



Scottish Information
Commissioner

**Decision 013/2007 Mr D and the Chief Constable of
Strathclyde Police**

*Information relating to an investigation carried out following a
complaint by the applicant*

Applicant: Mr D

Authority: Chief Constable of Strathclyde Police

Case No: 200600551

Decision Date: 25 January 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 013/2007 - Mr D and the Chief Constable of Strathclyde Police

Information relating to a police investigation – information withheld under various exemptions - authority's response generally upheld

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 34(1)(a)(i) (Investigations by Scottish public authorities and procedures arising out of such investigations), 35(1)(a) and (b) (Law enforcement) and 25(1) (Information otherwise accessible).

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 D submitted two information requests to Strathclyde Police, both seeking information relating to an investigation carried out by Strathclyde Police following a complaint made by Mr D about the conduct of East Dunbartonshire Council (the Council).

In response to these requests, Strathclyde Police stated that information held in relation to one of the requests was exempt on the grounds of sections 34(1)(a)(i) (Investigations by Scottish public authorities) and 38(1)(b) (Personal information) of FOISA. In relation to the second, Strathclyde Police stated that no information falling within the scope of the request was held. Strathclyde Police later went on to argue that, in relation to the first request, the information was also considered to be exempt under sections 25(1) (Information otherwise accessible) and 35(1)(a) and (b) (Law enforcement) of FOISA. Following a review by Strathclyde Police in relation to each request, Mr D applied to the Commissioner for a decision.

With regard to the first document, the Commissioner found that Strathclyde Police had correctly applied the exemptions under section 34(1)(a)(i) and sections 35(1)(a)



and (b) to the information requested by Mr D. With regard to the second, the Commissioner agreed that the requested information was not held by Strathclyde Police.

Background

1. Mr D has been involved in a long-running dispute with the Council with regard to the stewardship of Council-owned land which borders Mr D's property. Mr D's complaint stems from concerns about the impact that the land, which has become overgrown, will have on his property.
2. In 2001, Mr D contacted the Council to request that it take action with regard to the land. By 2005, Mr D considered that the matter had still not been resolved. As a result, Mr D contacted Strathclyde Police in October 2005, requesting that it conduct an investigation in order to determine whether the Council's failure to take action was racially motivated.
3. On 1 December 2005 Strathclyde Police informed Mr D that, following investigation, it had concluded that the Council's actions had no racist element to them.
4. On 7 December 2005, Mr D submitted an information request to Strathclyde Police. This request sought copies of full notes of a meeting which took place between Strathclyde Police and representatives of the Council on 9 November 2005, along with notes of internal discussions which took place between two named police officers.
5. Strathclyde Police responded to this correspondence on 25 January 2006. With regard to the request for notes of internal discussions, Strathclyde Police stated that no such notes existed, as the discussions were not minuted in any format.
6. With regard to the notes taken at the meeting on 9 November 2005, Strathclyde Police confirmed that this information was held. It stated, however, that this information was exempt from release under FOISA, on the grounds that the exemptions under section 34(1)(a)(i) (Investigations by Scottish public authorities) and 38(1)(b) (Personal information) were considered to apply. With regard to section 34(1)(a)(i), which is subject to the public interest test, Strathclyde Police confirmed its view that the public interest considerations in this case favoured maintaining the exemption.
7. Mr D requested that Strathclyde Police review its handling of his request in correspondence dated 30 January 2006.



8. Strathclyde Police responded to this correspondence on 28 February, informing Mr D that it upheld the decision contained in its original response and that it also considered that section 25(1) of FOISA (Information otherwise accessible) applied to the requested information.
9. Mr D submitted an application for a decision to me on 8 March 2006. The application was validated by establishing that he had made a request for information to a Scottish public authority (Strathclyde Police), and had applied to me only after asking that authority to review its response to his request.

The Investigation

10. In his application, Mr D stated that he was unhappy with Strathclyde Police's response for a number of reasons. Firstly, he stated that he was not seeking access to personal information in making his request, but was rather seeking access to notes of a meeting held between Strathclyde Police and the Council. He also stated his belief that the public interest in relation to this request favoured disclosure, for the reason that it would ensure the retention of public trust in police investigations.
11. With regard to Strathclyde Police's position that information was not held in relation to internal discussions, Mr D expressed his surprise that such discussions which underpinned decisions were not recorded. Mr D stated that he did not believe that section 17 of FOISA was intended to apply in such circumstances.
12. Finally, with regard to the application of section 25(1) Mr D stated that, as a layman, he was unclear as to the reasoning provided by Strathclyde Police for the application of this exemption.
13. My investigating officer contacted Strathclyde Police for its submissions in relation to this case, in terms of section 49(3)(a) of FOISA. The submissions were received and considered by the investigating officer.
14. In its submissions, Strathclyde Police also stated its view that additional exemptions applied to the information requested. These exemptions were those contained under sections 35(1)(a) and 35(1)(b) of FOISA (Law enforcement).



The Commissioner's Analysis and Findings

15. Mr D's original application to Strathclyde Police contained two distinct information requests. The first requested notes of a meeting held with the Council as part of the investigation process, while the second requested notes made during a discussion between two named officers. I will discuss Strathclyde Police's response to each of these separate requests below.

Request for notes of meeting with Council

16. Strathclyde Police identified two separate documents which fell within the scope of Mr D's request for notes of a meeting held with the Council on 9 November 2006. The first of these represented the notes held within the investigating officer's notebook, while the second represented a copy of Strathclyde Police's formal Racist Incident Report, which contained an account of the meeting of 9 November.
17. Strathclyde Police stated that a number of exemptions were considered to apply to this information. These were as follows:
- Section 34(1)(a)(i) – Investigations by Scottish public authorities
 - Sections 35(1)(a) and (b) – Law enforcement
 - Section 25(1) – Information otherwise accessible
 - Section 38(1)(b) – Personal information

Section 34(1)(a)(i) – Investigations by Scottish public authorities

18. Section 34(1)(a)(i) of FOISA exempts information if that information has, at any time, been held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence.
19. As the information requested was held by Strathclyde Police solely for the purposes of investigating Mr D's complaint that the actions of the Council were racially motivated and constituted a criminal offence, I am satisfied that the requested information falls within the scope of the exemption under section 34(1)(a)(i).
20. However, section 34(1)(a)(i) is subject to the public interest test contained in section 2(1)(b) of FOISA. Section 2(1) requires that, where information is exempt but is not subject to an absolute exemption, authorities consider the public interest in relation to the information before ultimately deciding whether it should be withheld.



21. In its correspondence with Mr D, Strathclyde Police set out that it considered that the balance of the public interest in relation to this case lay strongly in favour of non-disclosure. While Strathclyde Police acknowledged that there were public interest arguments that could be made in favour of disclosure, it indicated that, in its view, those arguments were significantly outweighed by those in favour of non-disclosure.
22. In favour of non-disclosure, Strathclyde Police argued that such information was rarely disclosed, as it was considered that release would compromise Strathclyde Police's ability to effectively carry out its functions. It was also argued that disclosure would be likely to affect the flow of information to Strathclyde Police during future criminal investigations.
23. In addition, Strathclyde Police argued that that the release of the information would be unfair to the Council staff members whose actions were investigated, and that there was a public interest in ensuring that those participating in police investigations were treated fairly. Strathclyde Police indicated that during the course of the investigation it had found no evidence to substantiate the allegations made by Mr D, and that the release of unsubstantiated allegations about individuals into the public domain would be unfair to those individuals.
24. Mr D, however, argued, in his communications with Strathclyde Police, that disclosure of the information would be in the public interest, because it would ensure that the public could retain its trust in police investigations.
25. It is important in such cases to note that, when considering whether it is appropriate to release information under FOISA, I must consider whether it is appropriate for that information to be released generally into the public domain, as opposed to released only to an individual who has been directly involved in, or affected by, the circumstances which led to the collection of the information. Information which is appropriate for release under FOISA will generally be available to all who seek it, regardless of their motive for doing so, or their involvement or non-involvement in a particular case.
26. As a result, the fact that it was Mr D who made the allegations upon which the investigation was based can have no bearing on the consideration of whether the information should be released to him under FOISA. I am obliged to consider only whether the specific information requested fulfils the criteria required for the application of the exemption in question and, if I find that this is the case, I must conclude that that authority acted in accordance with FOISA in its handling of that request.



27. In considering this issue, there are clearly valid public interest arguments in favour of the release of information of this type. I consider that there is a legitimate public interest in ensuring the accountability of Strathclyde Police and the manner in which it carries out its investigations. It is clearly in the public interest that those affected by, or accused of, crime, have confidence in the police's ability to conduct its investigations thoroughly, appropriately and without prejudice. In addition, it is also in the public interest that this confidence in the accountability of the police is shared by the wider population.
28. However, in this case, I am of the view that these public interest arguments favouring release are outweighed by the countervailing arguments favouring non-disclosure (and therefore the maintenance of the exemption under section 34(1)(a)(i)). In particular, I concur with Strathclyde Police's view that the release of this information would be likely to have a significant and damaging impact on the force's ability to gather evidence in relation to future investigations.
29. As stated by Strathclyde Police in the submissions made to this Office, the information requested by Mr D was collected during the course of an investigation, and the information gathered from Council staff members during that investigation was done so under the expectation that it would be used for the purposes of furthering the investigation only. Indeed, it is my view that there is a general expectation amongst those interviewed during police investigations that the information gathered will be used only for the purpose of investigating (and subsequently prosecuting) that offence, and there is correspondingly no expectation that information provided will be released into the public domain outwith that process.
30. It is my view that the release of the information requested by Mr D would have a detrimental impact on Strathclyde Police's ability to carry out its statutory functions, in that the release of such information would be likely to affect the future candour of those participating in police investigations. If individuals participating in investigations were to have a general awareness that the information they provide may well be released into the public domain for purposes other than the progression of that particular case, I accept that this would be likely to have a substantial inhibitive effect on their ability to contribute fully and openly to that process.
31. It will, therefore, only be appropriate for such information to be released in circumstances where there are significant public interest arguments in favour of release, and those arguments are not outweighed by those in maintaining the exemption.



32. In relation to the case under consideration, while I acknowledge that there are public interest arguments in favour of release, I consider that those arguments are outweighed by the countervailing arguments in favour of maintaining the exemption.
33. I therefore find that Strathclyde Police acted in accordance with Part I of FOISA in applying the exemption under section 34(1)(a)(i) to the information requested by Mr D.

Sections 35(1)(a) and 35(1)(b) – Law enforcement

34. Sections 35(1)(a) and 35(1)(b) exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially either the prevention or detection of crime (section 35(1)(a)) or the apprehension or prosecution of offenders (section 35(1)(b)).
35. With regard to the exemption under section 35(1)(a), I am of the view that the term “the prevention or detection of crime” encompasses any action taken to anticipate or prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could include activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and prevention.
36. Section 35(1)(b) has a narrower scope than section 35(1)(a), although there is likely to be a considerable overlap between the two exemptions. I consider that section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as the investigative processes used).
37. In relation to the application of these exemptions, Strathclyde Police presented similar arguments to those made in relation to the exemption under section 34(1)(a)(i) – namely that information of this type is gathered under a general expectation that it will only be disclosed in the course of criminal proceedings, and the release of such information would undermine this expectation and may deter victims or witnesses from co-operating fully with the police during investigations. Strathclyde Police therefore argued that, as a result, release would be likely to prejudice substantially both the prevention and detection of crime, and the apprehension and prosecution of offenders.



38. On consideration of this issue, I am of the view that the release of this information would indeed substantially prejudice both the prevention and detection of crime, and the apprehension of offenders, in that I accept Strathclyde Police's view that release of information in this case would be likely to have an substantially inhibitive effect on the willingness of those contributing to the investigative process to participate fully in investigations in future. My view on this issue is discussed in some detail within paragraphs 30-33 above. This inhibitive effect would, in my view, cause substantial damage to Strathclyde Police's ability to prevent and detect crime, and apprehend and prosecute offenders.
39. As with section 34(1)(a)(i), sections 35(1)(a) and (b) are subject to the public interest test. With regard to the application of the public interest test, Strathclyde Police repeated the arguments presented in relation to section 34(1)(a)(i) – namely that while it recognised that there were arguments in favour of release, these were outweighed by the public interest in ensuring both the flow of information to the police during investigations and the fair treatment of those individuals involved in the investigation process.
40. The consideration of the public interest in relation sections 35(1)(a) and (b) will involve much the same considerations as in relation to section 34(1)(a)(i), as it is the public interest with regard to the release of the same information which is being considered. My consideration of the public interest in relation to this release is set out under paragraphs 28 to 33 above, where I concluded that the public interest in disclosure of this information was outweighed by that in non-disclosure and the maintenance of the relevant exemption.
41. I therefore find that Strathclyde Police acted in accordance with FOISA in applying the exemptions contained under sections 35(1)(a) and 35(1)(b) to the information requested by Mr D.

Section 25(1) – Information otherwise accessible

42. As set out above, I consider that the information requested by Mr D with regard to Strathclyde Police's meeting with the Council is exempt from release under sections 34(1)(a)(i), 35(1)(a) and 35(1)(b) of FOISA. While I have therefore reached the conclusion that this information has been legitimately exempted by Strathclyde Police, I nevertheless wish to briefly discuss the application of section 25(1) of FOISA in relation to the requested information, as I consider that this exemption was inappropriately applied by Strathclyde Police.
43. Section 25(1) of FOISA exempts information in circumstances where the applicant can reasonably obtain the information other than by requesting it under section 1(1) of FOISA.



44. In its response to Mr D's request for review, Strathclyde Police stated that this information was reasonably obtainable to Mr D in that it "*may be recoverable in terms of Section 1(1)(a) of the Administration of Justice (Scotland) Act 1972 or by commission and diligence.*" In applying the exemption under section 25(1), Strathclyde Police also informed Mr D that he "*would also be entitled to request precognition facilities.*"
45. In his application to the Commissioner, Mr D has pointed out that, as a layperson, he was confused with regard to the meaning of Strathclyde Police's explanation with regard to the application of section 25(1). Indeed, in informing Mr D that it considered that the information he requested was reasonably obtainable elsewhere, it is notable that Strathclyde Police did not inform Mr D in any detail or in layman's terms as to either where or how he might obtain the information.
46. On receipt of Mr D's application, my Office sought further information and clarification from Strathclyde Police with regard to its application of section 25(1) and in particular the route by which the information might be reasonably obtained by Mr D.
47. In response, Strathclyde Police confirmed that its response to Mr D referred to the procedure by which individuals involved in proceedings (both criminal and civil) or considering such litigation can seek to recover evidence or information which may assist them in that process. In order to access this information, the individual would be required to apply to a sheriff to request the recovery of the information. If, on consideration of the application, the sheriff concluded that the information should be released to the individual, then that sheriff would issue a warrant of commission and diligence. Such a warrant would require the person holding the information (in this case Strathclyde Police) to make the information available to the applicant.
48. Section 25(1) applies, however, in circumstances where an individual can "*reasonably obtain*" information by a route other than through FOISA. Having considered the route proposed by Strathclyde Police, it is clear to me that this route falls significantly short of the requirements for it to be considered to be reasonably obtainable for the purposes of section 25(1).



49. In order for the information to be accessed by Mr D through the route proposed, Mr D would either have to be involved in, or be considering, litigation in relation to the case. I am of the opinion that this fact alone ensures that the requested information should not be considered to be reasonably obtainable for the purposes of section 25(1). I do not consider that it is reasonable, for the purposes of section 25(1), to require that an individual be either taking (or considering) legal action before he or she can seek access to the information in question. Indeed, it should be noted that proceeding by this route would ensure that Mr D had a right only to request the information, and that this would not necessarily mean that he subsequently had a right to receive it. Whether or not the information could be supplied to him would then depend on the ruling of the sheriff following his or her consideration of Mr D's application.
50. I am of the view, therefore, that this information should not be considered to be reasonably accessible to Mr D for the purpose of the exemption under section 25(1).
51. I therefore find that Strathclyde Police acted incorrectly in its application of section 25(1) to the information requested by Mr D.

Section 38(1)(b) – Personal information

52. Given that I am of the opinion that the requested information is exempt under sections 34(1)(a)(i) and 35(1)(a) and 35(1)(b), I do not intend to discuss Strathclyde Police's application of section 38(1)(b) of FOISA to the details of the names, dates of birth and contact details of the Council employees interviewed by Strathclyde Police.

Request for notes made during a discussion between two named police officers

53. With regard to Mr D's request for copies of any notes made in relation to a discussion between two named police officers following Strathclyde Police's meeting with the Council, Strathclyde Police stated that no notes were taken and, as a result, it held no information which could be provided in response.
54. In his correspondence with Strathclyde Police, Mr D indicated that he considered that such information should be held, in that he believed it was at this meeting that a final decision was taken in relation to the investigation. Mr D stated that he was surprised to learn that Strathclyde Police has a policy of not recording the reasons behind a decision, and stated that as such, he did not consider that section 17 of FOISA (Notice that information is not held) was designed to apply in such cases.



55. However, Strathclyde Police confirmed in its submissions to this Office that no such information was held. Strathclyde Police provided further information on the procedure for investigating complaints on this type, and advised that when such allegations are made, Strathclyde Police's actions and conclusions are recorded in the formal Racist Incident Report, a copy of which was considered by this Office within the scope of Mr D's first request. Strathclyde Police stated that such reports constitute the method through which decisions taken in relation to such investigations are documented and approved, and indicated that all information relevant to the investigation was therefore contained within this report.
56. While Strathclyde Police confirmed that a discussion did take place between the two officers in question in relation to this case, it stated that this discussion only took place following the approval of the final Racist Incident Report, and the purpose of the discussion was to facilitate the sending of a letter to Mr D to formally advise him of the outcome of the investigation. As such, Strathclyde Police asserted that no record was taken of this conversation, and indicated that there would be no requirement to do so, given that the Racist Incident Report had been finalised and approved.
57. Having considered the submissions made by Strathclyde Police I am satisfied that it holds no recorded information which falls within the scope of Mr D's second request. While I note Mr D's concern that no information is held in relation to these discussions, it is important to note that FOISA can only provide access to information which is recorded and held by an authority. If internal discussions are held in relation to a case and those discussions are not minuted by an authority, then the content of such discussions will not constitute "recorded information", and will not, therefore, be accessible under FOISA.
58. In the case in question, I am satisfied by Strathclyde Police's assertion that it saw no requirement for the discussion in question to be recorded. I am also satisfied from my investigation that the discussion was not in fact recorded. Therefore, I am of the view that Strathclyde Police acted in accordance with Part I of FOISA by responding to Mr D's request through the provision of a notice under section 17(1) that information was not held.



Decision

I find that the Chief Constable of Strathclyde Police (Strathclyde Police) acted in accordance with Part I of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to respond to Mr D's first request on the grounds that the requested information was exempt under sections 34(1)(a)(i) (Investigations by Scottish public authorities), 35(1)(a) and 35(1)(b) (Law enforcement) of FOISA.

I also find, however, that Strathclyde Police acted incorrectly in applying the exemption under section 25(1) to the information sought in Mr D's first request (although it should be noted that this does not materially alter the outcome of this case).

In relation to Mr D's second request, I find that Strathclyde Police acted in accordance with Part I of FOISA in responding to that request through the issue of a notice under Section 17(1) of FOISA, to the effect that the information was not held.

Appeal

Should either the Mr D or the Chief Constable of Strathclyde Police wish to appeal against this 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
25 January 2007



Appendix

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

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

(1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-

(a) an investigation which the authority has a duty to conduct to ascertain whether a person-

(i) should be prosecuted for an offence;

35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

(a) the prevention or detection of crime;

(b) the apprehension or prosecution of offenders;

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.