

Decision Notice

Decision 103/2016: Mr Alastair Tibbitt and Inverclyde Council

“Prevent” duty guidance and related information

Reference No: 201502034

Decision Date: 04 May 2016



Scottish Information
Commissioner

Summary

On 30 August 2015, Mr Tibbitt asked Inverclyde 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 in terms of sections 30(c) and 35(1)(a) of FOISA. Following a review, the Council informed Mr Tibbitt that it would neither confirm nor deny whether it actually held any information falling within the scope of his request.

The Commissioner investigated and found that the Council failed to respond to Mr Tibbitt’s request for information in accordance with Part 1 of FOISA. The Commissioner concluded that the Council was not entitled to apply section 18 of FOISA in response to Mr Tibbitt’s request for review; she required the Council to respond to Mr Tibbitt’s request for review otherwise than in terms of section 18 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 16(1) (Refusal of request); 18(1) (Further provision as respects responses to request)

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.
2. The information requested was as follows:
 4. Please confirm how many individuals have been referred, by Council staff, into the “Prevent” Professional Concerns process as described in the above guidance in the last 36 months
 5. Please supply all monitoring and/or evaluation reports provided to the local Multi-Agency CONTEST (Counter-Terrorism Strategy) group or the Scottish government in the last 36 months.

Mr Tibbitt also requested other information that is not the subject of this decision notice.

3. The Council responded on 23 September 2015. The Council informed Mr Tibbitt that it held the information requested. However, it withheld the information under the exemptions in

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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>

sections 30(c) and 35(1)(a) of FOISA. This was on the basis that disclosure would prejudice substantially, 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)).

4. On 23 September 2015, Mr Tibbitt wrote to the Council requesting a review of its decision. Mr Tibbitt considered the Council had taken a blanket approach in applying the exemptions in sections 30(c) and 35(1)(a) of FOISA. He considered the information could at least be provided in a redacted form, and also that the public interest favoured disclosing it.
5. The Council notified Mr Tibbitt of the outcome of its review on 26 October 2015. The Council gave notice (in terms of section 18(1) of FOISA) that it could neither confirm nor deny whether it held the information. The Council further explained that, if the information was held, it would be exempt from disclosure in terms of sections 31(1) (National security), 35(1)(a) and 38(1)(b) (Personal information) of FOISA.
6. On 31 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 stated he was dissatisfied with the outcome of the Council's review as he considered the public interest test had been applied incorrectly.

Investigation

7. The application was accepted as valid and the Council was given notice of this. 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. The case was then 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. The Council was invited to comment on this application and answer specific questions, with particular reference to its application of section 18 of FOISA.
9. In response, the Council provided arguments supporting its application of section 18. The Council provided no submissions in relation to the exemptions which it had applied alongside section 18.

Commissioner's analysis and findings

10. 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 Tibbitt and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 18(1) of FOISA – “neither confirm nor deny”

11. In its review outcome of 26 October 2015, the Council refused to confirm or deny whether it held any information falling within the scope of Mr Tibbitt's request. The Council adhered to this position in its submissions to the Commissioner.

12. Section 18 of FOISA allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by it;
 - (ii) if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
13. Where an authority has chosen to rely on section 18, the Commissioner must establish:
 - (i) whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose it because it was exempt under one of the exemptions cited in section 18(1). The authority must satisfy the Commissioner that:
 - (a) an exemption would apply and, if it did
 - (b) that the balance of the public interest would favour withholding the information, and then
 - (ii) whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
14. It is not sufficient simply to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information, if it existed and was held, would be exempt information under one or more of the listed exemptions. Where the exemption(s) is/are subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in disclosing any relevant information it held.
15. In this case, in its review response to Mr Tibbitt, the Council stated that if it did hold any information falling within the scope of his request, it could be withheld under the exemptions in sections 31(1), 35(1)(a) and 38(1)(b) of FOISA.
16. Whilst the Council provided the Commissioner with submissions in support of its application of section 18 of FOISA, it provided no submissions on the associated exemptions which had been applied alongside section 18.
17. In the absence of any submissions from the Council, the Commissioner is unable to conclude that, if the information existed and was held by it, the Council would be entitled to give a refusal notice under section 16(1) of FOISA. Consequently, she finds that the Council was not entitled to apply section 18 of FOISA in dealing with Mr Tibbitt's request for review.
18. In any event, the Commissioner is of the view that the Council's initial response to Mr Tibbitt on 23 September 2015 clearly stated that the information he was seeking existed and was held.
19. It follows from the issue of a refusal notice under section 16 – a refusal to disclose information which the authority holds and which it considers to be exempt – that the authority

giving that notice has indicated that it holds the information to which the request relates. The notice given by the Council in this particular case was explicit in this regard. The Commissioner does not accept that an authority can give such confirmation to a requester and then subsequently revert to a position whereby it refuses to confirm or deny the existence of the information in question. In the Commissioner's view, to do so would make no sense and would risk bringing into disrepute a provision designed for a very serious purpose.

20. In all the circumstances therefore, the Commissioner finds that the Council was not entitled to apply section 18 of FOISA in dealing with Mr Tibbitt's request for review. She therefore requires the Council to deal with those parts of his request under consideration in this decision notice in accordance with section 21 of FOISA, otherwise than by applying section 18 of FOISA (that is, a response in terms of section 21(4)(b)).

Decision

The Commissioner finds that Inverclyde Council (the Council) 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 Tibbitt. The Commissioner finds that the Council was not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the information requested by Mr Tibbitt existed or was held by it.

The Commissioner therefore requires the Council to respond to those parts of Mr Tibbitt's request under consideration in this decision notice, otherwise than in terms of section 18 of FOISA, by **20 June 2016**.

Appeal

Should either Mr Tibbitt or Inverclyde 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 Inverclyde 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

4 May 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.

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16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.

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