



Scottish Information
Commissioner

**Decision 186/2007 - Mr Richard Haley and the
Chief Constable of Tayside Police**

*Report on the trial phase of the operation of Tayside Police's
Special Branch Community Contact Unit*

**Applicant: Mr Richard Haley
Authority: Chief Constable of Tayside Police
Case No: 200601797
Decision Date: 11 October 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 186/2007 - Mr Richard Haley and the Chief Constable of Tayside Police

Report on the trial phase of the operation of Tayside Police's Special Branch Community Contact Unit

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 3(2)(a)(ii) (Scottish public authorities); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(a) and (b) (Law enforcement).

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 Richard Haley (Mr Haley) requested a copy of the report on the trial phase of the operation of Tayside Police's Special Branch Community Contact Unit (SBCCU) from the Chief Constable of Tayside Police (Tayside Police). Tayside Police responded by issuing a refusal notice stating that the information was exempt in terms of sections 34(1), 35 and 38 of FOISA. Mr Haley was not satisfied with this response and asked Tayside Police to review its decision. Tayside Police carried out a review and, as a result, notified Mr Haley that it upheld its initial refusal notice for the majority of the report, but provided Mr Haley with parts of the report. Mr Haley remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Tayside Police had dealt with Mr Haley's request for information largely in accordance with Part 1 of FOISA.



Background

1. On 26 May 2006, Mr Haley wrote to Tayside Police requesting a copy of the report on the trial phase of the operation of its SBCCU.
2. Tayside Police wrote to Mr Haley in response to his request for information on 16 August 2006. Tayside Police apologised for the delay in responding, confirmed that it held the information, but issued a refusal notice stating that the report was exempt in terms of sections 34(1), 35 and 38 of FOISA.
3. On the same day, Mr Haley wrote to Tayside Police requesting a review of its decision. Mr Haley made several points in his request for review. In particular, he noted that whilst such a report may contain information which was personal data, it may also contain information that was not personal data, and he would expect that information which was not personal data could therefore be disclosed. Mr Haley explained that he would also expect certain information to be excluded from disclosure (e.g. operational details of a sensitive nature), but that he would expect some information from the report to be capable of disclosure. He referred to operational issues which had been discussed in the national media (11 June 2006) and information already provided by Tayside Police on the SBCCU. Mr Haley stated that he was of the opinion that the report would contain information of a general or strategic nature, the release of which would not damage the police service. Mr Haley stated that he believed that members of the public who had engaged in discussions with the SBCCU would not have believed themselves to be involved in a criminal investigation, and he questioned the use of the exemption in section 34 of FOISA. Mr Haley also said that the public interest in this instance favoured disclosure: he highlighted that the SBCCU's role includes building trust between police and communities, is a form of policing that is new, and is concerned with the prevention of terrorism and with race/community issues, all of which it was in the public interest to be more aware.
4. On 11 October 2006, Tayside Police notified Mr Haley of the outcome of its review. Again, Tayside Police apologised for the delay. On review, Tayside Police upheld the exemptions already cited (sections 34(1), 35 and 38) for the majority of the material, but acknowledged that some of the material was capable of disclosure and therefore provided Mr Haley with a version of the report which excluded information which it believed to be exempt.
5. On 13 November 2006, Mr Haley 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.



6. The application was validated by establishing that Mr Haley 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.
7. On 19 January 2007, Tayside Police was notified in writing that an application had been received from Mr Haley. The case was then allocated to an investigating officer.
8. The investigating officer contacted Tayside Police, asking it to provide submissions on the application and to respond to specific questions at various points during the investigation. Tayside Police responded with its submissions on 27 March 2007, on 13 July 2007 and on 7 September 2007.

The Investigation

9. Tayside Police explained that its SBCCU was created in August 2005 in the wake of the terrorist bombings in London in July 2005. The SBCCU was established to create communication channels between Tayside Police and minority faith communities. The objectives of the SBCCU are to:
 - improve communication and links with all faiths and cultures through increased community contact at all levels, from places of worship to shopkeepers
 - establish and improve links with young people within our minority ethnic communities by visiting schools, colleges, universities and youth groups
 - establish and improve the current internal communication links between community liaison officers, local beat officers, intelligence officers and the SBCCU.
10. The SBCCU is described on Tayside Police's website at:
http://www.tayside.police.uk/special_branch_4.php
11. It was explained that after a six-month trial period a report was submitted to Tayside Police Force Executive to allow it to assess the work of the SBCCU. This report was called "Problem Profile – The Terrorist Threat and Community Tensions within Tayside" and this is the document which Mr Haley sought in his request.



12. As noted above, after review, Mr Haley was supplied by Tayside Police with a version of this report which excluded information which Tayside Police believed to be exempt.

Submissions by Tayside Police

13. Tayside Police explained that the version of the report provided to Mr Haley after its review had been revised in the interests of grammar and understanding in the spirit of assistance, in terms of section 15 of FOISA. It was for this reason that the supplied report did not appear to be a report with information redacted (a point which Mr Haley raised). Tayside Police acknowledged that this could have been made clearer to Mr Haley.
14. In submissions to my Office, Tayside Police added to the number of exemptions it was relying on to justify the withholding of parts of the report.
15. Firstly, Tayside Police submitted that some of the information was withheld by virtue of section 3(2)(a)(ii) of FOISA as information having been supplied in confidence by a Department of the Government of the United Kingdom.
16. Secondly, Tayside Police submitted that part of the information fell within section 31(1). Tayside Police said that to provide information, constituting intelligence, about individuals or organisations could alert such persons to the presence or absence of information and such persons could adapt their behaviour in a way which would prejudice the timely and accurate intelligence gathering on matters affecting national security. In particular, disclosure of intelligence gathering would allow persons to adapt their behaviour to disrupt such activities. Additionally, release of such information would, Tayside Police claimed, deter individuals or organisations from providing information and intelligence and this would prejudice the ability of the police service (including Tayside Police) to carry out timely and accurate intelligence gathering on matters affecting national security.
17. In respect of section 34(1)(a)(i), Tayside Police explained that it has a duty to ascertain whether a person should be prosecuted for an offence and some of the information fell within this exemption. There was a need to maintain “the integrity of investigations” which involved a willingness by the public to provide information in confidence to the police for the purposes of investigations. Release of the information in the report, it was submitted by Tayside Police, would prejudice active enquiries and could potentially identify intelligence sources.



18. Tayside Police also submitted that the information would fall within sections 35(1)(a) and (b) of FOISA since activities connected to terrorism or acts to undermine national security were also criminal offences. It submitted that if information on investigations, tactics, intelligence or intelligence gathering was released into the public domain there would be substantial harm to the police service in the inhibition of preventing, detecting and investigating crime.
19. Tayside Police claimed that some of the information withheld from Mr Haley was personal data and was consequently exempt in terms of section 38(1)(b) of FOISA.
20. Additionally, disclosure of information which was supplied by persons could identify such persons as sources of that information and expose them to some form of attack or retribution. This fact, Tayside Police submitted, was sufficient to engage section 39(1) of FOISA.
21. Finally, Tayside Police explained the considerations it had used in balancing the public interest in respect of the exemptions relied on above (sections 31(1), 34(1)(a)(i), 35(1)(a) and (b) and 39(1)). It explained that it had considered the following factors and had concluded that the balance of the public interest was in favour of withholding.
 - Accountability – release of the information would increase the accountability of Tayside Police by confirming that it was fulfilling its duties efficiently in monitoring persons involved in criminal activity or those intent on disrupting national security. However, there are regular inspections by independent bodies operating on behalf of the government to ensure that authorities such as Tayside Police are gathering and storing intelligence in a way that is lawful, proportionate and compliant with legislation;
 - Public awareness – release of the information would assist the public in understanding the legitimate interests of the police service in gathering and recording intelligence and improve the accuracy and quality of debate on such matters;
 - Criminal investigation – the only interest in disclosure would only be to prevent or detect crime, or to save life and that none applied in this instance;
 - Flow of information to the police service – the release of information would deter persons from providing information about crime or acting as covert human intelligence. This would have an adverse effect on the maintenance of a safe and just society and this was consequently not in the public interest;



- Efficient and effective conduct of the police – this line of reasoning was similar to that above, i.e. that release would compromise the law enforcement function of the police, and this was consequently not in the public interest;
- Public confidence – that no ongoing debate on the role of the police in respect of such matters of criminality and national security would be served by disclosure;
- Exemption provision – that the information was covered by a number of exemptions reinforcing the arguments in favour of the non-disclosure of the material.

Submissions by Mr Haley

22. Mr Haley made several points in his review request (of 16 August 2006) which he repeated in his application to my Office.
23. Mr Haley stated that there had been a substantial delay by Tayside Police in responding both to his initial request and also in conducting a review, but that he did not want these delays to form part of his application to me, but rather wanted his application to focus on the refusal by Tayside Police to release an unredacted version of the report.
24. Mr Haley stated that the content and the title (“Problem Profile – the Terrorist Threat and Community Tensions within Tayside”) of the report he received did not seem appropriate for a report on the trial phase of the SBCCU. Mr Haley also stated that the report provided to him by Tayside Police showed no indication of withheld information, nor any complexity or sensitivity which had been referred to by Tayside Police. He believed that the document provided was different from the document which he had requested, i.e. the document which had been referred to in the media as reporting on the 6-months trial phase of the SBCCU. Mr Haley provided his reasons for this belief, including: that the document supplied to him related to 10 weeks (as opposed to 6 months); the title of the document (which he said did not indicate consideration of the SBCCU); that the document did not appear to have any information redacted from it; that the document was dated 11 January 2006 (rather than later in 2006); and the content (which he said was different from that which was reported in the media).



25. Mr Haley explained that he would also expect certain information to be excluded from disclosure (e.g. operational details of a sensitive nature), but that he would expect some information from the report to be capable of disclosure. He referred to operational issues which had been discussed in the national media (11 June 2006) and information already provided by Tayside Police on the SBCCU. He stated that he was of the opinion that the report would contain information of a general or strategic nature, the release of which would not damage the police service. Mr Haley stated that he believed that members of the public who had engaged in discussions with the SBCCU had not believed themselves to be involved in a criminal investigation.
26. It was stated by Mr Haley that he believed that the report would contain information which it was in the public interest to disclose. He stated that the public interest should take account of the exceptional importance of the issues covered by the report in relation to community relations, civil liberties and protection of the public and “the well-publicised controversy surrounding the activities of the SBCCU.”
27. Mr Haley stated that he was opposed to the release of information on identifiable members of the public and this is not what he sought in his request.

The Commissioner’s Analysis and Findings

28. Mr Haley applied to me for a decision about whether Tayside Police complied with Part 1 of FOISA in withholding parts of the report. Although he referred to the timescales for responding to his initial request (in terms of section 10(1) of FOISA), and his request for review (in terms of section 21(1)), he did not ask me to issue a decision on whether Tayside Police complied with Part 1 of FOISA in respect of timescales. I shall therefore not consider this in the decision notice.
29. Mr Haley asked me to decide on whether Tayside Police was right to apply the exemptions to the material; and if so, whether the public interest test was weighed in favour of disclosure (which Mr Haley argued), balanced, or weighed in favour of withholding (as Tayside Police argued).



Content of the Report

30. In setting out my analysis and thinking in this decision I have been mindful of the comment of the Lord President in the case of the Scottish Ministers v the Scottish Information Commissioner (William Alexander's Application) 2007 SLT 27.
31. In this case the Lord President stated [at 18]:

“It is important, in our view, when considering these authorities to bear in mind that the respondent [the Scottish Information Commissioner], in giving reasons for his decision, is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed.”
32. The Lord President explains that, whilst I have a common law duty to give proper and adequate reasons to the authority and the applicant explaining my decision in respect of compliance with Part 1 of FOISA, I am restrained by the need to avoid disclosing information which ought not to be disclosed.
33. Mr Haley explicitly made the point that the report provided to him did not seem appropriate for a report on the trial phase of the SBCCU and provided reasons for this view (see paragraph 24 (above)).
34. I note that the information supplied to Mr Haley indicates that the report covers a period of approximately 6 months while recognising that the SBCCU had only been in place for 10 weeks. I also note Mr Haley's concerns about the title of the document (which he did not consider to be indicative of consideration of the SBCCU). However, it is clear from the version supplied to Mr Haley that the report has several aims.
35. In addressing Mr Haley's point that the report supplied to him did not show redactions, I accept the justification from Tayside Police that the report that the grammar was altered slightly at certain points to allow Mr Haley to comprehend the report with redactions. I accept Tayside Police's justification that this was done in the spirit of section 15 in order to make the redacted report readable. There is nothing to suggest that this was done with the intention of misleading Mr Haley.
36. I am satisfied that the information supplied to Mr Haley was the information referred to in the media report (with redactions) to which he referred in his request.



Application of section 3(2)(a)(ii) – is information held by Tayside Police?

37. Tayside Police submitted that some of the information withheld from Mr Haley was not held by it for the purposes of FOISA, having been supplied to Tayside Police in confidence by a Department of the Government of the United Kingdom, namely the Security Service.
38. Section 1(1) of FOISA provides a general right of access to information held by a Scottish public authority, such as Tayside Police. However, in terms of section 3(2)(a)(ii) of FOISA, information which is held in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom, is not considered to be held by a Scottish public authority for the purposes of FOISA. The purpose of section 3(2)(a)(ii) is to allow UK Ministers and Government departments to provide confidential information to Scottish public authorities whilst ensuring that any decision to release the information remains with the UK Ministers and Government departments, and subject to the Freedom of Information Act 2000 (“FOIA”) rather than FOISA. This purpose was noted in the Policy Memorandum which accompanied the Freedom of Information (Scotland) Bill and also in the Justice 1 Committee debates.
39. I am satisfied that the Security Service is a department of the Government of the UK.
40. Given the wording of section 3(2)(a)(ii), it is my view that the fact that information was **supplied** in confidence will not be definitive in assessing whether it is **held** in confidence for the purposes of section 3(2)(a)(ii). Whilst my scope, in terms of section 3(2)(a)(ii), for considering whether information should be kept confidential is limited, I am of the view that I am required for the purposes of this section to consider whether the information was provided on a confidential basis and whether it had a genuinely confidential nature (including whether any damage would result from its release). I am not required to decide whether there would be an actionable breach of confidence – as section 36(2) requires. Nor is any consideration of the public interest – either as the public interest test (section 2 of FOISA) or the public interest defence for actionable breach of confidence – to be applied here, as section 3(2)(a)(ii) does not contain any requirement that a breach of confidence be “actionable”.
41. The first factor which must be considered is whether the information was provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential. Tayside Police has supplied me evidence of this fact: in this instance, a clear indication at the time of supply by the relevant UK department that the information was to be kept confidential.



42. The second factor to be considered is whether information which was supplied in confidence remains confidential at the time of Mr Haley's request and this will be informed by the nature of the information. To use the test applicable to section 36(2) (Confidentiality), the question would be whether the information has the necessary quality of confidence – i.e. the information must not be common knowledge or otherwise be publicly available. I accept Tayside Police's submissions that the information was genuinely confidential at the time and that it remains so.
43. The third factor to be considered, which is related to the second, is whether any damage would result from the release of the information. While section 3(2)(a)(ii) does not require that the release of confidential information be an actionable breach of confidence, the prospect of damage will inform whether information is genuinely held in confidence. In general, if no damage would result from release there is no need to keep the information confidential.
44. Tayside Police provided submissions on the harm which would result from release of the information. These submissions were extensive and overlapped the exemptions claimed. These submissions are relevant to the damage which would result by the release of information which falls within section 3(2)(a)(ii).
45. Having given consideration to the submissions of Tayside Police in respect of section 3(2)(a)(ii), I accept that part of the information withheld from Mr Haley falls within section 3(2)(a)(ii) and as a consequence is not held by Tayside Police for the purposes of FOISA.
46. I note that the question of whether information was held in terms of section 3(2)(a)(ii) was only raised by Tayside Police following Mr Haley's application to me for a decision. This issue should have been raised by Tayside Police with Mr Haley. In failing to issue a notice to Mr Haley in terms of section 17 of FOISA, Tayside Police failed to comply with FOISA.

Application of section 35(1)(a) and (b) – Law enforcement

47. Tayside Police relied on several exemptions for withholding the information. I shall consider firstly its reliance on section 35(1)(a) and (b) of FOISA to withhold the information, other than the information which I have found to fall within section 3(2)(a)(ii).
48. Sections 35(1)(a) and 35(1)(b) provide that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially either the prevention or detection of crime (section 35(1)(a)) or the apprehension or prosecution of offenders (section 35(1)(b)).



49. In my briefing on the application of section 35, I have said that “prevention or detection of crime” will be wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of the persons suspected of being responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.
50. There is likely to be considerable overlap between information relating to “the apprehension or prosecution of offenders” and that relating to “the prevention or detection of crime”. However, “apprehension and prosecution of offenders” has a more narrow scope, relating to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for unlawful activity. Again, this term could refer to the apprehension and prosecution of specific offenders or to more general techniques (e.g. investigative processes used) and strategies designed for these purposes.
51. Tayside Police made a number of submissions in respect of the application of the section 31 exemption which it wished also to apply to the section 35 exemption. It stated that activities connected with terrorism or acts intended to undermine national security would constitute criminal offences and engage the exemption in section 35(1)(a) and (b) of FOISA. I accept this point.
52. In respect of the way in which disclosure would, or would be likely to, have a substantially prejudicial effect, Tayside Police submitted firstly that in the course of intelligence gathering there was an expectation that the information gathered would not be disclosed to a third party other than in the course of criminal proceedings. Disclosure in response to a request would therefore undermine this expectation and might deter persons from providing information to the police and this would hamper police investigations.
53. Secondly, Tayside Police argued – as has been argued by the police service in respect of previous applications – that disclosure would provide information to any person who was intent on any activity of a criminal nature and such a person could modify their conduct on the basis of this information; for example, to implement a criminal purpose in a way that would lessen detection.
54. The withheld information is from a report submitted to Tayside Police Force Executive to enable it to assess the work of the SBCCU during its trial phase. The functions of the SBCCU were listed in paragraph 9 (above). The justification of the SBCCU is stated on Tayside Police’s website as:

“The SBCCU was established in order to create channels of communication with our minority communities and to improve the flow of community intelligence between the police and communities in an effort to prevent a repeat of these atrocities [the terrorist bombings in London in July 2005]”.



According to this one stated aim is the prevention of terrorism.

55. A report of this nature will therefore contain information about the SBCCU - its role and context - in order for the Force Executive to assess the SBCCU. Assessment of the efficacy by the Executive would presumably involve comparison of evidence (as provided in the report) with the stated aims i.e. providing channels of communication with a view to the prevention and detection of specific crimes (acts related to terrorism).
56. Disclosure of the information would be likely to prejudice substantially either the prevention or detection of crime in the senses outlined by Tayside Police: information on investigations, tactics, intelligence or intelligence gathering being released into the public domain such that there would be harm to the police service in preventing, detecting and investigating specific crimes.
57. In this respect, I am of the view that the release of information contained within the report at this particular point in time would have the effect of prejudicing substantially Tayside Police's activity in relation to the prevention and detection, in terms of both its ability to detect whether a crime has been committed, and to its ability to apprehend or prosecute offenders in relation to any potential crime. In respect of intelligence gathering there would be an expectation that the information gathered would not be disclosed to a third party other than in the course of criminal proceedings. I accept in these circumstances that disclosure may deter persons from providing information and this would hamper the prevention or detection of crime
58. As a result, I find that Tayside Police acted in accordance with FOISA in concluding that the information sought by Mr Haley's request was exempt from disclosure in terms of both sections 35(1)(a) and 35(1)(b) of FOISA.
59. The exemptions in sections 35(1)(a) and (b) are subject to the public interest test required by section 2(1)(b) of FOISA. This means that I must now go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemptions.

The Public Interest Test

60. In considering the public interest test, Tayside Police looked at the public interest in disclosing the information and the public interest in withholding the information (see above).
61. The factors in favour of release include:
 - Increased accountability: release of the information would increase the accountability of Tayside Police by confirming that it was fulfilling its duties



- Increased awareness of police functions relative to an area of public interest (generally, security, terrorism, and community relations)
62. The factors against release include:
- Possible inhibition of flow of information to the Tayside Police with a consequent detriment to its ability to fulfil its legal obligations in respect of detection and prevention of crime
 - Detriment to the efficient conduct of the police in that release would compromise a law enforcement function of the police
63. I accept Mr Haley's argument that the accountability of Tayside Police would be increased if the full, unredacted report were to be released. I also accept that it would be in the interest of the public to be aware of how Tayside Police was fulfilling its duty in monitoring persons involved in criminal activity.
64. However, this accountability must be balanced against the public interest that Tayside Police be able to discharge this duty: in particular that Tayside Police's intelligence gathering and law enforcement and detection functions are not compromised.
65. Mr Haley is correct when he states that there is a public interest in the functions for which the SBCCU was created. In this application I note that Tayside Police has attempted to increase its accountability after its review, following Mr Haley's comments, by release of parts of the report to Mr Haley on 19 October 2006. I believe that this released information has gone some way to address just such a public interest in respect of this issue.
66. I also note the submissions of Tayside Police that there already exist mechanisms of accountability and scrutiny: for example, regular inspections by independent bodies operating on behalf of the government to ensure that authorities such as Tayside Police are gathering and storing intelligence in a way that is lawful, proportionate and compliant with legislation.
67. In taking into account the submissions from Tayside Police and Mr Haley, I have considered the public interest arguments in favour of disclosing the information. I have also taken into account the general public interest in ensuring that authorities are as open and accountable as possible in their dealings with the public. However, on consideration of these issues, it is my view that the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information.
68. I am therefore satisfied that Tayside Police correctly applied the public interest test in this case and that the exemptions in section 35(1)(a) and (b) should be maintained.



Sections 31(1), 34, 38(1)(b) and 39

69. I have noted in previous decisions, and in my Briefings on the exemptions, that several exemptions may apply to the same information.
70. For example, section 35 is a wide ranging exemption that has the potential to overlap with a number of other exemptions in FOISA. The greatest overlap is likely to be in relation to the exemption in section 34 (investigations by Scottish public authorities and proceedings arising out of such investigations).
71. Under FOIA, the equivalent law enforcement and investigations exemptions (sections 31 and 31) are mutually exclusive and if the investigations exemption applies, the law enforcement one cannot. The effect of this mutual exclusivity is to make the investigations exemption alone apply to information on specific investigations, while the law enforcement exemption applies to more general information such as policies and strategies. This mutual exclusivity is not a feature of FOISA, and so some information relevant to particular investigations may be exempt under both sections 34 and 35 of FOISA.
72. However, having decided that some of the information withheld from Mr Haley is not held by Tayside Police (in terms of section 3(2)(a)(ii)) and that the remaining information is exempt from disclosure (in terms of section 35(a) and (b)) and that, on balance, it is in the public interest for these exemptions to be maintained, I do not propose to consider whether the additional exemptions relied on by Tayside Police also apply to the information withheld.

Decision

I find that the Chief Constable of Tayside Police (Tayside Police) acted largely in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Haley. I find that the information which was withheld from the report was either not held by Tayside Police in terms of section 3(2)(a)(ii) of FOISA or was otherwise exempt from disclosure.

However, in failing to advise Mr Haley in terms of a notice under section 17 of FOISA that part of the information he requested was not held, I find that Tayside Police failed to comply with Part 1 of FOISA.



Appeal

Should either Mr Haley 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
11 October 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.

3 Scottish public authorities

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
 - (a) by the authority otherwise than –
 - (...)
 - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom



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.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but
 - (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold 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



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;