

Decision Notice

Decision 027/2018: Mr James Boyle and the Chief Constable of the Police Service of Scotland

Alleged criminal offences

Reference No: 201702143

Decision Date: 6 March 2018



Scottish Information
Commissioner

Summary

Police Scotland were asked for information concerning an alleged criminal complaint made to them by specified individuals. Police Scotland refused to confirm or deny whether the information existed or was held by them.

The Commissioner accepted that it would not be in the public interest for Police Scotland to reveal whether the information existed or was held.

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 provision as respects responses to request); 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 28 June 2017, Mr Boyle made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). Mr Boyle requested the identity of the officer with overall control of, and responsibility for, a specified police investigation following allegations made by named individuals.
2. Police Scotland responded on 14 July 2017. Police Scotland refused to confirm or deny whether they held the information requested or whether it existed, relying on section 18(1) of FOISA. They informed Mr Boyle that they were applying section 18(1) in conjunction with sections 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 38(1)(b) (Personal information) of FOISA.
3. On 24 July 2017, Mr Boyle wrote to Police Scotland, requesting a review of their decision. In Mr Boyle's view, it was not in the public interest to withhold any such information.
4. Police Scotland notified Mr Boyle of the outcome of their review on 29 August 2017, upholding their original decision without modification.
5. On 23 November 2017, Mr Boyle wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Boyle stated he was dissatisfied with the outcome of Police Scotland's review as he disagreed that any such information would be exempt from disclosure. Furthermore, he considered the public had a right to understand what police personnel had or had not done.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Boyle 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 15 December 2017, Police Scotland were notified in writing that Mr Boyle had made a valid application. 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, focusing on the provisions of FOISA cited in their responses to Mr Boyle.
9. Police Scotland responded with submissions. At this stage, Police Scotland confirmed that they considered any such information, if it existed and was held, would be exempt from disclosure in terms of section 34(1)(a) and (b) of FOISA. Police Scotland withdrew their previous reliance on the exemption in section 38(1)(b) of FOISA.
10. During the investigation, Mr Boyle provided additional submissions to the Commissioner in support of his application, focusing on the public interest.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr Boyle and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

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

12. Section 18 of FOISA allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by it;
 - (ii) 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, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
13. Where an authority has chosen to rely on section 18, the Commissioner must establish:
 - (i) whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose it because it was exempt under one of the exemptions listed in section 18(1). The authority must satisfy the Commissioner that:
 - (a) an exemption would apply and, if it did
 - (b) that the balance of the public interest would favour withholding the information, and then
 - (ii) whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
14. It is not sufficient simply 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, if it existed and was 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 able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in disclosing any relevant information it held.

15. In this case, Police Scotland submitted that, if the information existed and was held by them, it would be exempt from disclosure in terms of sections 34(1)(a) and (b) of FOISA.
16. The Commissioner will firstly consider whether Police Scotland 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. In this regard, he will consider the exemptions in section 34(1)(a) and (b) of FOISA.

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

17. Section 34(1)(a) and (b) of FOISA provide that information is exempt from disclosure if it is held for the purposes of:
 - (i) an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - (ii) an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii)); or
 - (iii) 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 (section 34(1)(b)).
18. The exemptions in section 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.
19. Police Scotland submitted that information of this nature, if it existed and was held by them, would be held for the purposes of an investigation of the types described in section 34(1)(a) and (b).
20. Police Scotland stated that any information of this nature, forming part of an assessment of whether there were grounds to instigate a criminal enquiry, would fall within the scope of the exemptions.
21. In Police Scotland's view, even in the event that no such grounds existed, there was (as with all police investigation), the possibility that an enquiry might be instigated in future should new information come to light.
22. In the Commissioner's view, if the information existed and was held by Police Scotland, it would be held for the purposes of an investigation they had a duty to conduct for the purposes specified above. It is clear that any such information would relate to a specific allegation which Police Scotland would have a duty to investigate; given the nature of the complaint, it could be held for no other purpose.

23. The Commissioner accepts, therefore, that any such information, if it existed and was held, would fall within the exemptions in section 34(1)(a) and (b) of FOISA.
24. As these exemptions are subject to the public interest test, the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and was held by Police Scotland) would be outweighed by that in maintaining the exemptions.

The public interest

25. Police Scotland acknowledged that there was a public interest in understanding how they undertook investigations and being assured that criminal allegations were investigated fully when required. They submitted that this must be balanced against the purpose of the exemptions in section 34 of FOISA, which was to ensure that the investigative process and associated reporting structures were followed and not jeopardised by the disclosure of information through FOISA.
26. Police Scotland submitted that there was an expectation by the public that they would handle information received from the public in a confidential manner. In Police Scotland's view, it was not in the interest of the public to disclose information received from the public which was likely to undermine this expectation. In their view, to do so could lead to the public becoming less willing to engage with the investigation of crime should these expectations not be met.
27. Police Scotland considered that the greater public interest lay in maintaining the exemptions, in order to ensure that the investigative process was not compromised by disclosure. They submitted that the investigation of crime and ensuring confidence in the justice system was a key responsibility which they had a duty to fulfil. They did not consider information should be disclosed where doing so would undermine these responsibilities.
28. Mr Boyle queried whether the community enjoyed a relationship of trust with Police Scotland. He submitted that the greater harm was not a public understanding of Police Scotland's activities, rather it was derelictions of duty, collusion, criminality and secrecy. In his opinion, Police Scotland's reasoning for withholding any such information was fallacious, tendentious and utterly specious.
29. The Commissioner has considered carefully all of the arguments presented by Mr Boyle and Police Scotland.
30. The Commissioner agrees with Police Scotland that the disclosure of information falling within the scope of the request would, if it existed and was held, undermine the public's expectation that it would be handled in a confidential manner. Given that the request in this case names specific individuals who are alleged to have made complaints to Police Scotland, he is also of the view that disclosure of this type of information would jeopardise the interests of any individuals linked to any such allegations. In his view, neither of these outcomes would be in the public interest.
31. Having considered all of the submissions made to him, the Commissioner has concluded that, in all the circumstances of this particular case, the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA would outweigh that in disclosure of the information requested, if it existed and was held.
32. In all the circumstances of this case, therefore, the Commissioner has concluded that Police Scotland could have given a refusal notice under section 16(1) of FOISA, on the basis that

the information (if it existed and was held) was exempt from disclosure under section 34(1)(a) and (b). He must now consider whether revealing whether the information existed and was held would be contrary to the public interest.

Section 18(1) – The public interest

33. The Commissioner has accepted that Police Scotland could give 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) and (b) of FOISA. He must now consider whether Police Scotland were entitled to conclude (for the purposes of section 18) that it would be contrary to the public interest to reveal whether the information existed or was held.
34. Police Scotland considered that to confirm whether or not a criminal investigation had taken place (which would be the consequence of confirming the existence or not of the requested information) would seriously inhibit their ability to investigate crime. They submitted that confirming whether or not the information existed or was held would, by default, result in the confirmation or denial of certain key points with regard to allegations of criminality (including whether they had been made and about whom) and what had (or had not) been done in response to them.
35. In Police Scotland's view, there would rarely be any discernible public interest in confirming or otherwise that a particular criminal investigation had taken place. In their view, this was also applicable to confirmation that a particular allegation had been made in the first instance. In their view, to confirm whether the information was held would likely jeopardise the interests of individuals linked to the allegations made. Police Scotland considered that such confirmation would be unfair to the subject(s) of any such allegation and to the individual(s) making any such allegations.
36. Police Scotland also considered confirming that an allegation had been made would lead to speculation and judgments being made outwith the proper and official legal processes for addressing such matters. In their view, to confirm whether an individual had been the subject of a criminal investigation could place that individual in a position of harm.
37. Police Scotland contended that individuals who reported allegations to them did so with an expectation that their involvement would remain confidential unless, for example, they were called upon to attend court as a witness in a criminal matter. In their view, such individuals would not expect details of the incident in question or confirmation of their involvement to be supplied to anybody not directly connected with the investigation process and would not expect it to be publicly disclosed.
38. In Police Scotland's view, it was likely that individuals would be less willing to report allegations to them in the knowledge that such information would enter the public domain. They considered there was no discernible public interest in releasing information under FOISA that would result in any reduction in the public's willingness of the public to engage with them in the investigation of criminal complaints.
39. Police Scotland also considered that to confirm whether the information requested existed or was held would compromise their current and future law enforcement role. In their view, confirming that a specific allegation had been made, or that a particular investigation had or had not taken place, would damage the relationship between them and those individuals who fulfilled a vital role in the investigatory process by providing them with information and intelligence. They submitted that the breakdown of this relationship would be seriously detrimental to their law enforcement capabilities.

40. Mr Boyle submitted that activities undertaken in public office, discharging public duties, were not (except in tightly defined areas) secret activities. In his view, the community had an absolute right to understand what Police Scotland personnel had, or had not, done.
41. Mr Boyle noted that Police Scotland had themselves recently made public the fact that several of their senior officers had been suspended or placed on restricted duties in connection with an investigation by the Police Investigations and Review Commissioner. He contrasted this with the position Police Scotland had taken in relation to his own information request.
42. Having considered the submissions made by both Mr Boyle and Police Scotland, the Commissioner is satisfied, in all the circumstances of this case, that it would have been contrary to the public interest for Police Scotland to reveal whether the information requested by Mr Boyle existed or was held by them.
43. In particular, the Commissioner recognises the prejudicial impact on future investigations that would likely result were Police Scotland to reveal the existence (or otherwise) of the information. Given the terms of the request, it would – inevitably – result in the confirmation or denial of certain key points. Such a detrimental effect would clearly not be in the public interest.
44. The Commissioner would point out that a disclosure under FOISA is not simply disclosure to the person requesting the information, but rather is a public disclosure. This must always be borne in mind when considering the effects of disclosure; a disclosure of this kind to one individual cannot, therefore, be considered in isolation.
45. As a result, the Commissioner is satisfied that Police Scotland were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr Boyle, or whether that information existed.

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 Boyle.

Appeal

Should either Mr Boyle 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.

Margaret Keyse
Head of Enforcement

6 March 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.

...

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;
- (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

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