

Decision Notice



Decision 017/2010 Ms Jessie Gilmour and Strathclyde Police

Refusal to confirm or deny that information is held

Reference No: 200901648

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Ms Jessie Gilmour (Ms Gilmour) requested from the Chief Constable of Strathclyde Police (Strathclyde Police) information relating to an alleged police investigation. On receiving no substantive response from Strathclyde Police, Ms Gilmour requested a review of the decision not to respond to her information request. Strathclyde Police then responded by refusing to confirm or deny whether the information requested existed or was held by them, in terms of section 18 of FOISA. Ms Gilmour remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had partially failed to deal with Ms Gilmour's request for information in accordance with Part 1 of FOISA. He found that Strathclyde Police had acted correctly in their application of section 18 of FOISA. However, he also found that they had breached the requirements of section 10(1) of FOISA by failing to respond to Ms Gilmour's request within the statutory timescale. He did not require Strathclyde Police to take any action in respect of this breach.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 18 (Further provision as respect responses to request); 21(4) (Review by Scottish public authority) and 34(1)(b) (Investigations by Scottish Public Authorities and proceedings arising out of such investigations)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 19 June 2009, Ms Gilmour wrote to Strathclyde Police seeking all information (including but not limited to a range of documents listed) relating to specified police investigation.
2. Strathclyde Police wrote on 23 June 2009 to acknowledge Ms Gilmour's request and then wrote again on 22 July 2009 to explain that they had not been able to respond within the statutory period of 20 working days. This second letter indicated that Strathclyde Police would endeavour to respond as soon as possible.



3. Ms Gilmour wrote again to Strathclyde Police on 31 August 2009, seeking a review of their handling of her information request. She noted that Strathclyde Police had not yet responded to her information request.
4. Strathclyde Police wrote to Ms Gilmour on 3 September 2009, issuing a notice under section 18 of FOISA. Section 18 gives Scottish public authorities the right to refuse to reveal whether information exists or is held by them, where they consider that to do so would be contrary to the public interest and, if it did exist and was held by the authority, the information could be withheld under any of a number of specified exemptions. Strathclyde Police stated to Ms Gilmour that exemptions in sections 34 and 35 of FOISA would apply if the requested information did exist and was held by them.
5. In this notice, Strathclyde Police apologised for the delay in responding to Ms Gilmour's request, and invited Ms Gilmour to request a review if she was dissatisfied with the decision.
6. Ms Gilmour wrote to the Commissioner on 16 September 2009, stating that she was dissatisfied with Strathclyde Police's handling of her case and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. She was unhappy that the information she sought had not been released to her. She also asserted that Strathclyde Police had taken longer than the statutory 20 working days to respond to her initial request and that they had apparently declined to provide a response to her review request.
7. Ms Gilmour's application was validated by establishing that she had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
8. Notwithstanding that Strathclyde Police indicated in its letter of 3 September that Ms Gilmour should seek a further review if she was dissatisfied with its response, the Commissioner would note that there was no requirement for Ms Gilmour to do so before making an application for a decision by him with respect to this decision.
9. Where an applicant has made an information request and received no response, and then made a valid request for review, thereby prompting the authority to issue a response, the response given has the effect of specifying the outcome of a review. This is because section 21(4) of FOISA sets out what an authority might do when it conducts a review:
 - a) confirm a decision with or without modification,
 - b) substitute a decision, or
 - c) reach a decision if none had been made before.
10. Where this process has been followed, a person can make an application to the Commissioner if they are dissatisfied with the response received from the authority. There is no requirement for an applicant to make a further request for review, nor any obligation on an authority to conduct a further review.



11. In this case, Strathclyde Police have indicated that Ms Gilmour's request for review was received "on or around" 2 September 2009, although they had no record of the date of its receipt. Since Strathclyde Police responded to Ms Gilmour's information request after receiving her request for review, the response issued on 3 September has accordingly been considered a notice specifying the review outcome in line with section 21(4)(c) of FOISA.

Investigation

12. Strathclyde Police were notified that an application had been received from Ms Gilmour and the case was allocated to an investigating officer.
13. The investigating officer subsequently contacted Strathclyde Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions relating to it. Strathclyde Police subsequently responded in full.
14. Ms Gilmour was also asked by the investigating officer to provide submissions regarding the case, and particularly in relation to the public interest in confirming whether the information she had requested existed or was held. Ms Gilmour provided her comments and these have also been taken into consideration in what follows below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the submissions that have been presented to him and he is satisfied that no matter of relevance has been overlooked.

Court of Session Opinion – requests for documents

16. The Commissioner notes that the information request by Ms Gilmour included a request for copies of documents. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA provides a right to information, not documents.



17. However, the Court said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
18. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Ms Gilmour and Strathclyde Police that Strathclyde Police questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which Strathclyde Police has subsequently had with the Commissioner that Strathclyde Police were unclear as to what the information request sought.
19. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.

Section 18 of FOISA

20. Section 18 of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information were held by the authority (and it need not be), the information could be withheld under any of the exemptions contained in sections 28 to 35, 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.
21. Where a public authority has chosen to rely on section 18, 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 public authority. This means that he is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information existed or was held by the public authority.



22. Strathclyde Police provided a number of arguments as to why it would be contrary to the public interest to confirm or deny whether the information requested by Ms Gilmour existed or was held by it. They submitted that, in general terms, confirming or denying the existence of this type of information could compromise the current or future law enforcement role of the police. They maintained that individuals provide information to the police with an expectation that their involvement will remain confidential and they would be less willing to provide any such information in the knowledge that such information could or would enter the wider public domain other than in the setting of the court room.
23. Strathclyde Police stated that the breakdown of this relationship would be seriously detrimental to the law enforcement capabilities of the police.
24. Ms Gilmour submitted that she believed the information she had requested to be held by Strathclyde Police. She argued that confirmation of its existence would provide accountability and transparency in decision making and as such would serve the interests of the public (as opposed to being of interest to the public).
25. While the Commissioner is unable to summarise all of the comments made by the parties to this case, he has considered them fully. Having considered these, the Commissioner is satisfied in the circumstances that it would be contrary to the public interest for Strathclyde Police to reveal whether the information requested by Ms Gilmour exists or is held by them.
26. The Commissioner then went on to consider the exemptions put forward by Strathclyde Police in conjunction with their use of section 18. Strathclyde Police submitted that if the information sought by Ms Gilmour existed and was held by it, it could be withheld under sections 34(1)(b) and 35(1)(a) and (b) of FOISA.

Section 34 of FOISA

27. Section 34(1)(b) of FOISA exempts information if it has, at any time, been held for the following the purpose 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.
28. In relation to the exemption in 34(1)(b), Strathclyde Police argued that should the requested information exist and be held by them, it would be held for the purposes of an investigation they had a duty to conduct to ascertain whether a person should be prosecuted for an offence, which in turn might lead to a decision by them to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
29. The Commissioner accepts that if the information requested by Ms Gilmour existed and was held by Strathclyde Police, it would be held for the purpose of an investigation relevant for the exemption in section 34(1)(b), and so it would be exempt from disclosure under its terms.



30. This exemption is subject to the public interest test and therefore 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 Strathclyde Police) would be outweighed by that in maintaining the exemptions under sections 34(1)(b).

Public interest test

31. In considering the public interest in both the disclosure of the information and in the maintenance of the exemption, Strathclyde Police concluded that on balance the public interest would favour the maintenance of the exemption. They accepted that disclosure of any information, should it exist and be held, may serve to assist the pursuit of justice by individuals and that it may support public accountability within the police service. However, they argued that disclosure of such information might also compromise the current or future law enforcement role of the police, harm the interests of third parties, prejudice future investigations, and inhibit the flow of information to the police.
32. They argued that the need to ensure the effective and efficient conduct of the police service and avoid compromise to current and future investigations clearly indicated that the public interest fell in favour of refusing to release any such information should it exist and be held.
33. Ms Gilmour submitted that the release of any such information if it existed or was held would serve to reflect professional and civil integrity and as such would be in the wider public interest.
34. Having considered the arguments presented by Strathclyde Police and by Ms Gilmour, the Commissioner is satisfied that if the information existed and was held, the public interest in maintaining the exemption in section 34(1)(b) would outweigh the public interest in the disclosure of the information.
35. Strathclyde Police also stated that the exemptions contained in sections 35(1)(a) and (b) of FOISA would apply to the information requested by Ms Gilmour if it existed and was held. However given that the Commissioner has accepted that this information, if it existed and was held, would be exempt under section 34(1)(b) of FOISA, he will not go on to consider these additional exemptions.
36. The Commissioner therefore finds that Strathclyde Police were entitled, under section 18 of FOISA, to refuse to reveal whether the information requested by Ms Gilmour existed or was held.

Section 10 of FOISA

37. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.



38. Strathclyde Police failed to provide a response to Ms Gilmour's information request within the 20 working day period allowed by section 10(1) of FOISA and only responded after she had requested a review in the light of this failure.
39. The Commissioner therefore finds that Strathclyde Police failed to comply with Ms Gilmour's request for information of 19 June 2009 within the 20 working days allowed by section 10(1) of FOISA. He notes their apology for this failure.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) partly complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Gilmour.

The Commissioner finds that in refusing to reveal whether the requested information existed or was held by it, in terms of section 18 of FOISA, Strathclyde Police complied with Part 1 of FOISA.

However, the Commissioner also finds that Strathclyde Police failed to comply with Part 1 of FOISA by failing to respond to Ms Gilmour's request for information within the timescales laid down by section 10(1) of FOISA. Since a response has now been provided, he does not require Strathclyde Police to take any action in respect of this breach in response to this decision.

Appeal

Should either Ms Gilmour 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
03 February 2010



Appendix

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.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further 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, 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.

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.

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-
 - ...
 - (b) 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; or
 - ...