



Decision Notice 247/2024

Use of private investigators

Authority: Chief Constable of the Police Service of Scotland
Case Ref: 202200812

Summary

The Applicant asked the Authority for information relating to the use of private investigators. The Authority refused to confirm or deny whether the information existed or was held.

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)(b) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 2 June 2022, the Applicant made a three-part request for information to the Authority. He asked the Authority for:
 - (i) Details of any contracts or agreements between the Authority and two named persons.
 - (ii) Details of any work contracted to the two named persons on behalf of the Authority.
 - (iii) Any policies or Standard Operating Procedures (SOPs) governing the use of private investigators by the Authority.

He limited the request to information created between 1 January 2015 and 1 December 2017.

2. The Authority responded on 30 June 2022. It refused parts (i) and (ii) of the request under section 18(1) of FOISA, in conjunction with sections 34(1), 35(1)(a) and (b) and 39(1) of FOISA. It refused to confirm or deny whether it held any information falling within the scope of these parts of the request, arguing that disclosure of the requested information, if held, would substantially prejudice the Authority's ability to prevent and detect crime and apprehend or prosecute offenders. In relation to part (iii) of the request, the Authority gave the Applicant notice, under section 17(1) of FOISA, that it did not hold any information falling within scope. It explained that there was no SOP or policy governing the use of private investigators by the Authority.
3. On 1 July 2022, the Applicant wrote to the Authority requesting a review of its decision to refuse to confirm whether or not it held information falling within the scope of parts (i) and (ii) of his request. The Applicant did not agree that the exemptions applied, and he argued that the public interest favoured disclosure. The Applicant did not challenge the Authority's reliance on section 17(1) of FOISA for part (iii) of the request.
4. The Authority notified the Applicant of the outcome of its review on 21 July 2022, upholding its original decision without modification.
5. On 21 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant argued that the public interest favoured disclosure of the information, if held.

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 20 September 2022, 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 case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Section 18(1) – neither confirm nor deny

10. 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.
11. 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.
 12. 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.
 13. In this case, the Authority submitted that if it held any information falling within the scope of parts (i) and (ii) of the Applicant's request, it would be exempt from disclosure under sections 34(1), 35(1)(a) and (b), and 39(1) of FOISA. In further submissions to the Commissioner, the Authority stated that it considered that section 38(1)(b) of FOISA would also apply to the withheld information (if it existed and was held).

Section 34(1) – Investigations by Scottish public authorities and proceedings arising out of such investigations

14. Section 34(1) of FOISA provides that information is exempt from disclosure if, at any time, it is held for the purposes of:
 - (i) 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));
 - (ii) 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));
 - (iii) 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));
 - (iv) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal (section 34(1)(c)).
15. 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. The exemptions are subject to the public interest test contained in section 2(1)(b) of FOISA.
16. The Authority submitted that, if the information existed and was held, it would be held for the purposes of an investigation.

17. The request asks for details about the use of private investigators by the Authority. In his requirement for review, and in his application to the Commissioner, the Applicant did not dispute that, if the information existed and was held, it would be held for the purpose of an investigation by a Scottish public authority or proceedings arising from such investigations.
18. The Commissioner considers it likely, that any such information, if it existed and was held, would be held for the purposes of a relevant investigation.

The public interest test - section 34(1)

19. As the exemption available under section 34(1) is subject to the public interest test, the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and was held by the Authority) would be outweighed by that in maintaining the exemption.
20. In its submissions, the Authority argued that the request was seeking to confirm the involvement of outside agencies in investigations into alleged crimes and to obtain confirmation of the named individual and investigative agencies or other bodies who had (or have not) been involved in any investigation. It argued that public disclosure, if the information existed and was held, would confirm the level and nature of such enquiries, those involved, their investigative results and serve as an indication to those who remained undetected of who and what means were dedicated to their capture.
21. The Authority argued that if members of the public believed that private investigators were utilised in police investigations, they may be reluctant to engage with the Authority as they would rightly believe that a private investigator would not be trained to the same standards as a police officer, nor would they be vetted to the same level. This could result in a loss of confidence by the general public, and who may become unwilling to assist the police with investigations: if this occurred, it would not be in the public interest.
22. The Authority noted that witnesses and other sources (on whom the police service relies heavily in carrying out its investigatory role) provide information to the Authority on the understanding that the information will remain confidential unless they are required to give evidence in court. It argued that there was no public interest in the release of information into the public domain that could compromise the future flow of information to the Authority and, in turn, compromise its ability to effectively fulfil its statutory obligations.
23. The Authority also highlighted the necessarily confidential nature of criminal investigation and the general right of those affected by criminal activity to have their information protected. It highlighted the importance of being allowed to conduct its investigations thoroughly, maintaining the integrity of any evidence gathered and managing its disclosure through the relevant processes controlled by the Crown.
24. In all the circumstances of this case, and even allowing for the relatively poor quality and limited coherence of the submissions he has received, the Commissioner is satisfied that there is sufficient potential for the disclosure of information falling within the scope of parts (i) and (ii) of the request would, if it existed and was held, undermine the integrity and proper confidentiality of its processes. In his view, this would not be in the public interest.
25. He is less persuaded, however, by the arguments in relation to public confidence. He would be very surprised if the Authority, if it did indeed use private investigators for any purpose, did so without full consideration of the attendant risks and without satisfying itself that the tasks and individuals involved were wholly suitable. He would also be very surprised if the Authority was not capable of explaining this adequately to the public.

26. In all the circumstances, therefore, the Commissioner has concluded that the Authority could have given a refusal notice under section 16(1) of FOISA, on the basis that the information (if it existed and was held) was exempt from disclosure under section 34(1). As the Commissioner has found the information could be exempted under section 34(1) of FOISA, he does not consider it necessary to consider if the information requested would also be exempt information by virtue of sections 35(1)(a), (b), 38(1)(b) or 39(1) of FOISA.

Section 18(1) – the public interest

27. Having accepted that the Authority could give a refusal notice under section 16(1) of FOISA, the Commissioner must now consider whether the Authority was entitled to conclude (for the purposes of section 18(1)) that it would be contrary to the public interest to reveal whether the information existed or was held.

The Applicant's submissions on the public interest

28. The Applicant acknowledged that there was a public interest in the Authority being able to carry out its functions (such as preventing and detecting crime) but he argued that confirming whether or not it employed the services of a named private investigator and how it did so would not cause substantial prejudice to the Authority's ability to carry out those functions. He noted that while the potential prejudice to active contracts might be "real", the release of historic contracts would not meet this test. He argued that the Authority had not detailed any assessment of the likelihood of any potential prejudice.
29. The Applicant commented that the public interest favoured transparency. He noted that the use of private investigators by police forces is controversial, and he argued that where their use exists, authorities should be transparent about this and the way they are employed. The Applicant submitted that there was a general public interest in transparency of the criminal justice system, and the practical impact of policy decisions.
30. The Applicant noted that the named private investigator's relationship with the Authority was raised at the public enquiry into the death of Sheku Bayoh. Given this, he argued that it would be in the public interest to understand whether there was any link between the Authority and the named private investigator.

The Authority's submissions on the public interest

31. In its submissions, the Authority acknowledged that there was a wider public interest in responding to requests, but it also argued that there were occasions where it was not in the public interest to confirm whether specific information was held or existed.
32. The Authority submitted that, given the circumstances of the request, it was recognised that harm existed by confirming or denying in the wider public domain whether the information was, or was not, held by it.
33. The Authority commented that it was clearly not in the public interest for any police force to publicly confirm or disclose whether a particular individual or their company has been employed nor to reveal the details of any work contracted (whether it was contracted to those individuals/companies, or not).

The Commissioner's findings

34. The Commissioner has considered the arguments put forward by the Applicant and the Authority carefully.

35. The Applicant has provided clear reasoning in support of his view that there was a strong public interest in providing clarity on this issue. He argued that the Authority had not provided any detailed reasons for refusing to confirm or deny whether it held the information he asked for.
36. The Commissioner finds it hard to accept the Authority's claim that harm would be caused by simply confirming whether or not the information is held. The Authority has argued that it is clearly not in the public interest for any police force to confirm whether or not a particular individual or their company has been contracted for work. However, the Authority has not explained why this is "clearly" the case, and it is not obvious to the Commissioner what the harm would be. The Authority has submitted that the financial and business interests of the named individual and their company may be harmed if the Authority had to confirm if they had or had not been contracted for work, but it has not provided any evidence or detailed reasoning to support this view. Apart from anything else, confirming or denying matters covered by these two parts of the request (as opposed to disclosure of the information itself, if in existence and held) would say nothing about the purposes of any engagement or the part of the Authority making it: the primary functions of the Authority may be the prevention and detection of crime, but it has many supporting corporate functions besides.
37. In the circumstances, the Commissioner finds himself in agreement with the Applicant and finds that the Authority has not presented any coherent justification for using section 18(1) of FOISA.
38. The Commissioner is unconvinced that confirming or denying whether the information exists, or not, would cause harm, or would breach any individual's right to privacy.
39. 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.
40. 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.

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 **23 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

6 November 2024