



Scottish Information
Commissioner

Decision 029/2007 Ms Sandra Uttley and the University of Stirling
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<i>Refusal to confirm or deny that information is held</i>
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Applicant: Ms Sandra Uttley
Authority: University of Stirling
Case No: 200600637
Decision Date: 12 February 2007

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



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Request for information held by the University of Stirling – the University issued a notice under section 18 of FOISA refusing to confirm or deny whether the information was held – this notice was upheld by the Commissioner following an investigation

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: section 1(1) (General entitlement); 18 (Further provisions as respects responses to requests) and 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations).

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

Facts

Ms Uttley made an information request to the University of Stirling (the University). The University responded, but refused to confirm or deny whether the information requested exists or is held by them. Ms Uttley asked the University to carry out a review. It did so, and upheld its original decision.

Ms Uttley subsequently asked the Commissioner to carry out an investigation. The Commissioner found that the University had complied with Part 1 of FOISA in refusing to confirm or deny whether the information is held by it.

Background

1. On 29 December 2005, Ms Uttley made an information request to the University.



2. The University responded to Ms Uttley on 27 January 2006. It advised her that, in this case, it is in the public interest to issue a notice under section 18 of FOISA. (Section 18 of FOISA gives public authorities the right to refuse to confirm or deny whether information is held by them in limited circumstances.)
3. Ms Uttley was dissatisfied with this response and, on 30 January 2006, asked the University to carry out a review on the basis that she disagreed with the use of the section 18 notice.
4. The University subsequently carried out a review and, on 1 February 2006, notified Ms Uttley that it wished to uphold its original decision.
5. Ms Uttley remained dissatisfied and, on 3 March 2006, applied to me for a decision as to whether the University had dealt with her information request in line with FOISA.
6. The case was allocated to an investigating officer and the application validated by establishing that Ms Uttley had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to her request.

The Investigation

7. The officer formally notified the University of the application on 5 May 2006, in terms of section 49(3)(a) of FOISA, and asked it to comment on the application.
8. Ms Uttley had supplied arguments as to why the University was incorrect to issue a notice under section 18 of FOISA and these, along with the submissions made by the University, have been fully taken into account in coming to this decision.



The Commissioner's Analysis and Findings

9. As noted above, section 18 gives public authorities the right to refuse to confirm or deny whether information is held by them in limited circumstances. Those 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 would be exempt under one 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.
10. Consequently, I have to consider whether the University was justified in issuing a refusal notice on the basis that to reveal whether the information sought by Ms Uttley exists or is held is contrary to the public interest and also to establish that, if the information did exist and was held, the University would be justified in refusing to disclose the information by virtue of one of the exemptions listed in section 18(1).
11. It is worth noting that where a public authority has chosen to rely on section 18, I must ensure that my decision notice does not confirm or deny one way or the other whether the information actually exists or is held by the public authority. This means that I am unable to comment in any depth on the reliance by the University on one or more of the exemptions listed in section 18(1) as to do so could have the effect of highlighting whether the information exists or is held by it.
12. In this case, the University has argued, *inter alia*, that it would not be in the public interest for it to reveal whether the information exists or is held by it because of the negative effect this could have on future investigations carried out by the University. On the basis of the arguments put forward by the University, I am satisfied that it is not in the public interest for the University to reveal whether the information exists or is held by it.
13. I am now required to satisfy myself that if the information did exist, and was held, the University would be justified in refusing to disclose the information by virtue of one of the exemptions listed in section 18(1).



14. The University has argued that the information, if it existed or was held, would be exempt in terms of the following exemptions:
- section 34(1)(b) (Investigations by public authorities and proceedings arising out of such investigations)
 - section 35(1) (Law enforcement) and
 - section 39(1) (Health, safety and the environment).
15. I have found it necessary only to consider the first exemption cited, i.e. section 34(1)(b). Section 34(1)(b) exempts from release information which has at any time been held by a Scottish public authority for the purposes 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.
16. I am satisfied that the information, if it did exist or was held, would be exempt in terms of section 34(1)(b) of FOISA.

Decision

I find that the University of Stirling complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to confirm or deny to Ms Uttley, in terms of section 18(1) of FOISA, whether information exists or is held by them.

Appeal

Should either the University or Ms Uttley wish to appeal this decision, there is a right to 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
12 February 2007



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.

18 Further provisions as respects responses to requests

- (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 that section.

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, 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
 - (...) (b) ...