

Decision Notice



Decision 138/2009 Mr N and Central Scotland Police

Reports on criminal and disciplinary investigations

Reference No: 200900570

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Scottish Information Commissioner

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Summary

Mr N requested from the Chief Constable of Central Scotland Police (Central Scotland Police) two reports relating to an incident. Central Scotland police responded by withholding all the information it held under several exemptions in FOISA. Following a review, Mr N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Central Scotland Police had dealt with Mr N's request for information in accordance with Part 1 of FOISA by correctly applying the exemption in section 34(1)(a)(i) to the withheld criminal investigation information. He also found that Central Scotland Police correctly applied the exemption under section 35(1)(g) of FOISA to the misconduct investigation information which had been withheld, on the basis that its disclosure would substantially prejudice the exercise of the police's functions in this area.

Consequently, the Commissioner did not require Central Scotland Police to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(g) and (2)(b) (Law enforcement)

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 2 December 2008, Mr N wrote to Central Scotland Police (through his solicitor) requesting, in respect of a particular incident, a Criminal Summary Report submitted to the Procurator Fiscal and a full Misconduct Investigation Summary Report submitted to the Deputy Chief Constable of Central Scotland Police.
2. Central Scotland Police responded on 13 January 2009 indicating it held the information sought, but withholding it under the exemptions in sections 30(c), 34(1)(a)(i), 35(1)(g) and 38(1)(b) of FOISA.



3. On 23 January 2009, Mr N wrote to Central Scotland Police (again through his solicitor) requesting a review of their decision. In particular, Mr N drew Central Scotland Police's attention to the completion of any relevant criminal processes, contending that withholding this information was prejudicing his and his solicitor's ability to properly consider a civil claim in the Courts against a named individual.
4. Central Scotland Police notified Mr N of the outcome of their review on 13 March 2009, upholding the original decision to withhold the information.
5. On 23 March 2009 Mr N wrote to the Commissioner, again through his solicitor, stating that he was dissatisfied with the outcome of Central Scotland 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 N 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. On 1 April 2009 Central Scotland Police were notified in writing that an application had been received from Mr N and were asked to provide the Commissioner with any information withheld from him. Central Scotland Police responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Central Scotland 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. In particular, Central Scotland Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested and to clarify comments in their decision letter regarding the ownership of the withheld information. Central Scotland Police's submissions in response (which cited additional exemptions) will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr N and Central Scotland Police and is satisfied that no matter of relevance has been overlooked.



10. The withheld information comprises two sets of information, which Central Scotland Police labelled “Document 1” and “Document 2”. Document 1 comprises information ingathered by Central Scotland Police when investigating a particular criminal matter, compiled as the Criminal Summary Report and passed to the Procurator Fiscal. Document 2 comprises information gathered in connection with a Central Scotland Police disciplinary investigation (the Misconduct Investigation Summary Report).

Recent Court of Session Opinion

11. The Commissioner notes that the information request made by Mr N was for particular documents. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
12. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr N and Central Scotland Police that Central Scotland Police questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which Central Scotland Police has subsequently had with the Commissioner that Central Scotland Police was unclear as to what the information request sought.
13. The Commissioner is satisfied in this case that the request is reasonably clear and that the information request is therefore valid.
14. Central Scotland Police applied a number of exemptions to the withheld information. They withheld the information in Document 1 under the exemptions in sections 30(c), 34(1)(a) and 38(1)(b) of FOISA. The information in Document 2 was withheld by Central Scotland Police under the exemptions in sections 30(b)(i), 34(1)(b), 35(1)(g) and 38(1)(b).

Section 34(1)(a)

15. Central Scotland Police applied the exemptions in section 34(1)(a)(i) and (ii) of FOISA to the withheld information in the Criminal Summary Report (Document 1). Central Scotland Police asserted that this information was held for the purposes of an investigation which it had 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.



16. The exemptions in section 34(1)(a) (set out in full in the Appendix) are class-based exemptions, which means that if information falls within the description set out in either part of section 34(1)(a), the Commissioner is obliged to accept it as exempt. There is no harm test, and therefore 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. The exemptions are, however, subject to the public interest test set out in section 2(1)(b) of FOISA.
17. Having considered the information in Document 1, the Commissioner is satisfied that it is exempt under section 34(1)(a)(i). Given the nature of the information (which relates to allegations of criminal conduct and their investigation by Central Scotland Police), the functions of the police and the fact that it was in fact submitted to the Procurator Fiscal for consideration, it has clearly been held by Central Scotland Police for the purposes of an investigation which it had a duty to conduct to ascertain whether a person should be prosecuted for an offence.
18. However, given that the exemptions in section 34(1)(a) are subject to the public interest test in section 2(1)(b) of FOISA, the Commissioner must go on to consider whether the public interest in disclosing the information in Document 1 is outweighed by the public interest in maintaining the exemption (and thereby withholding it).

Public interest – submission from Mr N

19. Mr N indicated that Central Scotland Police, by withholding the information he sought, were prejudicing his ability to obtain proper, fully informed legal advice about whether to pursue a civil claim in Court (and consequently to assess whether such a claim should be pursued).
20. He also pointed out that there were no longer any criminal proceedings in prospect in respect of this matter (no charges had been pursued and it was now too late to pursue them) and therefore no related prejudice to the individual who had been the subject of the investigation. He contended that the only possible prejudice would arise in relation to the civil claim under consideration, adding that any payment in such circumstances would be a matter for the individual's insurers and therefore would not prejudice the individual.
21. Mr N stated that he should be in a position to take fully informed decisions about what action he should proceed with, particularly in relation to a potential civil claim for reparation. Therefore, on balance, he considered the public interest arguments in favour of disclosing this information to outweigh any arguments that it should be withheld.

Public interest – submission from Central Scotland Police



22. Central Scotland Police recognised that disclosure under FOISA had the effect of making public authorities more accountable and that this factor could be applied to a wide range of scenarios. It acknowledged there was a public interest in police officers being seen to discharge their duties fairly, ethically and efficiently and in demonstrating there were processes in place to identify or deal appropriately with those who did not. Thus, it could be argued that disclosure of the withheld information contained in Document 1 would contribute to public debate on policing.
23. Central Scotland Police also commented on justice for the individual by recognising that disclosure of the information in Document 1 could assist Mr N in understanding the circumstances surrounding his complaint and the subsequent investigations.
24. However, Central Scotland Police also put forward arguments for withholding the information in Document 1. During the course of an investigation, they submitted, the police interview and gather evidence from any person who may be in a position to assist them. Central Scotland Police asserted that there was an acceptance that the information gathered would not be disclosed to a third party other than in the course of criminal proceedings, as to do so would undermine this expectation and would deter victims or witnesses from assisting the police in future.
25. Referring to the view of the Lord Advocate that it is not in the public interest for certain documents to be disclosed except where, in particular circumstances, the interests of justice require it, Central Scotland Police further asserted that release of the information in Document 1 would jeopardise the candour and freedom with which the police reported to the Procurator Fiscal. They referred to advice from the Crown Office and Procurator Fiscal Service, which states that witness statements and police reports such as this report are not generally made available to any other person, on the basis that there would be a risk to the fundamental presumption of innocence, adding that such a disclosure might lead to summary justice or “trial by media” (on the assumption that simply because the statement is made the accused is guilty).
26. Central Scotland Police also identified the importance in assessing the public interest of existing procedures available to individuals who require access to this type of information for legal proceedings (such as Commission and Diligence from the Court, precognition facilities etc), explaining that these served the individual interests of those concerned in the case with the Court deciding on fairness to both parties involved. Any interest in the withheld information in this case was, they argued, Mr N's alone and not that of the public at large: the public interest could thus be served by the processes referred to.
27. Therefore, Central Scotland Police argued that the public interest lay in ensuring appropriate access to those that required it, and not the making public of the information sought. It concluded that the public interest in disclosure was outweighed by that in maintaining the exemption.



28. The Commissioner has carefully considered all of the public interest arguments put forward by Mr N and by Central Scotland Police.
29. In favour of disclosure, it is clearly in the public interest that members of the public, such as Mr N, are not deterred or hindered from obtaining any legal advice needed in pursuing a civil case. In this connection, however, the Commissioner notes the potential availability to the applicant of the alternative procedures for access to such information in the context of litigation, which would not involve disclosure to the public at large. As Central Scotland Police also acknowledged, it is essential that there is adequate public scrutiny of police procedures to ensure that duties are being carried out appropriately and effectively and this is clearly in the public interest.
30. However, the counter arguments relate to the effect of disclosure of the withheld information on the working relationship of Central Scotland Police with the Procurator Fiscal. In particular, the Commissioner has noted the arguments presented by Central Scotland Police in relation to the position of the Lord Advocate's assertion and related guidance from the Crown Office and Procurator Fiscal Service. Whilst the Commissioner also recognises the need for absolute candour in the making of such reports, he cannot agree with Central Scotland Police's assertion that any guarantee against publication of such material should be absolute. Indeed, the Lord Advocate clearly accepts there can be occasions where the interests of justice are better served by the disclosure of information contained in police reports and statements. The Commissioner acknowledges, however, that the particular circumstances requiring disclosure would be likely to be exceptional and that generally such reports should not be disclosed.
31. The Commissioner finds in this case there is a strong public interest in maintaining the exemption contained in section 34(1)(a) of FOISA in relation to the information held in Document 1. It is unquestionably in the public interest that the public remains willing to co-operate with the criminal justice system by providing witness statements and other assistance to the police in the course of their investigations. The Commissioner is satisfied that such willingness would be diminished were information so obtained to be routinely disclosed under FOISA. While noting Mr N's particular interest in the information, on the other hand, he cannot identify as strong a public interest in disclosure.
32. On balance, therefore, the Commissioner finds that the public interest in disclosing the information in Document 1 is outweighed in this case by that in maintaining the exemption in section 34(1)(a). Given this conclusion, he does not require to consider the exemptions in section 34(1)(b) or 38(1)(b). He will therefore go on to look at the withheld information contained in Document 2.

Section 35(1)(g)



33. Section 35(1)(g) of FOISA allows a Scottish public authority to withhold information if its disclosure would, or would be likely to, substantially prejudice the exercise (by it or another public authority) of a function for any of the purposes listed in section 35(2). Central Scotland Police believed that disclosure of the information in Document 2 would, or would be likely to, prejudice substantially their ability to ascertain whether a person was responsible for conduct which was improper, which is the purpose listed under section 35(2)(b).
34. Investigations into allegations of misconduct by police officers below the level of Assistant Chief Constable are governed by the Police (Conduct) (Scotland) Regulations 1996 (the Conduct Regulations). It is clear from the Conduct Regulations that their application in relation to officers of Central Scotland Police is a "function" of Central Scotland Police, a required condition before the exemption in section 35(1)(g) can be applied. The purpose of an investigation and any necessary subsequent procedure under the Conduct Regulations would be to ascertain whether a particular police officer had been responsible for conduct amounting to misconduct, in other words conduct which was improper. The Commissioner is satisfied, therefore, that information derived from such an investigation would fall within the scope of section 35(1)(g), read with section 35(2)(b).
35. Central Scotland Police submitted that Document 2 comprised information to which this exemption applied. The process of investigating complaints against the police, they submitted, relied on the cooperation of witnesses to come forward and provide evidence. They argued such individuals expected their evidence and identities would only be revealed in the context of the investigation and any subsequent misconduct hearing: release outwith that context would have a severe negative impact on the investigative process, with individuals who might otherwise have been willing to come forward being inhibited from doing so.
36. Having considered these arguments and the information in Document 2, the Commissioner accepts Central Scotland Police's argument that disclosure of the information would prejudice substantially the conduct of future misconduct investigations, which would in turn prejudice substantially the exercise of their functions under the Conduct Regulations. In particular, he agrees that disclosure would, or would be likely to, lead to witnesses being inhibited in coming forward and less free and frank with their evidence were they to do so, to the substantial detriment of the process as a whole.
37. The exemption in section 35(1)(g) is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that, even although the Commissioner is satisfied that the disclosure of the report would, or would be likely to, prejudice substantially the carrying out by Central Scotland Police of the relevant function, the Commissioner must still order the report to be disclosed unless he is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.



38. Mr N contended that as the internal investigation had obviously been concluded (although the outcome was not known), there could be no further prejudice to the individual under investigation as any complaint had presumably been dealt with. His arguments as to prejudice from any civil action are set out above (paragraph 20).
39. On balance, Mr N was of the view that there was a stronger public interest in ensuring that he could make fully informed decisions as to whether to proceed with a civil claim.

Public interest test – submission from Central Scotland Police

40. Central Scotland Police recognised that justice to one particular individual (Mr N) might favour the release of the information requested, as would the public interests in accountability for such investigations and public debate on their conduct. However, it also gave consideration to the need to ensure the efficient and effective conduct of the Force (and in particular the conduct of investigations of this kind), concluding that this would clearly favour the withholding of the information requested. In this context, they referred to the detriment to the misconduct process described above, contending that this would not be in the public interest.
41. Central Scotland Police also indicated that third party interests might be jeopardised by disclosure of the withheld information. They argued that disclosure outwith the context of the misconduct process was an inappropriate way of dealing with allegations of the kind under investigation here.

Public interest test – the Commissioner's view

42. In this case, whilst the Commissioner recognises that Mr N has a legitimate personal interest (in pursuing reparation through any civil process available to him), on balance he does not consider that this is where the wider public interest lies. Having considered all relevant arguments, the Commissioner's view is that there remain strong public interest arguments in ensuring that misconduct investigations can be conducted without significant inhibition. He has accepted that such inhibition would be a consequence of disclosure in this case. He also accepts that, generally, the misconduct process, with the appropriate procedural safeguards, is the appropriate place for consideration of the information under consideration here, rather than making it subject to wider public scrutiny: in this case, he has not been persuaded that there are particular arguments for such wider scrutiny. In all the circumstances, therefore, the Commissioner has concluded that the public interest in withholding the information and maintaining the exemption in section 35(1)(g) outweighs any public interest there may be in disclosure. Consequently, the Commissioner is satisfied that Central Scotland Police were justified in withholding the information in Document 2 under section 35(1)(g) of FOISA.
43. Having reached this conclusion, the Commissioner has not found it necessary to go on to consider the application of the other exemptions relied on by Central Scotland Police in relation to Document 2.



DECISION

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

Appeal

Should either Mr N or Central Scotland 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.

Margaret Keyse
Head of Enforcement
26 November 2009



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.

...

- (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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to 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



...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

...

- (2) The purposes are-

...

- (b) to ascertain whether a person is responsible for conduct which is improper;

...