



Scottish Information
Commissioner
www.foi.scot

Decision Notice 243/2024

Death report

Authority: Chief Constable of the Police Service of Scotland
Case Ref: 202300200

Summary

The Applicant asked the Authority for the death report of her late mother. 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)

Background

1. On 17 October 2022, the Applicant made a request to the Authority for the death report of her late mother.
2. The Authority responded to the request on 14 November 2022. The Authority informed the Applicant, in line with section 18 of FOISA, that it was refusing to confirm or deny whether it held information falling within scope of her request. It noted that if the information was held, it would be exempt from disclosure under Section 34(2)(b).

3. On 17 November 2022, the Applicant wrote to the Authority requesting a review of its decision on the basis that she was dissatisfied with the Authority's application of section 18 of FOISA
4. The Authority notified the Applicant of the outcome of its review on 7 December 2022 fully upholding its original decision.
5. On 14 February 2023, the Applicant wrote to the Commissioner, applying for a Decision in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome of the Authority's review, arguing that the report should be disclosed as she was the deceased person's daughter.

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 1 March 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority provided its initial comments on 3 April 2023.
9. Following allocation of the case to an investigating officer, responses were sought from the Authority to specific questions relating to its reasons for refusing to confirm or deny whether it held the information.
10. Further comments were received from the Authority.

Commissioner's analysis and findings

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

Section 18(1) – "neither confirm nor deny"

12. Section 18(1) of FOISA allows Scottish 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.
13. 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.

14. 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.
15. 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.
16. 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

17. Section 34(2)(b) of FOISA exempts information if it is held at any time by a Scottish public authority for the purposes of any other investigation being carried out by virtue of a duty to ascertain the cause of death of a person (section 34(2)(b)(i)) or for the purpose of making a report to the Procurator Fiscal as respects the cause of death of a person (section 34(2)(b)(ii)).
18. The exemptions in section 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.
19. 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.
20. Having considered the specific wording of the Applicant's request and the information it would be likely to capture, the Commissioner is satisfied that, if the information did exist and was held, it would clearly relate to a relevant 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 informing the public of the processes involved in investigations of the nature covered by this request. The Authority also acknowledged (if the information existed and was held) what it considered to be a limited

public interest in terms of providing the Applicant with something of considerable value to her, personally.

23. The Authority noted that disclosure of the information (if it existed and was held) in response to an FOI request is public disclosure and there are existing processes in place out with FOISA for individuals to access information about the death of a loved one.
24. 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 asserted 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.
25. The Authority considered that the public interest lay overwhelmingly in protecting the integrity of investigations of this nature. It also noted that there was a public interest in withholding the information (if it existed and was held) in terms of the impact on the family and friends of a deceased individual.
26. On balance, the Authority concluded that the public interest in this case lies in favour of maintaining the exemption (if the information existed and was held).

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

27. The Commissioner recognises and acknowledges that the Applicant has a strong personal interest in viewing and understanding the content of the report covered by this request (if it existed and was held). He also agrees that disclosure of the information (if it existed and was held) would contribute to a fuller understanding of how the Authority conducts sudden death investigations and the nature of the reports which are submitted to COPFS.
28. However, in considering this case, the Commissioner must address the question of whether the information covered by the request (if it existed and was held) by the Authority should be made publicly available and not just to those who may have a personal interest in the matter.
29. 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 police investigations, and investigations of a similar nature. 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. The Commissioner acknowledges that there is a compelling argument for maintaining the exemptions contained in section 34 where they are applied to police reports, even where the information concerned no longer relates to ongoing investigations or proceedings. It is of considerable public interest that individuals remain willing to co-operate with the criminal justice system by providing statements and other assistance to the police in the course of

¹ <https://www.foi.scot/sites/default/files/Decision197-2007.pdf>

their investigations. The Commissioner is satisfied that such willingness would be diminished if, for example, the content of reports of the nature covered by this request were to be disclosed routinely under the terms of FOISA.

32. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the balance of the public interest in disclosure would be significant enough to outweigh that in maintaining the exemption in this case. The Commissioner therefore concludes that the Authority was correct in its application of section 34(2)(b) of FOISA to withhold the information falling within the scope of the request (if it existed and was held).

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 in a report which, if it existed and was held, would include evidence gathered in the process of an investigation as well as details of the conclusions reached.
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 Crown Office and Procurator Fiscal Service (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 individual's right to privacy.
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 19 December 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.

Euan McCulloch
Head of Enforcement

4 November 2024