

Decision Notice

Decision 078/2018: Mrs B and East Lothian Council

Video footage

Reference No: 201800418

Decision Date: 7 June 2018



Scottish Information
Commissioner

Summary

The Council was asked for the unedited video footage of a specific incident. The Council refused to disclose the information as it had been submitted to Police Scotland as part of an investigation.

Following investigation, the Commissioner found that the Council had been entitled to withhold the video footage under section 34(1)(a)(i) of FOISA, because it was held by a public authority for the purposes of an investigation as to whether a person should be prosecuted for a crime and the public interest favoured maintaining the exemption.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 34(1)(a)(i) (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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 6 December 2017, Mrs B made a request for information to East Lothian Council (the Council). This included a request for the unedited video footage (CCTV) of a specific incident, which she appeared in.
2. The Council responded on 3 January 2018. It advised Mrs B that it was withholding the CCTV under section 36(1) of FOISA (Confidentiality), as it might be required in connection with potential criminal proceedings and it therefore attracted litigation privilege.
3. On 5 January 2018, Mrs B wrote to the Council, requesting a review of its decision as she disagreed that section 36(1) of FOISA applied to the requested information.
4. The Council notified Mrs B of the outcome of its review on 24 January 2018. It now claimed the information was exempt under section 35(1)(a),(b) and (c) of FOISA as it had been submitted by Police Scotland to the Procurator Fiscal as part of a criminal investigation.
5. On 5 March 2018, Mrs B wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mrs B was dissatisfied with the outcome of the Council's review because she did not believe any of its arguments applied to a recording made in a public place.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mrs B made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 29 March 2018, the Council was notified in writing that Mrs B had made a valid application. The Council was asked to send the Commissioner the information withheld from

Mrs B. The Council 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 Council was invited to comment on this application and answer specific questions, with a view to explaining its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The Council responded, advising that it now considered the CCTV footage to be exempt from disclosure under section 34(1)(a)(i) of FOISA. It submitted that the information was also exempt under section 38(1)(a) and (b) of FOISA, as the personal data of Mrs B and others.
10. Mrs B provided submissions as to why she considered the information should be disclosed.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mrs B and the Council. He is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will first of all consider whether the information can properly be withheld under section 34(1)(a)(i) of FOISA. Only if he concludes that this exemption does not apply, will he go on to consider the application of section 38(1), as claimed by the Council.

Section 34(1)(a) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations

13. The Council withheld the information Mrs B sought under the exemption in section 34(1)(a)(i) of FOISA, which provides that information is exempt from disclosure if it is held at any time by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence.
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. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
15. The Council submitted that the CCTV footage in question had been recorded on a camera worn by a Council Officer in carrying out their statutory duties. The circumstances surrounding the incident recorded had been reported to Police Scotland, who had seized the CCTV footage as evidence. It advised that Police Scotland subsequently submitted the CCTV footage to the Procurator Fiscal, for consideration as to whether a prosecution should take place.
16. In this case, the Commissioner has considered the content of the CCTV footage and the submissions presented by the Council. While the Commissioner cannot publish the Council's full submissions or his full reasoning, as to do so would require referencing the information withheld, the Commissioner accepts that the withheld information has been held by the Council (and subsequently Police Scotland and the Procurator Fiscal, both public authorities) for the purposes of an investigation covered by section 34(1)(a)(i) of FOISA. Consequently, he must conclude that the exemption applies.

Public interest test

17. As noted above, the exemptions in section 34 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 relevant 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 the information can be withheld under one or more other exemptions in FOISA).
18. 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."
19. In this case, Mrs B provided the Commissioner with reasoning as to why she considered the information should be made public. These focussed on the fact that the CCTV footage was recorded in a public place, so in her view there would be no expectation of privacy, and her belief that disclosure would assist in holding public servants to account for their actions.
20. The Council advised the Commissioner that Police Scotland had submitted the CCTV footage to the Procurator Fiscal on 5 December 2017, the day before it received the request from Mrs B. It further submitted that the Procurator Fiscal had not yet reached a decision on prosecution, and it did not believe it would be in the public interest to release the footage into the public domain at that stage. It stated that to do so would risk compromising a criminal investigation, not least because the footage contained images of potential witnesses. It submitted that releasing the footage into the public domain could potentially inhibit the witnesses from cooperating.
21. 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."

22. In many decisions to date, the Commissioner has accepted a general public interest in making available information which could lead to an increase in accountability and scrutiny of public officials' actions. The Commissioner also recognises that Mrs B, who was present when the CCTV footage was recorded, has a personal interest in disclosure of the information contained in the footage. As stated above, however, the public interest should

be considered as "something which is of serious concern and benefit to the public" and "in the interest of the public", not merely something of interest to a particular individual.

23. In this case, the Commissioner is satisfied that it is in the public interest to allow the Procurator Fiscal to reach a decision and, if appropriate, act on it without the information being exposed to wider public scrutiny. There is clearly a considerable public interest in ensuring that allegations of crime can be considered and, where appropriate, prosecuted effectively, subject to the protections afforded to the accused by a fair trial. Public disclosure outwith that context is likely to lead to "trial by media", something which is not generally considered to be in the public interest and which, as noted above, the exemptions in section 34(1) of FOISA are designed to avoid.
24. Taking account of all of the submissions provided by Mrs B, and the content of the CCTV footage, the Commissioner is not satisfied that the public interest in disclosure is of sufficient substance to outweigh that in withholding the information in question. The Commissioner therefore concludes that the Council were correct in its application of section 34(1)(a)(i) of FOISA to withhold the requested information. Having reached this conclusion, he is not required to consider the application of the other exemptions identified by the Council.

Decision

The Commissioner finds that East Lothian Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs B.

Appeal

Should either Mrs B or the Council 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.

Margaret Keyse
Head of Enforcement

7 June 2018

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

...

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