



Decision Notice 099/2023

Identity of police officer

Applicant: The Applicant

Authority: Chief Constable of the Police Service of Scotland

Case Ref: 202101383

Summary

The Applicant asked the Authority if a police officer named in a media article was the same officer who had given evidence at the Applicant's trial. The Authority refused to supply the information. The Commissioner investigated and found that the Authority had been correct in terms of FOISA to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) and 2(2)(e) (Effect of Exemptions); 34(1)(b) and (c) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 47(1) and (2) (Application for decision by Commissioner)

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. On 19 August 2021, the Applicant made a request for information to the Authority. The Applicant referred to an [article](https://www.thetimes.co.uk/article/rangers-police-had-no-idea-how-to-tackle-finance-crime-gxc2g5z5m)¹ of 14 August 2021 in *The Times* newspaper and asked if the police officer referred to in that article was the same police officer who gave evidence at the Applicant's trial. The police officer referred to in the article of 14 August 2021, had a similar

¹ <https://www.thetimes.co.uk/article/rangers-police-had-no-idea-how-to-tackle-finance-crime-gxc2g5z5m>

name but higher rank to the officer who had given evidence in the Applicant's trial. To assist the Authority, the Applicant attached a transcript of his trial.

2. The Authority responded to the Applicant on 17 September 2021. It stated that it was not in the position to provide the information sought.
3. On 24 September 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because the information he had requested had not been provided to him, nor had the Authority's response complied with its obligations under FOISA.
4. The Authority notified the Applicant of the outcome of its review on 27 October 2021. The Authority overturned its initial decision, which it said had been a "business-as-usual" response. The Authority confirmed that it did hold recorded information that would show whether or not the police officer named in the newspaper article was the same officer who had given evidence at the Applicant's trial. The Authority, however, refused to provide this information, relying on the exemptions in sections 34(1)(b) and (c), 35(1)(a) and (b), 38(1)(b), and 39(1) of FOISA. The Authority explained why these exemptions applied, and why the balance of the public interest (where relevant) favoured withholding the information.
5. On 4 November 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he believed that the information he had requested had been unjustifiably withheld by the Authority.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 6 December 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information referred to in paragraph 4. The Authority provided the information, and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why it had withheld the information falling within the Applicant's request, and (where relevant) why the public interest favoured withholding this information. The Applicant too was invited to supply any comments or submissions he wished to make.
9. Both the Applicant and the Authority have given arguments in support of their respective views to the Commissioner.

Commissioner's analysis and findings

10. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

11. As stated in previous decisions, in [Scottish Ministers v Scottish Information Commissioner](#) [2006] CSIH 8², at paragraph 18, the Court of Session recognised that:

"in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
12. In this decision notice, the Commissioner has endeavoured to give as full account of his reasoning as he can, but, by necessity, in this case the comments of the Court of Session are applicable to some aspects.
13. Also, the decision is written so as not to reveal whether the answer to the Applicant's request is 'yes' or 'no' – as to do so would involve revealing what has been withheld – and this has necessitated reference to "police officer" and "police officers" (and similar expressions) through this decision.

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

14. The exemptions in section 34 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. However, the exemptions are subject to the public interest test contained in section 2(1)(b) of FOISA.
15. Section 34(1) provides that 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 (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.

The Authority's submissions about the exemption

16. The Authority explained that the request can only be interpreted as seeking recorded information held by it that would confirm (or disconfirm) that the police officer referred to in both cases was the same person.
17. To ascertain the answer to this request, the Authority explained that it could check with the officer/s or ascertain by looking at the case materials held from each case. The Authority explained that there was no register of every case an officer has been involved in over the course of their career. Such information was only available in case specific documentation (witness statements, reports to the Crown Office and Procurator Fiscal Service (COPFS), etc.) and that was information gathered for the purposes of an investigation.
18. Whilst there may be other ways for the Authority to confirm the answer to the request, the Authority explained that it would "theoretically be possible to demonstrate the link with reference to case materials from each case". That is, whilst an officer's ID number will have changed over the years with the move from the former forces to Police Scotland, it remained a unique identifier, usually listed alongside an officer's name on case-related records, that can be cross-referred with the officer's personnel record to confirm their identity.

² <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

The Applicant's submissions about the exemption

19. The Applicant's requirement for review referred to the officer named in the Applicant's transcript as giving hearsay evidence. The Applicant referred to the officer having given evidence in another trial and argued that there was an issue of reliability of evidence.

The Commissioner's view about the exemption

20. The information sought is a yes/no answer: that is, whether the officer/s named in both cases was the same person (which would be a "yes" answer from the Authority), or were different officers (a "no" answer from the Authority.)
21. It is clear to the Commissioner, given the subject matter of the request (i.e. the identity of a police officer in a criminal trial) that any information held by the Authority that answers this request must be, or have been, held by the Authority or by its statutory predecessor for the purposes set out in section 34(1)(b) or (c) of FOISA. The Commissioner agrees with the Authority's position on this matter. The Commissioner is therefore satisfied that the exemption in section 34(1)(b) applies.

Public interest test - section 34(1)

22. As noted above, the exemptions in section 34 are subject to the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions about the public interest

23. The Authority submitted that, although police officers are acting in the course of their employment, as opposed to in their private lives, there was no valid justification, outwith the criminal justice system, to provide information about the identity of officer/s that could help to identify them - either at that time or in the future.
24. In terms of the public interest, the Authority accepted that there is an interest in the criminal justice process generally and also, particularly, in relation to what could be deemed to be high profile cases. However, whilst it is recognised that court papers and indeed media coverage will name victims, witnesses and accused individuals, this is in the course of the criminal justice proceedings. It does not thereafter follow that it will be appropriate for the Authority – either via FOISA or otherwise – to confirm publicly that named individuals were involved in a case in any capacity.
25. The Authority recognised that there is an argument that this applies less so to police officers who are there in the course of their employment, but the fact remains that, outwith the criminal justice system, there is no valid justification to provide further information about the identity of such officers that could help to identify them, either at that time or further into the future.
26. Providing anyone, but particularly a convicted individual, with further details about a person who gave evidence against them, to the extent that it could help them to trace the officer years later, cannot, in the Authority's opinion, be in the public interest.

The Applicant's submissions about the public interest

27. The Applicant's requirement for review referred to the officer named in the Applicant's transcript as giving hearsay evidence. The Applicant referred to the officer having given evidence in another trial and argued that there was an issue of reliability of evidence.
28. The Applicant supplied several media articles about the police officer referred to in the article of 14 August 2021, highlighting that these articles were critical of the officer. Similarly, the Applicant referred to the [judgment](#)³ of the Court of Session in *David Grier v Chief Constable of Police Scotland* [2022] CSOH 2 and highlighted passages from it, for example paragraph 82 (which he quoted from).
29. The Applicant provided comments on why he suspected the named officer in both trials may be the same person.
30. The Applicant's public interest as, expressed by him, was that "there is a public as well as a private interest in ensuring that corrupt police officers are unveiled and miscarriages of justice to which they have contributed are remedied".

The Commissioner's view on the public interest

31. The Commissioner has considered carefully the arguments from the Applicant and the Authority on the balance of the public interest.
32. As has been stated in previous decisions, disclosure under FOISA has the effect of making information publicly available. The disclosure sought by the Applicant would therefore place information into the public domain that confirmed whether or not the officer named in the two criminal trials is, or is not, the same person. This would show the involvement, as police officer, of the named individual/s in each criminal trial. At present, the name of the police officer in each trial is in the public domain, i.e. the published judgment in each case refers to an identifiable named police officer and his role within the criminal justice process for the two trials.
33. First, it must be acknowledged that there is a very high public interest in the proper functioning of the criminal justice process. The arguments from both Applicant and Authority acknowledge this is, though they stress different aspects of the balance. There is a clear public interest in avoiding (or remedying) a "miscarriage of justice".
34. It is, however, important to be clear precisely what the public interest balance argued for by the Applicant (and the Authority) is. The Applicant's requirement for review explains the concern, and by implication the public interest: he suggests that the officer named "has been implicated in yet another controversy concerning the reliability of evidence gathered in the course of a criminal investigation and the methods adopted by him." The Applicant does not explain how such confirmation of identity (if this is the case) by the Authority would contribute to this public interest.
35. In contrast, the Authority has argued for a balance of public interest that suggest the functioning of the criminal justice system does not require such a disclosure. It also points to the public interest in the protection of an officer's identity outwith the criminal justice system.
36. As in previous decisions, the Commissioner has acknowledged and given weight to the public interest identified by the Applicant in transparency in the criminal justice system. This

³ https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh02.pdf?sfvrsn=d620d954_1

applies both generally and in relation to the particular cases to which the Applicant's information request relates.

37. However, the context of the request must be given due regard to. The Applicant is seeking information about two highly publicised court cases. In each, there is a published decision. Each has occurred within the context of the criminal justice system, with two reported decisions that have received considerable publicity. There has therefore been considerable scrutiny already of the named officer/s within the context of the criminal and the civil law.
38. The Commissioner does not attribute the same strength as the Applicant does to disclosing the identity of the officer/s. The Commissioner does not accept that such disclosure will have the effect in respect of the public interest in the proper functioning of the criminal justice system claimed by the Applicant.
39. The Commissioner also notes that if the Applicant had or has concerns about the conduct of the named officer in his case, there are a number of ways in which the Applicant could have or can have his concerns considered fully without recourse to FOISA. On balance, the Commissioner considers there to be a stronger public interest in maintaining the exemption in section 34 of FOISA than in disclosing the information.
40. On balance, therefore, the Commissioner found that the public interest in maintaining the exemptions in sections 34(1)(b) and (c) outweighed that in disclosure of the information withheld from the Applicant.
41. Having accepted that the Authority was correct to withhold the information in terms of section 34(1)(b) and (c) the Commissioner will not go on to consider the other exemptions cited by the Authority.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Daren Fitzhenry
Scottish Information Commissioner

11 October 2023

Appendix 1: 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) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - ...
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

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
 - (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...