

Decision Notice

Decision 200/2014: Mr Eddie Nisbet and the Chief Constable of the Police Service of Scotland

Police incidents reported at a nightclub

Reference No: 201400941

Decision Date: 16 September 2014



Scottish Information
Commissioner

Summary

On 10 February 2014, Mr Nisbet asked the Chief Constable of the Police Service of Scotland (Police Scotland) about incidents at a night club which had closed. Police Scotland released some information to Mr Nisbet, but withheld other information under exemptions relating to crime and safety. The Commissioner found that Police Scotland had been wrong to withhold this information and required them to disclose the information to Mr Nisbet.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 35(1)(a) and (b) (Law enforcement); 39(1) (Health, safety and the environment)

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 10 February 2014, Mr Nisbet requested information for the two year period prior to the closure of a specified nightclub. In his request, he asked:
 - a) How many police incidents originated from the nightclub before it closed?
 - b) How many incidents of rape and drink spiking were reported to the police involving the nightclub? If there were any incidents, how many of these resulted in convictions?
2. On 25 February 2014, Police Scotland responded, withholding the information for both parts under sections 35(1)(a) and (b) (Law enforcement) and 39(1) (Health and safety) of FOISA.
3. On 28 March 2014, Mr Nisbet wrote to Police Scotland, requesting a review of their decision to withhold information. He queried Police Scotland's use of the exemptions and application of the public interest test. He believed there was a greater public interest in disclosure of the information than in withholding it under FOISA.
4. Police Scotland notified Mr Nisbet of the outcome of its review on 22 April 2014, upholding its original response. However, it also offered to provide more general statistical information for that area of the City Centre, rather than the specific nightclub, as it had done so in the past. Mr Nisbet received information from Police Scotland, but remained dissatisfied that the information he had requested continued to be withheld.
5. On 30 April 2014, Mr Nisbet applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He did not agree with Police Scotland's application of the public interest test.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Nisbet made a request for information to a Scottish public authority and that he asked the authority to review its response to that request before applying to her for a decision.
7. On 13 May 2014, Police Scotland was notified in writing that Mr Nisbet had made a valid application. Police Scotland was asked to send the Commissioner the information withheld from him. 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 was invited to comment on this application and answer specific questions, including justifying its reliance on the exemptions under which it was withholding information from Mr Nisbet.
9. During the investigation, Police Scotland continued to rely on the exemptions in sections 35(1)(a) and (b) and 39(1) of FOISA for withholding information.

Commissioner's analysis and findings

10. 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 Nisbet and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

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

11. Section 35(1)(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime.
12. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. 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.
13. These are qualified exemptions which are subject to the public interest test in section 2(1)(b) of FOISA, should they be found to apply to the withheld information.
14. As the Commissioner's guidance¹ on this exemption indicates, 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 a specific (anticipated) crime or wider strategies for crime reduction and prevention.
15. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, more than simply a remote possibility.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

Mr Nisbet's submissions

16. Mr Nisbet drew attention to the fact that this venue had closed by the time he made his request in February 2014. In the circumstances, he did not believe the claimed exemptions could apply.

Police Scotland's submissions

17. Police Scotland noted that, although the premises covered by the request had closed in January 2013, the licensee had reopened nearby under the same name. These premises closed early in 2014 but, at the time of responding to Mr Nisbet's request, Police Scotland believed it was still possible the licensee could reopen again elsewhere. They accepted that it might be possible to release information of the kind Mr Nisbet was seeking for premises closed for a significant time, were they satisfied the establishment would not be reopening elsewhere under the same management, but this would have to be reviewed on a case-by-case basis, taking account of all relevant circumstances.
18. Police Scotland explained how information was reported and recorded in their database. Incidents logged as relating to a particular establishment could include incidents occurring in the street outside. There could be multiple reports of the same incident. Not all reported incidents would involve the commission of a crime. There would be complexities involved in providing the precise information Mr Nisbet was seeking from the information they held, and this would involve an element of judgement: in addition, however that information was presented, there would be scope for it being misunderstood.
19. Police Scotland went on to argue that disclosure of the withheld information would substantially prejudice their ability to police licensed premises. They referred to previous occasions when information about individual premises was released, submitting that this resulted in the media publishing "league tables" of those with the highest crime rates. Police Scotland asserted that this undermined the positive relationship they had with licensees, particularly those identified as having "bad reputations". Trust was lost and what Police Scotland described as a substantial effort was required to repair the relationship. They also referred to similar consequences from the disclosure of information of this kind by licensing boards.
20. For these reasons, Police Scotland claimed that disclosure would make licensees less likely to work with them in the apprehension of offenders and the prevention or detection of crime. They stressed the importance of protecting the process by which licence holders could provide information about incidents in confidence, allowing them to take action to reduce criminality and anti-social activity.

The Commissioner's conclusions on section 35(1)(a) and (b)

21. 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)). She must do this on the basis of the submissions she has received (or those parts of them she considers relevant), and their application at the time Police Scotland responded to Mr Nisbet's requirement for review.
22. The Commissioner acknowledges that Police Scotland relies upon licencees and their staff to report incidents in licensed premises and that this plays a key part in its wider strategies for the prevention and detection of crime there.

23. The status of the club is of importance here, in the context of the timing of Mr Nisbet's request and requirement for review. Police Scotland have simply referred to the relatively short time between the final closure of the establishment and receipt of Mr Nisbet's request. They note that the position might be different if the establishment had been closed (permanently) for a significant time, making no attempt to consider whether that had in fact happened by the time they responded to Mr Nisbet's requirement for review (which would appear to have been around three months after closure). In relation to timing, the specific circumstances of this case do not appear to have been addressed by Police Scotland.
24. The Commissioner does not underestimate the importance of maintaining trust between licensees and Police Scotland, with a view to facilitating the free supply of information which is of value in preventing or detecting crime. However, she is not satisfied (in all the circumstances of this case) that Police Scotland have established any risk of that trust being undermined, on the basis of the submissions they have provided. In addition to the question of timing, the Commissioner must note that information about incidents at or around specific licensed premises is published routinely, in the context of licensing board meetings and their minutes. That may, as Police Scotland have argued, be the most appropriate route for such reporting, in accordance with the relevant legislation. It does not follow, however, that disclosure of similar information under FOISA is necessarily wrong, particularly if the authority cannot provide substantial, relevant arguments for that information being withheld.
25. The information under consideration here is statistical, and to a degree historical, covering reported incidents over the two-year period before the closure of the original premises in January 2013. As explained above, authorities can give context and explanation of information at the time of its disclosure, to assist public understanding. Police Scotland have given examples of where licensees have reacted adversely to the disclosure of similar information in the past, arguing that another disclosure would affect licensees' willingness to report (thus increasing the risk to the public from such incidents). They have not, however, addressed the question of placing such information (if disclosed) in context.
26. For the reasons set out above, the Commissioner does not accept that disclosure of the withheld information to Mr Nisbet, and thereby into the public domain, would or would have been likely (at the time they responded to Mr Nisbet's requirement for review) to cause substantial prejudice to Police Scotland's ability to prevent or detect crime or apprehend or prosecute offenders. She does not believe such a conclusion can be reached on the basis of the general arguments provided here.
27. The Commissioner does not, therefore, accept that the exemptions in section 35(1)(a) and (b) of FOISA should be upheld in this case. Given that these 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 39(1) Health, safety and the environment

28. Police Scotland also withheld all the information Mr Nisbet requested under section 39(1) of FOISA.
29. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test in section 2(1)(b) of FOISA.

30. The Commissioner's briefing² on this exemption notes that section 39(1) does not contain the "substantial prejudice test" found in various other exemptions in Part 2 of FOISA. Instead, this exemption refers to the "endangerment" of health or safety.
31. The Commissioner's view is that the term "endanger" is sufficiently broad to apply where there is a direct or indirect threat to the safety of a person which would foreseeably arise in the future as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner considers that for endangerment to be considered likely there must, however, be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
32. In order for the exemption to apply, the public authority must be able to explain or show why disclosure of the information would be at least likely to cause such endangerment. There must be an evident connection between the two events (disclosure and endangerment).
33. In reaching a conclusion on the matter, the Commissioner must base her decision on the facts and submissions presented to her. The onus lies with the public authority to provide evidence, facts and arguments to support its conclusions.

Police Scotland's submissions

34. Police Scotland referred again to licensees' likely unwillingness to report incidents, should this information be disclosed. This would result in matters being undetected, with the result that no action could be taken to increase the safety of the premises. They described the kinds of risks to safety they envisaged, noting there was evidence to suggest that significant violent offences occurred within licenced premises.

Mr Nisbet's submissions

35. As indicated above, Mr Nesbit suggested that neither exemption claimed by Police Scotland could apply, given the closure of the establishment by the time he made his request.

The Commissioner's conclusions

36. The Commissioner has considered Police Scotland's submissions carefully. As indicated above, she acknowledges the importance of licensees and their staff being able to report incidents freely, with a view to preventing crime and thus maintaining public safety. The Commissioner also acknowledges that there can be significant risks to public safety in and around licensed premises, which may be exacerbated if incidents are not reported freely. However, the question here is whether disclosure of the particular information requested by Mr Nisbet (in response to his request, and particularly his requirement for review) would, or would be likely to, cause endangerment to public safety.
37. In the circumstances, given the submissions she has received, the Commissioner does not believe it necessarily follows that disclosure of *this* information would or would be likely to have the effects described by Police Scotland. As indicated above, the Commissioner notes that (by the time Police Scotland carried out its review, at least) the establishment, in any form, had been closed for some time. By that time, then, it must have been difficult to argue that the incidents in question could reasonably be associated with any particular premises or their management. As also indicated above, the Commissioner must note that information about incidents at or around licensed premises is published routinely, in the context of

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

licensing board meetings and their minutes. This may address, to some extent at least, any public interest Mr Nisbet is seeking to pursue, but it must also call into question the real risk of endangerment from disclosure.

38. In this case, therefore, the Commissioner is not persuaded by the arguments presented by Police Scotland. In her view, these arguments do not demonstrate why the actual information Mr Nisbet is seeking here would be likely to increase the risk of endangerment to the health or safety of those in licensed premises or the wider public. As indicated above, the authority needs to establish a link between disclosure and such endangerment: in all the circumstances of this case, the Commissioner does not find such a link to have been established.
39. Having concluded that disclosure of the withheld information in this case would not, and would not be likely to, endanger the physical or mental health or safety of any person, the Commissioner has found that the exemption in section 39(1) was incorrectly applied to the withheld information by Police Scotland.
40. Having reached this conclusion, the Commissioner is not required to consider the public interest test in relation to this information. She requires Police Scotland to disclose the withheld information.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Nisbet.

She finds that Police Scotland wrongly applied the exemptions in sections 35(1)(a) and (b) and 39(1) of FOISA, to the information it withheld from Mr Nisbet.

The Commissioner therefore requires Police Scotland to disclose the withheld information by 3 November 2014.

Appeal

Should either Mr Nisbet 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 fails 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.

Margaret Keyse
Head of Enforcement

16 September 2014

Appendix 1: Relevant statutory provisions

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.

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.

...

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;

...

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

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