



Decision Notice 146/2024

Missing person and sudden death investigations

Authority: Police Service of Scotland

Case Ref: 202400349

Summary

The Applicant asked the Authority for information relating to a missing person investigation and the investigation into the circumstances of a sudden death. The Authority refused to confirm or deny that it held the information, stating that - if it existed and was held - it would be exempt from disclosure and that it was not in the public interest to reveal whether the information existed.

The Commissioner investigated and found that the Authority was not entitled to refuse to reveal whether the information existed or was held. He required the Authority to issue a revised response to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and (b) (Effect of exemptions); 16(1), (2) and (3) (Refusal of request); 18(1) (Further provisions as respects responses to requests); 34(2)(b)(ii) (Investigations by Scottish public authorities and proceedings arising out of such investigations); (47(1) and (2) (Application for decision by Commissioner)

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 6 June 2023, the Applicant made a request for information to the Authority. She asked for information comprising statements, CCTV footage, correspondence, records and evidence gathered in relation to the investigation into an individual as a missing person and subsequently into the circumstances relating to his death.

2. The Authority responded on 27 June 2023, in terms of section 18(1) of FOISA, in conjunction with section 34(2)(b) (investigations by Scottish public authorities and proceedings arising out of such investigations) and refused to confirm or deny whether the information was held. The Authority stated that even if the information was held, the public interest lay overwhelmingly in protecting individuals' rights to privacy and their expectation of confidentiality – even in death. The Authority explained that, if the information was held, it would be held for the purpose of an investigation carried out with the aim of making a report to the Crown Office and Procurator Fiscal Service (COPFS) as respects the cause of death of a person and as such, it would be entitled to withhold the information under the terms of section 34(2)(b) of FOISA.
3. On 18 July 2023, the Applicant wrote to the Authority requesting a review of its decision. She stated that she believed that justice for the individual should outweigh any expectation of confidentiality in death, and that the overwhelming public interest is that, in her view, the circumstances of the death have not been properly investigated.
4. The Authority notified the Applicant of the outcome of its review on 4 August 2023. The Authority upheld the original response in full.
5. On 4 March 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she did not consider that the exemption applied and she believed that the information should be made public.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 21 March 2024, the Authority was notified in writing that the Applicant had made a valid application.
8. The case was subsequently allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the Authority's reasons for refusing to confirm or deny that it held the information.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 18(1) – neither confirm nor deny

11. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by it; and

- (ii) if the information existed and was held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
12. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information (if it existed and was held) would be exempt information under one or more of the listed exemptions. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption outweighs any public interest there would be in disclosing any relevant information it held.
 13. In this case, the Authority argued that, if it did hold any information falling within the scope of the request, it could be withheld under the exemption in section 34(2)(b) of FOISA.
 14. The Commissioner must consider whether the Authority could have issued a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held. Therefore, he will consider the exemption in section 34(2)(b) of FOISA first.
 15. Where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means he is unable to comment in any detail on the Authority's reliance on any of the exemptions referred to, or on other matters which could have the effect of indicating whether the information exists or is held by the Authority.

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

16. Section 34(2)(b) of FOISA exempts information that has at any time been held by a Scottish public authority for the purposes of an investigation being carried out by virtue of a duty to ascertain the cause of death of a person (section 34(2)(b)(i)) and/or making a report to the Procurator Fiscal as respects the cause of death of a person (section 34(2)(b)(ii)).
17. 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.
18. The Authority submitted that, if the information which fell within the scope of the Applicant's request existed and was held, it would be exempt from disclosure section 34(2)(b) of FOISA.
19. The Applicant argued that there was no investigation into the individual's death, no criminal proceedings, no civil proceedings and no inquiry.
20. The Commissioner notes the points made by the Applicant but he has considered the specific wording of the request and the information it would capture, and he is satisfied that, if the information did exist and was held, it would clearly relate to an investigation. The

Commissioner therefore accepts that, if the information existed and was held, section 34(2)(b) of FOISA would be engaged.

The public interest test - section 34(2)(b)

21. 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.
22. The Authority recognised there was a public interest in understanding the process of investigation and the level of success of an investigation, particularly in relation to the spending of public money. The Authority also acknowledged the public interest in certain persons being better informed as to how specific missing person and sudden death investigations are conducted and the nature of corresponding reports to COPFS.
23. However, the Authority argued that there was no public interest in disclosing this information (if it existed and was held) to the general public. The Authority argued that disclosure of the information (if it existed and was held) would significantly breach the right to privacy of the subject of the investigation and the expectations that personal information would be processed appropriately and correctly. It submitted that, if the information existed and was held by it, the public interest lay overwhelmingly in protecting the individual's right to privacy, even in death.
24. The Authority also submitted that disclosure of the specific details of how an investigation was carried out (if it existed and was held) would hamper its 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. The Authority commented that if any new information or evidence came to light which insinuated criminal activity, then those who had had been involved would be aware of the evidence that the Authority had and may be able to evade detection or capture. The Authority argued that this would not be in the public interest.
25. The Authority submitted that there was no public interest in releasing information (if it existed and was held) that would result in any reduction in the willingness of the public to engage with the Authority either generally or specifically as regards matters of public protection and vulnerability. The Authority submitted that the breakdown of the relationship between itself and members of the public would be seriously detrimental to the ability of the Authority to gain the trust of individuals, which was of critical importance.
26. The Authority acknowledged that while the Applicant might have a genuine interest in the information requested, if it existed and was held, this must be balanced with the wider public interest considerations of protecting its statutory role and preserving the relationship between itself and the public. The Authority submitted that it must retain public trust in its activities and it commented that disclosure of the information, if it existed and was held, could cause harm or distress to members of the public. The Authority argued that it remained in the public interest to withhold the information (if it existed and was held).
27. The Applicant submitted that the public interest would be severely damaged if the requested information was withheld, as the reputation of the Authority would be undermined. She argued that the Authority was abusing the system to prevent exposure of its failings, rather than any true consideration of the public interest.

The Commissioner's view on the public interest - section 34(2)(b)

28. The Commissioner recognises the public interest in disclosure of information which would show how the Authority conducts and reports on investigations generally, and specifically how it investigated the particular case specified by the Applicant. He also acknowledges the particular interest of the Applicant and he understands, and has sympathy for her reasons for requesting this information. The Commissioner considers that disclosure of the information, if it existed and was held, would contribute to a fuller understanding of how such matters are investigated generally, and how this particular case was investigated. However, in considering disclosure under FOISA, the Commissioner must address the question of whether the requested information, if it existed and was held, should be made available to the public at large.
29. 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".
30. The Commissioner's view is set out clearly in [Decision 197/2007 Mr Alan Turner and the Chief Constable of Grampian Police](#)¹, in which he stated that the inclusion of section 34 in FOISA reflected an inherent public interest in ensuring the proper and effective conduct of investigations carried out by Scottish public authorities. 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.
31. Having carefully considered the particular circumstances of this case, the Commissioner therefore concludes that the Authority would be entitled to withhold the information, if it existed and was held, under section 34(2)(b) of FOISA.
32. Consequently, the Commissioner is satisfied that the information requested, if it existed and was held, would be exempt from disclosure under section 34(2)(b) of FOISA and that the Authority could give a refusal notice under section 16(1) of FOISA, on the basis that the information would be exempt information by virtue of section 34(2)(b).

The public interest test – section 18(1)

33. The Commissioner must now consider whether the Authority was entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.
34. The Authority submitted that any response to the request, other than in terms of section 18, would publicly confirm that it held the personal information of a named individual and that a related investigation was conducted.
35. The test the Commissioner must consider is whether (having already concluded that the information, if it existed and was held, would be exempt from disclosure) revealing whether the information existed or was held would be contrary to the public interest.
36. As discussed above, the Commissioner has accepted the engagement of section 34(2)(b) of FOISA.
37. The request sought information which, if it existed and was held, would comprise evidence gathered in the process of an investigation, or investigations.

¹ <https://www.foi.scot/decision-1972007>

38. The Commissioner notes that it is a matter of fact that all sudden deaths are investigated and the circumstances and evidence surrounding such deaths reported to the COPFS. He acknowledges the Authority's submission that any response, other than in terms of section 18(1) of FOISA, would confirm that such an investigation had taken place.
39. The Commissioner is not convinced that confirming or denying whether the information exists or not would cause harm, or would breach any individuals right to privacy. He notes that there was significant media interest around this case and he cannot see how confirming whether or not the information is held, would add anything more to the information which is already in the public domain.
40. In the Commissioner's view, the Authority's arguments for section 18(1) focus more on the actual disclosure of any relevant information (if it existed and was held), as opposed to confirmation or otherwise of its existence and whether or not it was held.
41. The Commissioner, therefore, concludes that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.
42. The Commissioner requires the Authority to issue the Applicant with a revised review outcome, otherwise than in terms of section 18(1) of FOISA. He requires the Authority to confirm to the Applicant whether the information requested existed and was held by it when it received the request, and to issue a fresh review outcome in terms of section 21(4)(b) of FOISA.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

He finds that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.

The Commissioner therefore requires the Authority to reveal to the Applicant whether the information she requested existed and was held by it when it received her request, and to provide her with a fresh review outcome in terms of section 21(4)(b) of FOISA, by 15 August 2024.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

01 July 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.
- ...

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, 38, 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

...

- (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-
 - (i) by virtue of a duty to ascertain; or
 - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

...

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and

- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).