

Decision Notice



Decision 084/2010 Ms Sarah Beech of "The Digger" and the Chief Constable of Strathclyde Police

Witness protection

Reference No: 200901924
Decision Date: 3 June 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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St Andrews KY16 9DS
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Summary

Ms Sarah Beech of “The Digger” (Ms Beech) requested from the Chief Constable of Strathclyde Police (Strathclyde Police) information relative to the number of individuals referred to the Scottish Witness Liaison Unit. Strathclyde Police responded in terms of section 18 of FOISA, by neither confirming nor denying that the information was held. Following a review, as a consequence which Strathclyde Police stated that some information was not held whilst other information was exempt from release under various sections of FOISA, Ms Beech remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Ms Beech’s request for information in accordance with Part 1 of FOISA, by correctly withholding the information held in terms of section 35(1)(a) and (b) of FOISA. He did not require Strathclyde Police to take any action.

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 35(1)(a) and (b) (Law enforcement)

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 2 July 2009, Ms Beech wrote to the Strathclyde Police requesting the following information:
 - *The number of individuals who were referred to the Scottish Witness Liaison Unit by Strathclyde Police officers — this includes the number of people on it and those added to it — over the last five years, please break down for each year.*
 - *The number of people who have died whilst on protection with the Scottish Liaison Unit and the cause of death, please break the numbers down over the last five years.*

I would like the above information to be provided to me as paper copies.

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2. Strathclyde Police responded on 7 September 2009, issuing a notice under section 18 of FOISA. Section 18 gives a Scottish public authority the right to refuse to reveal whether information exists or is held by it, where it considers that to do so would be contrary to the public interest and, if it did exist and was held by the authority, the information is exempt information under any of a number of specified exemptions. Strathclyde Police informed Ms Beech that exemptions in sections 35 and 39 of FOISA would apply if the requested information did exist and they held it.
3. On 17 September 2009, Ms Beech wrote to Strathclyde Police requesting a review of their decision.
4. Strathclyde Police notified Ms Beech of the outcome of their review on 9 October 2009 and withdrew their reliance on section 18 of FOISA. In relation to the first part of the request, Strathclyde Police informed Ms Beech that the information was being withheld under sections 34(1)(a)(i) and (3); 35(1)(a) and (b), and 39(1) of FOISA.
5. In relation to the second part of Ms Beech’s request, Strathclyde Police issued a notice under section 17(1) of FOISA informing Ms Beech that no information was held.
6. On 6 November 2009 Ms Beech wrote to the Commissioner, stating that she was dissatisfied with the outcome of Strathclyde Police’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Ms Beech 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

8. On 21 December 2009, Strathclyde Police were notified in writing that an application had been received from Ms Beech and were asked to provide the Commissioner with any information withheld from her. Strathclyde Police responded with the information requested and the case was then allocated to an investigating officer.
9. 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. In particular, Strathclyde Police was asked to justify its reliance on any provisions of FOISA they considered relevant to the withheld information.
10. Strathclyde Police responded, withdrawing their reliance on section 34 of FOISA while confirming their position that the information was exempt and properly withheld in terms of section 35(1)(a) and (b) and 39(1) of FOISA.



11. The investigating officer also contacted Ms Beech and, in the course of correspondence, she accepted Strathclyde Police's response in terms of section 17(1) of FOISA in relation to the second part of her request, consequently withdrawing her application in this regard. In relation to the first part of her request she provided reasons why she considered there was a public interest in the release of the information requested.
12. The submissions provided by both Ms Beech and Strathclyde Police will be considered fully, insofar as relevant, in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Ms Beech and Strathclyde Police and is satisfied that no matter of relevance has been overlooked. He need only consider the first part of Ms Beech's request, her application in respect of the second part having been withdrawn.

Section 35(1)(a) and (b) – Law enforcement

14. Strathclyde Police have relied upon the exemptions in sections 35(1)(a) and (b) to withhold the information requested.
15. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime and/or the apprehension or prosecution of offenders. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
16. As outlined in *Decision 013/2007 Mr D and the Chief Constable of Strathclyde Police*, with regard to the exemption under section 35(1)(a), the Commissioner is of the view that the term "the prevention or detection of crime" encompasses any action taken to anticipate or prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could include activities in relation to a specific (or anticipated) crime or wider strategies for crime reduction and prevention.
17. The Commissioner considers that section 35(1)(b) has a narrower scope than section 35(1)(a), although there is likely to be a considerable overlap between the two exemptions. He considers that section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as the investigative processes used).

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18. Chapter 4 of the Serious Organised Crime and Police Act 2005 (the 2005 Act) makes provision for the protection of witnesses and others involved in criminal investigations or proceedings, by police forces and other relevant agencies. The remit of the Scottish Crime and Drugs Enforcement Agency (SCDEA) Scottish Witness Liaison Unit (SWLU) is to provide appropriate levels of support and assistance to witnesses, and those individuals listed in Schedule 5 of the 2005 Act. Specifically, it provides for those who become involved in the criminal justice system and, as a result, are subjected to some form of intimidation, in particular where witnesses are considered under significant to serious threat. This could relate to any of the individuals mentioned in Schedule 5, but Strathclyde Police focused in particular on those mentioned in paragraphs 1 and 28 (i.e. witnesses and members of their family, or those living with or associated closely to them) as the focus of Ms Beech's request.
19. Strathclyde Police noted that in this case the information requested related to those individuals who had been referred to the SWLU and therefore required the highest level of protection. This was known as Level 1 protection and referral would only be made at that level because of a real significant threat of harm or danger to the individual's life. They continued that the statistics for referrals to the SWLU were known only to a few within the organisation, on a "need to know" basis, such was the necessity for confidentiality.
20. Strathclyde Police stated they could not predict the trends of those placed on the witness protection scheme and numbers varied from year to year, with the result that in any one year there might only be a small number of witnesses on the register or possibly even none. In the event that the figure was none and Strathclyde Police confirmed this, then they believed this could seriously impact on the safety of witnesses on any cases which occurred after that confirmation, in that it would be known that witnesses in certain cases were not subject to any protection.
21. Strathclyde Police further submitted that disclosure of the figures (particularly for a number of consecutive years, as requested here) would allow individuals to assess the extent of witness protection measures provided by the force, if any, following which changes to the numbers could be correlated to specific cases through subsequent requests. While this information might only be of passing interest to most members of the general public, Strathclyde Police considered it to be of enormous interest to members of the criminal fraternity, especially organised crime groups involved in serious and serial crime.
22. Strathclyde Police stated that in this case they had a genuine and significant concern that (in the event of disclosure) use, to any degree, of the witness protection process would be highlighted and would negatively impact on those seeking or considering participating in it. They argued that individuals who provided information to the police did so with the expectation that they will be afforded protection by the police in order that their safety was not compromised. They submitted that the impacts of providing these figures, which could lead to the identification of those given police protection, or those who were not, could include the diverting of additional police resources, the costs of having to relocate people quickly and securely, and an undermining of the culture of mutual trust and security underpinning the witness protection scheme.



23. Strathclyde Police considered there to be an absolute link between a person on the scheme and an investigation, whether this was an eye witness or a member of their family or close associate. They contended that disclosure of the information requested could lead to a loss of trust in the protection system, which could quite simply close the investigation and negate the possibility of a trial, or more seriously cause a trial to collapse. They concluded that fear of disclosure of whether they were being protected or not, or of increased speculation by third parties that they were under protection or otherwise, would make members of the public less willing to come forward as witnesses – with consequent negative effects on the community.
24. In considering the submissions made by Strathclyde Police and outlined above, the Commissioner is conscious that the SCDEA in its annual report releases figures on a Scotland - wide basis and makes reference to the number of cases where individuals have given evidence and the sentences issued. He acknowledges that disclosure of the information requested, together with the information released by the SCDEA, could lead to correlation of data and speculation by others that individuals might or might not be receiving protection, thereby giving rise to the fears, particularly fear of reprisal, expressed by Strathclyde Police as outlined above.
25. Without going into further details of all the submissions made by Strathclyde Police, the Commissioner is satisfied, in the circumstances and having fully considered the subject matter, that the information withheld is sufficiently closely linked to strategies and general techniques in relation to crime, and also to activities in relation to specific crime (all as outlined at paragraphs 16 and 17 above), for it to come within the scope of section 35(1)(a) and (b) of FOISA. He is further satisfied, given the link to and serious nature of organised and serial crime, and the attendant risks of non-cooperation from witnesses should the information be disclosed, that the disclosure of the information requested would, or would be likely to, prejudice substantially both the prevention or detection of crime and the apprehension or prosecution of offenders.
26. Section 35(1)(a) and (b) of FOISA are both qualified exemptions, which means that their application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner will go on to consider the public interest arguments to determine whether the information was correctly withheld under sections 35(1)(a) and (b).

The public interest test

27. As noted above, the exemptions in section 35 of FOISA are subject to the public interest test in section 2(1)(b) of FOISA. This means that, although the Commissioner is satisfied that the disclosure of the information would, or would be likely to, prejudice substantially Strathclyde Police's ability to prevent or detect crime and apprehend or prosecute offenders, he must still order the information to be disclosed unless he is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs that in disclosure of the information.



28. Strathclyde Police provided a consolidated submission on the public interest test to support their reliance on the exemptions in sections 35(1)(a), 35(1)(b) and 39(1). Strathclyde Police advanced the following points in favour of releasing the information:

- *Accountability*

The disclosure of the numbers may inform the public as to whether the police provide an effective protection scheme to those whose lives are endangered as it would show that Strathclyde Police do not just place anyone and everyone on the register.

- *Accountability for Public Funds*

The disclosure of the numbers may inform the public as to whether public funds are spent effectively and that Strathclyde Police only pay for protection from public funds for those individuals that truly need it and have an extreme threat to their or their family's or a close personal relation's life.

29. Ms Beech advanced arguments that it was in the public interest to know how many persons had been referred to and accepted onto witness protection and made reference to witnesses being intimidated, leading to fewer people giving evidence. She submitted a belief that witnesses were not being protected by the police and drew attention to the reduction in the numbers published by the SCDEA.

30. Strathclyde Police advanced the following arguments against release of the information:

- *Exemption Provisions*

The information attracts more than one exemption.

- *Interests of Third Parties*

Disclosure of the information could lead to the identification of individuals, and increased speculation as to their identity, including those who may not be being given formal protection by the police.

- *Flow of Information to the Service/Force*

Witnesses to crimes may not provide information to the police for fear of the information being released into the public domain and thus being identified to criminals as having provided information.

- *Public Safety*

The information could harm the health and safety of an individual. Release of the information could identify individuals, including those not being protected, which would help criminals to commit their intended crime or intimidation more easily if they knew or could accurately gauge the amount of police protection being given, if any.

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31. On balance, Strathclyde Police concluded that the public interest test favoured non-disclosure of the information requested, for the reasons outlined above. In their view, it could not be in the public interest to disclose information which could allow criminals to gain knowledge that would advantage them in gaining easier access to target, seek identification of or intimidate individuals. In addition, they submitted that it was not in the public interest that an established process and trust was jeopardised through speculation and fear of reprisal through disclosure of the requested information.
32. Notwithstanding the arguments in favour of release detailed above, the Commissioner notes that the figures for Scotland as a whole are published by the SCDEA. Having considered all relevant arguments, however, he takes the view that the public interest arguments in favour of withholding the information and maintaining the exemptions increase in force considerably when the information is broken down to force level, with all the consequent risks. On balance, therefore, the Commissioner considers that these arguments against disclosure should prevail in this particular case. Consequently, he is satisfied that, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemptions.
33. The Commissioner is therefore satisfied that the information requested by Ms Beech was correctly withheld under the exemptions in section 35(1)(a) and (b) of FOISA.

Section 39(1) – Health and Safety

34. Strathclyde Police also applied the exemption in section 39(1) of FOISA to the information withheld. As the Commissioner has found the information to be exempt and correctly withheld under section 35(1)(a) and (b) of FOISA, he is not required to (and will not) go on to consider the application of section 39(1) in this case.

DECISION

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

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Appeal

Should either Ms Beech 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
3 June 2010



Appendix

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.

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;

...