



Scottish Information
Commissioner

**Decision 199/2006 – Mr Davies and the Chief
Constable of Strathclyde Police**

*Request for a copy of a report submitted by Strathclyde Police
Force to a Procurator Fiscal*

**Applicant: Mr Bryan Davies
Authority: Strathclyde Police Force
Case No: 200503254
Decision Date: 3 November 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 199/2006 – Mr Bryan Davies and the Chief Constable of Strathclyde Police

Report submitted to a Procurator Fiscal – Information withheld under section 34(2)(b)(ii) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations – section 35(1)(a) and (b) of FOISA – Law enforcement – section 38(1)(b) and 38(2)(a)(i) of FOISA

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: sections 1(1) (General entitlement) and 34(2)(b)(ii) (Investigations by Scottish public authorities 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 Davies requested a copy of a report submitted by Detective Inspector William McKenzie to the Procurator Fiscal at Paisley regarding the death of his mother. The Chief Constable of Strathclyde Police (the Police) refused to disclose the information on the basis that the information was exempt by virtue of sections 34(2)(b)(ii), 35(1)(a) and 35(1)(b) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Davies asked the Police to review their decision to withhold the information, but, on review, the Police upheld their initial decision. Mr Davies applied to the Scottish Information Commissioner for a decision as to whether the Police had complied with FOISA in refusing to provide him with a copy of the report.

The Commissioner found that the Police had complied with FOISA in withholding the report from Mr Davies.



Background

1. On 28 September 2005, Mr Davies asked the Police for a copy of a report submitted by Detective Inspector William McKenzie to the Procurator Fiscal at Paisley on Monday 15 June 1998. This report relates to the death of his mother.
2. On 27 October 2005, the Police responded to Mr Davies, refusing to release the report requested by him. The Police argued that the exemptions in sections 34(2)(b)(ii) and 35(1)(a) and (b) of FOISA applied to the information. The Police also advised Mr Davies that they considered that the public interest in withholding the information was greater than the public interest in releasing the information in this case.
3. On 2 November 2005, Mr Davies asked the Police to review their decision to withhold the information, arguing that as the report did not lead to a criminal prosecution, it could not substantially prejudice the prevention or detection of a crime, or the apprehension of offenders. He also argued that the public interest lay in disclosure of the information.
4. The Police carried out a review and, on 1 December 2005, responded to Mr Davies, upholding their initial response.
5. Mr Davies remained dissatisfied with the Police's response. On 2 December 2005, Mr Davies applied to the Scottish Information Commissioner for decision as to whether the Police had dealt with his information request in line with FOISA.
6. The case was allocated to an investigating officer. Mr Davies' appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to the Commissioner only after asking the public authority to review its response to his request.

The Investigation

7. On 14 December 2005, the investigating officer contacted the Police in terms of section 49(3)(a) of FOISA for their comments on the application and for further information in relation to this case. The Police responded on 13 January 2006.



Submissions from the Police

8. The Police stated that the report is exempt under section 34(2)(b)(ii) as the information is held 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 a death of a person.
9. The Police added that the report was also exempt under section 35(1)(a) and (b) as its disclosure would prejudice substantially the prevention and detection of crime and the apprehension or prosecution of offenders as to release the report would undermine the expectation that information provided in the course of interviews and evidence gathering would not be disclosed. This, the Police claimed, would hamper investigations as victims and witnesses would be less likely to provide this information in future.
10. Finally, the Police added that section 38(1)(b) (read in conjunction with section 38(2)(a)(i) of FOISA) applied in that the report contained personal data, the release of which would breach data protection principles.
11. The Police commented that the death of Mr Davies' mother is actively being reviewed by them and that disclosure of the report would substantially prejudice the investigation and any future prosecution.

Submissions for the applicant

12. Mr Davies explained he believed the Police's insistence upon his mother's death to be non-criminal was wrong and asserted that the information contained in the report was essential to establish whether there was new evidence that would lead to the reinvestigation of the cause of his mother's death.
13. He commented that the report was not a crime report and, consequently, the argument that release of the report would prejudice substantially the apprehension or prosecution of any offender was flawed. As such, Mr Davies believed that the exemptions under section 35(1)(a) and (b) had been incorrectly applied.
14. Mr Davies provided the investigating officer with a copy of a Final Autopsy Report in addition to a copy of the decision of a Criminal Injuries Compensation Appeal Hearing. I have considered the contents of both of these in coming to a decision on this case.



The Commissioner's Analysis and Findings

15. This investigation focussed on whether the information within the report was covered by the exemptions claimed by the Police. It did not consider whether Mr Davies's assertions about the report were correct or whether the information within the report constituted new evidence. That is beyond my remit as Commissioner.
16. I will consider first the use of the exemption in section 34(2)(b)(ii) of FOISA by the Police, as that relates most directly to the report which Mr Davies has asked for. In terms of section 34(2)(b)(ii) of FOISA, information is exempt information if held at any time by a Scottish public authority 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.
17. I have viewed the report in question. It is a report submitted to the Procurator Fiscal at Paisley as respects the cause of death of Mr Davies' mother and contains information on an investigation which was carried out on the cause of her death. I am therefore satisfied that the report falls within the class of information considered exempt under section 34(2)(b)(ii) of FOISA.
18. However, section 34 of FOISA is still subject to the public interest test required by section 2(1)(b) of FOISA. This means that, although the information in the report is exempt, it should still be released unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest

19. Advice from the Crown Office and Procurator Fiscal Service states that, while post mortem reports may be released to interested parties (such as next of kin), witness statements and police reports such as this report are not generally made available to the next of kin or any other person on the basis that there would be a risk to the fundamental principle of the presumption of innocence. Were information provided as part of police reports or witness statements to be released, this may lead to summary justice or trial by media on the assumption that simply because the statement is made, the accused is guilty. Where there is an allegation of wrongdoing this must still be proven with sufficient evidence in order to secure a conviction in criminal proceedings.



20. Further, the Police have advised me that they are actively engaged in reinvestigating the case to which the report relates. The Police assert that the report will be a key element in any future proceedings that may take place as the report contains information and evidence that could be relied upon in securing any future conviction.
21. The police have stated that they must consider the protection of witnesses and victims of crime. I am aware that the witnesses in this case have provided evidence in the expectation that their anonymity will be protected. While it may be possible to honour that anonymity in this report (for example, through redacting names and other personal identifiers), witnesses may have to be re-interviewed and, if the report is released, may be less willing to cooperate or even provide fresh statements.
22. These arguments favour the withholding of the information. The Police have also considered the public interest in the release of information, such as in allowing better understanding of the investigations undertaken by the Police, contributing to the overall debate surrounding this matter and improving the accuracy of the information in the public domain.
23. Mr Davies has argued that the public interest lies in the release of the information and I must now balance the two. The exemption contained in section 34(2)(a)(ii) is a class exemption. This means that there is no harm test contained in the exemption (e.g. there is no test of substantial prejudice in the exemption). If the information falls within a particular class of information, then it is deemed to be exempt. I believe this reflects the view of Parliament that this class of information should normally be protected. While the exemption is subject to the public interest test, I consider that I require persuasive arguments to find that the public interest lies in the release of this class of information.
24. In my view, the fact that the case is actively being evaluated for possible proceedings becomes the decisive factor in deciding where the balance of public interest lies. In general, where a case is actively being evaluated for possible proceedings, I am unlikely to consider it to be in the public interest to release this type of information on the basis that the release could undermine any future criminal proceedings. Clearly, it would be different if a case had been closed or re-interviewing witnesses is no longer essential to a conviction.
25. On balance, in this case, I am satisfied that the public interest lies in the maintaining of the exemption in that the public interest would not be served were any future investigation prejudiced or conviction prevented due to the release of this report.



26. Having established that the information within the report is subject to section 34(2)(b)(ii) and being satisfied that the balance of public interest lies in maintaining the exemption, I am not required to consider the remaining exemptions claimed by the Police.

Decision

I find that the Chief Constable of Strathclyde Police (the Police) dealt with Mr Davies's request for information in accordance with Part 1 of FOISA, in that he correctly applied section 34(2)(b)(ii) of FOISA to the information withheld and consequently complied with section 1(1) of FOISA.

Appeal

Should either Mr Davies or the Police wish to appeal against my 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
3 November 2006



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.

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

- (1) ...
- (2) Information is exempt information if –
- (a) ...
 - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out –
 - (i) ...
 - (ii) for the purpose of making a report to the procurator fiscal as respects,
the cause of death of a person...