

Decision Notice

Decision 024/2017: Mr Charles Welsh and the Chief Constable of the Police Service of Scotland

Allegation made to Police Scotland

Reference No: 201601703

Decision Date: 22 February 2017



Summary

Police Scotland were asked for information concerning a complaint made to them about alleged criminal offences by public officials. Police Scotland refused to confirm or deny whether the information existed or was held by them.

The Commissioner accepted that it would not be in the public interest for Police Scotland to reveal whether the information existed or was held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

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 11 July 2016, Mr Welsh made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked for all records arising from a submission he had made to Police Scotland. His submission concerned a complaint of criminal offences he claimed had been committed by officials of two Scottish public authorities.
2. Police Scotland responded on 15 July 2016. Police Scotland refused to confirm or deny whether they held the information requested or whether it existed, relying on section 18(1) of FOISA. They informed Mr Welsh that they were applying section 18(1) in conjunction with sections 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 38(1)(a) (Personal information) of FOISA.
3. On 25 July 2016, Mr Welsh wrote to Police Scotland requesting a review of their decision. In Mr Welsh's view, the information would not comprise personal data (so section 38(1)(a) could not apply). He also disagreed that the exemption in section 34(1) of FOISA could be engaged.
4. Police Scotland notified Mr Welsh of the outcome of their review on 3 August 2016. Police Scotland confirmed their position that section 18(1) of FOISA applied. In addition to the exemptions identified previously, Police Scotland claimed that section 38(1)(b) of FOISA could apply, assuming relevant information existed and was held.
5. On 15 September 2016, Mr Welsh wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Welsh stated he was dissatisfied with the outcome of Police Scotland's review because he did not agree that either of the exemptions identified by Police Scotland could apply in the circumstances. He also disagreed with Police Scotland's consideration of the public interest.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Welsh 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.
7. On 21 September 2016, Police Scotland were notified in writing that Mr Welsh had made a valid application. 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 were invited to comment on this application and answer specific questions, with particular reference to the provisions of section 18 and the exemptions cited in that connection.
9. Police Scotland responded with submissions.
10. During the investigation, Mr Welsh was invited to provide further submissions in support of his application. No additional submissions were received. The Commissioner has therefore proceeded to determine the case on the basis of the representations included in Mr Welsh's application to her and in his review request to Police Scotland, together with the submissions received from Police Scotland.

Commissioner's analysis and findings

11. 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 Welsh and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

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

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 listed 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, Police Scotland submitted that, if the information existed and was held by them, it would be exempt from disclosure by virtue of the exemptions in sections 34(1)(a) and (b) and 38(1)(a) and (b) of FOISA.
16. The Commissioner will firstly consider whether Police Scotland could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held. She will consider the exemptions in section 34 of FOISA first.

Section 34(1)(a) and (b) – Investigations by Scottish public authorities and proceedings arising out of such investigations

17. Section 34(1)(a) and (b) of FOISA provide that information is exempt from disclosure if it is held for the purposes of:
- (i) an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - (ii) an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii)); or
 - (iii) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b)).
18. The exemptions in section 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 subject to the public interest test contained in section 2(1)(b) of FOISA.
19. In his review request to Police Scotland, Mr Welsh queried whether any such investigation had actually taken place. In his view, if there had been no investigation, then there was no investigation which could be jeopardised by disclosure of the information and the section 34 exemptions could not apply.
20. Police Scotland submitted that information of this nature, if it existed and was held by them, would be held for the purposes of an investigation of the types described in section 34(1)(a) and (b).

21. Police Scotland responded to Mr Welsh's assertion that the exemption could not apply if there had been no investigation. In their view, information forming part of their assessment of whether there were grounds to institute a criminal enquiry would fall within the scope of the exemptions. Even where no grounds existed, there was (as with all forms of police investigation) the possibility that an enquiry might be instigated in the future, if new information came to light. Therefore, even if an investigation was not launched, any such information would still fall within the scope of section 34(1), in terms of their duty to ascertain whether an investigation was required, and might still be of relevance to such an enquiry if instigated in the future.
22. In the Commissioner's view, if the information existed and was held by Police Scotland, it would be held for the purposes of an investigation they had a duty to conduct for the purposes specified above. It is clear that any such information would relate to a specific allegation which Police Scotland would have a duty to investigate; given the nature of the complaint, it could be held for no other purpose.
23. In the Commissioner's view, even if Police Scotland concluded that no grounds existed to commence a criminal enquiry at that time, such information would form part of their assessment of whether any grounds existed (as they have argued).
24. The Commissioner accepts, therefore, that any such information, if it existed and was held, would fall within the exemptions in section 34(1)(a) and (b) of FOISA.
25. As these exemptions are subject to the public interest test, the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and was held by Police Scotland) would be outweighed by that in maintaining the exemptions.

The public interest

26. Mr Welsh submitted that Police Scotland's consideration of the public interest test was flawed. In his view, they had failed to take into account his assertions of maladministration and criminal behaviour. He believed this ought to have been included in Police Scotland's consideration of the public interest test as he considered it to be a matter of fundamental public interest.
27. Police Scotland acknowledged that there was a public interest in how they undertook investigations, and in being assured that allegations of this kind had been investigated fully, where required. They went on to submit that this must be balanced against the purpose of section 34, which was to ensure that the investigative process and associated reporting structures were followed and were not jeopardised by the disclosure of information through FOISA.
28. In Police Scotland's view, the public expected them to handle information they received in a confidential manner. Police Scotland did not consider it was in the interests of the public to disclose information in a manner which undermined this expectation. As a particular risk, they highlighted the public becoming less willing to engage with the investigation of crime should their expectations of confidentiality not be met.
29. Police Scotland argued that disclosure of such information would jeopardise the interests of any individuals linked to the allegations, in particular their right to fair treatment in any investigation. They believed disclosure would lead to a situation of "trial by the public", without the safeguards afforded by the criminal justice process, which could not be considered to be in the public interest.

30. On balance, Police Scotland considered that the greater public interest lay in maintaining the exemption in order to ensure that the investigative process was not undermined by disclosure. They highlighted the investigation of crime and ensuring confidence in the justice system as being among their key responsibilities, which they had a duty to ensure were fulfilled; they did not consider information should be disclosed where doing so would undermine these responsibilities.

The Commissioner's view

31. The Commissioner has considered carefully all of the arguments presented by Mr Welsh and Police Scotland.
32. The Commissioner agrees with Police Scotland that the disclosure of information falling within the scope of the request would, if it existed and was held, undermine the public's expectation that it would be handled in a confidential manner. She also agrees that disclosure of this type of information would jeopardise the interests of any individuals linked to any such allegations, in the manner claimed by Police Scotland. In her view, neither of these outcomes would be in the public interest.
33. The Commissioner is satisfied that Police Scotland took into account only factors which were relevant in considering the public interest, and that they carried out the associated balancing exercise appropriately.
34. Therefore, having considered all of the submissions made to her, the Commissioner has concluded that, in all the circumstances, the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA would outweigh that in disclosure of the information, if it existed and was held.
35. In all the circumstances of this case, the Commissioner has concluded that Police Scotland could have given a refusal notice under section 16(1) of FOISA, on the basis that the information (if it existed and was held) was exempt from disclosure under section 34(1)(a) and (b). She is not required, therefore, to go on to consider whether the information would also be exempt from disclosure under section 38(1)(a) and (b) of FOISA. She must still consider whether revealing whether the information existed and was held would be contrary to the public interest.

Section 18(1) – The public interest

36. The Commissioner has accepted that Police Scotland could give a refusal notice under section 16(1) of FOISA, on the basis that any relevant information would be exempt information by virtue of section 34(1)(a) and (b) of FOISA. She must now consider whether Police Scotland were entitled to conclude (for the purposes of section 18) that it would be contrary to the public interest to reveal whether the information existed or was held.
37. Mr Welsh did not provide any specific submissions explaining why he did not consider it would be contrary to the public interest to reveal whether the information existed or was held.
38. Police Scotland provided submissions on the consequences of revealing whether the information existed or was held. Naturally, there are aspects of these submissions the Commissioner cannot disclose without tending to reveal the answer to that question.
39. Police Scotland emphasised that disclosure of any relevant information (if held) would be to the public at large and not just to Mr Welsh. The effects of disclosure had to be examined in that context.

40. Police Scotland restated their view that to confirm whether the information requested by Mr Welsh existed or was held would jeopardise the interests of any individuals linked to the allegation. In their view, this would be unfair to those individuals and would lead to speculation and judgements being made outwith the proper and official legal processes in place to address such matters.
41. Police Scotland also submitted that individuals who report allegations to them do so with an expectation that their involvement will remain confidential unless, for example, they are called upon to attend court as a witness. In Police Scotland's view, it was likely that individuals would be less willing to report allegations in the knowledge that such allegations would enter the public domain. Police Scotland considered there was no discernible public interest in disclosing information under FOISA which would result in any reduction in the willingness of the public to engage with them during the investigation of criminal complaints.
42. Additionally, Police Scotland submitted that, to confirm that a specific allegation had been made, or whether a particular investigation had taken place, would damage the relationship between them and those individuals who fulfil a vital role in the investigatory process by providing them with information and intelligence. In Police Scotland's view, the breakdown of this relationship would be seriously detrimental to their law enforcement capabilities.
43. Having considered their submissions, the Commissioner is satisfied, in all the circumstances of this case, that it would have been contrary to the public interest for Police Scotland to reveal whether the information requested by Mr Welsh existed or was held by them.
44. In particular, the Commissioner recognises the prejudicial impact on future investigations that would likely result were Police Scotland to reveal the existence (or otherwise) of the information. Such a detrimental effect would clearly not be in the public interest.
45. The Commissioner recognises Police Scotland's point that a disclosure under FOISA is not simply disclosure to the person requesting the information, but rather is a public disclosure. This must always be borne in mind when considering the effects of disclosure; a disclosure of this kind to one individual cannot, therefore, be considered in isolation.
46. As a result, the Commissioner is satisfied that Police Scotland were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr Welsh, or whether that information existed.

Decision

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

Appeal

Should either Mr Welsh 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.

Rosemary Agnew
Scottish Information Commissioner

22 February 2017

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.

...

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.

...

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;
- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

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