



Scottish Information
Commissioner
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Decision Notice 289/2024

Report into a death in custody

Authority: Police Investigations and Review Commissioner

Case Ref: 202400913

Summary

The Applicant asked the Authority for a report into the death of a named individual in police custody. The Authority withheld the information requested under various exemptions in FOISA. The Commissioner investigated and found that the Authority was entitled to withhold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 34(2)(b)(ii) (Investigations by Scottish Public Authorities); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 10 May 2024, the Applicant made a request for information to the Authority. She asked for a copy of the report which was completed by the Authority after the death of Warren Fenty in 2014 at Kittybrewster police station.
2. The Authority responded on 17 May 2024. The Authority withheld the information requested under the exemptions in sections 26, 30(c), 34, 35(1) and 38(1)(b) of FOISA.
3. On 20 May 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because she did not agree these exemptions had been properly applied.
4. The Authority notified the Applicant of the outcome of its review on 17 June 2024. The Authority withdrew its reliance on the exemption in section 26 of FOISA but continued to

withhold the requested information under the exemptions in sections 30(c), 34(2)(b), 35(1)(g) and 38(1)(b).

5. On 3 July 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she did not agree the claimed exemptions applied, and in any event the public interest favoured disclosure.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 24 July 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions relating to the application of the exemptions claimed.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Information falling within the scope of the request

10. During the investigation, it became apparent that two reports (an interim and a final report) were completed by the Authority after the death of Mr Fenty. The Commissioner sought the Authority's comments on whether both reports fell within the scope of the request.
11. The Authority explained that it had not identified the interim report as part of its initial response or its review outcome, but that it identified it following the Commissioner's request for comments and that it now considered both reports fell within the scope of the request. The Authority confirmed that it wished to withhold both reports under the same exemptions in FOISA.
12. Having reviewed the withheld information, the Commissioner agrees that both reports fall within the scope of the request. His decision will consider both reports in what follows.
13. By failing to identify the interim report as falling within the scope of the request until during the investigation, the Commissioner must find that the Authority failed to comply with the requirements of section 1(1) of FOISA.

Section 34(2)(b)(ii) – Investigations by Scottish public authorities and proceedings arising out of such investigations

14. During the investigation, the Authority confirmed that it considered both reports exempt from disclosure under the exemption in section 34(2)(b)(ii) of FOISA. This exemption provides that information is exempt from disclosure if it is held at any time by a Scottish public authority for the purposes of an investigation being carried out for the purpose of making a report to the Procurator Fiscal as respects the cause of death of a person.
15. The exemptions in sections 34 are described as "class-based" exemptions. 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 in determining whether the exemption applies. Such exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
16. In this case, having reviewed the information withheld and the submissions presented by both the Applicant and the Authority, the Commissioner is satisfied that the withheld information has been held by Authority for the purposes of an investigation covered by section 34(2)(b)(ii) of FOISA.
17. The Commissioner therefore accepts that the exemption in section 34(2)(b)(ii) of FOISA applies to the withheld information. As noted above, the exemption in section 34(2)(b)(ii) of FOISA is subject to the public interest test in section 2(1)(b) of FOISA. Consequently, unless the Commissioner is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed.

The public interest test – section 34(2)(b)(ii)

18. As noted above the exemption in section 34(2)(b)(ii) is a qualified exemption and therefore subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 34(2)(b)(ii) was correctly applied to the withheld information, he is now required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The Authority's submissions about the public interest

19. The Authority recognised the public interest in disclosure of information that would show how it investigates and reports on deaths in police custody and that it would contribute to a fuller understanding of how it investigates such deaths in general and with regard to this specific death. The Authority also accepted that disclosure would enhance accountability regarding its own actions and those of Police Scotland.
20. However, the Authority considered that those from whom it seeks to ingather necessary and relevant information as part of investigations regarding deaths in police custody would not provide information (or some information) if it were known that the Authority would subsequently release that information, or parts thereof, into the public domain. The Authority argued that such disclosure would result in the reduction of willingness of the public and witnesses to engage with the Authority, which would result in it not receiving critical evidence and therefore undermine its ability to perform its statutory functions.

21. The Authority submitted that this would be a serious detriment and, while it recognised the Applicant might have an interest in the information requested, this must be balanced with the wider public interest consideration of protecting the statutory role of the Authority and with preserving the confidence of the public in how their information will be used.
22. The Authority submitted that it was in the public interest to protect the confidentiality of the information ingathered, both to protect the privacy of those involved in the investigation and to ensure cooperation from all those from whom the Authority relies on to provide statements and evidence.
23. The Authority noted that it is the role of the Crown Office and Procurator Fiscal Service to investigate deaths, not the public. The Authority argued that it cannot be said to be in the public interest for it to publish investigative materials (including reports), irrespective of the passage of time, to allow the public to make their own determination or commentary.
24. The Authority also considered that the public interest in this case had been satisfied by the public hearing of evidence in the FAI and the publication of the FAI determination. The Authority noted that the evidence heard had the benefit of being heard under oath and subject to the relevant legal tests, including examination, cross examination and legal testing.
25. The Authority submitted that these are established principles of justice and that to release untested source material or a summary thereof contained in the information requested may result in a form of summary justice, whereby wrongdoing or suggested wrongdoing would arise from allowing the public to draw conclusions from untested material.

The Applicant's submissions about the public interest

26. The Applicant noted that both the Authority's investigation and the FAI concluded with no further proceedings being sought, so she did not agree that disclosure of the information requested would result in any jeopardy to future proceedings.
27. Considering the information requested fed into a public examination of a death (concluded with the publication of the FAI determination) that is of public interest, the Applicant suggested it would be a natural extension of the legal process to consider the information requested to also be of public interest and that it should therefore be made available to the public to scrutinise.
28. The Applicant argued that deaths in custody are becoming an increasingly important subject area for public discussion, as prison populations rise to dangerous levels against a backdrop of record level drug related deaths, rising mental health issues and inequality. Being able to understand the how and why of these deaths in custody (wherever that may be) is important to inform the ongoing public health debate and maintain public trust in public authorities responsible for the wellbeing of detained individuals.
29. The Applicant highlighted [research published in February 2024¹](https://www.gla.ac.uk/news/archiveofnews/2024/february/headline_1042060_en.html) by the University of Glasgow which suggested that four people die every week in Scotland while in custody (not only police custody) or under the control of the state. The same report found that, over an eight-year period (2015-2022), 25 people died in police custody in Scotland.
30. The Applicant noted that the FAI in this case took ten years to complete, making it one of the longest running FAIs in Scottish legal history, and that, given the passage of time, several police officers had indicated that they could not recall the events that the Procurator Fiscal

¹ https://www.gla.ac.uk/news/archiveofnews/2024/february/headline_1042060_en.html

asked them about. The Applicant argued that disclosure of the information requested, which was prepared closer to the time of the incident, could place more accurate evidence into the public domain than the evidence given a decade later.

The Commissioner's view on the public interest

31. The Commissioner recognises the public interest in disclosure of information which would show how the Authority conducts and reports on investigations relating to deaths in police custody. Disclosure would contribute to a fuller understanding of how the Authority investigates such matters and how it investigated the death in question.
32. However, in considering disclosure under FOISA, the Commissioner must address the question of whether the information withheld by the Authority should be made available to the public at large, not just to those who may have a specific interest in the matter.
33. Given the nature of the case, the Commissioner recognises that there is a public interest in disclosure of the reports.
34. However, the Commissioner acknowledges that there can be a strong argument for maintaining the exemptions contained in section 34 of FOISA where they relate to investigations relating to deaths in police custody, even where the information concerned no longer relates to ongoing investigations or proceedings.
35. The Commissioner has considered whether disclosure of the information in question would contribute to the administration of justice and enforcement of the law, reveal any malpractice, enable correction of misleading claims or contribute to a debate on a matter of public interest. In the circumstances and having considered the content of the information that has been withheld, he does not find disclosure to be necessary for any of these purposes. He agrees with the Authority that [the publication of the FAI determination](#)² on 10 May 2024 goes some way to addressing the public interest in disclosure of the information (and was the proper forum for considering these matters).
36. The Commissioner also notes his finding in [Decision 030/2024](#)³ (at paragraph 40) that investigative materials should only be disclosed where the public interest considerations are overwhelming. In this case, he does not consider that they are.
37. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is significant enough to outweigh that in withholding the information in question. The Commissioner therefore concludes that the Authority was entitled to withhold the information under section 34(2)(b)(ii) of FOISA.
38. Given that the Commissioner has concluded that all of the information withheld by the Authority was correctly withheld in terms of section 34(2)(b)(ii) of FOISA, he is not required (and does not intend) to consider the other exemptions it applied to the request.

² https://www.scotcourts.gov.uk/media/kj4ieiep/2024fai014-fai-warren-george-fenty.pdf?_gl=1*x0rfj6*_up*MQ..*_ga*MjAyMDQ2NDxNS4xNzI5NTAzOTI2*_ga_P9F327KZJR*MTcyOTUwMzkyNi4xLjAuMTcyOTUwMzkyNi4wLjAuMA..

³ <https://www.foi.scot/decision-0302024>

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by correctly withholding information under section 34(2)(b)(ii) of FOISA, the Authority complied with Part 1.

However, by failing to correctly identify all the information in scope of the request, the Authority failed to comply with section 1(1) of FOISA.

Given that the Commissioner agrees that all of the information in scope of the request (including the interim report identified during his investigation) was properly withheld under section 34(2)(b)(ii) of FOISA, the Commissioner does not require the Authority to take any action in respect of this failure.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to 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.

Euan McCulloch
Head of Enforcement

9 December 2024