

Decision Notice



Decision 296/2013 Mr Q and the Chief Constable of the Police Service of Scotland

Inappropriate emails

Reference No: 201300899
Decision Date: 19 December 2013

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 28 February 2013, Mr Q asked the Chief Constable of Lothian and Borders Police (now the Police Service of Scotland) (the Police) for information relating to an incident involving inappropriate emails sent by police officers. The Police told Mr Q that some of the information was already in the public domain and so was exempt from disclosure under FOISA. The Police withheld the remaining information on the basis that they held it for the purposes of a criminal investigation. Following a review, at which point the Police sought to rely on additional exemptions, Mr Q remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Police had partially failed to deal with Mr Q's request for information in accordance with Part 1 of FOISA. The Commissioner accepted that the Police were entitled to withhold information held for the purposes of a criminal investigation, but that they should have made it clear to Mr Q that they did not hold some of the information he had asked for. She did not require the Police to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3), (4) and (6) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 34(1)(a) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(b) (Personal information)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendix 1 and Appendix 2 form part of this decision.

Note: Mr Q's request was made to the Chief Constable of Lothian and Borders Police. However, the decision has been issued in relation to the Chief Constable of the Police Service of Scotland as the statutory successor to the Chief Constable of Lothian and Borders Police under the Police and Fire Reform (Scotland) Act 2012. For ease of reference, both chief constables are referred to in this decision as "the Police".



Background

1. On 28 February 2013, Mr Q wrote to the Police requesting information relating to an incident involving inappropriate emails. Mr Q's requests are set out in full in Appendix 2 to this decision.
2. The Police responded on 4 March 2013. They referred Mr Q to a press release which provided some of the details sought and stated that the provision of further information to that conveyed in the press release was exempt on the basis that disclosure would or would be likely to prejudice substantially the detection of crime and the administration of justice (sections 35(1)(a) and (c)).
3. On the same date, Mr Q wrote to the Police requesting a review of their decision. Mr Q stated that the requests were made to establish what measures the Police were taking to bring justice and to introduce transparency and accountability.
4. The Police notified Mr Q of the outcome of their review on 27 March 2013. The Police maintained their reliance on sections 35(1)(a) and (c), but also sought to rely on section 34(1)(a). The Police, again, highlighted to Mr Q that some of the information that he sought was provided in their earlier press release on the issue. The Police also explained that some of the information he sought was dependant on whether their internal misconduct process was used and, if so, the outcome of that process.
5. On 4 April 2013, Mr Q wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Q made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to those requests. The case was then allocated to an investigating officer.

Investigation

7. On 8 July 2013, the investigating officer contacted the Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
8. During the course of the investigation, the Police provided corrected information to Mr Q, as they had erroneously provided him with incorrect figures regarding the number of persons involved in the incident.



Commissioner's analysis and findings

9. 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 Q and the Police. She is satisfied that no matter of relevance has been overlooked.

Requests C and E

10. The Commissioner is satisfied that the Police have provided Mr Q with all of the information requested in relation to parts C and E of his request. Mr Q has not raised any areas of concern pertaining to these elements of his request in his application to her. Consequently, the Commissioner will not consider these requests further in this decision notice.

Requests F, G, H, I and J

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If the authority does not hold any information covered by the request, it is required to give the applicant notice in writing to that effect, under section 17(1) of FOISA.
12. Requests F, G, H, I and J all relate to actions which may or may not be instigated as a result of the initial investigation. At the time of Mr Q's request, that initial investigation was at a very early stage and the Police could not answer Mr Q's questions, as they did not hold information requested by him.
13. The Commissioner is satisfied, taking account the timing of Mr Q's requests and the nature of the information sought, that the Police did not hold the information sought by these particular requests.
14. In their submissions, although acknowledging that they did not really know the answers to Mr Q's questions, and could not know until the investigations were concluded, the Police stated that they considered the provision of a notice under section 17 of FOISA in relation to these requests would have been unhelpful and disingenuous.
15. Notwithstanding their intentions, the Commissioner must find that the Police failed to comply with Part 1 of FOISA, by failing to notify Mr Q (in terms of section 17(1) of FOISA), that the information he sought was not held at the time of his request. If the Police were concerned that a section 17 notice would have been unhelpful, they could have provided advice and assistance to Mr Q (and indeed have a duty under section 15 of FOISA to do so).



Requests A and B

16. With respect to requests A and B (for how many emails had been flagged as inappropriate and how many emails contained sexual, sexist, racist or other derogatory/discriminatory remarks towards minorities), the Police withheld information on the basis that section 34(1)(a) of FOISA applied. Section 34(1)(a) provides that information is exempt from disclosure if it has been held at any time by a Scottish public authority for the purposes of 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.
17. 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.
18. The Police stated that they provided Mr Q with as much information as possible at the time of his request, but some of the information sought (e.g. whether it was more than one email or how, when and to whom the email(s) were sent/received), would form the material evidence if the case were to be taken forward. The Police emphasised that they were unable to provide Mr Q with this information, largely due to the timing of his request, indicating that further information may be disclosed as the matter progressed.
19. The Commissioner is satisfied that the information requested in relation to requests A and B was held by the Police for the purpose of investigating whether a person or persons should be prosecuted for an offence. Further, the Commissioner is satisfied that the Police had a duty to conduct that investigation. The Police have a duty to investigate reports made to them that crimes have taken place. The Police are agents for the Procurator Fiscal service and, as part of the judicial process, must investigate and determine whether to submit a report detailing the offence for the Procurator Fiscal so that the Procurator Fiscal can decide whether a person should be prosecuted for an offence.
20. Having considered the submissions presented by the Police, the Commissioner accepts that the information withheld has been held for the purposes of an investigation covered by section 34(1)(a) of FOISA. Consequently, she must conclude that the exemption applies.

Public interest test

21. The exemption in section 34(1)(a) is subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the relevant exemption. The Commissioner must then carry out a balancing exercise. Unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, she must order the information to be disclosed.



22. The “public interest” is not defined in FOISA, but has been described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has been held that the public interest does not mean “of interest to the public” but “in the interest of the public”¹.

The Police’s submissions

23. The Police acknowledged the strong public interest in disclosure in terms of accountability. They acknowledged that, as law enforcers, there is a high expectation that police staff behave appropriately and within the law at all times and especially within the workplace. As a result of the MacPherson Report ², the attitude of the police towards diversity is something that has been called into question and there has been a vast effort throughout the UK over a number of years to educate staff and extinguish unacceptable behaviour. The Police indicated that they take their responsibility in this area very seriously and, having recognised that there was such a public interest in this matter from the outset, had issued the press release to which Mr Q was referred.
24. The Police stated that they were as open as they could be whilst taking account of their responsibilities to properly investigate the matter.
25. Against this public interest in favour of disclosure, the Police balanced the public interest in avoiding the potential harm that would result were information to be disclosed before investigations were concluded. Release of details of the circumstances in which the emails were sent form part of the narrative of the case, and was potentially evidence in a criminal investigation. The Police submitted that it was clearly in the public interest to allow the administration of justice to proceed so that crime can be detected and offenders prosecuted.
26. In balancing the public interest test, the Police recognised the public interest in favour of disclosure, but considered that this had been met to a considerable extent by the press release that was issued at the time. The Police submitted that the information that remained withheld, was any information that would, in any way, jeopardise any potential criminal or misconduct proceedings that may ensue.

Mr Q’s submissions

27. Mr Q stated it was in the public interest that the information be disclosed, arguing that disclosure would facilitate the prevention and detection of police crime by tailoring future education. He argued that there should be an independently led enquiry into the matter and that the disclosure of this information would facilitate this.
28. He argued that the emails concerned were proof of potentially criminal behaviour by the police against members of the community and consequently there was a strong public interest in disclosure in the interests of justice.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTest.aspx>

² <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>



The Commissioner's view

29. As mentioned in previous decisions, the Commissioner accepts that the inclusion of section 34 in FOISA reflected an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring that the various investigatory processes making up the criminal justice system are not hampered in any way.
30. The Commissioner also recognises the strong public interest in transparency and accountability, particularly in light of the subject matter of this request. The Police themselves recognised the strong public interest and current focus on eliminating unacceptable behaviour in relation to these issues.
31. The Commissioner acknowledges the public interest arguments Mr Q presented in favour of disclosure. She is satisfied that these had been met to some extent by the information disclosed in the aforementioned press release issued by the Police.
32. Having considered carefully the relevant arguments presented by both parties, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs that in disclosing the information in question.
33. The Commissioner therefore concludes that the Police were entitled to withhold the requested information with regards to requests A and B under section 34(1)(a) of FOISA.
34. As she is satisfied that section 34(1)(a) applies to this information, she is not required to consider any other exemption applied by the Police to this information.

Request D – ranks of officers implicated

35. In relation to request D, the Police sought to rely on section 38(1)(b) of FOISA. The Police confirmed that it relied on this exemption on the basis that Mr Q sought an individual breakdown of the ranks of those implicated in the incident.
36. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or section 38(2)(b), as appropriate) exempts information from disclosure if it is “personal data” (as defined in section 1(1) of the DPA) and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
37. Given the wording of Mr Q's request, request for review and grounds of appeal, the Commissioner sought clarification from Mr Q as to the meaning of his request. Mr Q confirmed, during the course of the investigation, that he did not seek an individual breakdown (e.g. X number of constables, Y number of sergeants) of the ranks involved, but simply a list of the ranks involved, e.g. sergeants, constables etc.

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38. The investigating officer, during the course of the investigation, identified the information sought by Mr Q in media reports³(published 28 February 2013) relating to the incident.
39. The Police confirmed during the course of the investigation that, in light of Mr Q's clarification, they were no longer seeking to rely on section 38(1)(b) of FOISA, but were now seeking to rely on section 25(1) of FOISA, given that the information was otherwise accessible to Mr Q as a result of this media report.
40. Under section 25(1) of FOISA, information is exempt if an applicant can reasonably obtain that information other than by requesting it under section 1(1). Section 25(1) of FOISA is an absolute exemption and is therefore not subject to the public interest test. The Commissioner is satisfied that section 25(1) applies to this information as this information could reasonably be obtained by Mr Q at the time of his request other than by requesting it under section 25(1), i.e. via the media reports published on 28 February 2013.
41. The Commissioner is disappointed to note that the Police did not seek to clarify the terms of this part of Mr Q's request, in line with section 1(3) of FOISA. Had they done so, this information would have been provided to Mr Q at a much earlier stage and he may not have required recourse to the Commissioner in relation to this request.
42. As the Commissioner is satisfied that sections 17, 34(1)(a) and 25(1) apply to the information requested in this case, she is not required to consider the application of any of the other exemptions cited by the Police.

DECISION

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

The Commissioner finds that the Police were entitled to withhold information in relation to requests A and B under section 34(1)(a) of FOISA, and were entitled to withhold information in relation to request D under section 25(1) of FOISA.

However, in failing to provide adequate notice in terms of section 17(1) of FOISA in relation to requests F, G, H, I and J, the Police failed to comply with Part 1.

In the circumstances, the Commissioner does not require the Police to take any action in respect of these failures in response to Mr Q's application.

³ E.g. <http://news.stv.tv/scotland/215778-police-involved-in-racist-and-sexual-email-scandal-to-be-transferred/>

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Appeal

Should either Mr Q 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
19 December 2013



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.

...

- (3) If the authority –

- (a) requires further information in order to identify and locate the requested information; and
- (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –



(a) section 25;

...

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.

...

17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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;

...

38 Personal information

(1) Information is exempt information if it constitutes-

...

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...



Appendix 2

Mr Q's request

- A. How many e-mails within G Division HQ at Hawick have been flag (sic) as inappropriate?
- B. How many of these emails as in A contain sexual, sexist, racist, or other derogatory/discriminatory remarks towards minorities?
- C. How many police officers or staff have been implicated in the commission of these remarks?
- D. What are the ranks of the officers as stated in answer to C?
- E. How many of these officers have been suspended?
- F. How many of these officers have been arrested or charged?
- G. How many of these officers that were arrested or charged were actually charged/arrested under Breach of the Peace, telecommunications misuse or offences under the Football & Threatening Communications (Scotland) Act?
- H. If no officers were arrested or charged then why not?
- I. In relation to the discovery of these racist/sexual police emails, has the Crown & Procurator Fiscal Service been notified?
- J. Will there be an independent, transparent public investigation?