

Decision Notice

Decision 080/2016: Mr Alastair Tibbitt and the Chief Constable of Police Scotland

Police surveillance information

Reference No: 201501875

Decision Date: 8 April 2016



Scottish Information
Commissioner

Summary

On 18 August 2015, Mr Tibbitt asked the Chief Constable of Police Scotland (Police Scotland) for information regarding police surveillance carried out under the Regulation of Investigatory Powers (Scotland) Act 2000.

Police Scotland withheld information about protocols with third parties on the grounds that disclosure would substantially prejudice law enforcement (section 35(1) of FOISA) and stated that the costs of supplying the other information Mr Tibbitt had asked for would exceed the £600 threshold in the Fees Regulations.

Following an investigation, the Commissioner accepted that responding to parts of the request would exceed the costs threshold, but found that Police Scotland had failed to provide Mr Tibbitt with reasonable advice and assistance (as required by section 15(1) of FOISA). She required them to contact Mr Tibbitt to discuss how his request might be narrowed.

The Commissioner also found that section 35(1) of FOISA did not apply to the information about third party protocols and required Police Scotland to disclose this information to Mr Tibbitt.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 35(1)(a) and (b) (Law enforcement)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

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. Mr Tibbitt's request concerned statistical information relating to authorisations obtained for directed surveillance. The Regulation of Investigatory Powers (Scotland) Act 2000¹ (RIPSA) provides specified public authorities, including Police Scotland, with a regulatory framework within which they may undertake directed surveillance.
2. On 15 August 2015, Mr Tibbitt made a request for information to Police Scotland. His request was as follows:
 - (i) *How many Direct Surveillance Authority (DSA) authorisations have been issued by Police Scotland in accordance with RIPSA 2000 legislation, in the last 12 months for which records are available?*
 - (ii) *Of the total DSA issued above, how many have specified use of public space CCTV as a tactic for information gathering?*

¹ <http://www.legislation.gov.uk/asp/2000/11/contents>

- (iii) *In the last 12 months for which records are available, how many times has Police Scotland actually used public space CCTV for directed surveillance, as per Schedule 1, part 1 of RIPSAs 2000?*
 - (iv) *Police Scotland have agreed and signed protocols with local authorities and other partner agencies throughout Scotland that set out how their systems may be used for Directed Surveillance. Please provide a list of all the bodies where such protocol arrangements are in place, and electronic copies of the master documents. These are understood to be held at Central Authorities Bureau (CAB), West Hub, Scottish Crime Campus (SCC), Gartcosh.*
 - (v) *How many times in the last year have Police Scotland provided redacted Direct Surveillance Authority (DSA) to third party CCTV operators in order to conform with these protocol arrangements? Please break this figure down by CCTV operator.*
3. On 26 September 2015, Mr Tibbitt wrote to Police Scotland, requesting a review on the basis that they had failed to respond to his request.
 4. Police Scotland notified Mr Tibbitt of the outcome of their review on 12 October 2015. They apologised for failing to respond to Mr Tibbitt's information request within 20 working days.
 5. In respect of parts (i), (ii) and (iv) of the request, Police Scotland withheld the information under sections 35(1)(a) and (b) of FOISA (Law enforcement). Police Scotland also notified Mr Tibbitt they were not required to comply with parts (iii) and (v) of his request because the estimated cost of doing so exceeded the sum of £600 prescribed for the purposes of section 12(1) of FOISA (Excessive cost of compliance).
 6. On 12 October 2015, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Tibbitt did not agree that the information he had asked for in parts (i), (ii) and (iv) was exempt under section 35(1). He also queried the application of section 12(1) to parts (iii) and (v), commenting that he was not given the opportunity to narrow his request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt 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.
8. On 30 October 2015, Police Scotland were notified in writing that Mr Tibbitt had made a valid application. Police Scotland provided the information it had withheld from Mr Tibbitt in relation to request (iv) and the case was then allocated to an investigating officer.
9. 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 to answer specific questions with particular reference to the requirements of sections 12(1), 15(1) (Duty to provide advice and assistance) and 35(1) of FOISA.
10. Police Scotland responded. They told the investigating officer they now wished to rely on section 12(1) of FOISA (rather than on section 35(1)) in respect of part (ii) of Mr Tibbitt's request.

11. During the investigation, Police Scotland offered to disclose an alternative statistic in respect of part (i) of Mr Tibbitt's request, for the period of 1 April 2014 to 31 March 2015. Mr Tibbitt agreed to this and subsequently confirmed that he had received the information. This decision will therefore only focus on parts (ii) to (v) of the request.

Commissioner's analysis and findings

12. 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 Tibbitt and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 35(1)(a) and (b) of FOISA - Law enforcement

13. Police Scotland applied the exemptions in section 35(1)(a) and (b) to part (iv) of Mr Tibbitt's request.
14. Section 35(1)(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. As the Commissioner's guidance on this exemption highlights², the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.
15. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance also states, there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime". She considers that section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as investigative processes and use of police intelligence).
16. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the authorities have to be able to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
17. The exemptions in section 35(1) are subject to the public interest in section 2(1)(b) of FOISA.

Submissions from Police Scotland

18. Police Scotland provided the investigating officer with a copy of a guidance document on covert use of public space CCTV, which included the draft protocol wording. Although Police Scotland originally applied the exemptions in section 35 to the actual protocols, during the investigation, they stated that they did not see their section 35 arguments applying to the wording of the protocol agreements themselves.
19. However, they submitted that disclosing the list of bodies with agreements in place would prejudice substantially the prevention and detection of crime and the prosecution and apprehension of offenders. This was due to the fact that the success of criminal

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

investigations within a Police Force is often dependent on the use of covert techniques and methodology.

20. Police Scotland argued that many criminals are constantly active and astute in their assessment of police capabilities and would capitalise on any information that could be gleaned about policy and practice. Police Scotland considered that using the information to compromise policing methods would assist their offending behaviour, for example, enabling offenders to engage counter measures against disclosed surveillance techniques and local capabilities.
21. Police Scotland confirmed that the lack of a specific protocol agreement with particular authorities does not necessarily mean that CCTV cannot or will not be used in those areas. However, the lack of a protocol agreement would complicate and delay the process.
22. Applications would still be progressed, Police Scotland explained, but problems tended to arise where they were unable to reach an agreement with the person operating the system; for example, where the operator was looking for more information regarding the investigation than Police Scotland were prepared to provide.
23. Police Scotland stated that having an agreement in place streamlined the process significantly. Disclosing the list of bodies with protocol agreements in place would lead to the creation of a “map” showing those areas across the country where use of CCTV was more likely to be used as a tactic. It would be a reasonable assumption for the public to conclude that CCTV was more likely to be used as a tactic in those areas where protocols did exist.
24. Police Scotland were unable to provide any examples of situations where surveillance had not gone ahead because a protocol was not in place. Police Scotland stated that they will not conduct surveillance without showing the CCTV operator a copy of their DSA, but this is not the same as saying they would not conduct surveillance without a protocol being in place.

Submissions from Mr Tibbitt

25. It was Mr Tibbitt’s view that Police Scotland were seeking to maintain unreasonable secrecy over their activities and that there was a great deal of public interest in the extent of police surveillance in Scotland.
26. Mr Tibbitt stated that Police Scotland’s argument (that the disclosure of the names of organisations with surveillance agreements would allow a map to be drawn of places where surveillance is undertaken) was misguided. He submitted that such disclosure would not reveal the location of specific CCTV cameras but that, in any case, public bodies routinely disclosed the locations of their CCTV cameras when asked to via FOI requests.
27. He stated that CCTV operators had already disclosed to him, for example, how frequently Police Scotland had used their systems for directed surveillance. They had also provided him with a copy of the specific protocol agreement they have with Police Scotland.
28. With regard to the signed protocol agreements with Police Scotland, Mr Tibbitt stated that that he would be happy to accept redacted documents, if necessary.

The Commissioner’s conclusions

29. The Commissioner must consider whether disclosure would, or would be likely to, cause substantial prejudice to the prevention or detection of crime (section 35(1)(a)) or to the apprehension or prosecution of offenders (section 35(1)(b)).

30. She notes that, despite having been given three separate opportunities to provide robust arguments in support of the application of these exemptions, Police Scotland's submissions were repetitive, unpersuasive and not backed up by examples. Indeed, Police Scotland admitted that surveillance operations would still go ahead without the protocol as long as a DSA document was available for the CCTV operator to view.
31. Police Scotland's submissions do not persuade the Commissioner that disclosure of the information under consideration would have the effect claimed; i.e. that criminals would specifically tailor their activities to areas that did not appear in the list of bodies, in the remote hope that there would be less chance of their activities being captured on CCTV. The only thing that criminals would be able to "map" would be those areas (authorities) that have a protocol in place.
32. Given that Police Scotland has confirmed that surveillance could go ahead regardless of such protocols being in place (with the only difference being an administrative inconvenience to themselves), the Commissioner is not satisfied that disclosing the list of bodies would, or would be likely to, prejudice substantially Police Scotland's ability to prevent or detect crime or apprehend or prosecute offenders.
33. She therefore finds that the exemptions in section 35(1)(a) and (b) of FOISA do not apply to the lists of the bodies where protocol arrangements are in place and she requires Police Scotland to disclose the list to Mr Tibbitt.
34. In the absence of any arguments from Police Scotland as to why copies of the protocol agreements should be withheld from Mr Tibbitt, the Commissioner can see no reason why these too should not be disclosed, noting that Mr Tibbitt has confirmed that he would be content to receive redacted versions of the protocols.
35. The Commissioner therefore requires Police Scotland to disclose the protocols subject to the redaction of any personal data which would otherwise be exempt from disclosure under section 38(1)(b) of FOISA (Personal information).
36. Given that exemptions have not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Section 12(1) - Excessive cost of compliance

37. Section 12(1) provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should she find that the cost of responding to a request for information exceeds this sum.
38. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA. The public authority may not charge for the cost of determining whether it actually holds the information requested, or whether or not it should provide the information. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
39. Police Scotland applied section 12 to parts (ii), (iii) and (v) of Mr Tibbitt's request.

40. Police Scotland submitted that, in order to answer each of these requests, the full DSA paperwork would have to be reviewed for each case. They stated that no specific statistical information is gathered by them in respect of the use or potential use of public space CCTV for directed surveillance, nor is there any centrally accessible electronic system.
41. Regarding part (ii) of the request, the only way of ascertaining how many authorisations approved the use of public space CCTV as a tactic, Police Scotland stated, would be to read through the records associated with each and every authorisation. This would include not only the initial authorisation, but also any subsequent reviews and renewals, as the use of CCTV could be included at any stage in the process. Many of the records are held in hard copy (as opposed to electronically), but due to fact that each geographic division of Police Scotland remains a separate entity in terms of IT network, onsite inspection would be required in either case across the three locations (Edinburgh, Aberdeen and Gartcosh) where records are held.
42. Police Scotland provided the Commissioner with an example of the time and cost involved in looking for the information in respect of a “typical” DSA and the records associated.
43. Police Scotland submitted that the process of determining whether or not this DSA specified the use of public CCTV took 25 minutes, but added that some cases may be quicker than this or some may take longer. On the basis of a minimum of 15 minutes as an “average” time to research each DSA, the cost, at £15 per hour, would exceed £600.
44. Additionally, in order to reduce staff costs involved, the use of an appropriately vetted individual who earns closest to the £15 per hour limit would involve additional travel costs between Edinburgh, Aberdeen and Gartcosh. These are estimated at a minimum of £100.
45. Regarding parts (iii) and (v) of the request, the exercise required for part (ii) would need to be carried out in the first instance because knowing the number of cases in which the use of CCTV was *authorised* would be the starting point for any further research to establish whether it was *actually used* and, if so, *whether a redacted DSA was provided* to the CCTV operator.
46. Police Scotland also submitted that it was unlikely that either of these pieces of information would be recorded within the DSA paperwork, which tended to only refer to any information gained, but not its source. In any case, the full DSA paperwork would have to be reviewed and it would be necessary to examine every record associated with the case which may be held in a combination of formats such as intelligence logs, surveillance logs, crime reports and statements.
47. This process, Police Scotland estimated, would take several hours of research for each identified case and, even if there was no specific reference to the fact that a redacted DSA was passed to a CCTV operator, this could not be taken to mean necessarily that it did not occur.
48. Having taken account of the scope of the request and the nature of the information requested, the Commissioner accepts that the costs identified by Police Scotland in this case represent a reasonable estimate of the cost of complying with Mr Tibbitt’s request for information. The requests could not have been complied with within the £600 cost limit, and so Police Scotland were entitled to rely on section 12(1) of FOISA.

Section 15 - Duty to provide advice and assistance

49. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.

50. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public authorities under FOISA and the EIRs³ provides (at paragraph 9.3.3 in Part 2):

When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice, you may wish to take account of how much the cost limit has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.

51. The Commissioner considers this essential if the public authority is to fulfil its duty to provide advice and assistance under section 15 of FOISA. Often, a dialogue between the authority and the applicant can help the applicant to understand fully what can be provided within the cost limit. Police Scotland were invited to explain how they had discharged this duty in respect of Mr Tibbitt's request.

52. Police Scotland submitted that they make every possible effort to liaise with an applicant where it is considered that the costs associated with a request can be brought below the £600 limit, while still providing the applicant with information of interest to them. By way of example, Police Scotland noted a scenario where a request covers information for a 10 year period and only a five year or one year period is possible within cost. However, Mr Tibbitt only sought information for a short period in the first place (12 months). As a result, Police Scotland did not consider it helpful to suggest to Mr Tibbitt that an even shorter time period may be achievable.

53. Additionally, Police Scotland submitted that, even if they considered it were possible to provide a figure within the costs limits set out in FOISA, the figure would be exempt from disclosure under sections 35(1)(a) and (b) of FOISA.

54. In Police Scotland's view, the number of authorisations involving the use of CCTV gives a clear indication of the extent to which this tactic is used by them and this information could prove invaluable to offenders. Police Scotland considered that it would also give an indication as to how many authorisations related to other forms of directed surveillance and the harm would only increase should the time period be reduced to less than a year.

55. Police Scotland stated that, in view of these considerations, any attempt to liaise with Mr Tibbitt to bring his request down to a more manageable time period did not seem appropriate.

56. In considering these submissions from Police Scotland the Commissioner referred Police Scotland to *Decision 099/2013 Laura Francis and the Scottish Ministers*⁴ in which (paragraphs 36 – 40) she considered a similar scenario.

57. Paragraph 39 of this decision states:

³ <http://www.gov.scot/Resource/0046/00465757.pdf>

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201300275.aspx>

“In this case, it is difficult to see how the Ministers could be said to have considered anything on a case-specific basis. Quite properly, given the application of section 12(1), they have identified potentially relevant material, but do not appear to have gone on to extract what is actually relevant to the request and consider its content, which is what they would need to do to consider whether any exemptions applied ...”

58. Police Scotland argued that, while the cases were similar, that they were fundamentally different based on the nature of the information sought in each case. In *Decision 099/2013*, the information being sought was “*all legal advice the Scottish Government had received regarding policies on tuition fees*”. It was Police Scotland’s view that, for the information requested by Mr Tibbitt, there were really only two options for each of the statistics requested:

- (i) a zero response, or
- (ii) a numerical response between two points.

On that basis, Police Scotland were of the opinion that it was indeed possible to consider the harm in disclosure without knowing the exact number, as long as each of the above eventualities was considered.

59. The Commissioner has considered Police Scotland’s submissions on this matter, but she is not persuaded that it would be competent to accept the application of the exemption in the abstract, in particular as it is subject to both a harm test and the public interest test.

60. She also considers it would have been good practice by Police Scotland to have provided an explanation by way of advice and assistance to Mr Tibbitt, either during its handling of the application or in the refusal notice it issued. This would have helped Mr Tibbitt to understand why it would cost so much to comply with his request.

61. For the above reasons, the Commissioner concludes that Police Scotland failed to comply with its duty under section 15(1) of FOISA. She requires Police Scotland to contact Mr Tibbitt to discuss whether, and if so how, requests (ii), (iii) and (v) might be narrowed in order that information could be provided within the cost limit

Decision

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

The Commissioner finds that:

- (i) the information covered by part (iv) of the request is not exempt from disclosure under section 35(1)(a) or (b) of FOISA. She therefore requires Police Scotland to provide Mr Tibbitt with the list of bodies with protocol agreements and with copies of the protocol documents subject to the redaction of any personal data which would otherwise be exempt from disclosure under section 38(1)(b) of FOISA.
- (ii) Police Scotland were not required to comply with parts (ii), (iii) and (v) of Mr Tibbitt's request: compliance would cost more than £600 and section 12 therefore applied.
- (iii) Police Scotland failed to provide reasonable advice and assistance to Mr Tibbitt under section 15(1). The Commissioner therefore requires Police Scotland to contact Mr Tibbitt and offer advice and assistance.

Police Scotland must carry out these requirements by 24 May 2016.

Appeal

Should either Mr Tibbitt 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.

Enforcement

If Police Scotland fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

8 April 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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

(6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

(1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

(2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

(a) the prevention or detection of crime;

(b) the apprehension or prosecution of offenders;

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

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