

Decision Notice



Decision 216/2012 Mr Martin McGartland and the Chief Constable of
Strathclyde Police

Information presented to review panel

Reference No: 201200967
Decision Date: 20 December 2012

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr McGartland asked the Chief Constable of Strathclyde Police (Strathclyde Police) for information presented to the panel which reviewed the response to a previous information request he had made. Strathclyde Police disclosed some information, but withheld the remainder.

The Commissioner accepted that the majority of the information was exempt from disclosure, but found that other information had been wrongly withheld. As the remaining information is already available to Mr McGartland, the Commissioner did not require Strathclyde Police to provide it to Mr McGartland.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(b) and (c) (Prejudice to the effective conduct of public affairs)

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. The information request under consideration in this case relates to Strathclyde Police's internal review of its handling of a previous information request made by Mr McGartland on 21 June 2011. Strathclyde Police had responded to that request by refusing to confirm or deny (in terms of section 18 of FOISA) whether the information he had asked for existed or was held by them; in *Decision 247/2011 Martin McGartland and the Chief Constable of Strathclyde Police*¹, the Commissioner concluded that Strathclyde Police had been entitled to take this approach.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201101575.asp>

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2. On 27 August 2011, Mr McGartland made a further request to Strathclyde Police through the Whatdotheyknow² website (the WDTK website). Only part of that request, in which Mr McGartland requested “full details of all information evidence” (sic) used by the review panel when reviewing the response to his request of 21 June 2011, is considered in this decision.
3. Strathclyde Police responded to that request on 27 September 2011, advising Mr McGartland that, under section 14(2) of FOISA, they were not obliged to comply with this part of his request as it was substantially similar to his request of 21 June 2011. (Under section 14(2), where a Scottish public authority has complied with a request from a person, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar, unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.)
4. Mr McGartland appealed Strathclyde Police’s decision to the Commissioner, who issued *Decision 037/2012 Mr Martin McGartland and the Chief Constable of Strathclyde Police*³ on 22 February 2012. The Commissioner found that the request was not repeated, and required Strathclyde Police to respond to Mr McGartland’s request in terms other than section 14(2) of FOISA.
5. Strathclyde Police complied with *Decision 037/2012* on 10 April 2012. They disclosed a blank copy of the form used by the panel and withheld the remainder of the information covered by Mr McGartland’s request under sections 30(b) and (c) of FOISA.
6. On 13 April 2012, Mr McGartland requested a review of Strathclyde Police’s response, via the WDTK website.
7. Strathclyde Police notified Mr McGartland of the outcome of their review on 14 May 2012. They disclosed one additional page of information, but withheld the remainder under the previously cited exemptions.
8. On 15 May 2012, Mr McGartland emailed the Commissioner, stating that he was dissatisfied with the outcome of the review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr McGartland 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 their response to that request.

² www.whatdotheyknow.com

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201102135.asp>



Investigation

10. On 22 May 2012, Strathclyde Police were notified in writing that an application had been received from Mr McGartland and were asked to provide the Commissioner with the information withheld from him. Strathclyde Police responded with the information requested and the case was then allocated to an investigating officer.
11. 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.
12. Strathclyde Police replied on 13 July 2012. They confirmed that they were relying on the exemptions in sections 25(1), 30(b) and (c) of FOISA in relation to the information presented to the review panel. In relation to information covered by Mr McGartland's request of 21 June 2011, Strathclyde Police advised that their position remained unchanged: that is to say, in terms of section 18 of FOISA, they would neither confirm nor deny whether any such information existed or was held, but if it existed and was held, it would be exempt from disclosure under section 34(1)(a) of FOISA.
13. On the same day, Strathclyde Police disclosed some information to Mr McGartland which it had previously withheld under section 30(b) and (c) of FOISA, and advised him that it now considered this information to be otherwise accessible to him and, therefore, exempt from disclosure under section 25(1) of FOISA.
14. The investigating officer asked Mr McGartland whether he still required a decision from the Commissioner in relation to information which had been disclosed to him and asked him for submissions on the other matters to be considered by the Commissioner. Mr McGartland subsequently confirmed he still required a decision on this information, and provided submissions on other matters.
15. Mr McGartland's submissions, along with those of Strathclyde Police, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

16. 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 Mr McGartland and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Section 25(1) – information otherwise accessible



17. During the investigation, Strathclyde Police provided some information to Mr McGartland and advised that it now considered the information to be exempt from disclosure under FOISA by virtue of section 25(1). This exemption allows information to be withheld if the applicant can reasonably obtain the information other than by requesting it under section 1(1) of FOISA. This exemption is not subject to the public interest test in section 2(1) of FOISA.
18. The information in question consists of correspondence between Strathclyde Police and Mr McGartland, which Mr McGartland had previously posted on the WDTK website⁴.
19. The Commissioner is satisfied that, at the time of his request, it was indeed information which Mr McGartland could reasonably obtain other than by requesting it under section 1(1) of FOISA. She is therefore satisfied that the information is exempt under section 25(1) of FOISA.
20. The Commissioner notes that Strathclyde Police initially applied the exemptions in section 30(b) and (c) of FOISA to this information. Mr McGartland has asked for a decision on this matter. In their letter to Mr McGartland of 13 July 2012, Strathclyde Police acknowledged that the information was already available to him, and that this should have been pointed out at the outset. In the circumstances, the Commissioner finds that Strathclyde Police wrongly applied the exemptions in section 30(b) and (c) of FOISA to the information released on 13 July 2012.

Section 30(b)(i) and (ii) – prejudice to effective conduct of public affairs

21. In order for Strathclyde Police to be able to rely on the exemptions contained in section 30(b) of FOISA, they must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation, respectively.
22. The exemptions in section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of either exemption it is required to go on to consider the public interest test laid down in section 2(1)(b) of FOISA.
23. Strathclyde Police initially applied these exemptions to all of the information withheld from Mr McGartland. The Commissioner will consider whether they were correctly applied to the remaining information; that is, the information not already found to be exempt under section 25(1) of FOISA.
24. Strathclyde Police argued that the provision of advice, conversations and phone calls which are required by the reviewers must take place with frankness, candour and freedom, which can only happen if it is accepted that any deliberations and advice provided or sought during the review process will not be disclosed into the public domain.

⁴ http://www.whatdotheyknow.com/request/northumbria_police_17th_june_199#comment-25603

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25. Strathclyde Police explained that, in terms of the review process, those undertaking such reviews in future may feel constrained from fully articulating their judgments if they believe that their conclusions are likely to be publicly disclosed. Strathclyde Police considered that, if the information from the review panel was disclosed, it was likely that those involved in future reviews would be less candid or forthcoming with their views, which would be counterproductive. Strathclyde Police concluded that this would impair the effectiveness of future reviews, which would favour a “safe” conclusion or finding by the reviewer(s).
26. Strathclyde Police noted that it was often necessary to collate extensive and sensitive information for the purposes of a review in order to enable a rounded and unprejudiced debate. Strathclyde Police concluded that disclosure of the information, before any final decision was taken, would stifle the frankness and candidness of their deliberations. They argued that they should be allowed to comment on, or analyse, submissions without fear that such information may be subject to future disclosure.
27. When considering the exemptions in section 30(b) of FOISA, the Commissioner will usually look at the actual information withheld and ask why disclosure of that information might be expected to result in officials being substantially inhibited from providing advice or views. The exemptions in section 30(b) are not “class exemptions”, and can only be used to withhold information which (because of its nature and/or the context in which it exists, and not simply because it falls within a particular category of information), would cause officials to be substantially inhibited from providing advice or views. In other words, it is not sufficient to argue that information should not be disclosed solely because it has been provided to a review panel.
28. However, the Commissioner accepts that a review panel may be required to consider and discuss information which it has previously come to a determination on, and that this process may be hindered or prejudiced if participants are concerned that information from the review may be disclosed which would undermine the previous decision. In this case, there were particular sensitivities surrounding the review panel process, as the review concerned a response issued to Mr McGartland in which Strathclyde Police had chosen to neither confirm nor deny whether the information existed or was held by them. The Commissioner accepts that this creates a context in which the disclosure of apparently innocuous information, or confirmation of the lack or existence of information, could undermine the previous decision to neither confirm nor deny whether any relevant information was held.

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29. The Commissioner takes the view that the standard to be met in applying the tests contained in sections 30(b) is high. The word “substantial” is important here: the degree to which a person will, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views. However, it may still be relevant to consider whether the information in question consists of advice or views. In her briefing on the section 30(b) exemptions⁵, the Commissioner notes that:
- “The information withheld under section 30(b)(i) and (ii) is likely to be advice or views. Although FOISA does not require this, it is difficult to find examples of other kinds of information for which these would be the most appropriate exemptions.
- “Exchange of views’ (30(b)(ii)) implies that the views of more than one party were involved in the process during which the information was created. This makes it less likely that the exemption in 30(b)(ii) can apply to information which is simply presented as a report in situations where the author will not be involved in any subsequent discussion, or where the information is a statement of fact.”
30. The Commissioner notes that some of the information to which these exemptions were applied simply duplicates or summarises Mr McGartland’s request or request for review, or comprises other information publicly accessible via the WDTK website. The Commissioner does not consider that this information provides advice or records an exchange of views for the purposes of deliberation. However, as noted above, the primary consideration is not whether the information contains advice or views, but whether its disclosure would, or would be likely to, have a substantially inhibiting effect.
31. The Commissioner has considered the submissions presented by Strathclyde Police on the application of the exemptions in sections 30(b) and has examined the content of the information withheld under these exemptions. The Commissioner has been mindful that any disclosure or discussion of the information to which these exemptions have been applied should not undermine the decision to neither confirm nor deny whether any information is held in relation to Mr McGartland’s original request.
32. Having considered the case in some detail, the Commissioner is not persuaded that disclosure of the information described in paragraph 30 above would deter Strathclyde Police officers from providing advice and/or views freely and frankly to review panels in future, or serve to confirm or deny whether any information is held in relation to Mr McGartland’s original request. Similar content has been disclosed by Strathclyde Police during the investigation and is publicly available on the WDTK website. The Commissioner has therefore concluded that disclosure of this information would not be likely to have a substantially inhibiting effect, and that the exemptions in section 30(b) of FOISA were wrongly applied.

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp>



33. Strathclyde Police also applied the exemption in section 30(c) to this information. The Commissioner will consider this exemption below.
34. In relation to the remaining information withheld under section 30(b) of FOISA, the Commissioner is satisfied that its disclosure in this case would make it much less likely that participants in similar reviews in the future would make known their views so fully or frankly. She accepts that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, and that the exemptions in section 30(b) of FOISA apply.

Public Interest test

35. As the Commissioner is satisfied that the exemptions in section 30(b) have been correctly applied to some of the withheld information, she is required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to this information. She must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemptions.
36. In their submissions, Strathclyde Police identified a public interest in disclosing information which would provide accountability and enable the public to understand the decision making process when a review is conducted. Additionally, they accepted that disclosure of the information might assist Mr McGartland to understand what has been considered and evaluated in terms of his request(s), which might be in the public interest.
37. On balance, however, Strathclyde Police considered that disclosure would not be in the public interest. As discussed previously, they took the view that disclosure of the information considered by the review panel would almost certainly inhibit the candour and freedom with which such assessments are made and opinions expressed. Strathclyde Police explained why these applied to the case under consideration.
38. Mr McGartland considered that the withheld information should be disclosed in order to:
 - further the understanding of, and participation in, the debate of issues of the day;
 - facilitate the accountability and transparency of public authorities for decisions taken by them;
 - facilitate accountability and transparency in the spending of public money;
 - allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.
39. Mr McGartland took the view that Strathclyde Police were deliberately lying and concealing non-exempt information relating to him. He asserted that Strathclyde Police have been party to a cover-up and have been colluding with another police force. Mr McGartland stated that the public interest favoured disclosure and the only reason Strathclyde Police were withholding information was because disclosure was likely to cause them embarrassment; he considered that Strathclyde Police had no lawful reason to withhold the information.



40. In coming to a conclusion on the public interest test, the Commissioner considers that there is a general public interest (as highlighted by both Strathclyde Police and Mr McGartland) in making information held by public authorities accessible, in order to enhance scrutiny of decision making and thereby improve accountability and public participation.
41. On the other hand, the Commissioner must also consider the arguments for non-disclosure in the public interest. She accepts there is a strong public interest in enabling frank and candid debate when Scottish public authorities are reviewing the response to an information request, to ensure that all relevant facts and opinions are considered fully before a review decision is reached.
42. To this end, the Commissioner considers that there is a strong public interest in Strathclyde Police being able to receive full, considered and impartial internal advice before coming to a review decision, and that it would be strongly against the public interest to disclose information if this would discourage or inhibit officials from contributing freely and with candour to future reviews. As noted above, the Commissioner accepts that this would be a likely outcome, should the information in question be disclosed.
43. Having considered the arguments made by both parties to this case, the Commissioner has concluded that the public interest in favour of disclosing the information found to be exempt in terms of section 30(b) is outweighed by the public interest in maintaining these exemptions. The Commissioner has therefore concluded that Strathclyde Police were correct to withhold the information in question under the exemptions in section 30(b) of FOISA .

Section 30(c)

44. Strathclyde Police applied the exemption in section 30(c) of FOISA to all of the withheld information. However, the Commissioner will only consider whether this exemption was correctly applied to the information not already found to be exempt under sections 25(1) or 30(b) of FOISA.
45. The exemption in section 30(c) applies where disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" signifies that this exemption is to be used other than in the situations envisaged by the exemptions in section 30(a) and (b). Section 30(c) is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information. The exemption in section 30(c) is subject to the public interest test.
46. Authorities should be able to demonstrate that the risk of damage caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance – not simply marginal – and must occur in the near (certainly the foreseeable) future, rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.

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47. Strathclyde Police submitted that, in their efforts to consider all relevant information concerning a request or a review, they would be substantially prejudiced should it be thought, by those providing or closely associated with such information, that their co-operation would result in public disclosure of the information, particularly where this was unexpected or, in their view, unwarranted.
48. The Commissioner has carefully considered the remaining withheld information and notes that it either summarises or simply records the terms of Mr McGartland's request or request for review, or comprises other information publicly accessible via the WDTK website. The Commissioner does not accept that this information is of such sensitivity that disclosure would have the effect described by Strathclyde Police. Consequently, she does not accept that disclosure of this information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
49. In conclusion, the Commissioner finds that the exemption in section 30(c) of FOISA was wrongly applied to the information in question. The Commissioner would normally require Strathclyde Police to disclose information which has been wrongly withheld, but notes that it is already publicly available on the WDTK website. In the circumstances, she does not consider it appropriate to require Strathclyde Police to provide the information wrongly withheld under section 30(c) of FOISA.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McGartland.

The Commissioner finds that most of the information withheld from Mr McGartland was exempt under either section 25 or section 30(b) of FOISA.

However, the exemptions in section 30(b) and (c) of FOISA were wrongly applied to certain information; in advising Mr McGartland that the information was exempt under sections 30(b) and (c), Strathclyde Police breached Part 1 (and, in particular, section 1(1) of FOISA). Given that Strathclyde Police provided some of this information to Mr McGartland during the investigation and that the remaining information is identical or substantially similar in content to information already in the public domain and accessible by Mr McGartland, the Commissioner does not require Strathclyde Police to take any steps to remedy this breach.

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Appeal

Should either Mr McGartland or the Chief Constable of 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
20 December 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
- (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 –

- (a) section 25;

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.