

Decision Notice



Decision 016/2014 Mr Surender Singh and the Chief Constable of the Police
Service of Scotland

Parental abductions

Reference No: 201301495
Decision Date: 5 February 2014

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Summary

On 25 March 2013, Mr Singh asked the Chief Constable of Lothian and Borders Police (the Police) about incidences of parental abduction and whether the parents who had been charged with abducting their own children were from ethnic minorities. Mr Singh made a further request on 23 April 2013, this time asking whether the parents who had been charged had parental responsibility or whether they had left the UK with their child. In both cases, the Police withheld the information.

Following an investigation, the Commissioner found that the Police had been entitled to withhold the information: it was held for the purposes of a criminal investigation and, on balance, the public interest lay in 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) (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.

Mr Singh's first information request was made to the Chief Constable of Lothian and Borders Police. However, the decision for both requests has been issued in the name of the Chief Constable of the Police Service of Scotland (also, for the sake of convenience, described in this decision as "the Police") as the statutory successor to the Chief Constable of Lothian and Borders Police under the Police and Fire Reform (Scotland) Act 2012.

Background

1. Both of the requests investigated by the Commissioner in this decision are related to a request Mr Singh had previously made to Lothian and Borders Police (on 13 March 2013). In that request of 13 March 2013, Mr Singh asked, among other things, how many times the Police had charged parents with parental responsibility with child abduction, and had been advised that there were two such cases. He was told on 17 April 2013 by the Police that both cases occurred during 2012. On 22 April 2013, Mr Singh was given a guidance document about child custody disputes.
2. On 25 March 2013, Mr Singh wrote to the Police requesting the following information:
"...whether in either case the parents are from ethnic minorities or not..." (Request 1).
3. The Police responded on 28 March 2013 and withheld this information under various exemptions in FOISA, including section 34(1)(a) (Investigations by Scottish public authorities and proceedings arising out of such investigations).

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4. On the same day, Mr Singh wrote to the Police requesting a review of their decision, stating that he did not believe it was possible for anyone to be identified from this information. He pointed out that he was not asking which ethnic minority group the parents were from, that the parents could have been from anywhere in the world, and he could not see how it would be possible for a parent to be identified from the information. Mr Singh did not understand why there would be any distress caused by disclosure, and he thought that all forces were required to collect and publish crime statistics and provide diversity analysis.
5. The Police responded to Mr Singh's request for a review on 17 April 2013, and upheld their original decision.
6. After further correspondence between Mr Singh and the Police, on 23 April 2013, Mr Singh wrote to the Police requesting the following information:

"In the two cases in Edinburgh I would expect that the parents did not have parental responsibility, or they had parental responsibility and left the UK with their child. Please could you confirm if my understanding is correct or not..." (Request 2).
7. The Police responded to Mr Singh on 8 May 2013 and referred to their previous correspondence about this matter. They confirmed that the cases were very recent, and one was still pending at court. They were therefore "acutely aware" that the release of any further information ran the risk of allowing individuals to be identified (either rightly or mistakenly). The Police did not refer expressly to any exemptions in FOISA.
8. On 28 May 2013, Mr Singh wrote to the Police requesting a review of their decision. In particular, Mr Singh indicated that his request had asked the Police to confirm his understanding of their policy. Mr Singh noted that he could not see how individuals could be identified from complying with his request, as he was only seeking to establish that charging the parents was consistent with the policy the Police claimed to follow.
9. The Police responded to Mr Singh's request for a review on 29 May 2013. The response simply attached a copy of the Police's response (to Request 2) of 8 May 2013, and a copy of the review response (to Request 1) of 17 April 2013.
10. On 24 June 2013, Mr Singh wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Police's reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
11. The application was validated by establishing that Mr Singh made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its responses to those requests. The case was then allocated to an investigating officer.



Investigation

12. On 15 July 2013, the Police were notified in writing that an application had been received from Mr Singh and were asked to provide the Commissioner with any information withheld from him. The Police responded with the information requested and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted the 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, the Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested. Further submissions were received from Mr Singh and from the Police during the course of the investigation.

Commissioner's analysis and findings

14. 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 her by both the Police and Mr Singh. She is satisfied that no matter of relevance has been overlooked.

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

15. The Police withheld the information sought by Mr Singh under the exemption in section 34(1)(a) of FOISA. Section 34(1)(a) provides that information is exempt from disclosure if it has at any time been held by a Scottish public authority 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.
16. The exemption in section 34(1)(a) is sometimes described as a "class-based" exemption. 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 exemption is, however, subject to the public interest test contained in section 2(1)(b) of FOISA.



17. The Police submitted that the withheld information was subject to the section 34(1)(a) exemption because it has been held by the Police for the purpose of an investigation. The Police had a duty to conduct the investigation to ascertain whether a person should be prosecuted for an offence. The Police explained that the information they held related to the two cases in respect of which offences had been reported to Lothian and Borders Police. The Police argued that because they are agents for the Procurator Fiscal service, as part of the judicial process, they have a duty to investigate reports of crimes and to submit a report detailing the offence for the Procurator Fiscal to examine.
18. In relation to Request 1, Mr Singh said he could not see how knowing the ethnicity of a person could prejudice a case, as no other details are given and the individuals could be anywhere in the world, in particular if the case involved an international abduction. Mr Singh also said he wanted to know that the Police were not targeting ethnic minorities given that the charge is extremely rare and that it was not a crime for a parent to abduct their own child. He also thought this information would be available as part of a diversity analysis.
19. In relation to Request 2, Mr Singh referred to the guidance document about child custody disputes, which the Police had disclosed to him on 22 April 2013. His understanding, based on the guidance document, was that the Police's policy was that an arrest could only be made if either (i) the parents who had been charged did not have parental responsibility for their child, or (ii) they had parental responsibility and left the UK with their child. Mr Singh explained that in Request 2 he was seeking confirmation from the Police that this policy had been followed. He considered that such confirmation would not put any new information into the public domain which would allow any individual involved in the two cases to be identified, since the crime must, by default, involve specific features in order to lead to an arrestable offence.
20. Having considered the submissions presented by the Police and Mr Singh, and the withheld information itself, the Commissioner accepts that the withheld information has been held for the purposes of an investigation covered by section 34(1)(a). Consequently, she must conclude that the exemption applies. The Commissioner notes the comments made by Mr Singh (paragraphs 18 and 19) but, given that this is a class-based exemption, she cannot take the comments into account in considering whether the exemption applies.

Public interest test

21. As noted above, the exemption in section 34(1)(a) is 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 she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order that the information be disclosed (unless she considers that the information can be withheld under one or more of the other exemptions applied by the Police).



22. As stated in previous decisions, and in the Commissioner's briefing on the public interest test¹, 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".

The Police's submissions

23. In their submissions on the public interest, the Police referred to the rights of accused persons under the Human Rights Act 1998 to a fair trial, without undue prejudice. The Police stated that undue prejudice could occur if the withheld information were disclosed. The Police argued that part of the role of the Procurator Fiscal is to ensure that the criminal justice system works efficiently and that offenders are brought to justice. The Police also argued that there was a public interest in being able to demonstrate that victims would be helped and would not be put at further risk of harm, and that offenders would be brought to justice.
24. The Police had also considered the public interest in knowing how such cases are policed, in how police forces were spending public money, and whether there was an effective return for that expenditure.
25. However, the Police considered that the greater public interest lay in ensuring that this process could progress appropriately and that it was not negatively impacted or influenced by release of information, no matter how innocuous a request might appear to be. They acknowledged that release of information would inform public debate, but said it could not disclose the information to the detriment of ongoing cases.
26. The Police also noted that if there had been more cases which had been finalised at court, they would almost certainly have been able to release the requested information without fear of identifying individuals or jeopardising the court process.

Mr Singh's submissions

27. Mr Singh referred to the general public interest that information is accessible, i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation. Mr Singh also considered that the following public interest arguments were relevant, i.e. whether disclosure would:
- contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
 - contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
 - ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims; and
 - contribute to a debate on a matter of public interest.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTest.aspx>



28. Mr Singh thought that there was only one possible reason why the Police would not confirm that the arrests were consistent with the policy, and that was that there was inconsistency between policy and practice.

The Commissioner's view

29. In this case, the Commissioner accepts that there is a general public interest in disclosure of the information under consideration, so that the actions of the Police might be scrutinised, and to contribute to transparency and accountability. She also recognises that some public interest would be served by disclosure since it would aid understanding of the police investigation of such cases and would contribute to ensuring that the Police are adequately discharging their functions.
30. However, the Commissioner also recognises that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring that the various investigatory processes making up the criminal justice system are not hampered in any way.
31. The Commissioner accepts that there are strong arguments supporting the view that it is in the public interest to preserve the confidentiality of information held in relation to the investigation of a crime or potential crime. She considers that, in general, it will not be in the public interest to disclose information if this would undermine the confidence of the public in that part of the justice system. (It should be noted that disclosure of the information would not be to Mr Singh alone; the information would in effect be placed into the public domain.)
32. In this case, the Commissioner considers that the public interest in maintaining the exemption contained in section 34(1)(a) of FOISA in relation to the withheld information outweighs the public interest in disclosing the information. Although Mr Singh is of the view that disclosure of the information in Request 2 would only reveal that the Police are following their own policy, the Commissioner, having seen the withheld information, is satisfied that the disclosure of the withheld information in both Request 1 and Request 2 would in fact disclose information about two particular investigations by the Police of alleged criminal offences, and would prejudice the criminal justice process. The Commissioner considers that any benefit that may follow from disclosure of the withheld information is outweighed by the very considerable public interest in ensuring that such prejudice is not caused.
33. The Commissioner considers that disclosure would also cause harm to the victims in these two cases, and others, and would undermine the public's confidence in the criminal justice system. The Commissioner believes it is strongly in the public interest that the public maintains confidence in the criminal justice system.
34. Having considered carefully the particular circumstances of this case, the Commissioner has concluded that the public interest in withholding the information in question outweighs the public interest in disclosure of the information. The Commissioner therefore concludes that the Police were correct in their application of section 34(1)(a) of FOISA to withhold the requested information.

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35. As she is satisfied that section 34(1)(a) applies to this information, the Commissioner is not required to consider any other exemption applied by the Police to this information.

DECISION

The Commissioner finds that, in respect of the matters specified in his application, 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 Singh.

Appeal

Should either Mr Singh or the Police Service of Scotland 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.

Rosemary Agnew
Scottish Information Commissioner
5 February 2014



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

...