

Decision Notice



Decision 251/2011 Mr G and the Chief Constable of Strathclyde Police

Investigation concerning the murder of a named individual

Reference No: 201101219

Decision Date: 16 December 2011

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Scottish Information Commissioner

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Summary

Mr G requested from the Chief Constable of Strathclyde Police (Strathclyde Police) information pertaining to the investigation into the murder of named individual. Strathclyde Police advised that the requested information was being withheld under a number of exemptions of the Freedom of Information (Scotland) Act 2002 (FOISA). Strathclyde Police's response in relation to the requests under consideration in this decision advised Mr G that they did not understand what information was being sought.

Mr G then applied to the Commissioner and, following an investigation, the Commissioner issued *Decision 088/2011 Mr G and the Chief Constable of Strathclyde Police*, in which he ordered Strathclyde Police to conduct a review of the requests under consideration in this decision in line with the requirements of FOISA. Following this, Strathclyde Police issued a review response to Mr G advising that they did not hold any information in relation to parts of his request and that some information was exempt from disclosure under sections 34 and 35 of FOISA.

Following an investigation, in which it was established that Strathclyde Police did hold further information falling within the parts of Mr G's request under consideration, the Commissioner concluded that the information that was held was exempt from disclosure under sections 34(1)(a)(i) and (b) of FOISA. The Commissioner does not require Strathclyde 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) 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 7 July 2010, Mr G wrote to Strathclyde Police requesting a range of information pertaining to their investigation into the murder of a named individual. Strathclyde Police's handling of this request was considered in the Commissioner's *Decision 088/2011 Mr G and the Chief Constable of Strathclyde Police*.



2. This decision is concerned with the handling of three parts of Mr G's request of 7 July 2010, in relation to which Strathclyde Police had failed to conduct a review. The remaining parts will not be considered further in the present decision, though some parts are included below in order to show the wider context of the requests under consideration.
3. The requests under consideration in this decision are parts i.a, ii.c and vii (marked bold below), which sought:
 - i. **The following information relative to each of four sightings of the deceased on CCTV camera footage**
 - a. the identity or reference numbers of the CCTV camera
 - b. the precise location of the CCTV camera,
 - c. the timings recorded relative to the sightings,
 - d. the direction of travel of the deceased, as derived from the sightings
 - e. such additional information as has been derived from the sightings,**
 - f. the video tape format (e.g. 'real time'/'time lapse' etc) relative to the sightings,
 - g. the cataloguing references relative to any sequences or stills produced.
 - ii. **The following Information relative to a particular CCTV tape**
 - a. the location of the camera(s),
 - b. dates and times of footage recovered relative to a particular location, and
 - c. any information relative to sightings of the deceased or a named witness at this locus.**
 - vii. **All information as to steps taken to investigate the veracity of certain claims or as to any steps taken to eliminate a named person from the inquiry.**
4. Strathclyde Police responded to Mr G's request in a letter dated 6 August 2010. They withheld the requested information in its entirety, stating that it was exempt from disclosure under sections 38(1)(b), 34(1)(a) and (b) and 35(1)(a) and (b) of FOISA.
5. On 17 August 2010, Mr G's wrote to Strathclyde Police requesting that they review their response to his request. He commented that Strathclyde Police appeared not to have had regard to each element of his request when considering the application of exemptions, and that it had not given proper consideration to the public interest test in relation to the exemptions in section 34 and 35. He commented on each part of his request in turn, arguing in each case that the information requested should be disclosed.
6. On 29 September 2010, Strathclyde Police wrote to Mr G advising him that having reconsidered the requests i.e, ii.c and vii, they did not understand what information was being requested.



7. Mr G submitted an application to the Commissioner which resulted in *Decision 088/2011* being issued on 12 May 2011. The Commissioner's consideration of Strathclyde Police's handling of the requests i.e, ii.c and vii was set out in paragraphs 25 to 46 of that decision. That discussion is not repeated in full here, but it is relevant to note that the Commissioner found that each constituted a valid information request for the purposes of FOISA and that Strathclyde Police had failed to conduct a review of its initial response in relation to these requests in line with the requirements of sections 21(1), (4) and (5) of FOISA.
8. The Commissioner consequently required Strathclyde Police to conduct a review of parts i.e, ii.c and vii of Mr G's request dated 7 July 2010 in line with the requirements of sections 21(4) and (5) of FOISA. He noted that if they considered it beneficial to contact Mr G to better understand the intended scope or focus of these parts of his request, Strathclyde Police may choose to do so prior to issuing their response.
9. On 7 June 2011, Strathclyde Police wrote to Mr G inviting him to provide clarification of parts i.e, ii.c and vii of his request.
10. On 16 June 2011, Mr G responded to Strathclyde Police's request for clarification by providing additional commentary and explanation of his requests. Mr G indicated that he would adopt the interpretation of his request set out in paragraph 38 of *Decision 088/2011*. This stated:

With respect to parts i.e and ii.c, the Commissioner considers (in the absence of further clarification or evidence to the contrary) it is clear that the requests are seeking any recorded information that would indicate what findings or evidence had been drawn from consideration of the specified CCTV recording. With respect to part vii, the Commissioner considers it to be clear that the request is seeking recorded information that would evidence the steps taken by Strathclyde Police in relation to the matters specified. The information falling within this request would be that which would confirm which steps were taken, when and by whom.
11. With respect to the CCTV footage (relevant to parts i.e and ii.c of his request), Mr G commented further that it was unclear whether information relating to individual sightings would be indicative of movement or direction of movement. He indicated that this was the kind of information being requested, contingent on what had been recorded. He also commented that it might be that sightings have been recorded as taking place in the vicinity of named shops or premises. Mr G noted also that a witness statement had made reference to the production of a schedule of events shown on tapes that had been reviewed. He indicated that information derived from relevant tapes and recorded within such a schedule to fall within the scope of his request.
12. Mr G commented that it would not be for him to speculate about the type of steps taken to investigate the claims relevant to part vii of his request.



13. On 27 June 2011, Strathclyde Police provided Mr G with a response to his request for review. In relation to parts i.e. and ii.c. Strathclyde Police indicated that a further enquiry had been made with operational staff, but no further information had been provided to the review panel. It indicated in relation to part i.e that there was no further information (which the Commissioner understands to mean beyond that provided in response to parts i.a – d) that has been derived in the terms asked. In response to part ii.c, the review panel indicated that it had no information in the terms asked.
14. In relation to part vii, Strathclyde Police advised that any information falling within scope of this part of his request would be exempt under sections 34(1)(a) and (b) and 35(1)(a) and (b) of FOISA.
15. On 5 July 2011, Mr G wrote to the Commissioner, stating that he was dissatisfied with the outcome of Strathclyde Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
16. The application was validated by establishing that Mr G 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

17. On 11 July 2011, Strathclyde Police were notified in writing that an application had been received from Mr G and were asked to provide the Commissioner with any information withheld from him. Strathclyde Police responded with the information requested and the case was then allocated to an investigating officer.
18. The investigating officer subsequently contacted Strathclyde 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, Strathclyde Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
19. Strathclyde Police responded, providing their comments on the case and answering the questions raised by the investigating officer. Strathclyde Police were subsequently asked further questions, prompted by the comments made by Mr G (summarised in paragraph 11 above) regarding the types of information he expected to be held concerning CCTV footage. The investigating officer asked in particular whether the schedule of events mentioned in a witness statement was held by Strathclyde Police, and whether there was any other recorded information indicating what information had been recorded about the content of the relevant CCTV footage.



20. Strathclyde Police subsequently identified the schedule of events mentioned by Mr G, and provided a copy of this information to the Commissioner. They indicated that they considered this information to be exempt from disclosure under sections 34(1)(a)(i) and (b) and 35(1)(a) and (b) of FOISA. They indicated that no further information relevant to Mr G's information request was held.
21. Mr G was also invited on the matters raised by this case, and in particular the public interest test. The arguments presented by both parties will be considered, where relevant, in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

22. 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 G and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Information under consideration

23. As noted above, Strathclyde Police responded to Mr G's request for review by withholding the information sought by part vii, and indicating in response to parts i.e and ii.c of his request that no additional information, as described, was held. The Commissioner understands that in making this statement, Strathclyde Police was maintaining that all relevant information relating to the evidence contained in the relevant CCTV footage had been provided to Mr G already.
24. However, it became clear during the investigation that Strathclyde Police had not conducted appropriately focused searches to establish whether the particular information that Mr G had indicated was of interest to him was actually held, and it appeared still to be having some difficulties understanding what information might be relevant to the request.
25. When prompted to do so by the investigating officer, Strathclyde Police undertook further focussed searches, and identified the schedule of events described by Mr G when asked to clarify his request. The Commissioner considers that this document contains information falling within the scope of Mr G's requests i.e and ii.c, and so he will consider below whether Strathclyde Police were entitled to withhold this information under the exemptions they cited during the investigation.
26. The Commissioner is satisfied that, by the end of the investigation, Strathclyde Police had undertaken appropriate searches to identify relevant information falling within the terms of parts i.e and ii.c of Mr G's information request.



27. However, the Commissioner is disappointed to note the continued deficiencies of Strathclyde Police's handling of parts i.e and ii.c of Mr G's information request. Given that relevant information was located following prompting from the investigating officer, he considers that Strathclyde Police appears not to have conducted adequate searches to establish whether the particular types of information mentioned by Mr G (when he was invited to clarify his requests) were held, or to confirm their extent, prior to that point. As a result, Strathclyde Police incorrectly notified Mr G that no (additional) information was held falling within the scope of these requests.
28. The Commissioner would encourage Strathclyde Police in the future to take care to consider the actual information requested by applicants, and ensure that its response properly identifies and addresses that information.

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

29. Strathclyde Police relied upon the exemptions in sections 34(1)(a)(i) and (b) to withhold the information withheld in response to parts i.e., ii.c and vii of Mr G's request.
30. Section 34 provides a number of exemptions from disclosure which apply if the requested information has at any time been held by a Scottish public authority for the purposes of certain investigations. Relevant investigations include those in which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i)) and those 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 (section 34(1)(b)).
31. Strathclyde Police explained that the information withheld from Mr G was gathered and recorded for the purposes of an investigation which that they had a duty to conduct in order to ascertain whether a person or persons should be prosecuted for an offence. Following the investigation, a report was made to the Procurator Fiscal, and an individual was subsequently convicted of murder.
32. If information has been held by a Scottish public authority for the purposes of an investigation covered by section 34(1) of FOISA, it automatically falls under the relevant exemption. The Commissioner is satisfied that the information withheld by Strathclyde Police is entirely information created or gathered, and so held, for the purposes of a criminal investigation which Strathclyde Police had a duty to conduct, and in relation to which a report was made to the Procurator Fiscal, leading to a criminal trial and conviction. He is therefore satisfied that the exemptions in sections 34(1)(a)(i) and (b) are both applicable to this information.
33. However, the exemptions in section 34(1) are subject to the public interest test required by section 2(1)(b) of FOISA and the Commissioner must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



Public interest – submission from Strathclyde Police

34. Strathclyde Police accepted that considerations such as justice to the individual might show there would be public interest in disclosure, but they believed that the balance of public interest lay in withholding the information.
35. With respect to the information falling within the scope of parts i.e and ii.c of Mr G's request (contained within the schedule of events), Strathclyde Police maintained that disclosure of the information would show how, and why, they focus their enquiries, effectively showing what material is criminally relevant and thus what criminals should seek to hide or prevent from being recorded. They indicated that, in their view, it was not in the public interest that such information is disclosed.
36. With respect to the information falling within the scope of part vii of Mr G's request, Strathclyde Police commented that any information relating to evidence provided by witnesses is quite properly the provenance of the Crown and the Courts. They suggested that such witnesses would have no confidence in the police, their investigating processes or indeed the courts if such information be subject of subsequent public discussion.
37. They argued that, whilst it might be in the applicant's interest to attempt to gather other information in respect of the investigation, it cannot be said to be in the public interest that confidential and sensitive information is so disclosed.
38. Strathclyde Police also referred to their submissions on the public interest that were put forward in relation to Mr G's previous application regarding the same information request.
39. Within these submissions, Strathclyde Police recognised that there was some public interest in disclosure of the information, particularly if it assisted in ensuring justice for any individual.
40. However, they maintained that there is a genuine and strong public interest in ensuring that the flow of information and evidence to and from the police in relation to criminal investigations is not deterred or inhibited. They commented that, if it were, the police would not be in a position to fully investigate whether and by whom a crime had been committed.
41. Against release, they noted that the withheld information relates to CCTV footage seized and lines of enquiry undertaken as part of a criminal investigation, and also that the information withheld included information provided to Strathclyde Police by third parties. They highlighted that such information is considered in general terms to be confidential and would only be disclosed during proceedings instigated as a result of the investigation or other due legal process.
42. Strathclyde Police maintained that disclosure of such information may discourage or prevent the public from contacting the police in the future for fear that their information would be publicly disclosed. This, they argued, would be detrimental to the efficient and effective conduct of Strathclyde Police, as the police must be in a position to fully investigate matters reported to them.



Public interest – submission from Mr G

43. Mr G did not consider that the requested information to be in any way sensitive or controversial. He maintained that there was a clear public interest in transparency and confidence in the criminal justice system in relation to the availability of the information concerned. He also noted that, as much information relating to the investigation was made public at the time, the same approach should be taken now and the withheld information should be made public.

Public interest test – the Commissioner's view

44. The Commissioner has carefully considered the public interest arguments put forward by Mr G and Strathclyde Police (including those parts which are not summarised in full in this decision), and the particular information withheld from Mr G..
45. The Commissioner has also borne in mind that disclosure under FOISA is not made just to one person, but has the effect of making information publicly available.
46. He has noted that disclosure of the information under consideration would place into the public domain information confirming the nature and extent of certain CCTV evidence available to Strathclyde Police when investigating a murder, and would reveal details of the steps taken in relation to a particular line of inquiry. The information sought by Mr G would publicly confirm the nature and extent of the police investigation in that area, and provide insights into a named individual's involvement in that investigation.
47. It should of course also be noted that the matters under consideration may have been aired in the trial, and as such made public. However, the Commissioner recognises that public awareness of such facts will fade after those events. In addition the subject matter of Mr G request might not have been explored in detail at the time of the trial. As a result, the Commissioner's view is that the fact that the case went to trial should not be given significant weight as factor favouring public disclosure of information gathered for the purposes of the investigation at a later date.
48. The Commissioner acknowledges and has given some weight to the general public interest identified by Mr G in transparency in the criminal justice system. This applies both generally, and in relation to the particular case to which his information request relates. He recognises that some public interest would be served by disclosure in this case, since it would aid understanding of the police investigation into the relevant case.
49. However, he considers there to be a stronger public interest in maintaining the exemptions contained in section 34 of FOISA in relation to the withheld information. He considers that there is very considerable public interest in ensuring that the steps taken by the police to conduct a thorough investigation and the identities of the persons who they interviewed should be kept confidential, except where this is disclosed in the context of judicial proceedings or related processes.

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50. The Commissioner believes it is unquestionably and strongly in the public interest that the public remains confident in and willing to co-operate with the criminal justice system by providing witness statements and other assistance to police in the course of their investigations. He agrees with Strathclyde Police that disclosure under FOISA of the information requested by Mr G would be likely to undermine the confidentiality that is an understood part of police investigations, with the consequence that the public would be less willing to assist the police with future investigations.
51. He also considers that publicly disclosing information recorded and held by the police concerning particular CCTV evidence could provide insights into the police investigative strategies, to the detriment of future investigations. He considers it also to be strongly in the public interest that the nature and content of evidence gathered by police is not made publicly available outwith the context of judicial proceedings or related processes, as doing so could undermine such investigations.
52. On balance, the Commissioner finds that the public interest in maintaining the exemptions in sections 34(1)(a)(i) and (b) outweighs that in disclosure of the information withheld from Mr G. The Commissioner therefore upholds the decision of Strathclyde Police to withhold the information in question under section 34(1)(a)(i) and (b) of FOISA.
53. Having reached this conclusion, it is not necessary for the Commissioner to go on to consider the application of the exemptions in section 35(1)(a) and (b) of FOISA in this case.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) was entitled to withhold the information sought by parts i.e, ii.c and vii of Mr G's information request, on the grounds that it was exempt from disclosure under section 34(1)(a)(i) and (b) of FOISA.

Accordingly, he finds that they complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) when refusing to supply that information in response to the information request made by Mr G.

The Commissioner does not require any action to be taken in response to this decision.



Appeal

Should either Mr G or Strathclyde 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
16 December 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 –

- (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;

...