

Decision Notice



Decision 107/2008 Mr Frank Birch and the Chief Constable of Tayside Police

Refusal to reveal whether information exists or is held

Reference No: 200800084

Decision Date: 4 September 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Birch requested from the Chief Constable of Tayside Police (Tayside Police) verification of whether Tayside Police had carried out investigations into a named company (Company A). Tayside Police responded by refusing to reveal whether the information requested by Mr Birch existed or was held by them, in terms of section 18 of FOISA. Following a review, Mr Birch remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Tayside Police had dealt with Mr Birch's request for information in accordance with Part 1 of FOISA. He did not require Tayside Police to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 18 (Further provisions as respects response to request); 34(1)(a) and (b) (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.

Background

1. On 1 December 2007, Mr Birch wrote to Tayside Police seeking verification of whether they had carried out investigations into Company A.
2. On 18 December 2007, Tayside Police wrote to Mr Birch in response to his request for information. Tayside Police issued Mr Birch with a notice under section 18 of FOISA. Section 18 gives Scottish public authorities the right to refuse to reveal whether information exists or is held by them, where they consider that to do so would be contrary to the public interest and, if it did exist and was held by the authority, the information could be withheld under any of a number of specified exemptions. Tayside Police stated to Mr Birch that exemptions in sections 34 and 35 of FOISA would apply if the requested information did exist and was held by them.
3. On 21 December 2007, Mr Birch wrote to Tayside Police requesting a review of their decision.



4. Tayside Police notified Mr Birch of the outcome of their review on 27 December 2007. They upheld their initial decision and as such continued to rely on section 18 of FOISA.
5. On 15 January 2008 Mr Birch wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of Tayside 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 Birch 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

7. Tayside Police were notified that an application had been received from Mr Birch and the case was allocated to an investigating officer.
8. The investigating officer subsequently contacted Tayside Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions relating to it. Tayside Police subsequently responded in full.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the submissions that have been presented to him and he is satisfied that no matter of relevance has been overlooked.
10. Section 18 of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:
 - (a) a request has been made to the authority for information which may or may not be held by it;
 - (b) if the information were held by the authority (and it need not be), the information could be withheld under any of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and
 - (c) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.

Decision 107/2008
Mr Frank Birch
and the Chief Constable of Tayside Police



11. Where a public authority has chosen to rely on section 18, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the public authority. This means that he is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information existed or was held by the public authority.
12. Tayside Police provided details of the reasoning behind its consideration of the public interest. On the basis of the arguments put forward by Tayside Police, the Commissioner is satisfied in the circumstances that it would be contrary to the public interest for Tayside Police to reveal whether the information requested by Mr Birch exists or is held by them.
13. The Commissioner then went on to consider the exemptions put forward by Tayside Police in conjunction with their use of section 18. Tayside Police submitted that if the information sought by Mr Birch existed and they did hold it, it could be withheld under sections 34(1)(a) and (b), and 35(1)(a), (b) and (g) of FOISA (the last read in conjunction with section 35(2)(a)).
14. In relation to the exemptions in 34(1)(a) and (b), Tayside Police argued that should the requested information exist and be held by them it would be held for the purposes of an investigation they had a duty to conduct to ascertain whether a person should be prosecuted for an offence, which in turn might lead to a decision by them to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted. The Commissioner accepts these arguments, which bring the information requested clearly within the definition of information exempt under sections 34(1)(a)(i) and (b) (the terms of which are set out in full in the Appendix to this decision).
15. These exemptions are subject to the public interest test and therefore the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and was held by Tayside Police) would be outweighed by that in maintaining the exemptions under sections 34(1)(a)(i) and (b).
16. Tayside Police considered the public interest in both disclosure and maintaining the exemptions, before concluding that on balance the public interest favoured maintenance of the exemption. While acknowledging that disclosure of any information held might assist Mr Birch in pursuing legal remedies, allow members of the public to make more informed decisions about a particular organisation and encourage the provision to the police of further information about that organisation, they took the view that it might also prejudice the investigation of crime and assist offenders, inhibit the provision of relevant information and compromise third party interests. They concluded that the need to ensure the effective and efficient conduct of the police service and avoid compromise to current and future investigations clearly indicated that the public interest fell in favour of refusing to release any information which did exist and was held.

Decision 107/2008
Mr Frank Birch
and the Chief Constable of Tayside Police



17. Having considered the arguments presented by Tayside Police, the Commissioner is satisfied that they applied the public interest test correctly in relation to the exemptions in section 34(1)(a)(i) and (b). Accordingly, he is satisfied in the circumstances that they were entitled under section 18 of FOISA to refuse to reveal whether the information requested by Mr Birch existed or was held.
18. Given that the Commissioner has agreed that the information requested by Mr Birch, if it existed and was held, could be withheld under the exemptions in 34(1)(a) and (b) of FOISA, he does not consider it necessary to consider the other exemptions cited by Tayside Police in conjunction with their use of section 18.

DECISION

The Commissioner finds that the Chief Constable of Tayside Police dealt with Mr Birch's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to reveal whether the requested information existed or was held by it, in terms of section 18 of FOISA.

Appeal

Should either Mr Birch or the Chief Constable of Tayside 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
4 September 2008



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.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

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
- ...
- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
- ...