

Decision Notice



Decision 071/2013 Mr Russell Findlay and the Chief Constable of the
Police Service of Scotland

Unsolved Murders

Reference No: 201202319
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Scottish Information Commissioner

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Summary

On 14 September 2012, Mr Findlay asked the Chief Constable of Strathclyde Police (the Police) for specified details of all unsolved murders in the force area. The Police responded by stating that they were withholding the information under various exemptions: on review, they changed their position and informed Mr Findlay that they did not hold the information. Following an investigation, the Commissioner found that the Police had been wrong in stating that they did not hold the information. However, she accepted that the Police were entitled to withhold the information under exemptions in FOISA relating to criminal investigations.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 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.

As noted in the summary, Mr Findlay's information request was made to the Chief Constable of Strathclyde Police. However, the decision has been issued in the name of the Chief Constable of the Police Service of Scotland as he is the statutory successor to the Chief Constable of Strathclyde Police under the Police and Fire Reform (Scotland) Act 2012.

Background

1. On 14 September 2012, Mr Findlay wrote to the Police requesting specific details of all unsolved murders within the force area.
2. On 10 October 2012, the Police responded to Mr Findlay's request. They provided Mr Findlay with an explanation as to what was defined as an "unsolved homicide", with supporting information. They withheld the information he was seeking under sections 34(1)(a), 35(1)(a) and (b) and 39(1) of FOISA.
3. On 11 October 2012, Mr Findlay wrote to the Police requesting a review of their decision. He provided reasons why he did not agree that the information should be withheld.

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4. On 5 November 2012, the Police notified Mr Findlay of the outcome of their review. They substituted another decision for their previous one, now taking the view that they did not hold the information and giving Mr Findlay notice to that effect in terms of section 17 of FOISA.
5. On 7 November 2012, Mr Findlay wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Findlay made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. On 28 November 2012, the investigating officer notified the Police in writing that an application had been received from Mr Findlay. As required by section 49(3)(a) of FOISA, the investigating officer gave the Police an opportunity to provide comments on the application. The investigating officer asked the Police to justify their position (i.e. that they did not hold the information). If they now concluded that they did hold the information, they were asked to identify any provisions of FOISA they considered applicable to the information, with reasons why these provisions were considered applicable.
8. The Police responded on 14 January 2013. They accepted that they did hold the information requested by Mr Findlay, although they did not have a single source of such information. The Police provided submissions indicating that they were relying upon a number of exemptions in FOISA, and provided their reasoning for applying each of them.
9. The relevant submissions obtained from Mr Findlay and the Police will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Findlay and the Police. She is satisfied that no matter of relevance has been overlooked.



Section 17(1) – Information not held

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to certain restrictions which, by virtue of section 1(6), allow Scottish public authorities to withhold information or charge a fee for it. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
12. In their response to the requirement for review, the Police informed Mr Findlay that they did not hold information falling within the scope of his request. Given that they accepted during the investigation that they did hold the information, the Commissioner can only conclude that the Police were incorrect in responding to Mr Findlay's requests in terms of section 17(1) of FOISA. In this respect, they failed to deal with the request in accordance with section 1(1) of FOISA.

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

13. The Police withheld the information Mr Findlay sought under the exemption in section 34(1)(a) of FOISA, which provides that information is exempt from disclosure if it is held at any time for the purposes of 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.
14. 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. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
15. In this case, having considered the submissions presented by the Police, the Commissioner accepts that the withheld information has been held by them for the purposes of an investigation covered by section 34(1)(a) of FOISA. Consequently, she must conclude that the exemption applies.



Public Interest test

16. As noted above, the exemptions in section 34 are subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the relevant exemption. The Commissioner must then carry out a balancing exercise. Unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order the information to be disclosed (unless she considers that the information can be withheld under one or more other exemptions in FOISA).
17. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been 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."
18. The Commissioner is aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on 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 criminal proceedings as the appropriate forum for bringing information of this kind 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."

Submissions from Mr Findlay

19. Mr Findlay stated that he believed there was an overwhelming public interest in the information being released. The public had a fundamental right to know about the nature and extent of serious unsolved crimes, not least the crime of murder. He commented that any unsolved murder would have been the subject of contemporaneous and, possibly subsequent, publicity. It was therefore already in the public domain, albeit not in the collated format he had requested.



20. Mr Findlay further argued that there was no evidence that releasing the information would be detrimental to the investigative functions covered by the exemption. He submitted that any murderer who had not been brought to justice would already be aware of this fact. He did not believe the Police had offered any evidence that an investigation into such a person could be put at risk by releasing the information. He further commented that it would be potentially beneficial to the police for this information to be released, as it might yield new information and/or witnesses.
21. Mr Findlay continued that the public were entitled to know how many murders remained unsolved, and to evaluate police effectiveness.

Submission from the Police

22. The Police recognised a public interest in knowing who the victims of the murders were. It also recognised that disclosure would enhance accountability regarding how the Force had spent public funds, through public debate regarding such incidents.
23. Noting that enquiries were continuing in respect of these cases, the Police submitted that disclosure of the information would prejudice both ongoing investigations and court proceedings. They explained that the investigation of such cases could prove to be more challenging as time passed. Therefore, it was essential that information was disclosed in the correct manner, to ensure that neither the investigations nor the potential for bringing any new proceedings were put at risk. This was particularly the case in respect of individuals who considered themselves beyond detection. They noted that limited information regarding any homicide might be disclosed as part of an investigative strategy, any decision to do so being taken by the Senior Investigating Officer in consultation with COPFS.
24. The Police submitted that the information requested would indicate the scale of current enquiries and allow the perpetrator(s) to gauge whether or not they were likely to be detected. This would, in turn, allow them to take appropriate measures to avoid detection and make it more difficult for the investigating officers to complete their enquiries.
25. The Police further submitted that to disclose the specific details requested would deter the public from providing information to the police to assist in the detection and prosecution of offenders. They claimed it would also jeopardise the effectiveness of intelligence gathering and public confidence in their information being treated confidentially and sensitively.
26. The Police also noted that the deceased persons would most likely have family and friends still living. The release of the names of deceased person might cause unnecessary and renewed focus on and distress to the family and friends of the deceased, who had been (and still were) grieving for loved ones.



27. The Police explained that, for every current investigation, they carried out an impact assessment in relation to threats to the victim's family, suspects and their families, and general witnesses and members of the community who might be subject of intimidation. Significant intimidation, or cases of retaliation, was an element in many investigations. It was not possible to assess how many of these were prevented through the impact assessment and measures arising from it, but the Police considered it likely that in its absence the fear of crime and potential for threats, violence and reprisals (towards victims' families, suspects or witnesses) would increase substantially. They submitted that they would be unable to manage the potential risk to persons involved in these 500 plus cases, as the threat could come from anywhere (whether a member of an organised crime group or a grieving relative who had never previously come to their attention). They provided examples of such issues arising in practice, and argued that this approach should be give every chance to succeed.
28. On balance, the Police concluded that the public interest lay in maintaining the exemption and withholding the information.

The Commissioner's view

29. In many decisions to date, the Commissioner has accepted a general public interest in releasing information which may lead to an increase in accountability and scrutiny of public officials' actions. This could be said to be the case in relation to this information.
30. The Commissioner also recognises that Mr Findlay has a strong interest (as a journalist) in the disclosure of the information requested, and that the information would be "of interest to the public". As stated above, however, the public interest should be considered as "something which is of serious concern and benefit to the public" and "in the interest of the public".
31. As mentioned in previous decisions, the Commissioner accepts that the inclusion of section 34 in FOISA reflected 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 ensuring that the various investigatory processes making up the criminal justice system are not hampered in any way.
32. The Commissioner does not accept that the Police have provided adequate submissions to justify their claim that disclosure of the information would deter the public from providing information to the police to assist in the detection and prosecution of offenders, or jeopardise the effectiveness of intelligence gathering.
33. However, taking account of all other submissions provided by the Police, the Commissioner is satisfied that there is a genuine risk that disclosure of the information requested by Mr Findlay, would compromise the investigatory processes required to pursue these unsolved murders, and the associated safeguards for victims' families, witnesses and suspects.

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34. Having considered carefully 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 Police were correct in their application of section 34(1)(a) of FOISA to withhold the requested information. Having reached this conclusion, she is not required to consider the application of the other exemptions identified by the Police.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police wrongly provided Mr Findlay with a notice in terms of section 17(1) of FOISA, and thereby failed to deal with his request in accordance with Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner also finds that the Chief Constable of Strathclyde Police was entitled to withhold the information requested by Mr Findlay under section 34(1)(a) of FOISA. In the circumstances, she does not require the Chief Constable of the Police Service of Scotland to take any action.

Appeal

Should either Mr Findlay or the Chief Constable of the Police Service of Scotland 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.

Margaret Keyse
Head of Enforcement
19 April 2013



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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),



if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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;

...