



Scottish Information
Commissioner

**Decision 070/2006 Mr H and the Chief Constable
of Tayside Police**

*Requests for information about surveillance and property seized as
a result of a criminal investigation*

Applicant: Mr H

Authority: Chief Constable of Tayside Police

Case Nos: 200501621 and 200502781

Decision Date: 2 May 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 070/2006 Mr H and the Chief Constable of Tayside Police

Requests for details of surveillance carried out during criminal investigation and for details of property seized during the investigation – information relating to surveillance refused – notice under section 18 of the Freedom of Information (Scotland) Act 2002 issued – details of property provided during investigation – Commissioner upheld decision to issue notice under section 18 but noted a number of technical breaches in the way in which the information requests were dealt with

Facts

This decision concerns two separate, but related, information requests made by Mr H to the Chief Constable of Tayside Police (the Police) under section 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). The first request asked what telephones and emails had been “bugged” by the Police or third parties, what premises had been searched and what property had been seized during a criminal investigation of which Mr H was the subject. The Police refused to confirm whether it held any details in relation to surveillance in terms of section 18 of FOISA, but separately provided Mr H with lists of the property which had been seized during the investigation.

As a result of the Police providing the list of property to Mr H, Mr H made a further information request about the property. Although the Police failed to provide this information to Mr H in line with the timescales set down in FOISA, the information was provided after Mr H made his second application to the Commissioner.

Outcome

The Commissioner found that the Police were correct to issue a refusal notice in relation to surveillance under section 18 of FOISA. The Commissioner noted that other information was provided to Mr H during the two investigations, but that the Police had made certain technical breaches of FOISA in relation to the requests made by Mr H.

However, the Commissioner also noted that the Police had taken steps to improve their practice in relation to requests made under FOISA and he therefore did not require the Police to take any remedial steps in respect of these breaches.



Appeal

Should Mr H or the Police wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 28 January 2005, Mr H made an information request to the Police. Mr H had been the subject of a criminal investigation and had subsequently been found guilty. He asked what telephones and emails were “bugged” by the Police or third parties, what premises were searched and what property was seized during the investigation.
2. The Police responded on 25 February 2005 and issued Mr H with a notice under section 18 of FOISA. Section 18 of FOISA allows a public authority to refuse to reveal whether information exists or is held by it if the information is exempt under particular exemptions in FOISA and it would not be in the public interest for the authority to reveal whether the information exists or is held.
3. Mr H asked the Police to review its decision on 2 March 2005. (Mr H made a further information request to the Police in the same letter, this time asking the Police if it had authority to carry out any surveillance. Mr H did not make a request for review in relation to this part of his request. As a result, although he asked this question in his first application to me, I am not entitled to consider this matter.)
4. Mr H's letter of 2 March 2006 does not appear to have reached the relevant officer in the Police, but when Mr H later sent a reminder to the Police with a copy of the letter, the Police carried out a review.
5. Mr H was notified of the outcome of the review on 6 July 2005. The Police continued to rely on section 18 to refuse to reveal whether it held any information in relation to the surveillance of Mr H. However, on this occasion, the Police clarified which of the exemptions listed in section 18 they wished to rely on, as they are required to do.
6. Mr H also entered into further correspondence with the Police in relation to the property which had been seized by them.



7. Mr H applied to me for a decision and specified that he wanted to know if his telephones and emails were “bugged” along with those of third parties. In a second application, he asked me to investigate what property had been seized.
8. A list of the property seized was subsequently provided to Mr H by the Police. Mr H was not satisfied that the list was sufficiently detailed and the Police issued Mr H with a more detailed list a month later.
9. An investigating officer was allocated to these cases.

The Investigation

10. Mr H’s first application was validated by establishing that he had made an information request to a Scottish public authority (i.e. the Police) and that he had appealed to me only after asking the Police to review its response.
11. The investigating officer notified the Police of Mr H’s application and asked for their comments in terms of section 49(3)(a) of FOISA. The investigating officer asked the Police to confirm whether it held the information which Mr H had requested and to provide my Office with a copy of the information if it is held by them. The investigating officer also asked the Police for an analysis of its reasons for issuing a notice under section 18 and for an analysis of the specific exemptions they wished to rely on.
12. A response was subsequently received from the Police. The Police confirmed that they did not consider it to be in the public interest for them to reveal whether the information was held by them as, by doing so, could compromise police investigations in the future.
13. The Police are concerned that if they had to confirm whether the information was held, criminals would be able to assess the likely course of a police investigation should they choose to become involved in a particular type of criminal activity.
14. The Police stated that they wished to rely on the exemptions contained in sections 34 and 38 to withhold the information from Mr H. I will consider the use of these exemptions below.



The Commissioner's Analysis and Findings

15. This is the first decision where I have considered the use of a section 18 notice by a public authority. As such, it may be helpful to explain when a section 18 notice can be issued and what information a refusal notice which invokes section 18 should contain.
16. In effect, section 18 gives public authorities the right to refuse to confirm or deny whether information is held by them, but only in limited circumstances. Those circumstances are as follows:
- a request has been made to the authority for information which may or may not be held by it
 - if the information were held by authority (and it need not be), the information would be exempt under one of the exemptions contained in section 28 to 35, 39(1) or 41 and
 - the authority considers that to reveal whether the information exists or is held by them would be contrary to the public interest.
17. The relationship between section 18 and section 16 (which specifies the contents of refusal notices) is rather complex. However, I would expect a refusal notice where section 18 is being invoked to:
- state that the public authority considers that to reveal whether the information exists or is held by them would be contrary to the public interest and why
 - state that if the information existed and was held by the public authority, the information would be exempt
 - specify the exemption under which it would be exempt (as mentioned above, this must be one of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA)
 - state why the exemption would apply if the information existed or was held by the public authority, unless making that statement would disclose information which would itself be exempt (although all of the exemptions which can be used in conjunction with section 18 are subject to the public interest test, the public authority is not required to state why it considers that the public interest in maintaining the exemption outweighs that in disclosing the information) and



- give the applicant details of their rights to make a complaint to the authority and to request a review (this will usually be the same) and of their right to make an application to me for a decision.
18. Where a public authority has chosen to rely on section 18, I must ensure that my decision notice does not confirm one way or the other whether the information 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 highlighting whether the information exists or is held by the public authority.
19. In this case, the Police have argued that it would not be in the public interest for them to reveal whether the information exists or is held by them because to do so could compromise police investigations in the future. On the basis of the arguments put forward to me by the Police, I am satisfied that it is not in the public interest for the Police to reveal whether the information exists or is held by them.
20. I will now consider the exemptions put forward by the Police in conjunction with the use of section 18.
21. The Police have relied on the exemptions contained in section 34(1) of FOISA. Section 34(1) exempts information in four separate circumstances if the information has at any time been held by a Scottish public authority for the purposes of:
- 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))
 - an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii));
 - 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 (section 34(1)(b) or
 - criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal (section 34(1)(c)).
22. On the basis of the information which has been provided to me by the Police, I am satisfied that the information requested by Mr H falls within each of these exemptions.



23. The four exemptions in section 34(1) are all subject to the public interest test. This means that even although I am satisfied that the information requested by Mr H falls within the exemptions contained in section 34(1), I must still go on to consider whether the public interest in releasing the information is outweighed by the public interest in withholding the information. If I find that it is, then I must order release of the information.
24. Although, in most cases, I will consider the public interest in relation to each separate exemption, in this case I am satisfied that the public interest grounds in relation to each of the exemptions in section 34(1) are entirely interlinked and I will therefore consider the public interest grounds together.
25. In considering the public interest test, the Police considered both the public interest in releasing the information and the public interest in maintaining the exemption.
26. In considering the public interest in releasing the information, the Police considered that if the information did exist, the information might assist Mr H in assessing the efficiency or effectiveness of the Police in conducting an enquiry or whether there had been any abuse of office by a public official. The Police also considered the public interest in raising public awareness regarding the investigation of crime.
27. In considering the public interest in maintaining the exemption, the police took into account the public interest in maintaining the ability of the police to investigate and detect crime effectively and efficiently. The Police commented that the willingness of persons to impart information to the police is a key factor in the prevention and detection of crime.
28. On balance, the Police decided that the public interest in favour of maintaining the exemption outweighed the public interest in releasing the information. I am satisfied that the Police have applied the public interest correctly.
29. I therefore find that the information is exempt under the exemptions contained in section 34(1) of FOISA.
30. The Police also relied on the exemptions contained in section 35(1)(a), (b) and (c) and section 38(1)(b) of FOISA to withhold the information from Mr H. Given that I have already agreed that the information is exempt in terms of the four exemptions contained in section 34(1) of FOISA, I do not intend to consider these additional exemptions. However, I would like to note that the exemption in section 38 is not listed in section 18(1) and therefore cannot be used in conjunction with section 18.



The second application by Mr H

31. As mentioned above, Mr H made a second application to me for a decision. This followed on from a further information request which Mr H made to the Police when the Police released information to him while the investigation into his first application to me was being considered. As a result, I considered it appropriate to conjoin the two applications from Mr H and issue one decision notice for both.
32. The second application relates to a request by Mr H for, amongst other information, a list of property belonging to Mr H in the Police's possession. When Mr H did not receive a response, he submitted a valid request for review. However, the Police failed to review their decision and this led to Mr H making an application to me.
33. The investigating officer brought this application to the attention of the Police and asked for their comments. The Police advised my Office that Mr H's letters had been treated as items of routine correspondence rather than information requests as the requests were made during ongoing correspondence with Mr H in relation to the return of his property.
34. However, the information requested by Mr H was provided to him during the investigation and I note that the Police have issued new guidance to all members of staff to alert them to the procedures in place for dealing with information requests.

Technical breaches

35. As mentioned above, I note that the Police committed a number of technical breaches in dealing with Mr H's information requests.
36. Section 10(1) of FOISA provides that a public authority must reply to a section 1 request within 20 working days of receipt. The Police failed to do this in relation to the second application made to me by Mr H.



37. Section 20(1) of FOISA provides that a public authority must carry out a request for review within 20 working days of receipt. The Police failed to do this in relation to both of Mr H's applications. I note that the Police were unable to trace a copy of Mr H's first request for review, but this appears to have been as a result of the letter not being passed to the correct person rather than the letter not being received by the Police. The second failure came about as a result of the initial request not being recognised as a request under FOISA. However, in both cases I find that the Police breached the timescales set down in FOISA.
38. Finally, I find that the section 18 notice issued by the Police was defective in that it did not specify which of the exemptions listed in section 18(1) it would have relied on if it had had to reveal whether the information in question exists or is held by them. However, I recognise that this is a difficult area and hope that the guidance provided in this decision notice will assist the public authorities in relying on section 18 of FOISA in the future.

Decision

I find that the Chief Constable of Tayside Police (the Police) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to reveal to Mr H whether information existed or is held by them in relation to his surveillance.

I find that the Police failed to comply with Part 1 of FOISA in failing to

- reply to Mr H's second information request within 20 working days
- reply to Mr H's first and second request for information within 20 working days and
- advise Mr H of the exemption(s) they could have relied on (as listed in section 18(1)) of FOISA in refusing to confirm whether the information Mr H requested existed or was held by them.

I do not require the Police to take any remedial breaches in relation to these technical breaches.

Kevin Dunion
Scottish Information Commissioner
02 May 2006