

Decision Notice

Decision 124/2016: Mr Alastair Tibbitt and Orkney Islands Council

“Prevent” duty guidance and related information

Reference No: 201501858

Decision Date: 02 June 2016



Scottish Information
Commissioner

Summary

On 30 August 2015, Mr Tibbitt asked Orkney Islands Council (the Council) for information relating to the “Prevent” duty guidance for Scotland.

The Council informed Mr Tibbitt that the information was exempt from disclosure under sections 30(c) and 35(1)(a) of FOISA. During the investigation, the Council withdrew its reliance on section 30(c). It maintained that the information should be withheld under section 35(1)(a) (which relates to the prevention or detection of crime), also providing arguments for withholding it under sections 31(1) (which relates to national security) and 35(1)(b) (which relates to the apprehension or prosecution of offenders).

The Commissioner investigated and found that the Council was entitled to withhold some of the information under section 31(1). She did not accept that the remainder of the information was exempt from disclosure and required the Council to disclose it to Mr Tibbitt.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 31(1) (National security and defence); 35(1)(a) and (b) (Law enforcement)

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 30 August 2015, Mr Tibbitt made a request for information to the Council. The request concerned the “Prevent” duty guidance for Scotland¹. This guidance provides advice for specified Scottish authorities on their duties under the Counter-Terrorism and Security Act 2015² (the 2015 Act).
2. The information requested and under consideration here was:
... a copy of the Council’s current CONTEST and/or “Prevent” action plan, and any previous plans.
Mr Tibbitt also requested other information which is not the subject of this decision notice.
3. The Council responded on 7 September 2015. The Council informed Mr Tibbitt that the information was exempt from disclosure in terms of sections 30(c) and 35(1)(a) of FOISA. This was on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs (section 30(c)) and the prevention or detection of crime (section 35(1)(a)).

¹

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445978/3799_Revised_Prevent_Duty_Guidance_Scotland_V2.pdf

² <http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>

4. On 7 September 2015, Mr Tibbitt wrote to the Council requiring a review of its decision. Mr Tibbitt stated that there was a considerable public interest in the way the “Prevent” guidance was being implemented in Scotland. He did not consider it was appropriate to apply the exemptions the Council had cited.
5. The Council notified Mr Tibbitt of the outcome of its review on 5 October 2015. The Council upheld its original decision without modification.
6. On 11 October 2015, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Council’s review as he did not believe the exemptions had been applied appropriately.

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, the Council was notified in writing that Mr Tibbitt had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Tibbitt. The Council provided the information and confirmed that the information was being withheld under the exemptions in sections 30(c) and 35(1)(a) of FOISA. The case was 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. The Council was invited to comment on this application, justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
10. The Council subsequently provided submissions, confirming that the information was being withheld under the exemption in section 35(1)(a) of FOISA. The Council stated that the information was also being withheld under the exemption in section 31(1) of FOISA, on the basis that exemption was required for the purposes of safeguarding national security.
11. In subsequent correspondence, the Council stated that it was no longer relying on the exemption in section 30(c) of FOISA. Additionally, the Council submitted that the information was exempt from disclosure under section 35(1)(b) of FOISA on the basis that its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders.
12. During the investigation, Mr Tibbitt stated that he did not wish to receive the personal data of any individuals contained within the withheld information. Any such information has therefore been discounted from consideration in what follows.

Commissioner’s analysis and findings

13. 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 the Council. She is satisfied that no matter of relevance has been overlooked.

Section 31(1) – National security and defence

14. Section 31(1) provides that information is exempt information if exemption from section 1(1) of FOISA (i.e. the right to request information from a Scottish public authority) is required for the purpose of safeguarding national security.
15. The expression “national security” is not defined in FOISA. The Commissioner considers that the phrase covers matters such as defence of the realm; the prosecution of war; the disposition of the armed forces; nuclear weapons; security and intelligence services, and potential threats to the economic wellbeing of the UK (including terrorism, espionage and subversion).
16. It should be noted that section 31(1) specifies that the information is exempt from disclosure if exemption is required *for the purposes of safeguarding* national security, a condition which has a narrower scope than information which *relates* to national security. (See the Commissioner’s briefing on section 31(1)³.)
17. The Council submitted that this exemption solely requires information to be held for the purpose of safeguarding national security: there was no requirement, it argued, for potential harm to national security to be identified or quantified.
18. The Council stated that the information in the action plan clearly related to the safeguarding of national security, explaining which areas were, according to the security services, the biggest ongoing threats to national security. The Council continued that the most significant threat to the UK and its interests overseas came from terrorist groups. In its view, there were many ways in which these threats were being addressed, including monitoring and anti-radicalisation measures. The Council stated that information on these topics had a direct bearing on national security and safeguarding that security.
19. The Commissioner has considered the Council’s submissions carefully. She acknowledges that there is no test of substantial prejudice in this exemption, but exemption must still be required: she will still expect a link to be demonstrated between disclosure of the information under consideration and national security being compromised in some way.
20. In this case, the Commissioner is not persuaded that the majority of the information under consideration is particularly sensitive or contentious, or that there is any other basis for concluding that exemption from section 1(1) of FOISA is required for the purpose of safeguarding national security.
21. In the Commissioner’s view, the majority of the information comprises broad descriptions of actions to be undertaken by the Council and partner organisations, for example, reviews of procedures, reference to general protocols and procedures (without going into detail about the content of these protocols/procedures), developing training and general awareness-raising.
22. The Commissioner considers the majority of the information to be innocuous and uncontentious in nature. It is information that would be expected to appear in an action plan outlining a local authority’s responsibilities and intentions under Government guidance and its broad plans in the short to medium terms.
23. In the Commissioner’s view, the majority of the action plan contains no information which could be said to threaten national security in the event of its disclosure. The Commissioner

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section31/Section31.aspx>

is not satisfied that disclosure of this particular information would result in a threat to national security. She does not accept that the Council has demonstrated a link between the information and any direct bearing disclosure would have on national security and the safeguarding of that security, beyond simply making this assertion.

24. Consequently, the Commissioner is not satisfied that the Council was entitled to withhold the majority of the information in the action plan under the exemption in section 31(1) of FOISA. As the Commissioner is not satisfied that the information is exempt from disclosure under section 31(1), she is not required to consider the public interest test in section 2(1)(b) of FOISA.
25. The Commissioner has reached a different conclusion in relation to the information contained in the columns headed "RAG" (red, amber green) and "overall status". These columns provide an indication of the relative importance and seriousness the Council attaches to each of its proposed actions and the level of progress (or otherwise) made in relation to each action.
26. The Commissioner accepts that this information may provide an indication of the Council's state of preparedness (or otherwise) in relation to its duties under the "Prevent" guidance and the 2015 Act. In the circumstances, the Commissioner is prepared to accept that, in relation to this specific information, exemption from section 1(1) of FOISA is required for the purposes of safeguarding national security.
27. As the Commissioner is satisfied that this specific information (i.e. the information contained in the columns headed "RAG" and "overall status") is exempt from disclosure under section 31(1), she will now go on to consider the public interest test set down in section 2(1)(b) of FOISA (in relation to this information).

The public interest

28. The Council argued that, if the information were to be available to the public, terrorists and extremists would become aware of the preparedness of agencies in Orkney in implementing their duties under the "Prevent" guidance. The Council stated that the "Prevent" guidance addressed the preparedness of agencies to intervene if an individual was considered to be in danger of being influenced by extremist ideas. In the Council's view, a potential terrorist might use the information in the action plan to gain a full picture of the state of preparedness of agencies to intervene, and could use that information to their advantage.
29. Mr Tibbitt submitted that there was considerable public interest in understanding how local authorities in Scotland were responding to their statutory responsibilities as laid out in the "Prevent" guidance.
30. The Commissioner has balanced the Council's submissions against those of Mr Tibbitt and the general public interest in making the information available. The Commissioner accepts there is a public interest in ensuring that public safety is maintained. In her view, disclosure of the specific information under consideration here could provide an indication of the Council's readiness in relation to its duties under the "Prevent" guidance and the progress being made in relation to those duties. In the Commissioner's view, access to this information could put public safety at risk, which would be contrary to the public interest .
31. In conclusion, the Commissioner considers the public interest in maintaining the exemption in section 31(1) outweighs that in disclosure of this specific information. Consequently, she accepts that the Council was entitled to withhold the information contained in the columns headed "RAG" and "overall status" under section 31(1) of FOISA.

Section 35(1)(a) and (b) – Law enforcement

32. The Commissioner will now go on to consider the application of the exemptions in section 35(1)(a) and (b) of FOISA in relation to the information which she has not found to be exempt from disclosure under section 31(1).
33. 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 highlights⁴, 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.
34. 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 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 the use of police intelligence).
35. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers authorities have to be able to establish harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
36. The exemptions in section 35(1) are also subject to the public interest in section 2(1)(b) of FOISA.
37. In relation to section 35(1)(a), the Council submitted that "prevention or detection of crime" was wide enough to include actions taken to anticipate and prevent crime or to establish the identity and secure prosecution of people suspected of having committed a crime. Additionally, it could include a specific anticipated crime or wider strategies for crime reduction and detection.
38. In relation to section 35(1)(b), the Council stated that "apprehension or prosecution of offenders" focused on the process of identifying, arresting or prosecuting anyone suspected of being responsible for unlawful activity. The Council submitted that this applied to apprehension and prosecution of specific offenders, or to more general techniques such as investigative processes used, information received or guidance given and strategies designed for these purposes.
39. In relation to both exemptions, the Council argued that disclosure of the information would lead to fewer vulnerable people being referred and therefore an increase in the risk from terrorism. It argued that disclosure could alert groups/individuals that might have previously been unaware that they had been identified as a potential threat. It also argued that disclosure could alert other groups/individuals to the possibility that they had not been highlighted as potential threats and were therefore unknown to the security services. This would provide a degree of confidence and might lead to an escalation of activities.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

40. In the Council's view, given the level of risk, any prejudice was likely to have a substantial effect. The Council considered it reasonable to assume that there is a real risk (not fanciful or hypothetical) that disclosing this information was likely to increase the incidence of criminal offences.
41. The Commissioner has considered carefully the Council's submissions concerning these exemptions. However, she is unable to conclude that either exemption is engaged in relation to the information under consideration. The Commissioner does not consider the Council has properly explained or evidenced any link between the information under consideration and the prevention or detection of crime or the apprehension or prosecution of offenders, let alone any substantial prejudice that would ensue from disclosure.
42. The Commissioner might have reached a different conclusion had the information under consideration included any actual, finalised policies or protocols containing specific information about potential targets or individuals and groups under scrutiny by the Police or security services. However, as noted above in relation to the section 31(1) exemption, the information is generic in nature and contains little in the way of detail.
43. Accordingly, the Commissioner is unable to conclude that the Council was entitled to withhold this information under the exemptions in section 35(1)(a) and (b) of FOISA.
44. As the Commissioner is not satisfied that the information is exempt from disclosure under section 35(1)(a) and (b), she is not required to consider the public interest test in section 2(1)(b) of FOISA.
45. As the Commissioner has concluded that the Council was not entitled to withhold this information under any of the exemptions applied, she now requires the Council to disclose it to Mr Tibbitt.
46. With this decision, the Commissioner will provide the Council with a marked up copy of the information under consideration, indicating the information that can be redacted.

Decision

The Commissioner finds that Orkney Islands Council (the Council) 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 the Council was entitled to withhold information under section 31(1) of FOISA.

The Commissioner also finds that the Council was not entitled to withhold the remainder of the information under the exemptions in sections 31(1) and 35(1)(a) and (b) of FOISA. In doing so, it failed to comply with section 1(1) of FOISA. The Commissioner therefore requires the Council to disclose this information to Mr Tibbitt by **18 July 2016**.

Appeal

Should either Mr Tibbitt or Orkney Islands Council 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 Orkney Islands Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

02 June 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.

...

31 National security and defence

(1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.

...

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;

...

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