



Decision Notice 201/2024

Unidentified bodies and Lockerbie bombing

Authority: Police Service of Scotland

Case Ref: 202400406

Summary

The Applicant asked the Authority for information relating to two unidentified victims of the Lockerbie bombing. The Authority refused to confirm nor deny whether it held the requested information. The Commissioner investigated and found that the Authority was not entitled to refuse to confirm nor deny whether it held the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1) (Effect of exemptions); 18 (Further provision as respects responses to requests); 34(1)(b) (Investigations by Scottish public authorities); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 3 October 2023, the Applicant made a request for information to the Authority. The Applicant asked for the following information relating to two unidentified victims of the Lockerbie bombing:
 - 1) Since the inquest date of 16 October 1990, was further investigation carried out to confirm their identities?
 - 2) The names of these victims if they have been identified.
 - 3) What happened to the bodies.

- 4) If the bodies remain unidentified, whether [the Authority] still believes the total number of victims to still be 270 or should it be revised to 272.
2. The Authority responded on 2 November 2023. The Authority refused to confirm nor deny whether it held the information requested or whether it existed, relying on section 18(1) of FOISA in conjunction with sections 34(1)(b), 35(1)(a) and 35(1)(b).
3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision for the following reasons:
 - the Authority had not sufficiently evidenced a link between what he considered to be a “minor discrepancy” in reports of casualties and live investigations
 - the information requested had already been publicly alluded to in a Fatal Accident Inquiry
 - withholding information created a perception that the Authority had “something to hide.”
4. The Authority notified the Applicant of the outcome of its review on 12 February 2024, upholding its original response. The Authority acknowledged the Applicant’s interest in the topic but submitted that even seemingly inconsequential details could be important to the investigation.
5. On 18 March 2024, 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 the Authority’s review because it had applied exemptions “too broadly” and because it was in the public interest for the Authority to disclose the information requested.

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 27 March 2024, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently 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. The Authority was invited to comment on this application and to answer specific questions.
9. During the investigation, the Authority wrote to the Applicant confirming its view that 270 people were killed in the Lockerbie bombing. The Applicant confirmed that he no longer required a decision on part 4 of his request, so the Commissioner will not consider this further in his decision.

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 nor deny whether they hold information in the following limited circumstances:

- a request has been made to the authority for information which may or may not be held by it; and
 - 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
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
12. Where section 18(1) of FOISA 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 exemption referred to, or on other matters which could have the effect of indicating whether the information exists or is held by the Authority.
 13. In this case, the Authority submitted that, if it held any information falling within scope of the Applicant's request, it would be exempt from disclosure under sections 34(1)(b), 35(1)(a) and 35(1)(b) of FOISA.
 14. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) of FOISA 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.
 15. The Commissioner must first, therefore, consider whether the Authority could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held.

Section 34(1)(b) – Investigations

16. The exemption in section 34(1)(b) of FOISA provides that information is exempt from disclosure if it has at any time been held by a Scottish public authority for the purposes of 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.
17. The exemptions in section 34 of FOISA 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. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
18. In this case, the Authority confirmed that there is an ongoing investigation by both the Authority and the Crown Office and Procurator Fiscal Service which may lead to criminal charges. Any information held by the Authority would be solely held for the purposes of this investigation.
19. The Applicant submitted that his request did not relate to the criminal investigation, but to the separate Fatal Accident Inquiry.

20. Having considered the submissions made to him by both the Applicant and Authority, and the nature of the request, the Commissioner is satisfied that the information, if it is held by the Authority, would be held for the purposes of an investigation covered by section 34(1)(b) of FOISA. Consequently, he must conclude that the exemption applies.
21. Given that the Commissioner accepts that the Authority was entitled to rely on the exemption in section 34(1)(b) of FOISA for withholding all of the information requested, he is required to consider the application of the public interest test in section 2(1)(b) for that information.

Section 34(1)(b) – the public interest

22. As noted above, the exemption in section 34(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
23. 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. 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.

The Authority’s submissions on the public interest

24. The Authority confirmed that an investigation is ongoing, and a trial is pending in the United States. Any evidence collected in the original investigation may be used in this trial.
25. The Authority also clarified that, while the most recent prosecution is in the United States it is possible future prosecutions could be initiated in Scotland. To protect both the current and any future proceedings the Authority submitted details of the evidence they hold, which may include information that answers the Applicant’s questions, must be protected, even where these may seem inconsequential.
26. The Authority noted the significant public interest in this case but, in light of the substantial information already in the public domain, did not consider that disclosing information it may hold in connection to these questions would meaningfully add to public knowledge and awareness.

The Applicant’s submissions on the public interest

27. The Applicant considers the exemptions to have been applied too broadly and suggested that, given the conspiracy theories associated with this case, it is specifically unhelpful to leave ambiguities and loose ends that invite speculation.
28. The Applicant stresses that he is not asking about the investigation into culpability for the bombing, but about the casualties of the bombing. He did not see how a prosecution regarding the Lockerbie bombing could be prejudiced by the disclosure of information about who the victims were.
29. He argues that information about these individuals has been disclosed in the Fatal Accident Inquiry and if there is any prejudice this would be expected to have arisen in the context of the inquiry.

The Commissioner's view on the public interest

30. The Commissioner has carefully considered all the arguments presented by the Authority and the Applicant, noting that he is not able to summarise all of these in this decision as to do so may confirm whether the information existed or was held.
31. The Commissioner agrees that, given the nature, scale and profile of the Lockerbie bombing, there is considerable public interest in providing information about the bombing and associated investigations. He also accepts that there is some public interest in disclosing information that is as accurate and complete as possible to address the potential for misunderstanding and confusion.
32. However, the Commissioner also considers that there is a strong public interest in avoiding prejudice to the investigation and judicial processes and that the public interest in information about the Lockerbie bombing and related investigations has been served, to a certain extent, by the significant volume of information already in the public domain.
33. The Commissioner notes the Applicant's comments that some information about these unidentified bodies has already been released as part of a Fatal Accident Inquiry. However, the Applicant's questions seem to largely relate to any information that may have emerged after the Inquiry. The Commissioner does not accept that disclosure of some information, in the context of a formal judicial process, implies that other (albeit related) information must be disclosed under FOISA.
34. Further to this, the Commissioner found (in paragraph 40) of [Decision 030/2024](#)¹ that investigative materials should only be disclosed where the public interest considerations are overwhelming. The Commissioner does not consider this to be the case, in this instance.
35. In all the circumstances of the case, therefore, the Commissioner is satisfied, on balance, that the public interest in maintaining the exemption in section 34(1)(b) of FOISA would outweigh the public interest in disclosure of the information requested. The Commissioner therefore concludes that the Authority was correct in its application of the exemption in section 34(1)(b) to withhold the information requested.
36. Having accepted that the Authority could give a refusal notice under 16(1) of FOISA on the basis that any relevant information (if it existed and was held) would be exempt information by virtue of section 34(1)(b), the Commissioner is required by section 18(1) to go on to consider whether the Authority was entitled to conclude that it would be contrary to the public interest to reveal whether the information requested existed or was held.
37. As the Commissioner has accepted that the Authority could give a refusal notice under 16(1) of FOISA on the basis that any relevant information (if it existed and was held) would be exempt information by virtue of section 34(1)(b), he is not required to go on to consider if the information requested would also be exempt information by virtue of section 35(1)(a) or section 35(1)(b).

Section 18(1) – The public interest

38. 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.

¹¹ <https://www.foi.scot/decision-0302024>

39. The Applicant explained that he considered that there was a strong public interest in providing clarity on what happened to the victims in the aftermath of the bombing and to clear up ambiguities that invite unhelpful speculation.
40. The Authority submitted that it was not in the public interest to prejudice the ongoing investigation by both the Authority and the Crown Office and Procurator Fiscal Service, or any proceedings (including the ongoing prosecution in the United States), by confirming nor denying whether the information existed or was held.
41. However, the Authority has not described in any detail how *confirmation* of whether the information existed or was held would prejudice the ongoing investigation (or any subsequent prosecutions). The Commissioner notes that [the Lord Advocate has publicly acknowledged that there is an ongoing investigation into the Lockerbie bombing](#)².
42. In all the circumstances, and having considered the Authority's submissions fully, the Commissioner, in the specific circumstances of this case, fails to understand how (at the point when the Authority responded to the Applicant's requirement for review) it could have been contrary to the public interest to reveal the existence of the information requested (if it existed and was held).
43. As rehearsed earlier, the Commissioner cannot set out his full reasoning here as to do so may confirm whether the information existed or was held. However, he does not accept that confirming nor denying the information's existence (or whether it was held) would cause the prejudice claimed by the Authority. Confirming nor denying that the information exists, or is held, is simply just that – it does not extend to disclosure of the actual content or nature of any information (if it existed and was held).
44. In the Commissioner's view, the Authority's arguments for section 18(1) of FOISA 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 it was held.
45. On balance, therefore, the Commissioner concludes that the Authority was not entitled to refuse to confirm nor deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.
46. 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.

The Commissioner finds that the Authority was not entitled to refuse to confirm nor deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.

² <https://www.copfs.gov.uk/about-copfs/news/lockerbie-bombing-statement-from-the-lord-advocate/>

The Commissioner therefore requires the Authority to reveal to the Applicant whether the information he requested existed and was held by it when it received his request, and to provide him with a fresh review outcome in terms of section 21(4)(b) of FOISA, by **28 October 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

12 September 2024