

Decision Notice

Decision 158/2015: Mr Marc Ellison and the Chief Constable of the Police Service of Scotland

Rendition flights

Reference No: 201501026

Decision Date: 13 October 2015



Summary

On 17 March 2015, Mr Ellison asked the Chief Constable of the Police Service of Scotland (Police Scotland) for a copy of the interim report to the Lord Advocate regarding his investigation of alleged rendition flights passing through Scottish airports.

Police Scotland responded by stating that the report was exempt from disclosure under a number of exemptions in FOISA. Following a review, Mr Ellison remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Police Scotland were entitled to refuse to disclose the interim report.

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) and (b) (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 17 March 2015, Mr Ellison made a request for information to Police Scotland. The information requested was:
“a copy of the interim report - a redacted version if necessary - submitted to the Lord Advocate in 2014 on Police Scotland’s investigation on alleged rendition flights passing through Scottish airports”
2. Police Scotland responded on 16 April 2015, refusing to disclose the information on the basis that sections 31(1), 32(1)(a) and (b), and 34(1)(a) and (b) of FOISA applied.
3. On 17 April 2015, Mr Ellison wrote to Police Scotland, requiring a review of their decision. He did not accept the above exemptions applied to all the withheld information.
4. Police Scotland notified Mr Ellison of the outcome of their review on 18 May 2015. Police Scotland upheld their original decision without modification.
5. On 1 June 2015, Mr Ellison wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison reiterated that he did not accept the exemptions applied.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison 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 15 June 2015, Police Scotland were notified in writing that Mr Ellison had made a valid application. They were asked to send the Commissioner the information withheld from Mr Ellison. Police Scotland 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 and answer specific questions: these focused on the exemptions applied in correspondence with Mr Ellison.

Commissioner's analysis and findings

9. 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 Ellison and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Background

10. On 5 June 2013, the Lord Advocate announced to the Scottish Parliament that he was aware of information provided by the "The Rendition Project",¹ and asked Police Scotland to give this consideration in order to establish whether there was any evidence of crimes having been committed. Police Scotland received correspondence on 5 June 2013 from the Deputy Director of Serious Casework, Crown Office and Procurator Fiscal Service (COPFS), formally instructing them to consider the information released by "The Rendition Project" with a view to determining whether there was sufficient credible and reliable information to commence a criminal investigation. In response to these instructions, a Senior Investigation Officer produced a report for COPFS. The report is the subject of this request.

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

11. Section 34(1)(a)(i) provides that information is exempt from disclosure if it has been 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.
12. Section 34(1)(b) provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
13. 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 subject to the public interest test contained in section 2(1)(b) of FOISA.
14. As stated above, Police Scotland were formally instructed to investigate the matter, which they also submitted they had a statutory duty to do under the Police and Fire Reform (Scotland) Act 2012.

¹ <http://www.therenditionproject.org.uk/>

15. In this case, having considered the submissions presented by Police Scotland, the Commissioner accepts that the information was held for the purposes of an investigation covered by section 34(1)(a)(i) and 34(1)(b) of FOISA. Consequently, she must conclude that the exemptions apply.

Public interest test

16. 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 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 the information to be disclosed (unless she considers that the information can be withheld under one or more other exemptions in FOISA).
17. 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".
18. Mr Ellison argued that Police Scotland had not considered the public interest appropriately. He argued that the Scottish public were entitled to know whether or not adequate progress was being made towards establishing whether or not their skies had been implicated in flying people to detention without trial (and potentially torture), which he considered a considerable public interest argument in favour of disclosure.
19. Police Scotland acknowledged that some information on this subject was in the public domain, but contended that it amounted to no more than speculation. They submitted that disclosure of the withheld information, in such a context, could ultimately jeopardise their investigation.
20. Police Scotland argued that if there were allegations to be made, they should be addressed by the appropriate people under agreed international protocols for the investigation of crimes, not communicated publicly via an FOI disclosure. As this was an ongoing inquiry, Police Scotland submitted it was not in the public interest to disclose the information at this stage, thus compromising the investigation's integrity and potentially jeopardising the likelihood of any future prosecution.
21. They noted that they were already subject to external scrutiny regarding their handling of investigations, which they believed catered for this element of the public interest. Police Scotland did not consider it possible to negate the potential harm by providing a redacted version of the report, so this was not considered.
22. Police Scotland accepted that there was public interest in members of the public being provided with more factual information with regard to the public debate surrounding this subject, as opposed to the current speculation. However, they considered the overwhelming public interest lay in ensuring that the police could conduct both efficient and effective investigations, with a view to the prevention and detection of crime and the apprehension and prosecution of offenders.
23. In this case, taking account of the wider interest in this subject matter, the Commissioner recognises that there is a public interest in providing an insight into police methods and actions, so that the actions of the police may be scrutinised (contributing to transparency and accountability).

24. The Commissioner 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. The Commissioner accepts that there are strong arguments supporting the view that it is generally in the public interest to preserve the integrity of information relating 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 or the ability of police officers to gather comprehensive information for such investigations.
25. In this case, the Commissioner considers there to be a stronger public interest in maintaining the exemptions contained in section 34 of FOISA in relation to the withheld information. She considers that there is a considerable public interest in protecting the steps taken by the police to conduct and complete a thorough investigation and the procedures in that investigation.
26. Having considered the particular circumstances of this case carefully, the Commissioner has concluded that the public interest in disclosure of the information in question does not outweigh that in withholding the information. The Commissioner therefore concludes that Police Scotland were correct in their application of section 34(1)(a)(i) and (b) of FOISA to withhold the requested information.
27. Having reached this conclusion, the Commissioner is not required to consider the application of sections 31(1) and 32(1)(a) and (b), which were also applied by the Police to this information.

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 Ellison.

Appeal

Should either Mr Ellison 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

13 October 2015

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;

- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; 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