



Scottish Information
Commissioner

**Decision 062/2007 - Mr Bryan Davies and the Chief
Constable of Strathclyde Police**

*Documents relating to the investigation of a complaint made by the
applicant*

Applicant: Mr Bryan Davies
Authority: The Chief Constable of Strathclyde Police
Case No: 200502486
Decision Date: 25 April 2007

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Decision 062/2007 – Mr Bryan Davies and the Chief Constable of Strathclyde Police

Request for investigation report relating to a complaint regarding a police investigation – report withheld on the basis of the exemptions in sections 35(1)(a) and 35(1)(b) (Law enforcement) of FOISA – upheld by Commissioner

Relevant Statutory Provisions

The Freedom of Information (Scotland) Act 2002: sections 1(1) and 1(3) (General entitlement); 2(1) (Effect of exemptions); 10(1) (Time for compliance) and 35(1)(a) and 35(1)(b) (Law enforcement)

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

Facts

Mr Davies wrote to the Chief Constable of Strathclyde Police (Strathclyde Police) to request a copy of an investigation report prepared in response to complaints made by Mr Davies concerning Strathclyde Police's handling of its investigation following the death of his mother, Anne Davies, in 1998.

Strathclyde Police refused this request, citing various exemptions contained within the Freedom of Information (Scotland) Act 2002 (FOISA).

Following investigation, the Commissioner upheld Strathclyde Police's handling of the request, on the grounds of sections 35(1)(a) and 35(1)(b) of FOISA. The Commissioner found that the report was substantially composed of information drawn from a separate and ongoing investigation into the death of Mrs Davies. The Commissioner considered that the release of the investigation report would have the effect of prejudicing substantially various aspects of Strathclyde Police's ongoing investigation and that the public interest lay in maintaining the exemptions.



Background

1. On 5 September 2000, Mr Davies submitted a complaint to Strathclyde Police. This complaint related to concerns held by Mr Davies regarding Strathclyde Police's handling of an investigation carried out following the death of his mother, Anne Davies, in 1998. Mr Davies' complaint subsequently led to an investigation being carried out by the force into the various issues raised.
2. On 2 June 2005, Mr Davies wrote to Strathclyde Police to request a copy of all documents it held relating to the enquiry carried out into the complaint made by Mr Davies.
3. Strathclyde Police issued an initial response on 24 June 2005. In this response, Strathclyde Police informed Mr Davies that his request was being dealt with as a subject access request under the Data Protection Act 1998, as opposed to under FOISA. Mr Davies responded to this correspondence to clarify that he was not seeking access to his own personal information. Mr Davies reiterated that, in making his request, he sought access only to the investigation report which was generated in relation to his complaint.
4. Strathclyde Police issued a subsequent response to Mr Davies' request on 12 July 2005. This response informed Mr Davies that both the investigation report and the witness statements he sought were considered to be exempt under the following FOISA exemptions:
 - Section 34(1)(a)(i) – Investigations by Scottish public authorities and proceedings arising out of such investigations
 - Section 35(1)(a) and (b) – Law enforcement
 - Section 38(1)(b) – Personal InformationIn this letter, Strathclyde Police also explained that the exemptions under sections 34 and 35 were subject to the public interest test, and set out that they considered the balance of the public interest to lie in favour of maintaining the exemptions.
5. Mr Davies requested that Strathclyde Police review its response on 18 July 2005. In doing so, Mr Davies asserted that, in submitting his request, he was not seeking access to copies of specific witness statements, and that his request was worded in such a way as to only seek access to the investigation report prepared by Strathclyde Police.



6. Strathclyde Police subsequently carried out a review and wrote to Mr Davies on 15 August 2005 to advise him of the outcome. In this response, Strathclyde Police stated that it intended to uphold its original decision not to release the report, but wished to modify of the exemptions applied. Strathclyde Police then went on to infer that it considered the information to be exempt under section 34(1)(a)(i) of FOISA, although a specific section 34 exemption was not cited. Strathclyde Police also stated that the disclosure of the information “*would, or would be likely to, prejudice substantially the ability of a public authority to investigate any potential situation where a crime may have been committed*”. While this statement does not directly relate to a particular FOISA exemption, it appears that Strathclyde Police’s intention was to uphold its application of the exemptions under section 35(1)(a) and 35(1)(b) of FOISA, which relate to information the disclosure of which would, or would be likely to, prejudice substantially the prevention or detection of crime and the apprehension and prosecution of offenders, respectively.
7. In addition, Strathclyde Police went on to state that it considered that the information was also exempt in terms of section 35(1)(g) of FOISA, read in conjunction with section 35(2)(b) (Law enforcement).
8. No reference was made in the letter from Strathclyde Police as to whether it still wished to rely on the exemption contained in section 38(1)(b).
9. Mr Davies remained dissatisfied with the response from the Police and submitted an application to me on 20 August 2005. The application was validated by establishing that he had made a request for information to a Scottish public authority (Strathclyde Police), and had applied to me only after asking that authority to review its response to his request.

The Investigation

10. My Office contacted Strathclyde Police for its submissions in relation to the case. Various submissions were subsequently requested and received from both Strathclyde Police and Mr Davies throughout the course of the investigation. All relevant submissions have been fully considered during the course of the investigation.
11. During the course of the investigation, Strathclyde Police clarified that it considered the investigation report to fall within the scope of the following FOISA exemptions:
 - Section 35(1)(a) and (b); section 35(1)(g) read in conjunction with section 35(2)(b) – Law enforcement



- Section 34(1)(a)(i) – Investigations by Scottish public authorities and proceedings arising out of such investigations

The Commissioner's Analysis and Findings

Section 35(1)(a) and 35(1)(b) – Law Enforcement

12. Sections 35(1)(a) and 35(1)(b) exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially either the prevention or detection of crime (section 35(1)(a)) or the apprehension or prosecution of offenders (section 35(1)(b)).
13. The investigation report in question was prepared in response to allegations made by Mr Davies concerning Strathclyde Police's handling of an investigation following the death of his mother. Mr Davies raised a number of allegations in his communications with Strathclyde Police. These ranged from allegations of procedural breaches by officers during particular stages of the investigation, to specific allegations of criminality on the part of named individuals involved in the case.
14. Following the conclusion of the investigation, Mr Davies was informed by both Strathclyde Police and the Regional Procurator Fiscal that no evidence had been found which supported the specific allegations of criminality. Strathclyde Police also informed Mr Davies that, in relation to the non-criminal allegations made, its officers had for the most part complied with police procedures in their actions. In relation to one of Mr Davies' accusations, Strathclyde Police acknowledged that the actions of the officers in question had been in breach of police procedures. However, Strathclyde Police concluded that this breach occurred solely as a result of a breakdown in communication between the officers concerned, and did not warrant formal action being taken.
15. Having considered in detail the content of Strathclyde Police's report, it is clear that the report was initiated to investigate Mr Davies' allegations in relation to Strathclyde Police's handling of the investigation into the death of his mother. As such, the report is primarily concerned with the investigation of those allegations, as opposed to the investigation into the death of Mrs Davies. However, it is also clear that the content of the report is intrinsically and extensively linked to Strathclyde Police's investigations in relation to the death of Anne Davies. When considering whether the content of the report is appropriate for release, therefore, I must also assess whether the release of information contained within the report would prejudice substantially Strathclyde Police's efforts to either detect crime, or to apprehend or prosecute offenders, in relation to the death of Anne Davies.



16. In its submissions to this Office, Strathclyde Police has confirmed that its investigations into Mrs Davies' death are ongoing, and that all information gathered in connection with the investigation is actively being reviewed, considered and progressed. Strathclyde Police also stated that an episode of the television programme 'Unsolved', which was broadcast in November 2006 and which focussed on the circumstances surrounding Mrs Davies' death, had led to several new lines of enquiry being pursued.
17. Strathclyde Police's role in reviewing and assessing the information held will naturally involve the assessment of whether Mrs Davies' death should be attributed to a criminal cause. In such circumstances, where a criminal cause is suspected, the role of Strathclyde Police will be to identify, apprehend and prosecute the offender(s). In this respect, a case can clearly be made for the information which is held by Strathclyde Police in relation to Mrs Davies' death to fall within the scope of both sections 35(1)(a) and 35(1)(b).
18. While the report relates to the investigation of Mr Davies' complaints, it is substantially composed of information relating to the police investigation into Mrs Davies' death. The report requested by Mr Davies describes in detail various aspects of Strathclyde Police's investigation. This includes detailed descriptions of the locus at which Mrs Davies' death occurred, the physical circumstances of the death, the injuries sustained, the activity at the locus following the discovery of Mrs Davies' body, and the actions of various officers in the early stages of the investigation. In addition, the report contains descriptions of information obtained from various witnesses interviewed by Strathclyde Police in connection with Mrs Davies' death.
19. It should be noted that the information described above is distributed throughout the document, and cannot be easily separated from that other information the report contains. In those sections of the report which specifically address the complaints raised by Mr Davies, for example, the investigating officer's view of the validity of those complaints is discussed and illustrated using information drawn directly from Strathclyde Police's investigations into Mrs Davies' death.
20. In this respect, I am of the view that the release of information contained within the report at this particular point in time would have the effect of prejudicing substantially Strathclyde Police's activity in relation to the investigation of Mrs Davies' death, in terms of both its ability to detect whether a crime has been committed, and to its ability to apprehend or prosecute offenders in relation to any potential crime. If the information contained within the report sought by Mr Davies were released into the public domain at this point in time, I have no doubt, on consideration of the report, that it would cause actual and significant harm to Strathclyde Police's ongoing investigation of that case.



21. As a result, I find that Strathclyde Police acted in accordance with FOISA in concluding that Mr Davies' request should be refused on the grounds of both sections 35(1)(a) and 35(1)(b) of FOISA.

Consideration of the public interest

22. Section 2(1)(b) of FOISA requires that a public interest test be applied in relation to information which is considered to be exempt under sections 35(1)(a) and 35(1)(b) of FOISA. In applying this test, information falling within the scope of the exemptions should only be withheld if the public interest in maintaining the exemption outweighs that in disclosing the information.
23. In considering the circumstances of this case, I acknowledge that there are public interest arguments to be made in favour of release of the information. These arguments exist in terms of both generally ensuring that police investigations are carried out appropriately and without prejudice, and in terms of ensuring that complaints which are made in relation to those investigations are also investigated in a similar manner. However, I am of the clear opinion that any such considerations are, in this case, significantly outweighed by the public interest in ensuring that the integrity and security of Strathclyde Police's ongoing investigations into the circumstances of Mrs Davies' death is maintained. It would clearly not be in the public interest for an investigation of this type to be prejudiced as a result of the release of information and evidence prior to the conclusion of the investigation (and the conclusion of any subsequent prosecution).
24. I am therefore firmly of the view that, having considered fully the circumstances of the case, the balance of the public interest lies strongly in favour of the non-disclosure of information contained within the report at this particular point in time.

Conclusion on exemptions

25. Given that I have upheld the use of the exemptions contained under sections 35(1)(a) and 35(1)(b) to the information requested by Mr Davies, I am not required to go on to consider whether the information should also be considered to be exempt in terms of sections 35(1)(g) or 34(1)(a)(i).

Strathclyde Police's handling of the request

26. I will conclude by briefly discussing two aspects of Strathclyde Police's handling of Mr Davies' request for information.



27. Section 10(1) of FOISA obliges Scottish public authorities to respond to information requests within 20 working days of receipt. As noted above, Strathclyde Police initially interpreted Mr Davies' request of 2 June 2005 to be a request for his own personal information. Following Mr Davies' clarification of the nature of his request, Strathclyde Police issued a response on 12 July 2005, some 27 working days following the receipt of his initial request.
28. In this respect, I find that Strathclyde Police's failure to respond to Mr Davies initial request within 20 working days of receipt was in breach of section 10(1) of FOISA.
29. It should be noted that, while I am aware that section 1(3) of FOISA sets out that authorities are not obliged to provide information in circumstances where further information is required to identify and locate the requested information, I do not consider that section 1(3) applies in relation to Mr Davies' request. This is because Strathclyde Police neither required further information in order to identify the information sought by Mr Davies (section 1(3)(a)), nor contacted Mr Davies to request further information (section 1(3)(b)).
30. Finally, I wish to briefly comment on Strathclyde Police's response to Mr Davies' request for review.
31. Sections 21(4)(a) and (b) of FOISA set out that, when undertaking a review, an authority may either confirm a decision complained of, with or without modifications, or substitute a different decision. In its response to Mr Davies, Strathclyde Police stated that it intended to uphold the original decision with modification of the exemptions applied. Strathclyde Police went on to make explicit reference to only one FOISA exemption in this response – the exemption contained under section 35(1)(g). Strathclyde Police did not, therefore, confirm the full range of exemptions which were considered to apply, despite having previously stated that it intended to modify those exemptions. While it is possible, for those with a reasonable working knowledge of the FOISA legislation, to deduce from commentary provided that Strathclyde Police intended to uphold the application of sections 34(1)(a)(i) and 35(1)(a) and (b), this was not made explicitly clear, and would not necessarily be apparent to a layman reviewing Strathclyde Police's correspondence.
32. Strathclyde Police should, therefore, note that it will be good practice for authorities to inform applicants of the specific FOISA exemptions which are considered to apply when responding to requests for review. This will particularly be the case in circumstances where initial decisions have been either modified or substituted in some way by the authority.



Decision

I find that the Chief Constable of Strathclyde Police (Strathclyde Police) acted in accordance with Part I of the Freedom of Information (Scotland) Act 2002 in finding that the information requested by Mr Davies was exempt under sections 35(1)(a) and 35(1)(b) of FOISA. I also find that Strathclyde Police were correct to uphold these exemptions after considering the public interest test required by section 2(1)(b) of FOISA.

I also find that Strathclyde Police breached section 10(1) of FOISA in failing to respond to Mr Davies initial request within the appropriate FOISA timescales.

I do not require Strathclyde Police to take any action in relation to this failure.

Appeal

Should either Mr Davies or Strathclyde Police wish to appeal the 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 notice.

Kevin Dunion
Scottish Information Commissioner
25 April 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.

- (3) If the authority -
 - (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

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