

# Decision Notice



Decision 019/2010 Mr Russell Findlay of the Sunday Mail and Northern Constabulary

Information pertaining to a specified incident

Reference No: 200901642  
Decision Date: 5 February 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Russell Findlay of the Sunday Mail requested from Northern Constabulary information pertaining to a specified incident which had been the subject of a press release. Northern Constabulary withheld the information in terms of section 34(1)(b) of FOISA. Following a review, Mr Findlay remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Northern Constabulary had dealt with Mr Findlay's request for information in accordance with Part 1 of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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

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1. On 24 July 2009, Mr Findlay of the Sunday Mail wrote to Northern Constabulary requesting information in relation to an incident which had been the subject of a press release issued in January 2009. The press release indicated that police were carrying out enquiries into an assault that had taken place at a specified place and time. It noted that police were keen to trace a particular car (which was described) and urged anyone with knowledge of such a vehicle to contact them.
2. Mr Findlay's information request stated that he would like to establish
  - "The exact nature of the crime which was reported.
  - The outcome of the criminal investigation, i.e. details of the person(s) arrested and scheduled court appearances."



3. Northern Constabulary responded on 19 August 2009, but withheld the information in terms of the exemption in section 34(1)(b) of FOISA.
4. On the same day, Mr Findlay wrote to Northern Constabulary requesting a review of its decision.
5. Northern Constabulary notified Mr Findlay of the outcome of its review on 10 September 2009, upholding its previous refusal to disclose the information.
6. On 15 September 2009, Mr Findlay wrote to the Commissioner, stating that he was dissatisfied with the outcome of Northern Constabulary's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Findlay 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. On 21 September 2009, Northern Constabulary was notified in writing that an application had been received from Mr Findlay. The case was then allocated to an investigating officer.

## Investigation

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9. The investigating officer subsequently contacted Northern Constabulary on 19 October 2009, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Northern Constabulary was asked to justify its reliance on any provisions of FOISA which it considered applicable to the information requested. Northern Constabulary was also asked to provide the Commissioner with any information withheld from Mr Findlay.
10. Northern Constabulary responded on 6 November 2009 with the information requested, and confirmed that it continued to withhold the information in terms of section 34(1)(b) while additionally citing section 35(1)(a), (b) and (c), of FOISA. Northern Constabulary also provided submissions on the public interest test.
11. Mr Findlay was asked by the investigating officer to provide his submissions, which he did.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Findlay and Northern Constabulary and is satisfied that no matter of relevance has been overlooked.



### Section 34(1)(b)

13. Northern Constabulary applied the exemption in section 34(1)(b) of FOISA on the basis that the information had been held for the purposes of an investigation by it into certain allegations made to Northern Constabulary, which in the circumstances may lead to a decision by Northern Constabulary to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.
14. The exemption in section 34(1)(b), set out in full in the Appendix, is a "class" exemption. 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. The exemption is, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
15. In order for section 34(1)(b) of FOISA to apply, the Commissioner has to be satisfied that the following tests are fulfilled:
  - the information been held by a Scottish public authority at any time;
  - the information was held for the purposes of an investigation conducted by the authority (which may still be ongoing);
  - the investigation could lead (or could have led) to a decision by the authority to make a report to the procurator fiscal, to allow the procurator fiscal to decide whether or not to instigate criminal proceedings.
16. In this case, Northern Constabulary received a complaint which led them to initiate an investigation, and prompting the issuing a press release seeking information from the public.
17. Northern Constabulary maintained that the information requested by Mr Findlay was held for the purpose of their investigation into this matter, which remained ongoing. They indicated that they would make a decision in due course as to whether a report should be made to the procurator fiscal to determine whether or not criminal proceedings should be instituted.
18. The Commissioner is satisfied that any information falling within the scope of Mr Findlay's request was and still is held by Northern Constabulary for the purpose of an investigation conducted by a public authority to which FOISA applies. The Commissioner is also satisfied that the investigation concerned may lead to a decision by the public authority to make a report to the Procurator Fiscal, to allow the procurator fiscal to decide whether or not to instigate criminal proceedings.
19. The Commissioner is therefore satisfied that the exemption in section 34(1)(b) was correctly applied by Northern Constabulary to the information in this case.



### The public interest test

20. As noted above, the exemption in section 34(1)(b) is subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the exemption and to carry out a balancing exercise. Unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers that the information can be withheld under one or more other exemptions in FOISA).
21. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been variously 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. it must serve the interests of the public.
22. The Commissioner is aware that there are general public interest concerns surrounding the disclosure of information falling within the exemptions set out in section 34(1) of FOISA. During Parliamentary debates on these exemptions, the then Justice Minister, Jim Wallace, noted that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecutions and investigations, and the role of criminal proceedings as the appropriate forum for bringing information of this kind into the public domain. Mr Wallace also said: "We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."

### *Submissions from Mr Findlay*

23. Mr Findlay argued that Northern Constabulary's refusal to divulge, in his view contrary to usual procedure, the nature of the alleged crime, had hindered the media's ability to report on this and denied the public the right to know what had allegedly happened.
24. He expressed the view that smaller police forces in particular were perverting freedom of information law to withhold information. He stated that, normally, basic details of any type of crime reported to the police could be ascertained through a media enquiry. Refusals of such enquiries, he argued, forced the media to go down the "tedious and time-consuming" route of FOISA.
25. Mr Findlay maintained that the police refusal to disclose the nature of the allegation in this case was unprecedented. He suggested that, normally, a police force would be obliged to reveal basic points including the nature of an incident, the stage reached in enquiries, and whether anyone had been arrested.



26. Mr Findlay argued that the public had an absolute right to know the nature of an alleged crime reported to the police, especially where they had already made it public.
27. The Commissioner notes that Mr Findlay's comments on this case have highlighted a number of concerns with the general practice of police forces with respect to the disclosure of information, and the handling of enquiries from the media. In this decision, however, he must focus on the public interest in disclosing the particular information requested by Mr Findlay in all the circumstances of the case. His conclusions can address only whether, in this case, Northern Constabulary acted in accordance with Part 1 of FOISA.
28. In doing so, he will consider the general public interest in disclosure of information of this type, as highlighted by Mr Findlay, but he would also note that information requests should be considered on a case by case basis, in the light of the facts of that case. Disclosure of information in one set of circumstances will not necessarily mean that similar information should also be disclosed in another case, where different circumstances hold.

#### *Submissions from Northern Constabulary*

29. Northern Constabulary recognised that there is a public interest in making the public aware of issues of general concern, but argued that its press release fulfilled this function in this case. It also identified a public interest in accountability of the appropriate use of public funds in investigating reported incidents.
30. Northern Constabulary argued that, because an investigation was ongoing, disclosure of the information under consideration could prejudice that investigation and might prevent an individual being brought to justice. They argued that disclosure of the information could assist offenders in evading justice in future.
31. It was also argued by Northern Constabulary that disclosure of the information requested while the investigations were ongoing could prejudice the human rights of persons involved and their rights under the Data Protection Act 1998. They also maintained that disclosure of the information might risk the health and safety of these individuals.
32. Northern Constabulary stated that disclosure of the information would deter members of the public from reporting crime or giving witness statements in the expectation of confidentiality (unless required to testify in court in public), thereby reducing the effectiveness of policing.

#### *Conclusion on the public interest*

33. The Commissioner has taken into consideration all the public interest submissions made by both parties and he accepts that there is a general public interest in releasing information which may lead to an increase in accountability and scrutiny of public officials' actions, including the police.
34. It is his view that there is a public interest in scrutinising the actions of police forces and in ensuring that investigations into alleged criminal offences are carried out thoroughly with all relevant matters being taken into account.



35. Nonetheless, the Commissioner considers that there are stronger public interest arguments as to why the exemption in section 34(1)(b) should be maintained in relation to the information under consideration in this case.
36. The Commissioner has reached this conclusion having considered the information requested by Mr Findlay, the comments outlined above, and also the background information supplied by the police about the circumstances surrounding the particular investigation concerned.
37. The circumstances of this case mean that it is not possible for the Commissioner to explain his reasoning fully in this decision. However, he would confirm that he has considered all of the public interest arguments and other information provided to him, and is satisfied that given all the circumstances of this case, that the public interest in maintaining the exemption in section 34(1)(b) outweighs that in disclosure of the information requested by Mr Findlay.
38. Accordingly, the Commissioner finds that Northern Constabulary correctly withheld the information requested by Mr Findlay. Having reached this conclusion, he is not required to (and will not) go on to consider the application of the further exemptions cited in terms of section 35 of FOISA.

## DECISION

The Commissioner finds that Northern Constabulary complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Findlay.

## Appeal

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Should either Mr Findlay or Northern Constabulary 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**  
**5 February 2010**



## Appendix

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### 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.

...

##### 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;