



Scottish Information
Commissioner

**Decision 128/2006 Christine Grahame MSP and the
Chief Constables of Central Scotland Police,
Dumfries and Galloway Constabulary, Grampian
Police, Lothian and Borders Police, Northern
Constabulary, Strathclyde Police and Tayside
Police**

Special Branch files containing the title "Scottish National Party"

Applicant: Christine Grahame MSP

**Authorities: Chief Constables of Central Scotland Police,
Dumfries and Galloway Constabulary, Grampian Police,
Lothian and Borders Police, Northern Constabulary,
Strathclyde Police and Tayside Police**

**Case Nos: 200503159, 200502890, 200503161, 200502930,
200502939, 200600069, 200502892**

Decision Date: 27 June 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 128/2006 Christine Grahame MSP and the Chief Constables of Central Scotland Police, Dumfries and Galloway Constabulary, Grampian Police, Lothian and Borders Police, Northern Constabulary, Strathclyde Police and Tayside Police

Request for number of files held by Special Branch containing the title “Scottish National Party” and the period covered – notice under section 18 of the Freedom of Information (Scotland) Act 2002 issued (contrary to public interest to reveal whether information exists or is held)

Facts

Ms Grahame requested from the chief constables of seven Scottish police forces (referred to collectively in this decision as “the Police”) the number of files held by Special Branch containing the title “Scottish National Party” and the period the files relate to. The Police refused to confirm whether they held any of the information requested, or whether that information existed, in terms of section 18 of the Freedom of Information (Scotland) Act 2002 (FOISA). That decision was upheld on review and Ms Grahame applied to the Scottish Information Commissioner for a decision.

Outcome

The Commissioner found that the Police were correct to issue a refusal notice in relation to the information requested under section 18 of FOISA.

Appeal

Should Ms Grahame or the Police wish to appeal against this decision, there is a right of 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.



Background

1. On 25 August 2005, emails were sent to Chief Constables of Central Scotland Police, Dumfries and Galloway Constabulary, Grampian Police, Lothian and Borders Police, Northern Constabulary, Strathclyde Police and Tayside Police (referred to collectively in this decision as “the Police”), on behalf of Christine Grahame MSP. Each of these emails were in the following terms:

“I would like the following information under the Freedom of Information (Scotland) Act 2002:

 - The number of files held by Special Branch which A) contain the title “Scottish National Party” and B) the period for which these files relate to.”
2. The chief constable of each police force replied with a notice under section 18 of FOISA, on various dates between 16 and 22 September 2005. Section 18 allows a Scottish public authority to give a person requesting information under section 1(1) of FOISA notice refusing to disclose whether the information requested by that person exists or is held by it, if the information would be exempt under certain provisions of FOISA if it existed and was held but the authority considers that to reveal whether the information does exist or is held would be contrary to the public interest.
3. The same exemptions under FOISA were cited by each of the chief constables as being relevant to the information requested. These were sections 35(1)(a) and (b) (Law enforcement), 36(2) (Confidentiality) and 39(1) (Health and safety). In addition, one force chose to rely on the exemption contained in section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations) and, during the investigation, the Police also cited section 31 (National security and defence) as being relevant to the information requested.
4. On various dates between 19 September 2005 and 23 November 2005, the seven chief constables were asked on Ms Grahame’s behalf to carry out reviews of their respective decisions to serve notice in terms of section 18. Ms Grahame was of the opinion that the exemptions stated were not relevant to her request, pointing out that the Scottish National Party was a legitimate, democratic political party and the principal opposition in Scotland. She considered there to be a public interest in disclosure of the information requested, so that it could be ascertained whether public resources were being used in a way which might or might not undermine the democratic political process of the country.



5. Responses to Ms Grahame's requests for review were provided by the seven chief constables on various dates between 13 October and 22 December 2005, all upholding the earlier decisions.
6. Ms Grahame remained dissatisfied with the outcome of her requests and applied to me separately in respect of each of the seven requests.
7. An investigating officer was allocated to these cases.

The Investigation

8. Ms Grahame's applications were validated by establishing that she had made an information request to each of seven Scottish public authorities (i.e. the Police) and that she had appealed to me only after asking the Police to review their respective responses.
9. It was agreed with the Police that a single response to the investigation would be co-ordinated on behalf of all seven chief constables.
10. The investigating officer notified the Police of Ms Grahame's application and asked for their comments in terms of section 49(3)(a) of FOISA. The investigating officer asked the Police to confirm whether the information Ms Grahame had requested existed and was held by them and to provide my Office with a copy of the information if it did exist and was held. The investigating officer also asked the Police for an analysis of its reasons for issuing a notice under section 18 and for an analysis of the specific exemptions they wished to rely on, with appropriate reference to the public interest test in both cases.
11. A response was subsequently received from the Police. The Police confirmed that they did not consider it to be in the public interest for them to reveal whether the information requested existed or was held by them, as to do so would be likely to compromise the intelligence functions of Special Branch.



12. The Police have advised that information held by Special Branch in all police forces is intelligence material that is fundamental to its effective operation, in support of both local policing and the work of the Security and Secret Intelligence Services nationally. They argue that the existence of a file containing intelligence material relating to an individual or organisation is in itself information that could prove useful to that individual or organisation. The non-existence of such a file could also prove useful, as it would indicate the absence of police knowledge of (or activity relating to) the individual or organisation concerned. The Police consider that an approach of neither confirming nor denying whether such information exists or is held is, therefore, necessary and must be applied consistently if it is to be effective.
13. The Police have stated that they would wish to rely on the exemptions contained in sections 31, 35(1)(a) and (b) and 39(1) to withhold any relevant information from Ms Grahame. In addition, one force chose to rely on section 34. During the investigation, the Police withdrew their reliance on section 36(2) as being inappropriate in connection with a section 18 notice.

The Commissioner's Analysis and Findings

14. Where a public authority has chosen to rely on section 18(1), I must establish whether the authority is justified in issuing a refusal notice on the basis that to reveal whether the information exists or is held would be contrary to the public interest; and also to establish that if the information existed and was held, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
15. In so doing, I must ensure that my 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 I will be unable to comment in any depth on the reliance by the public authority on one of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information exists or is held by the public authority.



16. In general, however, the application of section 18 can be explained as, colloquially, a “Neither Confirm Nor Deny” (NCND) policy where the public interest would be harmed if the authority were to confirm or deny that certain information was held. Again, in general, the argument is that if, for example, the Security Bodies were to confirm details of their operations, this may be harmful to national security and law enforcement and this would be contrary to the public interest. The harm would occur if they were to confirm they held certain information; but so too could harm occur if they were to admit that they did not hold certain information. In which case, it is in the public interest not to reveal whether the information exists.
17. In such circumstances, it is also argued that the NCND approach has to be applied consistently, and so should be used whether or not any organisation was actually subject to investigation, as for an authority to indicate that no information was held by it on an organisation would negate the purpose of neither confirming nor denying whether information was held by it in respect of another organisation.
18. In this case, the Police have argued that it would not be in the public interest for them to reveal whether the information requested exists or is held by them because to do so would be likely to compromise the intelligence functions of Special Branch. On the basis of the arguments put forward to me by the Police, I am satisfied that it is not in the public interest for the Police to reveal whether the information exists or is held by them. I will say, however, that while I accept the need for consistent application of a “NCND” approach in relation to information of this kind, and am content that such an approach is likely to be appropriate in many requests for information of this kind, it is always possible that there will be exceptions to the general rule and therefore it is important that each request for such information is considered individually.
19. I will now consider whether any of the exemptions put forward by the Police in conjunction with the use of section 18 apply.
20. The Police have relied on the exemptions contained in section 35(1)(a) and (b) of FOISA. These exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially:
 - (i) the prevention or detection of crime (section 35(1)(a)); or
 - (ii) the apprehension or prosecution of offenders (section 35(1)(b)).



21. The Police have argued that the information requested would (assuming it existed and was held by the Police) have been gathered for the prevention and detection of crime and the apprehension and prosecution of offenders, on the basis that this encompasses the role of Special Branch (notwithstanding the specific nature of some of its responsibilities). On the basis of the information the Police have provided to me, I am satisfied that the information requested by Ms Grahame would fall within each of the exemptions in section 35(1)(a) and (b).
22. The two exemptions cited in section 35(1)(a) and (b) are both subject to the public interest test. This means that even although I am satisfied that the information requested by Ms Grahame would, assuming it existed and was held by the Police, fall within the exemptions contained in section 35(1)(a) and (b), I must still go on to consider whether the public interest in releasing such information would be outweighed by the public interest in maintaining the exemption. Only if I find that the greater public interest would lie in maintaining the exemption can I uphold the application of section 18.
23. Although, in most cases, I will consider the public interest in relation to each exemption separately, in this case I am satisfied that the public interest arguments applicable to each of the exemptions in section 35(1)(a) and (b) are entirely interlinked and I will therefore consider the public interest as it applies to both exemptions together.
24. In considering the public interest test, the Police examined both the public interest in releasing the information and the public interest in maintaining the exemption. From the submissions provided by them, I am satisfied that they concluded correctly that the public interest would favour maintaining the exemption.
25. I therefore find that the information requested would (assuming it existed and was held by the Police) be exempt under the exemptions contained in section 35(1)(a) and (b) of FOISA.
26. The Police also relied on the exemptions contained in section 31 and 39(1) of FOISA to justify withholding any relevant information from Ms Grahame (and, in addition, one force chose to rely on section 34). Given that I have already agreed that the information would be exempt in terms of the two exemptions contained in section 35(1)(a) and (b), I do not intend to consider these additional exemptions.



Decision

I find that the Chief Constables of Central Scotland Police, Dumfries and Galloway Constabulary, Grampian Police, Lothian and Borders Police, Northern Constabulary, Strathclyde Police and Tayside Police each complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to reveal to Ms Grahame whether information existed or was held by them in relation to the number of files held by Special Branch containing the title “Scottish National Party” and the period covered by them.

Kevin Dunion
Scottish Information Commissioner
27 June 2006