

Decision Notice



Decision 123/2013 Mr E and the Chief Constable of the Police Service of Scotland

Road traffic incident

Reference No: 201300840
Decision Date: 28 June 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
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St Andrews KY16 9DS
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Summary

On 31 January 2013, Mr E requested from the Chief Constable of Strathclyde Police (the Police) specific information relative to a road traffic incident. The Police refused to confirm or deny whether it held the information. Following an investigation, the Commissioner found that the Police were entitled to neither confirm nor deny whether they held information which would address Mr E's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provisions as respects responses to request); 34(1)(a)(i) and (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.

Note: Mr E's information request was made to the Chief Constable of Strathclyde Police. However, the decision has been issued in the name of the Chief Constable of the Police Service of Scotland as he is the statutory successor to the Chief Constable of Strathclyde Police under the Police and Fire Reform (Scotland) Act 2012.

Background

1. On 31 January 2013, Mr E wrote to the Police and in relation to a specific traffic incident requested the following information:
 - a) The Vehicle and Equipment logs for the Police vehicle involved;
 - b) Clarification as to whether both Officers were involved in use of the VASCAR system;
 - c) The location of the road marking (and distance) used to find the alleged average speed;
 - d) Clarification that VASCAR is an "APPROVED" system.



2. On 27 February 2013, the Police responded to Mr E's request. They provided Mr E with general information on the status of VASCAR. In relation to the particular information requested by Mr E, the Police notified him, in accordance with section 18 of FOISA, that they could neither confirm nor deny whether they held the information or whether it existed.
3. The Police explained that, should the information requested exist, it would be held for the purposes of an investigation and therefore would be exempt from disclosure in terms of section 34 of FOISA.
4. On 1 March 2013, Mr E wrote to the Police requesting a review of their decision, on the basis that he had not been provided with the information he requested.
5. On 25 March 2013, the Police notified Mr E of the outcome of their review. They upheld their original response, in terms of section 18 of FOISA, without modification.
6. On 28 March 2013, Mr E wrote to the Commissioner's office, stating that he 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 Mr E made a request for information to a Scottish public authority and 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

8. By virtue of the Police and Fire Reform (Scotland) Act 2012, on 1 April 2013 the Chief Constable of the Police Service of Scotland (Police Scotland) became the statutory successor of the Chief Constables of the previous eight Scottish police forces. This included the statutory responsibilities laid out in FOISA.
9. On 17 April 2013, the investigating officer notified Police Scotland in writing that an application had been received from Mr E. Police Scotland were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions.
10. Police Scotland responded on 8 May 2013, confirming that they were relying upon section 18 of FOISA on the basis that (if held) the information could be withheld under section 34(1)(a) and (b) of FOISA. They provided reasons for this position.
11. Mr E was invited to provide his comments on this case, and in particular on the public interest in confirming whether or not the information he requested existed or was held by Police Scotland. Mr E did not submit any comments other than those contained within his application.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr E and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 18(1) of FOISA – “neither confirm nor deny”

13. As mentioned above, the Police refused to confirm or deny whether they held any information falling within the scope of Mr E's request. Police Scotland adhered to this position in their submissions to the Commissioner.
14. Section 18 allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
- a request has been made to the authority for information which may or may not be held by it;
 - if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38,¹ 39(1) or 41 of FOISA;
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
15. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. She must also establish whether, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions listed in section 18(1) of FOISA.
16. Whilst doing so, the Commissioner must ensure that her decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.

¹ The Freedom of Information (Amendment) (Scotland) Act 2013 added section 38 to the list of exemptions in respect of which section 18 could be claimed on 31 May 2013.



17. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information it held would be exempt information under one or more of the listed exemptions. Where the exemption(s) is/are subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be satisfied that the public interest in maintaining the exemption(s) outweighs any public interest there would be in releasing any relevant information it held.
18. In this case, Police Scotland submitted that if they did hold any information falling within the scope of Mr E's request, it could be withheld under section 34(1)(a) and (b) of FOISA.
19. The Commissioner must first, therefore, consider whether the Police could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held.

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

20. Section 34(1)(a) of FOISA provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person (i) should be prosecuted for an offence or (ii) prosecuted for an offence is guilty of it.
21. 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.
22. In this case, having considered the submissions presented by Police Scotland, the Commissioner accepts that if the requested information in this case existed and was held by Police Scotland, it would be held for the purposes of an investigation which they had a duty to conduct for the purposes specified above. The Commissioner accepts, therefore, that such information would fall within the exemptions in section 34(1)(a) of FOISA.
23. This exemptions in section 34(1)(a) are subject to the public interest test in section 2(1)(b) of FOISA.

Public Interest test – section 2(1)(b)

24. 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. it must serve the interests of the public.



25. The Commissioner is aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on these exemptions, 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."

Submission from Police Scotland

26. Police Scotland recognised a public interest in holding the force to account for the policies and procedures it used in this area. It also recognised the public interest in justice to a given individual, while pointing out that this needed to be balanced against the wider public interest considerations associated with disclosure to the world at large (the effect of disclosure under FOISA).
27. Police Scotland provided a number of arguments as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. These related largely to the effects of such disclosure on the course of justice, but also raised questions of public safety.

The Commissioner's view

28. Having carefully considered all of the arguments presented by Police Scotland and by Mr E (and noting that she is not able to summarise all of these in this decision), the Commissioner has concluded, in all the circumstances, that the public interest in maintaining the exemptions in section 34(1)(a) of FOISA would outweigh the public interest in disclosure of the information, if in existence and held.
29. Having accepted that the Police could have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information would be exempt information by virtue of section 34(1)(a) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether the Police were entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.

The public interest – section 18(1)

30. Mr E provided personal reasons why he believed the information should be disclosed, but offered no other comments.

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31. Police Scotland submitted that to reveal whether information requested by Mr E existed or was held would not be in the public interest. While acknowledging his own, genuine interest in the information, they pointed out that this had to be balanced with the wider public interest considerations of protecting their own law enforcement role and preserving their confidential relationship with the public.
32. The Commissioner is satisfied that, were Police to have revealed whether any of the information requested by Mr E existed or was held, that would have had the prejudicial impact claimed on its law enforcement functions and relationship with third parties. Clearly, this would not be in the public interest.
33. The Commissioner notes that in responding to Mr E, the Police explained to him that a disclosure under FOISA is not simply a disclosure to the person that requests it; rather, it is a public disclosure. This is a point the Commissioner would endorse, and which must always be borne in mind when considering the effects of disclosure. A specific disclosure of this kind to one individual cannot, therefore, be considered in isolation.
34. Having considered the submissions of both parties, the Commissioner is satisfied, in all the circumstances of this case, that it would be contrary to the public interest for Police Scotland to reveal whether the relevant information requested by Mr E existed or was held by them.
35. As a result, the Commissioner is satisfied that Police Scotland are entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr E.

DECISION

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

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Appeal

Should either Mr E or the Chief Constable of the Police Service of Scotland 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.

Margaret Keyse
Head of Enforcement
28 June 2013



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.

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

...



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
 - (ii) prosecuted for an offence is guilty of it;

...