



Scottish Information
Commissioner

**Decision 174/2007 Mr Edmund Raphael-Beldowski and the Chief
Constable of Tayside Police**

Request for police case file for an unsolved murder in 1912

**Applicant: Edmund Raphael-Beldowski
Authority: The Chief Constable of Tayside Police
Case No: 200600769
Decision Date: 25 September 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 174/2007 Edmund Raphael-Beldowski and the Chief Constable of Tayside Police

Request for police case file – murder investigation from 1912 – information withheld – section 34(1)(a)(i) and (b) – public interest considered – Commissioner required disclosure of information.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (general entitlement), 2(1) (Effect of exemptions), 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations).

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

Facts

Mr Raphael-Beldowski requested information relating to an unsolved murder which took place in Broughty Ferry in 1912 and transcripts of a trial relating to that murder from the Chief Constable of Tayside Police (Tayside Police). Tayside Police advised Mr Raphael-Beldowski that no such trial had taken place and accordingly, it did not hold any information in relation to that part of his request. Tayside Police withheld the information relating to the murder itself on the basis that it was exempt from disclosure under the terms of sections 34(1)(a)(i) and (b) of FOISA. This decision was upheld following an internal review, although Tayside Police did disclose some information which did not relate to witness accounts of the circumstances surrounding the murder. Mr Raphael-Beldowski remained dissatisfied with Tayside Police's responses and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Tayside Police had failed to deal with Mr Raphael-Beldowski's request for information in accordance with Part 1 of FOISA. He required Tayside Police to supply the information withheld from Mr Raphael-Beldowski.



Background

1. On 3 August 2005, Mr Raphael-Beldowski wrote to Tayside Police requesting information relating to the investigation of an unsolved murder committed in Broughty Ferry in 1912. Mr Raphael-Beldowski also requested the transcript of the criminal trial of an individual suspected of carrying out the murder.
2. Mr Raphael-Beldowski's request concerned the murder of Miss Jean Milne. Miss Milne was murdered sometime between 13 October and 2 November 1912 in her home in Broughty Ferry. Miss Milne was a 69 year old woman who lived alone in a large mansion house.
3. During the course of the investigation, a suspect was identified and charged with murdering Miss Milne. However, the case against him was subsequently dropped and he was released without facing trial. The murder remains unsolved.
4. On 30 August 2005, Tayside Police wrote to Mr Raphael-Beldowski in response to his request for information. Tayside Police explained that the suspect in the case was never tried and accordingly, it did not hold any transcripts of a trial relating to the murder of Miss Milne. In relation to the request for information held regarding the murder, Tayside Police advised Mr Raphael-Beldowski that the information was considered exempt in terms of section 34(1)(a)(i) and (b) of FOISA. Tayside Police also advised Mr Raphael-Beldowski that it considered the public interest in disclosing the information was outweighed by that in maintaining the exemptions.
5. On 23 September 2005, Mr Raphael-Beldowski wrote to Tayside Police requesting a review of its decision. In particular, Mr Raphael-Beldowski noted that his primary interest was in the history of the house where the murder was committed and stated that he did not consider his request "to be disadvantageous or contentious to any degree". He also suggested that his request did not cause any material damage to the wider public interest in the confidentiality of police investigations. He also noted that, given the age of the case, no living person could now be apprehended for the murder in question.
6. On 24 October 2005, Tayside Police wrote to notify Mr Raphael-Beldowski of the outcome of its review. As a result of its review, Tayside Police agreed to release some information to Mr Raphael-Beldowski. This consisted of two witness statements describing the house and grounds where the murder was committed. Tayside Police upheld its earlier decision to withhold the remainder of the file claiming that there was a justifiable public interest in withholding statements containing evidence pertinent to the police investigation of the murder.



7. On 3 April 2006, Mr Raphael-Beldowski wrote to my Office, stating that he was dissatisfied with the outcome of Tayside Police's review and applying to me for a decision in terms of section 47(1) of FOISA. He indicated that he did not accept that there was a justifiable public interest in withholding the information when no living person could now be brought to trial for the offence. He indicated that he believed the public interest lay in the disclosure of the information.
8. The application was passed to an investigating officer and validated by establishing that Mr Raphael-Beldowski 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.

The Investigation

9. On 22 May 2006, Tayside Police was notified in writing that a valid application had been received from Mr Raphael-Beldowski and was asked to provide my Office with specified items of information required for the purposes of the investigation. Tayside Police was also asked to comment on the matters raised by Mr Raphael-Beldowski in terms of section 49(3) of FOISA, to respond to specific questions on the application, and to provide details of its reasoning when applying the exemption under section 34(1)(a)(i) and (b) of FOISA.
10. Tayside Police responded with the information requested on 13 June 2006. Tayside Police reiterated its position that the information it held relating to the murder was exempt in terms of section 34(1)(a)(i) and (b) and that the public interest in disclosing the information was not outweighed by that in maintaining the exemption.
11. In its submission, Tayside Police also indicated it considered that, during the review process, Mr Raphael-Beldowski had narrowed the scope of his request and was not interested in obtaining information on the case itself but was seeking information relating to the house where the murder had been committed. As a consequence, Tayside Police had agreed to release some information relating to the property and surroundings.
12. During the course of the investigation, Mr Raphael-Beldowski submitted that the National Archives had recently released information concerning a historic, unsolved murder which had occurred in 1943. My office subsequently contacted the National Archives and was provided with details of the guidelines used when considering requests for information of this type.



The Commissioner's Analysis and Findings

13. In coming to a decision in this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Raphael-Beldowski and Tayside Police and I am satisfied that no matter of relevance has been overlooked.

The scope of the request

14. As indicated in paragraph 11 above, Tayside Police has indicated in its submission to my Office that it considers the scope of the request to have been narrowed at the review stage to one seeking information about the house and grounds where the murder was committed. I must therefore consider whether this was indeed the intention of Mr Raphael-Beldowski and what information should be considered to fall within the scope of his request.
15. In Mr Raphael-Beldowski's initial letter to Tayside Police on 3 August 2005, he requested transcripts of the criminal trial of the suspect in the case. This letter also referred to "the files pertaining to the ...case" and asked Tayside Police to "impart what you know...." Mr Raphael-Beldowski went on to state his interest in knowing whether the case had been left open and if further investigations had been made.
16. In its response dated 30 August 2005, Tayside Police confirmed to Mr Raphael-Beldowski that no trial had taken place and so no information relating to such a trial was available. Tayside Police then went on to explain why the information held relating to the murder investigation itself was being withheld.
17. In Mr Raphael-Beldowski's request for review dated 23 September 2005, he clearly made reference to the fact that his appeal was "for access to the informational documents which you hold pertaining to the unsolved murder of the late Miss Jean Milne...." He did go on to indicate that his principal interest was in the history of the property in question rather than to gain information surrounding the circumstances of the case. However, given that Mr Raphael-Beldowski had specifically made reference to his wish to access documentation relating to the unsolved murder, I am satisfied that the files relating to the murder did indeed form part of his request and that the request was not limited to information concerning the property where the crime had occurred.
18. Therefore, I will consider all information held by Tayside Police in relation to this murder in what follows.



Application of section 34(1)(a)(i) and (b)

19. Tayside Police have applied the exemptions in section 34(1)(a)(i) and (b) of FOISA to all information within the file it holds relating to the murder of Miss Jean Milne (with the exception of the limited information that has already been supplied to Mr Raphael-Beldowski).
20. Tayside Police stated that the information held in the file was exempt as it was held for the purposes of an investigation which the then Broughty Ferry Police had a duty to conduct to ascertain whether a person should be prosecuted for an offence. Tayside Police also stated that the information was exempt as it was held for the purposes of an investigation which may lead to a decision to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
21. Section 34(1) states that:
 - (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.

...
22. Sections 34(1)(a) and (b) contain class-based exemptions. This means that if information falls within the description set out above, I am obliged to accept it as exempt. There is no harm test; I am not required or permitted to consider whether disclosure would substantially prejudice an interest or activity, or otherwise to consider the effect of disclosure.
23. Further, the exemptions in section 34(1) are not time limited in that they apply to information held “at any time”.
24. Also, these exemptions, unlike most other exemptions contained in Part 2 of FOISA, do not fall away with time. Once information falls within one of the relevant categories, it will remain exempt information in perpetuity.



25. In the circumstances, I accept that the information requested by Mr Raphael-Beldowski falls within the scope of the exemption in section 34(1)(a)(i) of FOISA in that this information has been held for the purposes of ascertaining whether a person should be prosecuted for an offence.
26. I also accept that the information falls within the scope of the exemption in section 34(1)(b) of FOISA in that this information has been held for the purposes of an investigation which may lead to a decision to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
27. However, both exemptions relied upon in this case are subject to the public interest test required by section 2(1)(b) of FOISA. I am therefore required to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the relevant exemption.

Consideration of the public interest

28. The public interest test under FOISA requires me to carry out a balancing exercise in respect of those arguments in favour of disclosing the information and those arguments against disclosure.
29. Section 2(1)(b) of FOISA states that, where the exemption claimed is not absolute, the information will be considered exempt only to the extent that “in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption”. An easier way of explaining this is by saying that, where a qualified exemption applies, the information should only be withheld if the public interest in withholding it is greater than the public interest in releasing it.
30. The “public interest” is not defined in the Act but it has been variously described as “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”, i.e. it serves the interests of the public.



Arguments in favour of withholding the information on public interest grounds

31. I am aware of the concerns surrounding the disclosure of information of this kind. During the Parliamentary debates concerning this exemption, the then Justice Minister, Jim Wallace argued that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecutions and investigations and the role of the criminal proceedings as the forum for bringing information into the public domain. He went on to say: “We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons”. This is reflected in the public interest arguments presented by Tayside Police in this particular case.
32. In their initial response to Mr Raphael-Beldowski, Tayside Police stated that the release of the information would potentially have a damaging effect on its (and other police forces’) ability to effectively investigate such crimes. It considered that potential witnesses to future crimes could interpret the release of this type of information into the public domain as a lessening of the confidentiality provided to them by police forces. It considered this to have the potential to hamper the investigation and detection of crime.
33. In its submissions to my Office, Tayside Police also pointed out that the exemptions contained in section 34(1) of FOISA do not weaken with the passage of time. They rightly noted that the Act specifies that the information is exempt if held at any time for the purposes of an investigation and does not provide a limit as to when this time lapses.
34. Tayside Police also pointed out that the suspect in the case was cleared before any trial took place and that family reputation must be taken into account. Additionally, statements made by two witnesses were “on the strict understanding that the names (of the witnesses) would not be made public”. Tayside Police have suggested that these two points tend to support not releasing the information as they could implicate the reputation of any direct family of both the suspect and witnesses.

Arguments in favour of disclosure on public interest grounds

35. In many of my decisions to date, I have pointed out that, there is a general public interest in releasing information that may lead to an increase in accountability and scrutiny of public officials’ actions. In general, it seems to me that there are a number of reasons why disclosure of this kind of information could be in the public interest. There is a general public interest in information being accessible because this enhances scrutiny of decision making processes and thereby improves accountability.



36. Furthermore, in this particular case, disclosure of information relating to an investigation that took place more than 90 years in the past, would allow the public to examine the procedures followed by the police at the time and the nature and conduct of such investigations. Disclosure would also provide an insight into society at the time, particularly through the contents of, and language used in, witness statements.
37. Disclosure would also provide insights into the specific murder investigation concerned, and the investigative steps undertaken by the police in an attempt to solve the case..

Conclusions on the public interest

38. Although Tayside Police correctly pointed out that the exemptions under consideration in this case are not changed by the passage of time, I would note that the public interest test is separate from tests associated with the exemptions under FOISA. The balance of the public interest can and will shift with the passage of time, while membership of a relevant category of information may not.
39. I accept that the existence of exemptions that last in perpetuity within section 34(1) suggests that the type of information that falls within them should generally be subject to a degree of protection. This protection is provided to ensure the effective administration of justice. However, this does not mean that the public interest will never favour disclosure of information that falls under the scope of these exemptions.
40. In this case, I am satisfied that disclosure could not be harmful in any future investigation or trial relating to the murder of Miss Milne. It is clear that no living person could today (or at the time of Mr Raphael-Beldowski's request) stand trial; that few, if any, witnesses will still be living; and that there is no significant prospect of the case being reopened. Tayside Police has confirmed to me that it is unable to identify if and when the case was last subject to an active investigation. It has also indicated that it is highly unlikely that the case will be reopened as all witnesses are probably deceased.
41. Given that the documents that have been requested deal with an investigation that appears to have been concluded for quite some time, the sensitivity of the information – in terms of its status as evidence – will have decreased substantially over time



42. As noted above however, Tayside Police have expressed the view that disclosure would be harmful more generally to future investigations by deterring potential witnesses. However, bearing in mind the time that has elapsed since the investigation into this case, I am not persuaded that there is likely to be such a threat to future investigations. In reaching this view, I have noted that the information under consideration in this case is quite clearly historical, and dates from a period when society and police methods were quite different from today. As noted above, those named within these documents will now almost all be deceased. I do not accept that people aware of this information having been disclosed would decline to assist the police in their investigations or expect that their own witness statements would be routinely disclosed during their own lifetime.
43. Tayside Police have also stated that the reputation of the suspect should be taken into account. I note that the suspect was publicly named at the time of the investigation and in the decades since. Any harm to his reputation through his involvement in this case has already taken place. The facts of the case show however that he was never tried, let alone convicted and I am therefore satisfied that no further harm to his reputation would follow from disclosure.
44. Tayside Police also submitted that the reputation of any direct family of both suspect and witnesses could be implicated by release of the information. However, given that more than 90 years have elapsed since the murder and the innocuous nature of much of the evidence and witness statements, I am not satisfied that this argument justifies maintaining the exemptions applied in this case.
45. In its submissions, Tayside Police also pointed out that two statements were made by witnesses on the basis that their names would not be made public. This may have a bearing if such witness statements were released at the time of events or even in their lifetime. However these witnesses are likely to have been deceased for some considerable length of time, and I do not believe that it would be sensible to conclude that undertakings given at that time allowed, or even were intended to imply, that this anonymity remain in perpetuity. I am satisfied, given the passage of time, that there would be no harm to the public interest in disclosure.
46. Having carefully considered the arguments presented by Tayside Police, I therefore am not persuaded that the public interest in disclosing the information in this case is outweighed by that in maintaining the exemption. I therefore find that Tayside Police has incorrectly applied the public interest test to the exemptions in section 34(1)(a)(i) and (b) of FOISA.



47. My opinion may have differed had the case been more recent; or had there had been more recent developments; or had it been likely that potential suspects or witnesses would still be alive. In any of these cases, it would be more difficult to argue that disclosure would be in the public interest. In this case however, the significant passage of time means that the public interest in disclosure of the information now outweighs that in the maintenance of the exemptions that apply to it.
48. In reaching this conclusion, I note the position adopted by the National Archives in relation to files involving unsolved murders. In the case of files held by the National Archives which are subject to a public interest test, the test is carried out by the Metropolitan Police. General guidelines prescribe that unsolved murder files may be opened once all suspects, and hypothetical suspects, are over the age of 85. However, this does not guarantee disclosure as consideration will still be given to whether very graphic details about such crimes such as photographs or pathologists' reports can be released.
49. Clearly, in this particular case, any witnesses or potential suspects who remain alive will be substantially over the age of 85. Furthermore, I do not consider that any of the information contained within the police file is of a particularly graphic or distressing nature.
50. I now require Tayside Police to supply the information withheld from Mr Raphael-Beldowski within 45 days of the receipt of this notice.

Decision

I find that the Chief Constable of Tayside Police (Tayside Police) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Mr Raphael-Beldowski.

I find that Tayside Police incorrectly applied the public interest test to the exemptions in section 34(1)(a)(i) and (b) of FOISA to the information withheld from Mr Raphael-Beldowski. In doing so, Tayside Police failed to comply with section 1(1) of FOISA

I therefore require Tayside Police to supply the information withheld from Mr Raphael-Beldowski within 45 days of the receipt of this decision.



Appeal

Should either Mr Raphael-Beldowski or Tayside Police wish to appeal against this decision, there is a right of 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
25 September 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 ...

...

 - (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

...