

# Decision Notice



Decision 004/2009 Mr John R Gowans and Falkirk Council

All information held regarding a fatal accident

Reference No: 200800619

Decision Date: 12 January 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr John R Gowans requested all the information Falkirk Council (the Council) held regarding the death of his son, Craig Gowans. The Council relied upon sections 34(1)(a), 34(1)(b), 34(2)(b) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) to withhold all of the requested information. Following a review, in which the Council upheld its previous decision, Mr Gowans remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Gowans' request for information in accordance with Part 1 of FOISA, by withholding the information under section 34(1)(a) of FOISA. He did not require the Council to take any action.

## 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) (Effect of exemptions); 34(1)(a) (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.

Health and Safety at Work etc. Act 1974

Health and Safety (Enforcing Authority) Regulations 1998

## Background

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### Background to the case

1. Craig Gowans, who's father is the applicant in this case, was an apprentice footballer at Falkirk Football Club. On 8 July 2005, Craig and other players at the club were pushing a piece of training equipment when it touched an overhead power cable. Craig was electrocuted and died instantly.



2. The Council was informed of the incident and carried out an investigation under the Health and Safety at Work etc Act 1974, which led to the subsequent submission of an interim report to the procurator fiscal.
3. Thereafter, the procurator fiscal instituted proceedings against Falkirk Football Club and the case was called in Falkirk Sheriff Court in November 2005. The Club was fined £4000 after pleading guilty to breaches of the Health and Safety at Work etc Act 1974.

### **Mr Gowans' information request**

4. On 25 July 2007, Mr Gowans wrote to the Council requesting all the information that the Council held regarding the death of his son.
5. The Council responded to this request on 9 January 2008. It provided details of the types of information that it held, but explained that it was withholding the information under the terms of exemptions contained in sections 34(1)(a), 34(1)(b), 34(2)(b) and 38(1)(b) of FOISA. The Council's response noted that it was based on consideration of whether the information should be disclosed to the world at large in terms of FOISA. The Council noted, however, that Mr Gowans had a valid interest in the information that others did not. The Council suggested that he contact the Council to discuss what information might be made available on a private basis.
6. On 29 January 2008, Mr Gowans emailed the Council requesting a review of its decision. He indicated that he strongly opposed the Council's decision and asked the Council to reconsider the original request.
7. The Council notified Mr Gowans of the outcome of its review on 10 April 2008, stating that it was relying on the previously cited exemptions to withhold all the information Mr Gowans had requested.
8. On 21 April 2008, Mr Gowans wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Gowans 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.

### **Investigation**

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10. The delays in the Council's responses to Mr Gowans' information request have been investigated and addressed already in the Commissioner's *Decision 055/2008 Mr X and Falkirk Council*. The investigation in this case was focussed solely on the question of whether the Council had acted in accordance with Part 1 of FOISA by withholding the information Mr Gowans had requested.



11. On 29 April 2008, the Council was notified in writing that an application had been received from Mr Gowans and it was asked to provide the Commissioner with any information withheld from Mr Gowans. The Council supplied the Commissioner's Office with copies of the documents concerned and the case was then allocated to an investigating officer.
12. The investigating officer subsequently contacted the Council on 30 May 2008, providing it with 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, the Council was asked to provide a general background to the case and justify its reliance on the provisions of FOISA it considered applicable to the information requested. The Council responded on 27 June 2008 with its comments on the case and responses to the specific questions raised.
13. The investigating officer also wrote to Mr Gowans on 30 May 2008 inviting him to provide submissions on why he considered that the public interest in disclosing the information outweighed that in withholding it, and why he had a legitimate interest in the information withheld regarding third parties such as witnesses. Mr Gowans responded with his comments on 20 June 2008.
14. During further discussions with the investigating officer, the Council identified certain documents that it no longer considered exempt under FOISA, and additionally claimed that the exemption in section 26(a) of FOISA applied to one of the documents that it was withholding.
15. The Council subsequently released eight of the documents that it had previously withheld to Mr Gowans. This decision will consequently consider only the remaining information that the Council continues to withhold.

## **Commissioner's analysis and findings**

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16. In coming to a decision on this matter, the Commissioner has considered all of the information withheld and the submissions that have been presented to him by both Mr Gowans and the Council and he is satisfied that no matter of relevance has been overlooked.
17. As noted above, the Commissioner has issued a decision (*Decision 055/2008 Mr X and Falkirk Council dated 17 April 2008*) on the technical failings of the Council with respect to the timescales in sections 10 and 21 of FOISA in its handling of Mr Gowans' information request. No further comments on these breaches will be made in this decision.
18. The Council has withheld a total of 141 documents that fall within the scope of Mr Gowans' information request. In so doing, the Council has sought primarily to rely upon exemptions contained in section 34 of FOISA, but it has also applied the exemption in section 38(1)(b) in relation to some of the documents. Section 26(a) has been applied to one document on the grounds that disclosure is prohibited under the Health and Safety at Work etc. Act 1974.



### **Consideration of section 34(1)(a)**

19. The Council has applied the exemptions in section 34(1)(a)(i) and (ii) of FOISA to all of the withheld documents on the basis that the information has been held for the purposes of an investigation which it has a duty to conduct to ascertain whether a person should be prosecuted for the alleged offence or prosecuted for an offence is guilty of it. The information withheld comprises documents pertaining to its investigation into Craig Gowans' death and includes its report to the procurator fiscal, witness statements, plans and photographs of the scene, technical reports and other background information relating to Falkirk Football Club and the incident.
20. The exemptions in section 34(1)(a) (set out in full in the Appendix) are class-based exemptions, which means that if information falls within the description set out in either part of section 34(1)(a), the Commissioner is obliged to accept it as exempt. There is no harm test; therefore 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 exemptions are, however, subject to the public interest test required by section 2(1)(b) of FOISA.
21. Having considered the contents of the documents withheld, the Commissioner is satisfied that these are held for the purposes of the investigation conducted by the Council following Craig Gowans' fatal accident to determine whether a person should be prosecuted for the alleged offence or, if prosecuted, is guilty of the offence.
22. The Commissioner is satisfied that the Council has a duty to conduct such an investigation under the terms of the Health and Safety at Work etc Act 1974 with respect to relevant work activities specified within the Health and Safety (Enforcing Authority) Regulations 1998 (the Regulations). Schedule 1 of the Regulations lists the practice or presentation of sporting activities one of those for which local authorities shall be the enforcing authority.
23. Having considered all the withheld documents and the Council's submissions concerning the nature of the investigation to which they relate, the Commissioner has found that the exemptions in section 34(1)(a)(i) and (ii) of FOISA have been correctly applied in this case.

### **Consideration of the public interest test**

24. As noted above, the exemptions in section 34(1)(a) are subject to the public interest test required by section 2(1)(b) of FOISA. This requires the Commissioner to carry out a balancing exercise in respect of those arguments in favour of disclosing the information and those arguments against disclosure. Unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemptions outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers that the information is exempt under one or more other exemptions in FOISA).



25. The "public interest" is not defined in FOISA but it 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 serves the interests of the public.

### **Arguments in favour of withholding the information on public interest grounds**

26. The Commissioner has noted that during the Parliamentary debates concerning this exemption, the then Justice Minister, Jim Wallace, argued 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 the criminal proceedings as the forum for bringing information into the public domain. He 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".
27. In its submissions the Council stated that the information was gathered for the specific purpose of reporting to the procurator fiscal and that disclosure would prejudice the proper conduct of such investigations.
28. The Council also submitted that statements are taken and reports of this type are written in the knowledge that the information may be released within the judicial process and that this judicial process includes checks and balances and an overarching objective of achieving justice. It stated that if the information were to be released under FOISA there would be no such checks and balances and there would be nothing to prevent the information being used out of context and if this was to happen there would be a real danger that all involved would become more guarded in what they say or write. In particular, the Council commented that witnesses may become less open or even evasive and this would be against the public interest.
29. The Council also noted in the comments from the Justice Minister (in the debate on the then Freedom of Information (Scotland) Bill on 28 February 2002) that the family of a victim will have a legitimate interest in the information and it may be entirely appropriate for that information to be made available in private. However the Council submitted that it would be contrary to the public interest to release such information into the public domain, and it referred to the Commissioner's *Decision 197/2007 Mr Alan Turner and the Chief Constable of Grampian Police* (which considered a request for access to witness statements concerning a fatal air crash) in support of its position.

### **Arguments in favour of disclosure of the information**

30. In his correspondence with the Commissioner's Office, Mr Gowans has made clear that he does not wish to have just private access to the information he has requested, but he wishes it to be disclosed into the public domain.



31. In many decisions to date, the Commissioner has pointed out that there is a general public interest in releasing information which may lead to an increase in accountability and scrutiny of public officials' actions. In general, the Commissioner considers that there are a number of reasons why disclosure of this kind of information could be in the public interest. There is a general public interest in information being accessible, because this enhances the scrutiny of decision making and investigative processes and thereby improves accountability.
32. Disclosure in this particular case, would enable the public to more fully understand the steps taken by the Council to investigate the accident, to understand the evidential basis for its conclusions, and to assess whether the investigation was properly carried out.
33. Mr Gowans has argued that the public interest in disclosure of the withheld information outweighs that in maintaining the exemptions. He has submitted that disclosure would enable sports teams and recreational organisations capacity to make better informed decisions regarding health and safety matters; and it would facilitate an improved scrutiny of these decisions and ensure a safer environment for youngsters to participate in sport.
34. He also noted that disclosure would illustrate the dangers facing sports teams using areas with electricity cables overhead. He commented that, according to Falkirk's procurator fiscal, the necessary steps had been taken at the site concerned to prevent such an outcome in the future. He disagreed with this assessment and asserted that there is still a significant danger to anyone participating in sport at this site. He indicated that disclosure would accurately inform the public of the dangers of using such areas and allow them to make informed decisions regarding their use.
35. My Gowans also explained that disclosure would allow scrutiny of the Council's ability to effectively fulfil its purpose as a public authority, and to allow assessment of the process followed in this case.
36. In his application to the Commissioner, he noted that the incident had received wide publicity; but he argued that it was only through access to this information that it would be possible to establish the truth of the events, rather than to attempt to piece these together from hearsay.

### **Conclusion on the public interest**

37. The Commissioner recognises that Mr Gowans has a strong personal interest in fully understanding the circumstances of the death of his son. However, in considering this case, the Commissioner must address the question of whether the information withheld by the Council should be made publicly available, and not just to those who have been affected by the events concerned. The Commissioner is aware that Council has offered to discuss with Mr Gowans the possibility of making information available on a private basis to him and his family, but Mr Gowans has (to this point) indicated that his preference is that the information is made available under the terms of FOISA.
38. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public".



39. The Commissioner agrees with Mr Gowans that the tragic circumstances of Craig Gowans' death mean that there is a real public interest in understanding how such an accident happened, in ensuring that this was properly investigated, and that any appropriate steps were taken to ensure that a similar accident does not happen in future. The Commissioner agrees that disclosure would contribute to a fuller understanding of the circumstances that led to Craig Gowans' death, and to public awareness of the dangers posed by overhead power cables in locations where sporting or any other activities are undertaken.
40. However, the Commissioner's view, set out clearly in *Decision 197/2007 Mr Alan Turner and the Chief Constable of Grampian Police*, is that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in avoiding prejudice to ongoing investigations; avoiding prejudice to any subsequent criminal or other proceedings, and the right of an accused to a fair trial; and protecting victims and witnesses, and thereby the ongoing willingness of members of the public to cooperate with the various investigatory processes making up the justice system, and the system for dealing with sudden deaths and fatal accidents.
41. In decision *146/2008 Alan and Joyce Beasley and Chief Constable of Strathclyde Police*, the Commissioner stated that there are generally compelling arguments for information exempt under section 34(1)(a) being considered only by the Procurator Fiscal in a dispassionate and objective setting, followed where appropriate by proper criminal proceedings. As the Commissioner has indicated in a number of previous decisions, it is generally impossible to guarantee the fair treatment of any of those who might be involved in the absence of the safeguards afforded by due legal process, and consequently in most cases it will not be appropriate to permit consideration of information of this kind outwith such an environment.
42. The weight of such interests has, in a number of cases led the Commissioner to reject the "routine" or "regular" disclosure of witness statements, or the details of relevant investigations and associated reports under FOISA.
43. The Commissioner has balanced the competing public interest arguments in this case, and drawn the conclusion that the public interest in maintaining the exemptions outweighs that in disclosure.
44. In reaching this decision, the Commissioner has noted that the proceedings that followed the Council's investigation led to Falkirk Football Club pleading guilty and being fined for breaches of the Health and Safety at Work etc. Act 1974. There was widespread publicity at the time of the accident and this prosecution which highlighted the dangers posed by overhead electrical cables.
45. Although the Commissioner appreciates Mr Gowans' desire to understand more fully the steps taken in the investigation of Craig Gowans' death, the Commissioner does not consider that the disclosure of the information withheld in this case would contribute significantly to the wider public interest or the general promotion of public health and safety.





46. The Commissioner finds all the circumstances of this particular case that the public interest in favour of allowing such investigations to proceed within the context of the formal legal process (and with the protections that affords to witnesses and other participants) and without disclosure into the public domain outweighs the public interest arguments that Mr Gowans has identified.
47. Accordingly, the Commissioner finds that the Council has correctly applied the exemption contained with section 34(1)(a) of FOISA to the documents under consideration.
48. Since the Commissioner has upheld the Council's reliance on section 34(1)(a) he will not go on to consider the reliance on the other exemptions cited by the Council.

## DECISION

The Commissioner finds that Falkirk Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information Mr Gowans had requested on the basis that it was under section the terms of 34(1)(a) of FOISA.

## Appeal

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Should either Mr Gowans or the Council 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**12 January 2009**



## 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 –

(a) the provision does not confer absolute exemption; and

(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-

(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;