

Decision Notice

Decision 016/2016: Mr Robert Kidd and the Chief Constable of the Police Service of Scotland

Investigation report

Reference No: 201502114

Decision Date: 27 January 2016



Scottish Information
Commissioner

Summary

On 6 April 2015, Mr Kidd wrote to the Chief Constable of the Police Service of Scotland (Police Scotland) and, referring to previous communications, asked for all reports, communications and correspondence concerning the matter previously raised. Police Scotland refused to confirm or deny whether they held the information, or whether the information existed.

Following an investigation, the Commissioner found that Police Scotland were entitled to neither confirm nor deny whether the information was held, or whether the information existed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18 (Further provisions 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 6 April 2015, an email was sent to Police Scotland on behalf of Mr Kidd referring to the subject matter of previous correspondence and asking for all reports, communications and internal and external correspondence concerning the matter in question. Subsequent references to Mr Kidd in this Decision should be read as including persons acting on his behalf.
2. Police Scotland responded on 7 May 2015, notifying Mr Kidd (in accordance with section 18 of FOISA) that they could neither confirm nor deny whether they held the information, as to do so would be contrary to the public interest.
3. Police Scotland further explained that, if held, the information would be exempt from disclosure in terms of sections 34 and 38 of FOISA.
4. On 8 May 2015, Mr Kidd wrote to Police Scotland, requiring a review of their decision. He wanted to establish whether the information existed and was held by Police Scotland.
5. Police Scotland notified Mr Kidd of the outcome of their review on 29 May 2015. They upheld the original decision without modification.
6. On 9 November 2015, Mr Kidd wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kidd stated he was dissatisfied with the outcome of Police Scotland's review, providing reasons why he did not, in the circumstances, agree with the application of sections 34 and 38 of FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Kidd made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision. The case was then allocated to an investigating officer.
8. On 24 November 2015, Police Scotland were notified in writing that Mr Kidd had made a valid application.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 7 December 2015, Police Scotland were invited to comment on this application and answer specific questions, with particular reference to their application of section 18 of FOISA.
10. Police Scotland responded on 16 December 2014, confirming that they were applying section 18, on the basis that (if it existed and was held) the information could be withheld under sections 34(1)(a) and (b) and 38(1)(b) of FOISA. They provided arguments in support of this position
11. Mr Kidd was given the opportunity to provide further submissions on the public interest, but did not do so.

Commissioner's analysis and findings

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

Section 18 of FOISA – “neither confirm nor deny”

13. As mentioned above, Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr Kidd's request, or whether such information existed. Police Scotland adhered to this position in their submissions to the Commissioner.
14. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) 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, 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 an authority has chosen to rely on section 18, 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 authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions listed in section 18(1).

16. The Commissioner must ensure that her decision 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 authority's reliance 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.
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, 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.
18. In this case, Police Scotland submitted that if they did hold any information falling within the scope of Mr Kidd's request, it could be withheld under sections 34(1)(a) and (b) and 38(1)(b) of FOISA.
19. The Commissioner will first of all consider whether Police Scotland would be entitled to rely upon the exemptions contained in section 34 of FOISA.

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

20. Section 34(1)(a) and (b) of FOISA provide that information is exempt from disclosure if it is held 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 (section 34(1)(a)(i));
 - 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
 - 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)).
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. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
22. The Commissioner accepts that if the requested 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. The Commissioner accepts, therefore, that such information would fall within the exemptions in section 34(1)(a) and (b) of FOISA.
23. 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 if it was held by Police Scotland) would be outweighed by that in maintaining the exemptions.

24. Police Scotland acknowledged that there was some public interest in disclosure of the information sought by Mr Kidd, if it existed and was held, but considered any benefit in relation to justice to a particular individual would be outweighed by prejudice to other individuals and also to the investigation and prosecution of crime generally.
25. In presenting their arguments, Police Scotland emphasised that disclosure of information under FOISA is effectively to the world at large. They submitted that disclosure of the information sought by Mr Kidd, if it existed and was held, could cause significant harm to both individuals and to law enforcement. They explained that disclosure of any information held would jeopardise the interests of anyone linked to such an investigation and disclose whether an individual had been the subject of a related allegation. It would lead to speculation and judgement about the matters covered by the request, outwith the appropriate legal processes.
26. Police Scotland also submitted that individuals involved in such investigations would not expect such information to be placed in the public domain, which would result in the reduction in the willingness of the public to engage with the Police conducting such investigations. This, they submitted, would compromise the law-enforcement role of the Police, which was not in the public interest.
27. Police Scotland concluded that, if the information existed and was held, the wider public interest of protecting the law enforcement role of the Police Service and preserving the relationship between the Police Service and the public, who fulfil a vital role in providing information and intelligence, would strongly favour maintaining the exemptions.
28. In his application to the Commissioner Mr Kidd stated that he disagreed with the application of section 34. As mentioned above, Mr Kidd did not provide any further submissions to the Commissioner.
29. Having carefully considered all of the arguments presented by Police Scotland and by Mr Kidd (noting that she is not able to summarise all of these in this decision), the Commissioner has concluded that in all the circumstances the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA would outweigh the public interest in the disclosure of the information, if the information existed and was held.
30. Given that the Commissioner is satisfied that, if it existed and was held, the information would be exempt from disclosure in terms of section 34(1)(a) and (b) of FOISA, she is not required to consider the application of section 38(1)(b) as also claimed by Police Scotland.
31. Having 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, the Commissioner must 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.

The public interest - section 18

32. Police Scotland provided reasons for concluding, on balance, that it would not be in the public interest to reveal whether they held the requested information, or whether it existed. These were in line with the public interest submissions considered above in relation to the exemptions.

33. In his application to the Commissioner Mr Kidd stated that it was grossly unfair that Police Scotland responded in terms of section 18 of FOISA. However, as indicated above, he made no further submissions on this matter.
34. The Commissioner is satisfied, in all the circumstances of this case, that were Police Scotland to reveal whether the information requested by Mr Kidd existed or was held, that would have the prejudicial impact on investigations claimed by Police Scotland. This would not be in the public interest.
35. As a result, the Commissioner is satisfied Police Scotland were entitled to refuse to confirm or deny, in line with section 18 of FOISA, whether they held the information requested by Mr Kidd, 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 Kidd.

Appeal

Should either Mr Kidd or Police 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
27 January 2016

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.

- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given 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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