

Decision Notice

Decision 085/2015: Mr Paul Hutcheon and the Chief Constable of the Police Service of Scotland

Stop and search report

Reference No: 201402569

Decision Date: 22 June 2015



Summary

On 7 August 2014, Mr Hutcheon asked the Chief Constable of the Police Service of Scotland (Police Scotland) for information regarding a report into “stop and search”, which was published in January 2014.

Police Scotland disclosed extracts of emails falling within the scope of the request and withheld one email in its entirety under section 30(b)(ii) of FOISA. During the investigation, Police Scotland disclosed redacted versions of the emails from which they had previously disclosed extracts.

Following an investigation, the Commissioner was satisfied that Police Scotland had identified all the information falling within scope of the request and found that the exemption in 30(b)(ii) of FOISA was correctly applied to the withheld email. She did not require Police Scotland to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs)

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 7 August 2014, Mr Hutcheon made the following information request to Police Scotland:
“Regarding the Scottish Centre for Crime and Justice Research’s report into stop and search¹ published in January 2014 [“the report”], please provide me with:
a) all internal and external communications on the findings of the report and the report itself
b) all internal and external communications on the timing of the report’s publication.”

Mr Hutcheon stated that he was only interested in communications between 1 December 2013 and 31 January 2014.
2. Police Scotland responded on 12 September 2014. They disclosed extracts from six emails that fell within scope of the request, withheld four emails under section 36(1) of FOISA and one email under section 30(b)(ii) of FOISA.
3. On 23 September 2014, Mr Hutcheon emailed Police Scotland requesting a review of their decision. Mr Hutcheon was content for correspondence from legal advisers to be withheld, but considered that Police Scotland were likely to hold more correspondence than that disclosed. In relation to the email withheld under section 30(b)(ii) of FOISA, Mr Hutcheon was content for a name to be withheld, but considered that there was a public interest in disclosure of the remainder.

¹ http://www.sccjr.ac.uk/wp-content/uploads/2014/01/Stop_and_Search_in_Scotland1.pdf

4. Police Scotland notified Mr Hutcheon of the outcome of their review on 4 October 2014. Police Scotland disclosed additional extracts from four emails that fell within scope of the request and continued to withhold a single email under section 30(b)(ii) of FOISA.
5. On 4 November 2014, Mr Hutcheon applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Hutcheon stated he was dissatisfied with the outcome of Police Scotland's review because he considered that further information could be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Hutcheon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 11 November 2014, Police Scotland were notified in writing that Mr Hutcheon had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from him. They 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. Police Scotland were invited to comment on this application. They were asked to provide an explanation of the searches that had been conducted for the requested information and to answer specific questions, including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
9. Police Scotland provided their submissions on 22 January 2015 as to why the single email should be withheld. They also provided correspondence substantiating their position that they did not hold any further information covered by Mr Hutcheon's request.
10. On 12 February 2015, Police Scotland disclosed full, but redacted, versions of the emails they had previously disclosed in extract form to Mr Hutcheon. Mr Hutcheon accepted that personal information within these emails should be withheld.
11. Mr Hutcheon provided his public interest submissions as to why the email which had been withheld in full should be disclosed.
12. On 16 March 2015, Police Scotland were asked whether searches had been conducted of named individuals' email mailboxes. Police Scotland stated that the searches had encompassed these individuals and no further information had been identified.
13. In April 2015, Police Scotland were asked whether, in light of recent media coverage of stop and search issues², the withheld email could now be disclosed. Police Scotland confirmed that the email should still be withheld and provided further comments to support their position.

² For example: <http://www.bbc.co.uk/news/uk-scotland-31525040>

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 Mr Hutcheon and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Was all relevant information identified and located by Police Scotland?

15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

Details of Police Scotland's searches

16. Police Scotland submitted that searches were undertaken on three separate occasions: at the time of the application; at time of the review; and when Mr Hutcheon applied for a decision from the Commissioner. These searches confirmed that Police Scotland does not hold any further information in relation to this request. Police Scotland commented that, at the time of their review of his request, they had asked Mr Hutcheon what further information he believed them to hold, but he did not respond to this question.
17. Police Scotland provided details of the individuals and departments that were asked to search for the requested information. Police Scotland explained that the individuals involved have responsibility for, or involvement with, the information specified in Mr Hutcheon's request.
18. Police Scotland provided copies of email correspondence with staff enquiring whether information was held; the responses received confirmed that no further information was held. Police Scotland also provided information about the length of time for which they routinely retain certain types of information.
19. Later in the investigation, Police Scotland were asked whether searches had been conducted of named officers' emails. Police Scotland confirmed this had been done.
20. On the basis of the evidence provided about the searches carried out by Police Scotland, the Commissioner accepts (on the balance of probabilities) that all relevant information was identified by Police Scotland when they reviewed their response to Mr Hutcheon's request.

Section 30(b)(ii) – Prejudice to effective conduct of public affairs

21. Police Scotland relied upon the exemption contained in section 30(b)(ii) of FOISA to withhold information in a single email. The email contains comments from a Police Scotland employee on the report a few days before it was published.
22. Police Scotland confirmed that this single email was the only information which contained comments on the report. Police Scotland explained that the withheld email was not widely distributed for comment, but it was printed and presented to a Police Scotland officer for their consideration. The email author remembered discussing the comments with the officer, but was unaware of any further distribution of the email or action taken in relation to the email, and no written record was created regarding their discussion.

23. In order for Police Scotland to rely on this exemption, they must show that disclosure of the information would (or would be likely to) inhibit substantially the free and frank exchange of views for the purposes of deliberation. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
24. In applying the exemption, the chief consideration is not whether the information constitutes opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.
25. Each request should be considered on a case-by-case basis, taking into account the effects on the future exchange of views anticipated from disclosure of the particular information involved.

Police Scotland's submissions

26. Police Scotland submitted that they require the mutual trust and cooperation of any employee or other individual asked to provide comments, and if these individuals were concerned that such information would be made public, it would substantially inhibit Police Scotland's ability to provide a professional judgement in relation to any policing issues. Police Scotland considered that any relevant discussions/professional opinions should remain undisclosed to allow candour and freedom of expression without it being made public in a manner that would jeopardise this significant work.
27. Police Scotland considered that it was for its officers and staff to discuss, deliberate and provide opinion on issues that relate to their operational activities in an open and honest manner. They argued that information generated as a result of such exchanges of views must be afforded an appropriate level of protection. Publishing this information would be likely to make those involved in future deliberation and exchanges of opinion less candid.
28. Although the email in question was an internal email, Police Scotland also submitted that other agencies were likely to be inhibited from providing free and frank views if this information was disclosed under FOISA. Police Scotland stated that, in their experience, independent researchers and education establishments are particularly guarded and concerned about inappropriate public disclosure of personal or corporate opinion before a planned publication date, or where it does not form part of (or is understood not to be part of) any final production. Police Scotland did not want to jeopardise the confident and productive arrangements they have with those persons or bodies.
29. Police Scotland considered that if the information were disclosed, this would be to the detriment to the force, as those other parties' experience and opinions would no longer be available or sought, for fear of inappropriate public disclosure.
30. Police Scotland submitted that, in relation to this particular case, the person who wrote the email was likely to be substantially inhibited from exchanging views for the purpose of deliberation, if the information was disclosed. The author of the email has stated that relevant discussions or opinions would remain undisclosed to allow candour and freedom of expression to be provided, whether negative or positive, without being made public.

31. Police Scotland considered it is commonly understood that any expressed opinion, when not already understood to be for public consumption, will remain personal opinion. They stated that such opinions might well inform comment on the work or worth of other professionals in a positive or negative manner, and believed it was likely that inappropriate or unexpected public disclosure of those opinions would jeopardise not only the standing of the email author but those other individuals, particularly if opinion was negative.
32. Police Scotland concluded that, in their view, disclosure would stifle any robust discussions or comment, certainly in a recordable format, and this was not desirable.

Mr Hutcheon's submissions

33. Mr Hutcheon noted that the Chief Constable and his senior officers have regularly defended the stop and search policy in public, so he could see no reason why views on this report should not be published. Mr Hutcheon considered that, in the past, it was not a subject on which Police Scotland had declined to offer a firm view and he therefore considered that publication would contribute to an ongoing public debate.

The Commissioner's view

34. As noted above, in assessing whether the exemption in section 30(b)(ii) of FOISA is engaged, the chief consideration is not whether the information constitutes opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially the exchange of views.
35. Each request must be considered on a case-by-case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision was being considered, and for which further views were still being sought, for example, is likely to be more substantially inhibiting than once advice has been taken.
36. In this instance, the views were expressed by one individual. The Commissioner considers that the comments within the withheld email represent the early stages of discussion and consideration. She takes the view that, in the circumstances of this case, the email author should be allowed a private space to raise such matters freely and openly, without the concern that such comments would be made public. The Commissioner accepts that the withheld email contains frank and candid comments on the report, which were prepared for the purposes of discussion at a high level, on a matter which was likely to be controversial. The Commissioner considers that disclosure would be likely to stifle the frankness and candour of comments on similarly controversial issues in future.
37. The Commissioner accepts that disclosure of the withheld email would make it less likely that Police Scotland staff in a similar situation would provide such views in the future with the same degree of frankness and candour. She consequently accepts that disclosure of the withheld email would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner is of the view that Police Scotland were entitled to consider this information exempt under section 30(b)(ii) of FOISA.

Public interest test

38. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
39. 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. disclosure must serve the interests of the public.
40. The Commissioner is aware that circumstances had changed between the time at which Police Scotland reviewed their response to Mr Hutcheon's request and the time of writing this decision,³ but she must reach her decision on the basis of the circumstances that prevailed at the date Police Scotland responded to Mr Hutcheon's requirement for review. In this instance the relevant date is 24 October 2014. In October 2014, the subject of stop and search did not dominate media coverage in the way that it has done in later months, particularly after Sir Stephen House was questioned by the Scottish Parliament's Justice Committee in February 2015⁴. The findings in this decision should be considered in this context: as considering the public interest in disclosing or withholding comments on a report that had not been as widely publicised as was later the case.

Police Scotland's submissions

41. Police Scotland stated that stop and search activities are the subject of public interest, in its general sense, and public comment. They acknowledged that disclosing the withheld information would assist understanding of the matter and contribute to public debate and transparency.
42. Police Scotland considered that they were taking "strident measures" to ensure that public safety, crime reduction and police accountability is enhanced by a robust, proportionate and accountable stop and search process. They considered that this approach would ensure public interest matters were fully addressed.
43. Police Scotland also raised the public interest inherent in preventing the inhibition of the free and frank exchange of views for the purposes of deliberation, as discussed above. Police Scotland considered that disclosure would obstruct their efforts to progress matters in a considered and methodical manner.
44. Police Scotland concluded that the public interest in disclosing the withheld information was outweighed by the public interest in maintaining the exemption.

³ <http://www.bbc.co.uk/news/uk-scotland-31525040>

⁴ <http://www.bbc.co.uk/news/uk-scotland-31525040>

Mr Hutcheon's submissions

45. Mr Hutcheon considered that the report in question was not a Police Scotland report, but was sent to Police Scotland out of courtesy. Mr Hutcheon noted that stop and search is a controversial policy which has generated a lot of discussion and media interest. The findings of the report were controversial and triggered a large amount of press coverage.
46. Mr Hutcheon considered that it was in the public interest to know what Police Scotland thought of the findings.
47. Mr Hutcheon submitted that the findings within the report do not relate to individual policing operations, but instead relate to the overall volume of stop and searches carried out by officers. He concluded that publication of the email would add to the understanding of Police Scotland's view of what he described as "an alternative take on the policy". He believed that there was a public interest in knowing how the single police force reacted, internally and externally, to what was undoubtedly an uncomfortable report.

The Commissioner's view

48. The Commissioner has considered all of the arguments presented to her, in relation to the public interest in withholding or disclosing the information in the email in question. She acknowledges the strong public interest in transparency in relation to Police Scotland's controversial stop and search policy, which would extend to transparency over any comments from within Police Scotland on an external report on the stop and search policy.
49. Against this, the Commissioner notes that the views within the withheld email do not appear to have been discussed with more than one person within Police Scotland and are not understood to represent Police Scotland's final position on the report. There is no evidence that the views expressed in the email were acted upon or passed on for further discussion or deliberation.
50. The Commissioner acknowledges that there is a public interest in allowing individuals private space for views to be exchanged and discussed, without the fear that such views would be disclosed. As noted above, the Commissioner is persuaded that, in the circumstances, disclosure in this case would limit frankness or willingness to comment in similar circumstances in the future, which would diminish the quality of the views provided for the purposes of deliberation. This would be contrary to the public interest. The Commissioner considers Mr Hutcheon's arguments on the public interest to be well-founded, but, on balance, given that the information he requested relates to one individual's comments on the report, and given that these comments do not appear to have led to any action or to have been considered widely within Police Scotland, she has concluded that there is a significant, and greater, public interest in Police Scotland being able to obtain such comments in future, and in preventing individuals from being inhibited from exchanging similar views.
51. In coming to this decision, the Commissioner has considered the extent to which the public interest has been met by the information disclosed by Police Scotland, in relation to Mr Hutcheon's request.
52. On balance, therefore, the Commissioner finds that the public interest in disclosing the remaining withheld information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, she is satisfied that Police Scotland were correct to withhold the email under that exemption.

Decision

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

Appeal

Should either Mr Hutcheon or the Chief Constable of 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

22 June 2015

Appendix 1: 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info