

Decision Notice

Decision 071/2018: Mr Douglas Walker and the Chief Constable of the Police Service of Scotland

Report into an unexplained death

Reference No: 201800001

Decision Date: 30 May 2018



Scottish Information
Commissioner

Summary

Police Scotland were asked for the Senior Investigating Officer's case review report or equivalent documentation regarding an unexplained death.

Police Scotland withheld the requested information under a number of exemptions in FOISA.

The Commissioner investigated and found that the information was correctly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 35(1)(a) and (b) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 October 2017, Mr Walker made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked for the Senior Investigating Officer's (SIO) case review report "or equivalent documentation which outlines the reasons there were no suspicious circumstances as per the original investigation" [i.e. the investigation into the unexplained death of a named individual].
2. Police Scotland responded on 9 November 2017. They refused to disclose the requested information, as they considered it exempt under a number of exemptions: section 34(1)(b) of FOISA (Investigations by Scottish public authorities), section 35(1)(a) and (b) of FOISA (Law enforcement) and section 39(1) of FOISA (Health, safety and the environment).
3. On 10 November 2017, Mr Walker emailed Police Scotland requesting a review of their decision on the basis that he did not consider that the exemptions applied. He made a number of points to Police Scotland, some of which related to comments about the death as reported in the media. He commented that the circumstances of the death seem highly suspicious, and that it was in the public interest to disprove allegations of a cover-up, which would ensure accountability where appropriate.
4. Police Scotland notified Mr Walker of the outcome of their review on 11 December 2017. Police Scotland upheld their previous response. They acknowledged a public interest in the disclosure of the information requested, but indicated that, as the case had not yet come to a conclusion, they had to ensure there was no detriment to any ongoing investigations or future investigations or the potential for proceedings to be brought against any individual are put at risk.
5. On 2 January 2018, Mr Walker applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Walker was dissatisfied with "the lack of transparency in a case with a massive public interest" which he believed "fuels allegations of a cover-up and also prevents accountability".

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Walker made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to him for a decision.
7. On 1 February 2018, Police Scotland were notified in writing that Mr Walker had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Walker. Police Scotland 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. Police Scotland were invited to comment on this application and answer specific questions. These questions focussed on the exemptions Police Scotland had relied upon in their response to Mr Walker. Police Scotland responded on 29 March 2018.
9. During the investigation, Police Scotland were asked to provide further explanations relating to the information falling within scope of the request.
10. Mr Walker was also invited to provide any further comments on why he considered it was in the public interest for the requested information to be disclosed.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Walker and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Information falling in scope of the request

12. Mr Walker asked for the SIO's case review report or equivalent documentation.
13. Police Scotland provided the Commissioner with a range of documents which they believed to be information covered by this request. They did not identify any single document as the SIO report or its equivalent. Police Scotland explained that all the documents provided to the Commissioner relate to the SIO's findings.
14. Having considered the withheld documents, the Commissioner is satisfied that the majority fall within the scope of Mr Walker's request for information equivalent to an SIO's report about the unexplained death. However, the Commissioner considers that some of the information falls outwith the scope of the request.
15. For the purposes of the investigation and the decision, the Commissioner is satisfied that he has been provided with all information captured by the terms of Mr Walker's request.

Section 35(1)(a) and (b) of FOISA – Law enforcement

16. Section 35(1)(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. As the Commissioner's guidance on this exemption¹ highlights, the term "prevention or detection of crime" is wide ranging,

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.

17. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance also states, there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime". He considers that section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as investigative processes and use of police intelligence).
18. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance, which would be likely, at least, to follow disclosure, and more than simply a remote possibility.

Police Scotland's submissions

19. Police Scotland submitted that the unexplained death could be reinvestigated, and that disclosure of details about the investigation would potentially have an adverse impact on these investigations and the apprehension or prosecution of offenders. Police Scotland gave the following reasons:
 - Compromised evidence – if a suspect learns that her/his case may be subject of a reinvestigation, they may dispose of evidence which would be crucial to an investigation. Police Scotland provided an example of a previous murder investigation, whereby a suspect's and his parents' dwellings were searched under warrant in an attempt to recover property returned to him after his acquittal. Police Scotland explained that it was anticipated that, if this property was recovered, it might have yielded forensic evidence with advancement in techniques.
 - Police Scotland contended that cases could be compromised by the media giving advance warning to suspects that their case could be revisited, resulting in them ensuring that nothing of evidential value would be found during a search.
 - Police Scotland considered that disclosing information about an unexplained death will only bring the memories of the deceased's death back to the forefront of families' minds, increasing their stress, depression, grief and potential anger towards those they perceive as being responsible. Police Scotland submitted that many families have in fact asked for no further publicity and gave an example of a case where the press publicised a case, even though the family had asked the media to show compassion and restraint.
20. Police Scotland stated that, regardless of the passage of time, the death of the named person (in the request under consideration) remains an unexplained death. When considering disclosure of information, they must ensure that this does not put at risk any future investigations or the potential for any new proceedings to be brought against an individual, particularly one who considers themselves beyond detection.
21. They considered that disclosure of information which would show which cases (or victims) were subject to being investigated or re-investigated at any or a certain point in time would have the effect of prejudicing the ability of the police to identify the perpetrators and bring

them to justice. In effect, disclosure of the information would make perpetrators aware of new activity on a case and allow them to take steps to evade detection.

Mr Walker's submissions

22. In his request for review, Mr Walker noted that the Scottish Conservative shadow justice secretary Liam Kerr said: "The circumstances of this death seem highly suspicious, so it's startling that the police have taken a decision that there has been no foul play...".
23. Mr Walker noted that Police Scotland contended that disclosure could compromise a future investigation and that new evidence may come to light. He commented that the investigation is not actively being worked on, and referred to evidence which he believed had been dismissed without explanation.
24. Mr Walker commented that Police Scotland's logic would mean that all "unexplained" cases are not open to scrutiny, which simply not the case.
25. Mr Walker considered that, on balance, the public interest in transparency far outweighs the possible prejudice of future investigations.

The Commissioner's conclusions

26. Having considered the submissions from both Mr Walker and Police Scotland, the Commissioner is satisfied that any information held by Police Scotland and falling within the scope of Mr Walker's request would be held for purposes relating to the prevention or detection of crime and/or the apprehension or prosecution of offenders.
27. The Commissioner notes the comments made by Mr Walker and has seen the newspaper articles about the unexplained death. He is aware that detailed information about the investigation of the unexplained death into the named individual has been reported in the media. This does not necessarily mean that related or similar information should be disclosed in response to an information request. Information contained in a police report carries a different status to information in a media report.
28. As the Commissioner has noted in previous decisions, each application for a decision must be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
29. The Commissioner is satisfied, on the basis of Police Scotland's submissions, that disclosure of any of the withheld information would, or would be likely to, prejudice substantially the detection of crime and the apprehension of offenders in relation to the unexplained death. The Commissioner accepts that damage could be caused to any future investigation of the death, specifically in relation to the detection of crime and the apprehension or prosecution of offenders. He therefore accepts that the exemptions in section 35(1)(a) and (b) of FOISA apply.

The public interest test

30. As the Commissioner has found that the exemptions in section 35(1)(a) and (b) were correctly applied to the withheld information, he is required to consider the public interest test in section 2(1)(b) of FOISA. He must consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemptions in section 35(1)(a) and (b) of FOISA.

Police Scotland's submissions

31. Police Scotland's view that disclosure of the requested information would impact on the process of investigating this case and other similar cases has already been stated and considered. When making submissions on the public interest test, Police Scotland referred to these arguments to support their view that it would not be in the public interest for the information to be disclosed.
32. Police Scotland considered that it is in the public interest that the approach to the management of unexplained death cases is given every opportunity to succeed.
33. Police Scotland stated that accountability for public funds and public awareness might favour disclosure in the public interest but took the view that, in this case, the public interest is better served through retention of the information. They argued that it cannot be in the greater public interest to compromise the efficiency of the police service and public safety.
34. Police Scotland considered that it was in the public interest to withhold the requested information, regardless of the passage of time.

Mr Walker's submissions

35. Mr Walker submitted that disclosure of the withheld information was very much in the public interest. He stated that there is a clear perception that the police are "sweeping the case under the carpet". He argued that the public needs to be assured that this is not the case, which could only be done by disclosing the requested information.
36. Mr Walker noted that Police Scotland have been dogged by various controversies recently, including "the M9 scandal", which has led to the public's faith and trust in Police Scotland being "at a severe low". He considered that disclosure of the information in this case would be in the public interest to disprove allegations of a cover-up, and to ensure accountability where appropriate.

The Commissioner's conclusions

37. The Commissioner acknowledges the general public interest in transparency and accountability, in relation to the actions and decisions taken by Scottish public authorities. He also acknowledges that disclosure of the withheld information would provide the public with an improved understanding of the police investigation and view of this case.
38. On the other hand, the Commissioner has already acknowledged that disclosure of the information would, or would be likely to, lead to substantial prejudice for the purposes of section 35(1)(a) and (b) of FOISA. This would clearly not be in the public interest: the Commissioner accepts Police Scotland's contention that there is a strong public interest in not disclosing the withheld information to ensure that any future investigation of the case is not compromised.
39. Having balanced the public interest for and against disclosure, the Commissioner has concluded that the arguments against disclosure should prevail in this particular case. He is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemptions in section 35(1)(a) and (b) outweighs that in disclosure of the information under consideration.
40. The Commissioner therefore finds that Police Scotland were entitled to withhold the information under the exemptions in section 35(1)(a) and (b) of FOISA.

41. As the Commissioner accepts that this information is properly withheld in terms of section 35(1)(a) and (b) of FOISA, he is not required to consider Police Scotland's application of the exemptions in sections 34(1) and 39(1).

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Walker.

Appeal

Should either Mr Walker or Police Scotland 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.

Margaret Keyse
Head of Enforcement

30 May 2018

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 –

...

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

...

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;

...

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