service and the public. That was to retain public trust in Police activities and ensure that no disclosure of information would cause harm or distress to members of the public. Therefore, Police Scotland submitted that it remained in the public interest to withhold the requested information.

The Commissioner's view

25. The Commissioner recognises the public interest in disclosure of information which would show how Police Scotland conduct and report on investigations. Disclosure would contribute to a fuller understanding of how Police Scotland investigate such matters and, in particular, the death in question. However, in considering disclosure under FOISA, the Commissioner must address the question of whether the information withheld by Police Scotland should be made available to the public at large, and not just to those who may have an interest in the matter.
26. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public".
27. In relation to information provided by witnesses, the Commissioner's view is set out clearly in *Decision 197/2007*¹, in which it is stated that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring the ongoing willingness of members of the public to cooperate with the various investigatory processes making up the justice system, and the system for dealing with sudden deaths and fatal accidents.
28. The Commissioner acknowledges that there can be a strong argument for maintaining the exemptions contained in section 34 where they relate to such investigations, even where the information concerned no longer relates to ongoing investigations or proceedings.
29. The Commissioner has considered whether disclosure of the information in question would contribute to the administration of justice and enforcement of the law, reveal any malpractice, enable correction of misleading claims or contribute to a debate on a matter of public interest. Considering the content of the information that has been withheld, the Commissioner does not find disclosure to be necessary for any of these purposes.
30. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is significant enough to outweigh that in

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600889.aspx>

withholding the information in question. The Commissioner therefore concludes that Police Scotland were entitled to withhold the information under section 34(2)(b)(ii) of FOISA.

31. Given that the Commissioner has concluded that all of the information withheld by Police Scotland was correctly withheld in terms of section 34(2)(b)(ii) of FOISA, he is not required (and does not intend) to consider the exemption in section 39(1) in relation to that information.

Decision

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

Appeal

Should either the Applicant or Police Scotland wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement

17 December 2020

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

...

- (2) Information is exempt information if-

...

- (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-

...

- (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

...

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