

Decision Notice



Decision 149/2009 Mr Andrew Hart and Tayside Police

Information relating to an alleged incident.

Reference No: 200901445

Decision Date: 22 December 2009

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Scottish Information Commissioner

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Summary

Mr Andrew Hart (Mr Hart) requested from the Chief Constable of Tayside Police (Tayside Police) information relating to an alleged incident. Tayside Police refused to confirm whether the information requested existed or was held by them, in terms of section 18 of FOISA. Following a review in which this decision was upheld, Mr Hart remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Tayside Police had dealt with Mr Hart'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) and (6) (General entitlement); 2(1) (Effect of exemptions); 18 (Further provision as respect responses 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 2 July 2009, Mr Hart emailed Tayside Police seeking information relating to an alleged incident. He requested from Tayside Police various details pertaining to an allegation that he claimed to have been made by a third party or parties against another named person or persons. He asked for details of when such allegations had been made, the nature of these allegations, and for various details of related events and steps taken by Tayside Police.



2. On 22 July 2009, Tayside Police wrote to Mr Hart in response to his request for information. Tayside Police issued Mr Hart 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 Hart that exemptions in sections 34 and 35 of FOISA would apply if the requested information did exist and was held by them.
3. On 22 July 2009, Mr Hart emailed Tayside Police requesting a review of their decision.
4. Tayside Police notified Mr Hart of the outcome of their review on 6 August 2009. They upheld their initial decision and as such continued to rely on section 18 of FOISA.
5. Mr Hart emailed the Commissioner's Office on 6 August 2009, 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 Hart 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 Hart 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.
9. Mr Hart was also asked by the investigating officer to provide submissions regarding the case, and particularly in relation to the public interest in confirming whether the information he had requested existed or was held. Mr Hart provided his comments and these have also been taken into consideration in what follows below. .

Commissioner's analysis and findings

10. 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.



Section 18 of FOISA

11. 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 request has been made to the authority for information which may or may not be held by it;
 - 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
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
12. 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.
13. Tayside Police provided a number of arguments regarding its view that it would be contrary to the public interest to confirm or deny whether the information requested by Mr Hart existed or was held by it. It submitted that, in general terms, confirming or denying of the existence of this type of information could compromise the current or future law enforcement role of the police. They maintained that individuals provide information to the police with an expectation that their involvement will remain confidential and they would be less willing to provide any such information in the knowledge that such information would enter the wider public domain.
14. Tayside Police stated that the breakdown of this relationship would be seriously detrimental to the law enforcement capabilities of the police and would cause significant harm both to individuals and to the law enforcement function.
15. Mr Hart submitted that it was in the public interest to understand the nature and status of any police action in response to the alleged incident and that it would serve the interests of clarity for any such information held to be made public.
16. While the Commissioner is unable to summarise all of the comments made by the parties to this case, he has considered them fully. Having considered these, 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 Hart exists or is held by them.
17. 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 Hart existed and was held by it, it could be withheld under sections 34(1)(a) and (b), and 35(1)(a) and (b) of FOISA (the last read in conjunction with section 35(2)(a)).



Section 34 of FOISA

18. Section 34(1)(a) and (b) of FOISA exempts information if it is held for the following purposes:
 - an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii));
 - 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 (section 34(1)(b));
19. 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).
20. 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).
21. In considering the public interest in both disclosure and maintaining the exemptions, Tayside Police concluded that on balance the public interest would favour the maintenance of the exemption. They accepted that disclosure of any information held may serve to assist the pursuit of justice by individuals but they argued that it might also compromise the current or future law enforcement role of the police.
22. Tayside Police submitted that the release of any such information may also undermine the investigation and detection of crime, inhibit the provision of relevant information and compromise the interests of third parties. They argued 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 such information should it exist and be held.
23. As noted above, Mr Hart submitted that it would be in the public interest for any such information to be released as it would confirm the official and genuine nature of any enquiries carried out by Tayside Police in relation to the alleged incident.



24. Having considered the arguments presented by Tayside Police and by Mr Hart, the Commissioner is satisfied that if the information existed and was held, the public interest in maintaining these exemptions would outweigh the public interest in the disclosure of the information.
25. Tayside Police also stated that the exemptions contained in sections 35(1)(a) and (b) of FOISA would apply to the information requested by Mr Hart if it existed and was held. However given that the Commissioner has accepted that this information, if it existed and was held, would be exempt under section 34(1) of FOISA, he will not go on to consider these additional exemptions.
26. The Commissioner therefore finds that Tayside Police were entitled under section 18 of FOISA to refuse to reveal whether the information requested by Mr Hart existed or was held.

DECISION

The Commissioner finds that the Chief Constable of Tayside Police dealt with Mr Hart'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 Hart 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
22 December 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.

[...]

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
 - (ii) prosecuted for an offence is guilty of it;
 - (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

[...]