

Decision Notice



Decision 189/2012 Ms Janet Ellis and the Chief Constable of Grampian Police

Witness statements

Reference No: 201201641

Decision Date: 21 November 2012

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

Ms Ellis requested from the Chief Constable of Grampian Police (Grampian Police) copies of statements held relating to the death of a named individual. Grampian Police refused to disclose the information as it related to an investigation into the death of a person and was the personal data of those who provided the statements. Following an investigation, the Commissioner found that Grampian Police had been entitled to withhold the information as it related to an investigation into the death of the named person.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (general entitlement); 2(1)(b) (Effect of exemptions); 34(2)(b)(ii) (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 11 November 2011, Ms Ellis wrote to Grampian Police requesting copies of statements taken relating to the death of a named person.
2. Grampian Police responded on 16 December 2011, informing Ms Ellis that the information was exempt from disclosure under sections 38(1)(b) and 34(2)(b)(ii) of FOISA, as the information was the personal data of those who provided the statements, which concerned the investigation into the death of a person.
3. On 1 February 2012, Ms Ellis wrote to Grampian Police requesting a review of their decision. Ms Ellis asked Grampian Police if the statements could be provided with any personal data redacted.
4. Grampian Police notified Ms Ellis of the outcome of their review on 28 February 2012. Grampian Police upheld the original decision to withhold the information under sections 34(2)(b)(ii) and 38(1)(b) of FOISA. They explained that personal data could not be redacted to allow release.



5. On 24 August 2012, Ms Ellis wrote to the Commissioner, stating that she 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 Ms Ellis 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. The case was then allocated to an investigating officer.

Investigation

7. On 31 August 2012, Grampian Police were notified in writing that an application had been received from Ms Ellis and asked to provide the Commissioner with any information withheld from her. Grampian Police responded with the information requested and the case was then allocated to an investigating officer.
8. On 17 September 2012, the investigating officer 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 reliance on any provisions of FOISA they considered applicable to the information requested (with specific reference to the provisions cited in their responses to Ms Ellis).
9. Grampian Police responded on 8 October 2012, indicating that they were relying upon sections 34(2)(b)(ii) and 38(1)(b) of FOISA to withhold the information and providing their reasoning for each.
10. The relevant submissions received from both Grampian Police and Ms Ellis will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Ms Ellis and Grampian Police and is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first of all consider the exemption contained in section 34(2)(b)(ii) of FOISA, going on to consider the exemption in section 38(1)(b) of FOISA only if she is satisfied that the first exemption is not engaged in this case.



Section 34(2)(b)(ii) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations

13. Grampian Police withheld the information they held and which fell within the scope of Ms Ellis's request under the exemption in section 34(2)(b)(ii) of FOISA, which provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation being carried out for the purpose of making a report to the procurator fiscal as respects the cause of death of a person.
14. The exemptions in sections 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. Such exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
15. In this case, having reviewed the information withheld and the submissions presented by Grampian Police, the Commissioner is satisfied that the withheld information has been held by Grampian Police for the purposes of an investigation covered by section 34(2)(b)(ii) of FOISA.
16. The Commissioner therefore accepts that the exemption in section 34(2)(b)(ii) of FOISA applies to the withheld information. As noted above, however, this exemption is subject to the public interest test in section 2(1)(b) of FOISA. Consequently, unless the Commissioner is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order the information to be disclosed.

Public Interest test

17. 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. disclosure must serve the interests of the public.

Submission from Ms Ellis

18. In her correspondence with Grampian Police and the Commissioner, Ms Ellis outlined her personal interest in obtaining the information requested, and further explained that she had previously been given conflicting information (from a separate source) and believed she was entitled to know about any action taken.



Submission from Grampian Police

19. Grampian Police recognised a public interest in knowing how such investigations were carried out, particularly where there were allegations that the evidence had not been assessed correctly.
20. Grampian Police also submitted, however, that to disclose the statements could hamper their ability to conduct such investigations in the future.
21. Grampian Police considered that if witness details were disclosed along with details of the information they had provided to the police, witnesses would be reticent to come forward with information in the future. This reduction of flow of information would prevent the police from carrying out thorough investigations, hampering both the detection of crime and the prosecution of offenders. Grampian Police also submitted that witnesses had the expectation of privacy about the way in which they and the information they provided were handled.
22. Grampian Police further explained that the enquiry officer had verbally informed Ms Ellis of the findings of the investigation, and that the force's Information Disclosure Unit had provided information to Ms Ellis on a personal basis, outwith FOISA.
23. Grampian Police concluded, on balance, that the public interest lay in withholding the information. In coming to this conclusion, Grampian Police stated that they had taken into consideration the lack of any indication, by Ms Ellis or others, that Grampian Police had mishandled the investigation. In the circumstances, Grampian Police concluded that the public interest lay in withholding the information, in order to protect the effective conduct of police investigations in the future.

The Commissioner's view

24. The Commissioner recognises that Ms Ellis has a strong personal interest in fully understanding the circumstances of the death in question and agrees that disclosure would contribute to a fuller understanding of how Grampian Police investigate such matters and, in particular, the death in question. However, in considering disclosure under FOISA, the Commissioner must address the question of whether the information withheld by Grampian Police should be made available to the public at large, and not just to those who may have a personal interest in the matter.
25. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public".

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26. The Commissioner's view is set out clearly in *Decision 197/2007 Mr Alan Turner and the Chief Constable of Grampian Police*¹, in which it is stated that the inclusion of section 34 in FOISA reflected an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring the ongoing willingness of members of the public to cooperate with the various investigatory processes making up the justice system, and the system for dealing with sudden deaths and fatal accidents.
27. The Commissioner acknowledges that there is a compelling argument for maintaining the exemptions contained in section 34 where they are applied to witness statement, even where the information concerned no longer relates to ongoing investigations or proceedings. It is of considerable public interest that individuals remain willing to co-operate with the criminal justice system (and that for dealing with sudden deaths and fatal accidents) by providing witness statements and other assistance to the police in the course of their investigations. The Commissioner is satisfied that such willingness would be diminished if, for example, witness statements were to be disclosed routinely under the terms of FOISA.
28. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is significant enough to outweigh that in withholding the information in question. The Commissioner therefore concludes that Grampian Police were entitled to withhold the information under section 34(2)(b)(ii) of FOISA.
29. Given that the Commissioner has concluded that all of the information withheld by Grampian Police was correctly withheld in terms of section 34(2)(b)(ii) of FOISA, she is not required (and does not intend) to consider the exemption in section 38(1)(b) in relation to that information.

DECISION

The Commissioner finds that the Chief Constable of Grampian Police complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Ellis.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600889.asp>

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Appeal

Should either Ms Ellis or the Chief Constable of 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
21 November 2012



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

...

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

...

- (2) Information is exempt information if-

...

- (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-

...

- (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

...