



Scottish Information
Commissioner

**Decision 104/2007 Ms Catherine Cameron and the
Chief Constable of Strathclyde Police**

*Confirmation of the identity of an individual who was reported to the
Procurator Fiscal's Office in contemplation of criminal proceedings.*

**Applicant: Ms Catherine Cameron
Authority: The Chief Constable of Strathclyde Police
Case No: 200601268
Decision Date: 5 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 104/2007 Ms Catherine Cameron and the Chief Constable of Strathclyde Police

Confirmation of the identity of an individual who was reported to the Procurator Fiscal's Office in contemplation of criminal proceedings – Commissioner upheld decision not to release information

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): section 1(1) (General entitlement); 2(1) (Effect of exemptions) and 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

Data Protection Act 1998 (DPA): section 35(2) (Disclosures required by law or made in connection with legal proceedings etc.)

Administration of Justice (Scotland) Act 1972 (the 1972 Act): section 1(1A) (Extended powers of courts to order inspection of documents and other property, etc.)

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

Facts

On behalf of their client, Catherine Cameron, Digby Brown, Solicitors asked the Chief Constable of Strathclyde Police (Strathclyde Police) for information as to the identity of an individual who had been reported by the Police to the Procurator Fiscal with respect to a particular incident. Strathclyde Police refused to release this information, but without referring to any of the exemptions in FOISA. Ms Cameron was not satisfied with this response and asked Strathclyde Police to review their decision. Strathclyde Police upheld their decision not to release the information on review, but this time made it clear that they were relying on the exemptions in sections 34(1)(a)(i) and 38(1)(b) of FOISA for doing so. Ms Cameron remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Ms Cameron's request for information in accordance with Part 1 of FOISA.



Background

1. On 28 March 2006, Digby Brown, Solicitors wrote to Strathclyde Police on behalf of their client, Ms Cameron, to request the identity of the individual who was reported to the Procurator Fiscal's Office in contemplation of criminal proceedings with respect to a particular incident.
2. Strathclyde Police responded on 11 May 2006 and indicated that they were not willing to disclose this information. They did not cite any exemption(s) under FOISA for withholding the information, but instead indicated that Digby Brown could apply for a Court Order under section 1 of the 1972 Act to obtain the information on behalf of Ms Cameron.
3. On 13 June 2006, Digby Brown wrote to Strathclyde Police, requesting a review of Strathclyde Police's decision. In doing so, Digby Brown highlighted the fact that they had made a request for information under FOISA. Digby Brown also stated that if Strathclyde Police were of the view that the information that they had requested on behalf of their client, Ms Cameron, was personal information, then they would suggest that it could be released in terms of section 35(2) of the DPA.
4. Strathclyde Police notified Digby Brown of the outcome of its review on 11 July 2006. They upheld their original decision to withhold the information, but this time indicated that they had relied on the exemptions in sections 34(1)(a)(i) and 38(1)(b) of FOISA in doing so. At the same time, Strathclyde Police refused to release the information under section 35(2) of the DPA.
5. On 4 September 2006, Digby Brown wrote to my Office on behalf of Ms Cameron, stating that she was dissatisfied with the outcome of Strathclyde Police's review and applying for a decision in terms of section 47(1) of FOISA. The application was validated by establishing that Digby Brown, Solicitors, acting on behalf of Ms Cameron, had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
6. On 7 September 2006, Strathclyde Police were notified in writing that an application had been received and were asked to provide my office with specified items of information required for the purposes of the investigation. Strathclyde Police responded with the information requested and the case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted Strathclyde Police, asking it to provide comments on the application and to respond to specific questions on the application.



8. A full response was received from Strathclyde Police to the specific questions that had been asked by the investigation officer.

The Investigation

9. This investigation relates to a request for information as to the identity of the individual who was reported to the Procurator Fiscal's Office in contemplation of criminal proceedings regarding a particular incident.

Submissions from Strathclyde Police

10. In their submissions to my Office, Strathclyde Police indicated that they were relying on two exemptions under FOISA for withholding the name of the individual from Ms Cameron. These exemptions are:
 - Section 34 (1)(a)(i) – Investigations by Scottish public authorities and proceedings arising out of such investigations.
 - Section 38(1)(b) – Personal information.
11. Section 49 of FOISA gives me the power to effect settlement of applications and so, during the course of the investigation, the investigating officer contacted Strathclyde Police to ask whether they would reconsider disclosing the information under section 35(2) of the DPA, if Ms Cameron were to withdraw her application to me.
12. Strathclyde Police responded that the DPA gave them a discretion to release the information and that they were not required to release the information. Moreover, they were not willing to release the information, which is why they had suggested to Digby Brown that a court order under the 1972 Act be sought instead. I understand that since the application was made to me, a court order has been granted under the 1972 Act, providing Ms Cameron with the details she was looking for.



Submissions from Digby Brown Solicitors on behalf of Ms Cameron

13. In their submissions, Digby Brown contend that the details of the individual involved in the incident in question are not personal data and as a result are not exempt in terms of section 38 of FOISA, but that if it was the Commissioner's view that the individuals information did constitute personal data, then the information should be released under section 35(2) of the DPA.
14. Digby Brown also provided me with arguments as to why, in their view, it would be in the public interest for the requested information to be released.

The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Digby Brown and Strathclyde Police and am satisfied that no matter of relevance has been overlooked.
16. As has been explained already, Strathclyde Police sought to rely on exemptions under sections 34(1)(a)(i) and 38(1)(b) of FOISA for withholding the identity of the individual from Ms Cameron. I have only found it necessary to consider one of the exemptions relied upon by Strathclyde Police (section 34(1)(a)(i) of FOISA) in this decision notice. I trust that the reason for this will become apparent later.

Section 34(1)

17. Section 34(1)(a)(i) exempts information if it has at any time been held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence. The exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
18. Strathclyde Police have advised that the information which Ms Cameron is seeking was gathered as part of a criminal investigation in order to ascertain whether that person should be prosecuted for an offence, and that the matter was then reported to the Procurator Fiscal.



19. I need to be satisfied on three separate counts in considering this exemption: that the information was gathered for the purpose of an investigation; that the investigation was one which Strathclyde Police has a duty to conduct and that the purpose of this investigation was to ascertain whether someone should be prosecuted for an offence.
20. The information provided to me by Strathclyde Police has satisfied me on all three counts.

Public interest test

21. As I am satisfied that the information is exempt in terms of section 34(1)(a)(i) of FOISA, I am now required to consider the application of the public interest test in section 2(1)(b) of FOISA. In other words, although I have found that the information is exempt under section 34(1)(a)(i) of FOISA, I must still order release of the information unless I find that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
22. The public interest is not defined in FOISA, but it has been variously described as being 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; that is, that it serves the interest of the public.
23. In applying the public interest test, Strathclyde Police looked at the public interest in disclosing the information and the public interest in maintaining the exemption. It then sought to balance this to determine whether the public interest in maintaining the exemption outweighed that in disclosing the information. The arguments raised by Strathclyde Police are detailed below. In looking at these arguments, it must be remembered that the effect of FOISA is to release information into the public domain and not just to a specified individual for limited use.

Argument in favour of disclosure

- Disclosure of the information requested would enable Ms Cameron to seek civil restitution.

Arguments in favour of non disclosure

- The very nature of the criminal investigation and the fact that the matter was reported to the Procurator Fiscal gives rise to a public interest test favouring non-disclosure of the information requested.
- The applicability of the exemptions quoted give rise to a public interest favouring non-disclosure of the information requested.



- In this case the person charged was the subject of a police investigation and the matter reported to the Procurator Fiscal. To disclose this could impact adversely upon that person's personal life.

Having considered the argument in favour of disclosure and those in favour of non disclosure, Strathclyde Police were of the view that on balance the public interest in disclosure of the information requested was outweighed by the public interest in maintaining the exemption.

24. In considering the application of the public interest test in section 2(1)(b) of FOISA, I have taken account of the public interest test arguments that have been advanced by Strathclyde Police. I have also taken account of the arguments that were submitted by Digby Brown on behalf of Ms Cameron.
25. In examining the information which has been withheld, together with the submissions from Strathclyde Police and Digby Brown, I understand that Digby Brown are of the view that there is a public interest in allowing this type of information to be made available to members of the public who have suffered loss, injury or damage as a result of negligence of a third party, to enable them to pursue a civil action against that the third party. Digby Brown have also argued that the fact that section 35 of the DPA allows personal information to be disclosed for court proceedings recognises that there is a need for information to be released to pursue a civil claim or to enforce a legal right. Consequently, they have asserted that a similar line of reasoning must be used when considering the public interest test under FOISA.
26. I would note here the difference between the manner in which information is disclosed under section 35 of the DPA and under FOISA. Under the DPA, the release of information is, to a certain extent, limited. It is true that section 35 of the DPA would permit a data controller (in this case, Strathclyde Police), to release the information which Ms Cameron has sought. However, the information can only be released for specific purposes (in this case, for the purpose of, or in connection with, legal proceedings). The use to which the personal information can be put is therefore limited. Were the information to be released under FOISA, there would be no such limitations on the use of the information. I must therefore consider whether it is appropriate for the information relating to the identity of the individual to be released generally into the public domain, as opposed to released only to an individual who has been directly involved in, or affected by, the circumstances which led to the collection of the information.
27. As a result, the fact that Ms Cameron clearly has an interest in obtaining the information, as it will assist her in pursuing a civil claim can have no real bearing on the consideration of whether the information should be released to her under FOISA.



28. I consider that there is a general public interest in ensuring that investigations into criminal offences are carried out thoroughly by the Police and that all relevant matters are taken into account. However, I am not of the view that disclosure of the requested information in this case would satisfy this public interest.
29. I accept the argument that has been raised by Strathclyde Police in relation to the fact that disclosure of the identity of this individual could have an adverse impact on the individual's personal life. A report was submitted to the Procurator Fiscal, and while it is clear that no further action was taken by the Procurator Fiscal, the very fact that a report was made could, I believe, have an adverse impact on the individual's personal life. I cannot see how the public interest would be served by ordering the release of the name of the individual in question. In considering where the public interest lies, I consider I should also take account of the fact that information about criminal proceedings or the commission or alleged commission of an offence is afforded additional protection by our society through, for example, the DPA.
30. It is also clear that there is a well established mechanism within the Scottish legal system which allows for an application to be made to the courts for such information to be released. This mechanism is available under section 1(1A) of the 1972 Act, and it is at the discretion of the court whether this information can be released to the applicant. The court is given a wide discretion to order disclosure of information as to the identity of persons who appear to the court to be persons who might be witnesses in existing civil proceedings or in civil proceedings which are likely to be brought. In exercising that discretion the court will have regard to the particular circumstances of each individual case and it will be for the party seeking the order to show why an order should be made. As noted above, since the application was made to me, a court order has been granted under section 1(1A) of the 1972 Act, providing Ms Cameron with the information she required in order to raise civil proceedings against the individual in question.
31. I therefore take the view that the appropriate route to use to access the requested information is the 1972 Act. I consider that it is in the public interest and the interest of maintaining an effective and efficient justice system that this route should be used.
32. On balance, therefore, while I find that Ms Cameron clearly has an interest in accessing the information, I am not satisfied that the wider public interest benefits in release of this information are strong. Therefore I find that the public interest in disclosure of the identity of the individual is outweighed by the public interest in maintaining the exemption in section 34(1)(a)(i) of FOISA.



33. As I am satisfied that the information which has been requested is exempt under section 34(1)(a)(i) of FOISA and that this exemption should be maintained, I shall not consider the application of the exemption in section 38(1)(b) to this information.

Decision

I find that Strathclyde Police acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Digby Brown, Solicitors on behalf of their client Ms Cameron.

Appeal

Should either Ms Cameron or Strathclyde Police 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
5 July 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.

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

Data Protection Act 1998

35 Disclosures required by law or made in connection with legal proceedings etc.

- (2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –
 - (a) for the purposes of, or in connection with, any legal proceedings (including prospective legal proceedings), or



- (b) for the purpose of obtaining legal advice,
or is otherwise necessary for the purposes of establishing, exercising
or defending legal rights.

Administration of Justice (Scotland) Act 1972

1 Extended powers of courts to order inspection of documents and other property, etc.

- (1A) Without prejudice to the existing powers of the Court of Session and of the sheriff court, those courts shall have power, subject to subsection (4) of this section, to order any person to disclose such information as he has as to the identity of any persons who appear to the court to be persons who –
 - (a) might be witnesses in any existing civil proceedings before that court or in civil proceedings which are likely to be brought; or
 - (b) might be defenders in any civil proceedings which appear to the court to be likely to be brought.