

Decision Notice



Decision 201/2011 Mr P and the Chief Constable of Grampian Police

Information concerning an allegation of rape

Reference No: 201100954
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Scottish Information Commissioner

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Summary

Mr P asked the Chief Constable of Grampian Police (Grampian Police) for information relating to a complaint that was made to them regarding an alleged rape. Grampian Police responded, having dealt with the request as a subject access request under the Data Protection Act 1998 (the DPA), refusing to supply the information because it related to a third party. Following a review, Grampian Police acknowledged that the request should have been dealt with under the Freedom of Information (Scotland) Act 2002 (FOISA) and refused to supply the information on the grounds that it was exempt from disclosure under sections 34(1) and 38(1)(b) of FOISA. Mr P remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Grampian Police had partially failed to deal with Mr P's request for information in accordance with Part 1 of FOISA. He concluded that they were entitled to withhold the requested information under the exemptions in sections 34(1)(a)(i) and (b) of FOISA, which apply to information held for the purposes of criminal investigations.

However, he found that in failing to provide a response to Mr P's request within 20 working days, Grampian Police breached section 10(1) of FOISA. He also found that Grampian Police had failed to provide Mr P with a refusal notice in accordance with section 16(1) of FOISA. He did not require Grampian 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); 10(1)(a) (Time for compliance); 16(1) and (2) (Refusal of request) and 34(1)(a)(i) 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 28 February 2011, Mr P wrote to Grampian Police to request information as to the date and time that a named person made a complaint with regard to an allegation of rape of another named person in a particular month and year. Mr P also asked for confirmation of what the actual complaint was, and where the complainant said that the rape had taken place.
2. Grampian Police responded on 6 April 2011. Grampian Police dealt with Mr P's request as a subject access request under the DPA. They refused to supply the information, noting that this data related to a third party, and they considered that it was not reasonable to provide this information.
3. On 6 April 2011, Mr P wrote to Grampian Police requesting a review of their decision. In particular, Mr P noted that the information he had requested related to a charge and indictment, which was discussed in open court, and is, he maintained, a matter of public record by way of court transcripts.
4. Grampian Police notified Mr P of the outcome of their review on 6 May 2011. They acknowledged that Mr P's request should have been dealt with under FOISA rather than the DPA, and that a refusal notice under section 16 of FOISA should have been issued to him. Grampian Police apologised for these errors. Grampian Police refused to disclose the requested information to Mr P on the basis that it was exempt from disclosure under sections 34(1)(a)(i) and (b) and section 38(1)(b) of FOISA.
5. On 23 May 2011, Mr P wrote to the Commissioner, stating that he was dissatisfied with the outcome of Grampian 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 P 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 3 June 2011, Grampian Police were notified in writing that an application had been received from Mr P and were asked to provide the Commissioner with any information withheld from him. Grampian Police responded with the information requested and the case was then allocated to an investigating officer.



8. The investigating officer subsequently contacted Grampian 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, Grampian Police were asked to justify their application of the exemptions in sections 34(1)(a)(i) and (b) and 38(1)(b). They were also invited to comment on the public interest test associated with section 34(1).
9. Grampian Police were also invited to comment on the points made in Mr P's application, including his assertion that the information requested was in the public domain as part of the relevant indictment and opinion of the court, and that he needed the withheld information in order to gain access to justice. They were also invited to respond to Mr P's comment that Grampian Police did not respond to his request within the statutory timescale prescribed in section 10(1) of FOISA.
10. A response was received from Grampian Police on 27 June 2011, providing submissions explaining their application of the exemptions in sections 34(1) and 38(1)(b) and comments on the other matters raised by Mr P in his application to the Commissioner.
11. The submissions from both Grampian Police and Mr P are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

12. 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 P and Grampian Police and is satisfied that no matter of relevance has been overlooked.

Section 34(1)(a)(i) and (b) of FOISA

13. Grampian Police withheld all of the requested information from Mr P under the exemptions in sections 34(1)(a)(i) and (b) of FOISA, which provide that information is exempt from disclosure if it is held for the purposes of:
 - 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)); or
 - 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)).



14. The exemptions in sections 34(1) are described as “class-based” exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: 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 in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
15. In his submissions, Mr P referred to a number of cases which involved the disclosure of information to people who have been accused of an offence. However, given that disclosure under FOISA means disclosure into the public domain and not just to the accused for the purposes of defending a charge or challenging a verdict, the Commissioner does not consider these cases to be relevant for the purposes of determining whether either of the exemptions set out above should be upheld or maintained.
16. Grampian Police explained that the withheld information is recorded and held by them in connection with the duty on the police constables of a police force, under section 17(1)(b) of the Police (Scotland) Act 1967, when an offence has been committed, to take all lawful measures, and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offence with all due speed for justice. Grampian Police noted that the allegation in this case was rape, an offence at common law in Scotland, as confirmed at the relevant time in Schedule 1 of the Sex Offenders Act 1997 (which has since been repealed).
17. Grampian Police noted that the receipt of the complaint of interest to Mr P placed an obligation on them to conduct an investigation to ascertain whether a person should be prosecuted for an offence. They noted that, in this case, that investigation led to a report being submitted to the procurator fiscal.
18. Having reviewed the information withheld (along with the documents within which this information is contained) and the submissions presented by Grampian Police, the Commissioner is satisfied that the withheld information has been held by them for the purposes of an investigation covered by section 34(1) of FOISA, and that this investigation was carried out to determine whether a person should be prosecuted for an offence, and resulted in a report being submitted to the Procurator Fiscal.
19. The Commissioner therefore accepts that the exemptions in section 34(1)(a)(i) and (b) of FOISA apply to the withheld information. He will now go on to consider whether the public interest in maintaining the exemptions (and withholding the information) outweighs the public interest in disclosure, as required by section 2(1)(b) of FOISA.

The public interest test

20. As stated in previous decisions, the “public interest” is not defined in FOISA, but has been 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 must serve the interests of the public.

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21. Section 2(1)(b) of FOISA provides that (with the exception of the absolute exemptions listed in section 2(2)) the general entitlement in section 1(1) of FOISA applies to exempt information only where, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

Submission from Mr P

22. In his application, Mr P submitted that the information he has requested is in the public domain and forms part of the indictment and the opinion of the court, issued into the worldwide domain by the Scottish Court Service and the Crown Office.
23. He also commented that, without access to the withheld information, he was being denied access to justice. He highlighted that, as an accused person, he was legally entitled to know exactly what is being alleged. He indicated that he was legally entitled to receive the information.

Submission from Grampian Police

24. Grampian Police recognised that there is a public interest in disclosure of the information to demonstrate transparency in the process by which criminal investigations and proceedings are conducted, which in turn, instils confidence in the criminal justice system. Grampian Police also acknowledged that there is also a public interest in disclosure that assists the pursuit of justice, and the identification of miscarriages of justice.
25. In this case, Grampian Police contended that the key public interest factor which lies in maintaining the exemptions is that of maintaining the expectation of confidence on the part of police witnesses. Grampian Police submitted that a failure to guarantee the confidentiality, other than for criminal proceedings, would discourage members of the public from contacting the police to report offences, from providing statements to support police reports to prosecuting authorities and from otherwise co-operating with the police to bring offenders to justice.
26. On balance, Grampian Police concluded that the detriment to the police's role in the investigation of crime and law enforcement which would result from disclosure outweighs the benefits that would result in terms of transparency and confidence in the criminal justice system. In reaching this conclusion, Grampian Police took account of the alternative, statutory avenue of applying to the Scottish Criminal Cases Review Commission (SCCRC), which is open to offenders to highlight potential miscarriages of justice, which they considered diminished the weight of arguments in favour of disclosure.
27. Grampian Police also commented on the submission made by Mr P in his application as to why he considers that the public interest lies in the disclosure of the requested information.

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28. With regard to Mr P's comment about his consideration that the requested information is already in the public domain, Grampian Police indicated that it did not consider the information to be in the public domain. They noted that the indictment (which was published as part of a 2010 Appeal Court judgement) made no reference to the complaint made by the individual referred to in Mr P's request.
29. Grampian Police acknowledged that references were made in the 2010 Appeal Court judgement to the complaint of interest to Mr P, but noted that the date, time and content of that complaint were not published in that document. Grampian Police stated that the information requested by Mr P has not been published or otherwise placed in the public domain by Grampian Police, and indicated that they were not aware of the Crown Office and Procurator Fiscal Service or Scottish Court Service having done so either.
30. Grampian Police also stated that, even if it were the case that the requested information was cited in public during the trial in 2002, the passage of time would now render the information subject to the right to respect for privacy and, therefore, be private rather than public. Grampian Police referred to paragraph 27 of the Supreme Court judgement in the case of *R (on the application of L) (FC) v Commissioner of Police of the Metropolis* [2009] UKSC 3, and paragraph 62 of the Commissioner's *Decision 088/2011 Mr G v the Chief Constable of Strathclyde Police* to justify their view.

The Commissioner's view

31. The Commissioner has carefully considered the public interest arguments advanced by Mr P and Grampian Police.
32. Turning to Mr P's contention that the information he has requested is already available in the public domain, the Commissioner has examined the information that is publicly available, together with the information under consideration. The Commissioner acknowledges that certain information relating to the allegation that is of interest to Mr P is available in the public domain within the 2010 Appeal Court judgement, although this does not name the individual who made the complaint. The Commissioner is satisfied that the specific information under consideration is not available in the public domain within the Appeal Court judgement, or the indictment published as part of that judgement.
33. The Commissioner recognises in this case, as he did in *Decision 088/2011 Mr G and the Chief Constable of Strathclyde Police*, that some of the detail sought by Mr P may well have been publicly disclosed in the course of the original criminal trial. However, this trial was in 2002 and it is likely that public awareness of this case and these facts will have faded. He does not consider that previous disclosure in the course of a trial some years previously can lead to the conclusion that the information remains publicly available. The Commissioner is therefore unable to accept that the information withheld continues to be publicly accessible information.



34. The Commissioner accepts that there is a general public interest in ensuring that allegations of criminal activity are thoroughly investigated and, where appropriate, that reports are made to the Procurator Fiscal. The Commissioner also accepts that this general public interest extends to ensuring transparency in the justice system as to how criminal investigations and proceedings are conducted to ensure that justice is not only done, but is seen to be done in all cases. The Commissioner has consequently given some weight to the arguments made by Mr P about the need for the information to be disclosed in order to allow him access to justice.
35. However, disclosure in response to a request made under FOISA is not only made to the person requesting it, but has the effect of making the information publicly accessible. In this context, the Commissioner considers that the public interest identified in paragraph 34 has to be balanced against the requirement for Grampian Police to be able to gather evidence and take statements from witnesses to facilitate them in being able to fully investigate alleged criminal activity, without placing those providing statements or reports in fear that their evidence will be placed into the public domain. The Commissioner recognises the very real need and considerable public interest in ensuring that witnesses and those providing information to the police are assured that the fact and content of the information they provide will be treated in confidence, except where this is disclosed in the context of judicial proceedings or related processes.
36. The Commissioner acknowledges that, if the information requested by Mr P were to be disclosed into the public domain, which is the effect of disclosure under FOISA, then this may be likely to deter members of the public from contacting Grampian Police in future or from providing witness statements.
37. The Commissioner has also noted that there other routes available to accused persons to access information about the evidence against them, without this information being made publicly available. The Commissioner therefore considers that there is only limited public interest in information of the type requested by Mr P being made available in response to a request made in terms of FOISA.
38. On balance, and having weighed the public interest both for and against disclosure in this case, the Commissioner has concluded that the public interest in disclosing the information is outweighed by that in maintaining the exemptions in sections 34(1)(a)(i) and (b).
39. He therefore finds that the Police were entitled to withhold this information.

Other matters to consider

40. In his application to the Commissioner, Mr P highlighted his concern that Grampian Police did not provide a response to his request within the requisite timescale laid down in FOISA.
41. Section 10(1) of FOISA gives public authorities a maximum of 20 working days following the receipt of the request to comply with the request; this is subject to certain exceptions, which are not relevant in this case.

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42. As is apparent from the information in the background section, Grampian Police did not provide a response to Mr P's request for information within 20 working days following the receipt of his request. The Commissioner therefore finds that Grampian Police failed to comply with section 10(1) of FOISA.
43. The Commissioner has also found that, in failing to recognise and process Mr P's request for information under FOISA, Grampian Police failed to comply with Part 1 of FOISA in that they did not provide Mr P with a refusal notice in accordance with section 16(1).
44. The Commissioner does acknowledge, however, that after reviewing their handling of Mr P's information request, Grampian Police recognised these failures and apologised to Mr P for this. As a consequence, the Commissioner does not require Grampian Police to take any action in relation to these failures in this case.

DECISION

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

The Commissioner finds Grampian Police correctly applied the exemptions in section 34(1)(a)(i) and (b), and so complied with Part 1 when refusing to disclose the information requested by Mr P.

However, in failing to provide a response to Mr P's request for information within 20 working days, and failing to provide a refusal notice to Mr P, Grampian Police failed to comply with Part 1, in particular sections 10(1) and 16(1) of FOISA.

For the reasons set out in paragraph 44 above, the Commissioner does not require Grampian Police to take any action in response to these failures in this case.



Appeal

Should either Mr P or Grampian 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
4 October 2011



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.

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request;

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-



- (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

...

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;