

Decision Notice

Decision 084/2015: Mr Paul Delamore and the Chief Constable of the Police Service of Scotland

The investigation into Willie Macrae's death

Reference No: 201500190

Decision Date: 19 June 2015



Scottish Information
Commissioner

Summary

On 14 July 2014, Mr Paul Delamore asked the Chief Constable of the Police Service of Scotland (Police Scotland) for information regarding the investigation into Willie Macrae's death.

Police Scotland withheld the information, claiming that disclosure would prejudice their ability to prevent and detect crime, apprehend or prosecute offenders. Following a review, Mr Delamore remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Police Scotland had failed to respond to Mr Delamore's request for information in accordance with Part 1 of FOISA. This was because Police Scotland had wrongly withheld information requested by Mr Delamore, and they had also failed to notify Mr Delamore that some of the information he requested was not held. She required Police Scotland to provide Mr Delamore with the information he had requested and which they held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 39(1) (Health, safety and the environment)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. Mr Willie Macrae died in April 1985 and his death was ruled to be suicide. Since then, there has been significant public speculation regarding the circumstances of his death.
2. On 14 July 2014, Mr Delamore made the following request for information to Police Scotland, referring to documents disclosed in response to a separate request:
 - (1) At what time on the 6th April 1985 were the police notified of a gunshot wound?
 - (2) And at what time on the 6th April 1985 were the family of Mr Macrae notified about his situation?
 - (3) I see that there is a date (7th April 1985) for the photos of the gun in the request. Could I please also get a time on when these were taken?
 - (4) Following on from this, could I also please get the time/date of when the photographs of the car in the request were taken?
 - (5) Could I also get the time of when the car was removed from the locus on the 7th April 1985?
 - (6) On what date/time was the post-mortem conducted?

3. Police Scotland responded on 14 August 2014. In their response, Police Scotland notified Mr Delamore that they were withholding all of the requested information under section 34(1)(b) of FOISA, and the information covered by part 6 of his request was also being withheld under section 39(1) of FOISA.
4. On 25 August 2014, Mr Delamore wrote to Police Scotland requesting a review of their decision on the basis that their consideration of the public interest test had failed to take into account the nature of the information he had asked for. Mr Delamore did not accept that disclosure of the details he had requested would cause the harmful consequences anticipated by Police Scotland. He asked Police Scotland to bear in mind that where the public interest in disclosing or withholding the information is finely balanced, there should always be a presumption in favour of disclosure.
5. Police Scotland notified Mr Delamore of the outcome of their review on 22 September 2014, upholding their original response.
6. On 28 January 2015, Mr Delamore applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Delamore stated he was dissatisfied with the outcome of Police Scotland's review because he did not accept that the exemptions being relied upon were applicable to the information he requested.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Delamore made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 9 February 2015, Police Scotland were notified in writing that Mr Delamore had made a valid application, and were asked to send the Commissioner the information withheld from him. Police Scotland provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were invited to comment on this application and answer specific questions, including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Delamore and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 17(1) of FOISA (Notice that information is not held)

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.

12. In submissions to the Commissioner, Police Scotland informed the Commissioner that they did not hold any information falling under part 3 of Mr Delamore's request (which asked for the time that photographs of a gun were taken). When questioned, Police Scotland explained that the photograph of the gun was taken as a production in relation to the case and only the date of the photograph is noted on the production label attached to the firearm. Police Scotland confirmed that the time the photograph was taken was not recorded.
13. Having considered the submissions provided by Police Scotland, the Commissioner accepts that the information requested by Mr Delamore in part 3 of his request is not held by Police Scotland.
14. However, Police Scotland have provided no convincing explanation as to why they failed to notify Mr Delamore that they did not hold this information, as required by section 17(1) of FOISA.
15. The Commissioner is concerned that Police Scotland failed to establish that they did not hold this information in their original response and review outcome.
16. Police Scotland have submitted that the information requested by Mr Delamore was not indexed in a manner that made it easy to establish, beyond doubt, that they held the requested information. This may be so, but all Scottish public authorities are required to establish whether they hold information *before* going on to consider whether any exemption applies to that information. In this case, Police Scotland informed Mr Delamore that they could not provide him with the information covered by part 3 of his request as the information was exempt from disclosure in terms of section 34(1)(b) of FOISA and the public interest favoured upholding the exemption.
17. It is clear that the response and review outcome provided by Police Scotland were not based on the actual information held by Police Scotland, as Police Scotland did not hold any information covered by part 3 of Mr Delamore's request. This approach is not compatible with Police Scotland's obligations under FOISA. The Commissioner expects Police Scotland to take steps to ensure that when they respond to any future requests for information, their response is based on the actual information that they hold.
18. The Commissioner would also remind Police Scotland of their obligations to follow good records management practices, as set out in the Scottish Ministers' "Section 61 Code of Practice"¹. In particular, Part 1, Sections:
 - 3, which states "Authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes,
 - 4, which states "Authorities should keep their records in systems that enable records to be stored and retrieved as necessary, and
 - 5, which states "Authorities should know what records they hold and where they are, and should ensure that they remain usable for as long as they are required.

¹ Scottish Ministers' Code of Practice on records Management by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002
<http://www.gov.scot/About/Information/FOI/Section60Code/s61codeofpractice>

Section 34(1)(b) of FOISA (Investigations by Scottish public authorities and proceedings arising out of such investigations)

19. Section 34(1)(b) of FOISA applies to information that has, at any time, been held by a Scottish public authority for the purposes of an investigation, which 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.
20. Police Scotland have relied on section 34(1)(b) of FOISA to withhold information falling under parts 1, 2, 4, 5 and 6 of Mr Delamore's request for information
21. The Commissioner has considered the withheld information and is satisfied that all of it is information which falls under the scope of the exemption in section 34(1)(b) of FOISA.

Public interest test

22. The exemption in section 34(1)(b) is subject to the public interest test contained in section 2(1)(b) of FOISA. The Commissioner must consider the public interest factors favouring both disclosure of the information and the maintenance of the relevant exemption and carry out a balancing exercise. Unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, the information must be disclosed (unless she finds that the information should be withheld under another exemption applied by Police Scotland).

Submissions from Police Scotland

23. Police Scotland acknowledged that disclosure of the requested information "would indicate accountability and satisfaction to the public" that the investigation into the death of Mr Macrae was conducted properly by the police service and public funds used correctly. Police Scotland also acknowledged an argument that it may be in the public interest to provide further details in relation to the case as the investigation is now closed, and because of the passage of time since the incident occurred.
24. However, Police Scotland stressed that "public interest" does not mean "of interest to the public" but "in the interest of the public". Police Scotland argued that it is never in the public interest to disclose information provided by the public in confidence to assist the police service with their investigations, regardless of the passage of time.
25. Police Scotland stated that they had already made public a significant amount of information relating to the investigation into the death of Mr Macrae. Police Scotland argued that it could undermine future enquiries to release any further information collated from witness statements as part of the investigation, and which did not result in criminal proceedings, without agreement between all relevant agencies.
26. Police Scotland balanced the competing factors for and against disclosure in the public interest and argued that the decision must fall in favour of preserving the confidentiality of information provided to the police by the public, and the relationship of trust between Police Scotland and its partnership agencies, to ensure the effective outcome of an investigation. In this case, Police Scotland believed this should "carry more weight than that of accountability".

Submissions from Mr Delamore

27. Mr Delamore indicated that his requests to Police Scotland were aimed at establishing a timeline of events, and he submitted that this was something that the official account of the death of Willie Macrae had failed to do. Mr Delamore argued that disclosure of the information he had asked for was in the public interest. In particular, with regard to part 5 of his request, Mr Delamore stated that it was important to clarify whether or not this information exists within Police Scotland's documentation, in order to maintain public confidence in investigating authorities.
28. Mr Delamore questioned how disclosure of the requested information could cause any further damage to Mr Macrae, and he stressed the continuing public interest in the case. Mr Delamore noted that, on 10 April 2015, a public petition calling for a Fatal Accident Inquiry into Mr Macrae's death had garnered 8,147 signatures. Mr Delamore also referenced various recent news articles that discussed Mr Macrae's death and argued that public interest in Mr Macrae's death is still high.
29. Mr Delamore submitted that any mistakes made by Police Scotland (during their investigation) should be admitted, otherwise other, more unconventional, theories pertaining to the death of Mr Macrae would continue to flourish. Mr Delamore argued that continued public speculation regarding the death of Mr Macrae is more likely to harm the Macrae family than the disclosure of the specific factual information he requested.
30. Mr Delamore argued that any information that does not infringe upon any criminal investigations or potential criminal investigations (since there is thought to be no criminality in this case) should be disclosed.

Commissioner's considerations

31. The Commissioner acknowledges that when individuals provide information to Police Scotland to assist with any investigation (criminal or otherwise) they have an expectation that the information they provide will be held in confidence and will be used only for the purposes of a police investigation. The Commissioner notes that Police Scotland are concerned that if witness statements (or parts of witness statements) are disclosed in this case, this may reduce the public's willingness to come forward in the future and assist Police Scotland with their investigations.
32. Police Scotland have provided evidence to show that the information requested by Mr Delamore is contained within witness statements. However, in this case, it is clear that Mr Delamore has not asked for any witness statements; he is merely asking for specific facts from Police Scotland's investigation into the circumstances of Mr Macrae's death. For example, Mr Delamore asked for the time a photograph of a gun was taken, the date and time that a post-mortem took place, and the time that police were notified of a gunshot wound. The Commissioner acknowledges that these facts are contained within witness statements, but she does not accept that their disclosure, in isolation from the context provided by the rest of the statement, would cause the type of harm cited by Police Scotland.
33. The Commissioner does not accept that disclosure of the requested information would have any impact on the public's willingness to assist the police with future investigations. The Commissioner considers that none of the witnesses providing the statements containing the requested information could be identified from disclosure of the factual information Mr Delamore has requested. The information does not represent anyone's views or recollections. Overall, the Commissioner is not persuaded that disclosure of the requested information in this case would dissuade anyone from co-operating with Police Scotland in any future incident.

34. The Commissioner agrees that “public interest” does not mean “of interest to the public” but “in the interest of the public”. However, in some circumstances it may be in the public interest to disclose information in which the public is interested: if, for example, disclosure would serve the general public interest that information is accessible, and therefore enhance scrutiny of decision-making processes and improve accountability.
35. The Commissioner is aware that the death of Mr Macrae has been subject to continuing speculation over the last 30 years and it is undoubtedly of interest to the public. Since his death, there has been a multitude of news stories raising questions over the official verdict of suicide. The investigation into Mr Macrae’s death was reviewed by the Crown Office in 2010/2011, and there is currently a public petition requesting a Fatal Accident Inquiry into his death, which has now gathered more than 10,000 signatures. The Commissioner notes that there has been a significant level of public distrust regarding the original investigation into the death of Mr Macrae. She takes the view that disclosure of additional factual information about the case could be in the public interest, by helping to establish the known facts and, in doing so, perhaps help dispel public distrust.
36. On balance, the Commissioner finds that the public interest in maintaining the exemption in section 34(1)(b) of FOISA is not outweighed by the public interest in disclosure of the withheld information. Accordingly, the Commissioner requires Police Scotland to disclose to Mr Delamore all of the information falling within the scope of parts 1, 2, 4 and 5 of his request.
37. In this case, the information is factual and concise, and can be extracted easily from the documents. That being the case, the Commissioner considers it would be acceptable for Police Scotland to extract the information and summarise it in a single, separate, document, if they so wished. But Police Scotland must ensure that it is clear what information relates to which part of Mr Delamore’s information request.
38. Police Scotland also relied on section 39(1) of FOISA to withhold the information covered by part 6 of Mr Delamore’s request, in which he asked for the date/time that the post mortem on Mr Macrae was conducted. The Commissioner will now go on to consider the application of the exemption to that information.

Section 39(1) of FOISA - Health, safety and the environment

39. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test in section 2(1)(b) of FOISA.
40. The Commissioner's briefing on this exemption notes that section 39(1) does not contain the "substantial prejudice" test found in various other exemptions contained in Part 2 of FOISA. Instead, this exemption refers to the "endangerment" of health or safety.
41. The Commissioner's view is that the term "endanger" is sufficiently broad to apply where there is a direct or indirect threat to the safety of a person which would foreseeably arise in the future, as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner considers that for endangerment to be considered likely there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
42. In order for the exemption to apply, the public authority must be able to explain or show why disclosure of the information would be (at least) likely to cause such endangerment. There must be an evident connection between the two events (disclosure and endangerment).

Police Scotland submissions

43. Police Scotland argued that the information collected during the investigation into Mr Macrae's death is invariably sensitive. If disclosed, it will be widely circulated in the media and Police Scotland considered it implausible to assume that the family of Mr Macrae would not be aware of, and therefore affected by, its release. Police Scotland submitted that details of the case appear in the media on an annual basis, causing continuing distress to Mr Macrae's family. Police Scotland argued that as this year is the 30th anniversary of Mr Macrae's death, further disclosures may cause additional distress to the family who may again be trying to come to terms with the loss of Mr Macrae. Police Scotland submitted that they have a duty to protect the well-being of the community.
44. Police Scotland also provided the Commissioner with a recent newspaper article (dated 8 May 2015) in which a member of Mr Macrae's family stated that they did not believe there were any suspicious circumstances surrounding his death and that there was no reason not to accept the official turn of events.

Commissioner's conclusions on section 39(1) of FOISA

45. The Commissioner has no doubt that the loss of Mr Macrae must have caused (and will continue to cause) mental anguish and distress to Mr Macrae's family. She accepts that any press coverage about his death, or the investigation into his death, will only serve to remind the Macrae family of the loss they have suffered, thus adding to their stress and anguish. However, based on the submissions provided by Police Scotland, it is clear that media interest surrounding Mr Macrae's death has never waned and recurs annually. Given that Police Scotland does not disclose new information about the case on a yearly basis, this cycle of media attention indicates to the Commissioner that media interest is not dependent on the emergence of new factual information, but rather it thrives on the emergence or re-emergence of theories and speculation.
46. While the Commissioner does not seek to underestimate the distress caused to a mourning family by media intrusion, she finds that Police Scotland have provided no evidence to suggest that withholding the requested information would, in any way, prevent this ongoing media attention, or that this media attention is endangering the mental health of members of Mr Macrae's family. The Macrae family have endured repeated speculation about Mr Macrae's death since it was first reported, and sadly, despite their own requests for those interested parties to accept the official version of events, it is likely that they will continue to endure such speculation, regardless of whether information is disclosed in this case or not.
47. The Commissioner does not consider that withholding the time and date of the post-mortem, would, in any way, lessen the media interest in Mr Macrae's death, or that disclosing it is likely to endanger the mental health of anyone associated with Mr Macrae. In light of this, the Commissioner finds that the exemption in section 39(1) of FOISA does not apply to the information withheld under part 6 of Mr Delamore's request.
48. Having concluded that the exemption was wrongly applied, the Commissioner is not required to consider the public interest test in relation to disclosing or withholding this information. She requires Police Scotland to disclose the information to Mr Delamore.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Delamore.

She finds that Police Scotland wrongly withheld information under sections 34(1)(b) and 39(1) of FOISA, and that they also failed to give Mr Delamore notice that they did not hold some of the information he asked for (part 3 of his request).

The Commissioner therefore requires Police Scotland to disclose all of the withheld information to Mr Delamore by **4 August 2015**.

Appeal

Should either Mr Delamore or the Chief Constable of the Police Service of Scotland wish to appeal against this decision, they have the right to 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.

Enforcement

If the Chief Constable of the Police Service of Scotland (Police Scotland) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland have failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

19 June 2015

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.

...

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-

...

(b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...

39 Health, safety and the environment

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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