

Decision Notice



Decision 003/2009 Mr William Carlin and Renfrewshire Council

Investigation of a Councillor

Reference No: 200801552

Decision Date: 12 January 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Carlin requested from Renfrewshire Council (the Council) all documents relating to a specified investigation of a Councillor. The Council responded by withholding the information under sections 34(1) and 38 of FOISA. Following a review, in which the Council upheld its decision to withhold the information, Mr Carlin remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Carlin's request for information in accordance with Part 1 of FOISA. He found that the information was properly withheld under section 34(1)(b) of FOISA, on the basis that it was information which had been held by the Council for the purposes of carrying out a relevant investigation and the public interest lay in withholding this information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1)(b) (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 16 June 2008, Mr Carlin wrote to the Council requesting the following information:
"All documents relating to the investigation of [a named Councillor] by [a named employee], Internal Auditor, relating to information supplied by myself from 06 March 2007 onwards inclusive".
2. The Council responded on 11 July 2008 and in terms of section 16 of FOISA issued a refusal notice stating that the information held was withheld under the exemptions in sections 34(1) and 38 of FOISA.
3. On 15 July 2008, Mr Carlin wrote to the Council requesting a review of its decision. Mr Carlin stated he disagreed with the Council's response, believing it to be contradictory.



4. The Council notified Mr Carlin of the outcome of its review on 1 August 2008. The Council upheld the original decision to withhold the information requested under sections 34(1) and 38 of FOISA.
5. On 28 October 2008, Mr Carlin wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council'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 Mr Carlin 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

7. On 31 October 2008, the Council was notified in writing that an application had been received from Mr Carlin and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council confirmed that in withholding the information it was relying upon sections 34(1)(a) and (b) of FOISA (in that it had been held in connection with an investigation by a Scottish public authority into a potential criminal offence) and 38(1)(b) of FOISA (in that it pertained to personal data the disclosure of which would contravene the data protection principles).
10. While the Council had also withheld some information in terms of section 25(1) of FOISA, being correspondence with Mr Carlin which it believed would already be in his possession, during the investigation the Council provided him with further copies. Consequently, the Commissioner need not consider this information further.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Mr Carlin and the Council and is satisfied that no matter of relevance has been overlooked.



12. The circumstances are that on 6 March 2007, following a conversation with an internal auditor of the Council, Mr Carlin wrote to that internal auditor alleging that a named Councillor had "*abused ... position and trust by avoiding paying and fiddling both the Poll Tax and Council Tax*". This letter of 6 March 2007 also provided the internal auditor with certain information which Mr Carlin believed to be pertinent to his allegations.
13. In this case, the Council provided the Commissioner with the information withheld from Mr Carlin and argued that all of it was exempt in terms of section 34(1)(a) and (b) of FOISA, submitting in addition that some of it was exempt in terms of section 38(1)(b) of FOISA. The Commissioner will first of all consider the information under section 34(1).

Section 34(1) - Investigations by a Scottish Public Authority

14. The Council applied the exemptions in section 34(1)(a) and (b) of FOISA on the basis that the information had been held for the purposes of an investigation into allegations made to it, for the purpose of ascertaining whether the subject of the investigation should be prosecuted for the alleged offence and to decide whether a report should be submitted to the procurator fiscal for this purpose. From the Council's submissions, the Commissioner understands that it is not claiming section 34(1)(a)(ii) to be applicable in this case.
15. The exemptions in sections 34(1)(a) and (b), set out in full in the Appendix, have been 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. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
16. In order for section 34(1)(a)(i) of FOISA to apply the Commissioner has to be satisfied that the following tests are fulfilled:
 - a) the information has been held by a Scottish public authority at any time;
 - b) the information was held for the purposes of an investigation;
 - c) the investigation was one which the authority had a duty to conduct; and
 - d) the information was held for the purposes of ascertaining whether a person should be prosecuted for an offence.
17. In order for section 34(1)(b) of FOISA to apply the Commissioner has to be satisfied that the following tests are fulfilled:
 - a) the information been held by a Scottish public authority at any time;
 - b) the information was held for the purposes of an investigation conducted by the authority (which may still be ongoing);



- c) the investigation could lead (or could have led) to a decision by the authority to make a report to the procurator fiscal, to allow the procurator fiscal to decide whether or not to instigate criminal proceedings.
18. In this case the Council received a complaint alleging that the Councillor had been engaged in avoiding payment of both Community Charge and Council Tax and also suggesting that certain expenses had been fraudulently claimed. If such allegations had been found to be true, this could have led to prosecution for the criminal offence of fraud. The Council contended that the information had been gathered for the purpose of investigating these allegations, with a view to ascertaining whether the person under investigation should be prosecuted for an offence and whether a report ought to be made to the procurator fiscal requesting consideration of the relevant criminal proceedings, and therefore (whether or not the matter was reported to the procurator fiscal or any prosecution actually took place) it had been held by the Council for the purposes detailed in section 34(1)(a) and (b) of FOISA. The Council also submitted that its Chief Internal Auditor had a duty to investigate as appropriate allegations of improper conduct, in this case fraud, received by the Council.
19. Having considered the information to which these exemptions have been applied, the Commissioner is satisfied, without considering whether the Council was in fact under a duty to carry out the investigation in question, that the withheld information was at some point held by the Council for the purpose of an investigation it carried out, which in the circumstances had the potential to lead to a decision to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted. Therefore, it was and remains exempt information for the purposes of section 34(1)(b). Whether or not a report was submitted to the procurator fiscal is immaterial, the context and possible outcome of the investigation being the relevant considerations. The Commissioner notes that Strathclyde Police (through whom any report to the procurator fiscal would require to have been made) were also involved in the investigation.
20. The Commissioner is therefore satisfied that the tests mentioned at paragraph 17 above are met and therefore that the information withheld from Mr Carlin is exempt under section 34(1)(b) of FOISA.

The public interest

21. As noted above, the exemptions in section 34(1) are subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the exemption. The Commissioner must then carry out a balancing exercise. Unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers that the information can be withheld under one or more other exemptions in FOISA).



22. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been variously 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. it must serve the interests of the public.
23. The Commissioner is aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on this exemption, the then Justice Minister, Jim Wallace, argued that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecutions and investigations, and the role of criminal proceedings as the appropriate forum for bringing information of this kind into the public domain. He also said: "We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."

Arguments in favour of disclosure of the information

24. In many decisions to date, the Commissioner has pointed out that there is a general public interest in releasing information which may lead to an increase in accountability and scrutiny of public officials' actions. This could be said to be the case in relation to this information.

Arguments against the disclosure of the information

25. The Council argued that it was clearly in the public interest that those who either made allegations or statements requiring investigation or supplied information in the course of such an investigation could do so without being concerned that material gathered in the course of the investigation would be published unless it was necessary to do so by way of resulting criminal proceedings. Were this not the case, the Council argued, persons making such allegations or asked to make statements during the investigation of such allegations could be intimidated, with the consequence that the investigation would be incomplete and inaccurate.
26. The Council continued to the effect that those subject to allegations and investigations which did not result in proceedings should not expect the material gathered in such investigations to be published. It pointed out that the co-operation of individuals in such investigations generally rested on the legitimate expectation that their contributions would not be disclosed except through appropriate proceedings on conclusion of the investigation. In conclusion, the Council took the view that the public interest would be better served by withholding the information rather than disclosing it.

Conclusion on the public interest

27. The Commissioner accepts that there is a public interest in scrutinising the actions of the Council and in ensuring that investigations into alleged criminal offences are carried out thoroughly with all relevant matters being taken into account.



28. Nonetheless, the Commissioner considers that there are stronger public interest arguments as to why information gathered during an investigation falling within the scope of section 34(1)(b) should be afforded protection.
29. The Commissioner considers that there are strong reasons for upholding this exemption in this case. In particular, there should be no unnecessary inhibitions or deterrence to the flow of information and evidence to and from Scottish public authorities in relation to such investigations, particularly where questions of propriety in positions of public trust are at issue. In this case, the Commissioner also notes the involvement of Strathclyde Police in relation to these allegations. Were this flow of information to be impeded, the Council and consequently the police would find it significantly more difficult to investigate crime, one of the core duties of the police and (in this area at least) a matter of significant legitimate concern to the Council.
30. Having considered the information withheld and the arguments for and against disclosure, therefore, the Commissioner finds that the public interest in maintaining the exemption in section 34(1)(b) of FOISA outweighs that in disclosure of the information in this case, and accordingly that the Council correctly withheld the information under this exemption. Having reached this conclusion, he is not required to (and will not) go on to consider the application of the exemption in section 34(1)(a)(i).

Section 38(1)(b) – Personal Information

31. The Council also applied the exemption in section 38(1)(b) of FOISA to certain information. As the Commissioner has found all of this information to be exempt and correctly withheld under section 34(1)(b) of FOISA, he is not required to (and will not) go on to consider the application of section 38(1)(b).

DECISION

The Commissioner finds that Renfrewshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Carlin, the information in question being properly withheld under section 34(1)(b) of FOISA.

Decision 003/2009
Mr William Carlin
and Renfrewshire Council



Appeal

Should either Mr Carlin or Renfrewshire Council 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
12 January 2009



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 –

...

- (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; or

...

- (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;

...