



Scottish Information
Commissioner

**Decision 130/2007 Mr Edward Milne and the Chief
Constable of Tayside Police**

*Information relating to the use of a telephone tracking device or
telephone tape recorder in relation to particular telephone numbers.*

**Applicant: Mr Edward Milne
Authority: The Chief Constable of Tayside Police
Case No: 200601298
Decision Date: 7 August 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 130/2007 Mr Edward Milne and the Chief Constable of Tayside Police

Information relating to the use of a telephone tracking device or telephone tape recorder in relation to particular telephone numbers – refusal to confirm or deny whether information held – Commissioner found that Tayside Police acted in accordance with Part 1 of FOISA..

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 18 (Further provision as respects responses to request); 34 (1)(a), (b), (c) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a), (b), (c), (g) (Law enforcement).

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 Milne requested from the Chief Constable of Tayside Police (Tayside Police) all files and information that relates to the use of a telephone tracking device or telephone tape recorder in relation to particular telephone numbers. Tayside Police responded by refusing to confirm whether they held any of the information that Mr Milne had requested, or whether the information existed, in terms of section 18 of FOISA. Mr Milne was not satisfied with this response and asked Tayside Police to review its decision. Tayside Police carried out a review and, as a result, notified Mr Milne that they had upheld the decision to refuse to confirm or deny whether the requested information was held or existed. Mr Milne remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Chief Constable of Tayside Police had dealt with Mr Milne's request for information in accordance with Part 1 of FOISA. He did not require the Chief Constable of Tayside Police to take any action.



Background

1. On 11 February 2006, Mr Milne wrote to Tayside Police requesting the following information:
 - All files and information that relates to the use of a telephone tracking device or telephone tape recorder in relation to particular telephone numbers including the people and all institutions involved.
2. On 21 March 2006, Tayside Police wrote to Mr Milne in response to his request for information. Tayside Police issued Mr Milne with 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. On 24 March 2006, Mr Milne wrote to Tayside Police requesting a review of their decision.
4. On 18 July 2006, Tayside Police wrote to notify Mr Milne of the outcome of their review. Tayside Police continued to rely on section 18 of FOISA to refuse to reveal whether the information which Mr Milne had requested existed or was held. However, in this letter Tayside Police did provide clarification as to which of the exemptions listed in section 18 they believed would apply if the information existed and was held, as they are required to do.
5. On 19 July 2006, Mr Milne wrote to my Office, stating that he was dissatisfied with the outcome of Tayside Police's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Milne 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 that request.
7. On 18 August 2006, Tayside Police were notified in writing that an application had been received from Mr Milne and were asked to provide my Office with specified items of information required for the purposes of the investigation. An information notice was issued to Tayside Police on 11 October 2006 as no response had been received from them to the letter of the 18 August 2006.
8. Tayside Police responded on 26 October 2006 with the information requested and the case was then allocated to an investigating officer.



The Investigation

9. 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) a request has been made to the authority for information which may or may not be held by it
 - b) 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
 - c) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
10. Tayside Police have submitted that if they did hold any material relating to the interception of communications then this would be most likely to be held for the purpose of a criminal investigation. They noted that where such covert surveillance is undertaken, the investigation would be undermined should the subject become aware of the interception. Tayside Police advised that if they were to confirm or deny that they held this type of information then this could have the effect of an individual being able to use this information for their own gain, which would not be in the public interest.
11. Tayside Police have argued that in order for its investigations utilising covert surveillance to remain effective, it is important to take a consistent approach to requests for information about such activities. Tayside Police submitted that if they confirmed in certain cases whether information was held, but they declined to do so in other cases, then this would entail that cases could be identified where an interception is taking, or has taken place.
12. Tayside Police stated that if the information requested by Mr Milne existed and was held, this information would be exempt from disclosure under the terms of sections 34(1)(a), 34(1)(b), 34(1)(c), 35(1)(a), 35(1)(b), 35(1)(c) and 35(1)(g) (read in conjunction with section 35(2)(a)) of FOISA .



The Commissioner's Analysis and Findings

13. Where a public authority has chosen to rely on section 18(1) of FOISA, 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.
14. 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.
15. In general, however, the application of section 18 can be explained as 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. In general, the argument put forward by the Police is that, if for example Tayside Police were to confirm details of any covert surveillance that they were carrying out then it is likely that a release of such information could substantially prejudice Police investigations into involvement in serious criminality, and this would be contrary to the public interest. Tayside Police argue that this prejudice and harm would be caused to investigations and the law enforcement functions of the Force if they were to confirm that they held the requested information; but that harm could also occur if they were to admit that they did not hold the requested information. In which case, it is in the public interest not to reveal whether the information exists.
16. In such circumstances Tayside Police have asserted that the NCND approach has to be applied in a standardised and consistent manner, and so should be used whether or not an individual's telephone communications are subject to surveillance. They have submitted that for Tayside Police to indicate that no information was held by it on the individual's telephone communications would negate the purpose of neither confirming nor denying whether information was held by it in respect of another individual.
17. On the basis of the information that has been submitted to me by Tayside Police I am satisfied that it is not in the public interest for Tayside Police to reveal whether the information requested by Mr Milne exists or is held by them.



18. I will now consider the exemptions put forward by Tayside Police in conjunction with the use of section 18 of FOISA.
19. Tayside Police have relied on the exemptions in sections 34 and 35 of FOISA.
20. Section 34 of FOISA exempts information in four separate circumstances if the 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 (section 34(1)(a)(i))
 - an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii));
 - 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 (section 34(1)(b));
 - criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal (section 34(1)(c)).
21. Having considered the submissions that have been made to me by the Police, I am satisfied, if it existed or was held, the information requested by Mr Milne would fall within the scope of each of these exemptions. I am also satisfied that if the information existed or was held, the public interest in maintaining these exemptions would outweigh the public interest in the disclosure of the information.
22. Tayside Police also relied on the exemptions contained in sections 35(1)(a), 35(1)(b), 35(1)(c) and section 35(1)(g) (read in conjunction with 35(2)(a)) of FOISA to justify withholding any relevant information from Mr Milne. Given that I have already agreed that this information, if it existed or was held, would be exempt under the exemptions in section 34(1) of FOISA, I do not intend to consider these additional exemptions.

Decision

I find that the Chief Constable of Tayside Police (Tayside Police) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Milne.



Appeal

Should either Mr Milne or Tayside 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 decision notice.

Kevin Dunion
Scottish Information Commissioner
7 August 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 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.

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; or
 - (ii) prosecuted for an offence is guilty of it;
 - (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



- (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.

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;
 - (c) the administration of justice;
 -
 - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
 -
- (2) The purposes are-
 - (a) to ascertain whether a person has failed to comply with the law;
 - ...