

Decision Notice

Decision 106/2018: Mr C and the Chief Constable of the Police Service of Scotland

Detention of an individual

Reference No: 201800461
Decision Date: 11 July 2018



Summary

Police Scotland were asked for information regarding the detention of a specific individual, which had been reported in the press. Police Scotland refused to disclose the information as it related to a criminal investigation.

Following his investigation, the Commissioner found that Police Scotland had been entitled to withhold the information under section 34(1)(a)(i) of FOISA, because it was held by a public authority for the purposes of an investigation as to whether a person should be prosecuted for an offence and the public interest favoured maintaining the exemption.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 34(1)(a)(i) (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 30 October 2017, Mr C made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The request sought specific information held in relation to the detention of a named individual, the detention having been reported in the press.
2. Police Scotland responded on 24 November 2017, notifying Mr C (in accordance with section 18(1) of FOISA) that they could neither confirm nor deny whether they held the information, as to do so would be contrary to the public interest.
3. Police Scotland further explained that, if held, the information would be exempt from disclosure in terms of sections 31(1), 34(1)(b), 35(1), 38(1)(b) and 39(1) of FOISA.
4. On 27 November 2017, Mr C wrote to Police Scotland, requesting a review of their decision on the basis that he disagreed with the application of section 18(1) of FOISA.
5. Police Scotland notified Mr C of the outcome of their review on 28 December 2017. They upheld the original decision.
6. On 4 January 2018, Mr C wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr C stated he was dissatisfied with the outcome of Police Scotland's review because he disagreed with the response in terms of section 18(1) of FOISA.
7. During the Commissioner's investigation into the application of section 18(1) of FOISA, on 9 March 2018, Police Scotland reconsidered their position and provided Mr C with a further review outcome. They confirmed that they held the information requested, which they considered to be exempt from disclosure under section 38(1)(b) (Personal information) and section 34(1) (Investigations) of FOISA. Following this, Mr C withdrew his initial application.

8. On 13 March 2018, Mr C wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr C stated he was dissatisfied with the outcome of Police Scotland's review because he disagreed that the exemptions applied, with reasoning.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr C made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 20 March 2018, Police Scotland were notified in writing that Mr C had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr C. Police Scotland provided the information and the case was allocated to an investigating officer.
11. 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 exemptions cited in their second review outcome.
12. Police Scotland responded, with reasons why they considered both exemptions to apply.

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 him by both Mr C and Police Scotland. He is satisfied that no matter of relevance has been overlooked.
14. The Commissioner will first of all consider whether the information could properly be withheld under section 34(1)(a)(i) of FOISA. Only if he concludes that this exemption does not apply, will he go on to consider the other exemptions claimed by Police Scotland.

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

15. Police Scotland withheld the information Mr C sought under the exemption in section 34(1)(a)(i) of FOISA, which provides that information is exempt from disclosure if it is 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 should be prosecuted for an offence.
16. 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 in section 2(1)(b) of FOISA.
17. Police Scotland submitted that the information in question had been obtained by them in carrying out their statutory duties relating to the investigation of crime. They submitted that the actual outcome of the investigation was immaterial to whether the information fell within

the scope of section 34(1)(a) of FOISA. It was held for the purposes specified in section 34(1)(a) and as such fell within that exemption.

18. In this case, the Commissioner has considered the information held by Police Scotland and the submissions they provided. While the Commissioner cannot publish Police Scotland's full submissions or his full reasoning, as to do so would involve referencing the information withheld, the Commissioner accepts that the withheld information has been held by Police Scotland for the purposes of an investigation covered by section 34(1)(a)(i) of FOISA. Consequently, he must conclude that the exemption applies.

Public interest test

19. As noted above, the exemptions in section 34 are 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 he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers the information can be withheld under one or more other exemptions in FOISA).
20. As stated in previous decisions, 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 also been held that the public interest does not mean "of interest to the public" but "in the interest of the public."
21. In this case, Mr C provided the Commissioner with reasoning as to why he considered the information should be made public. This focussed on the public interest in determining whether Police Scotland abused their powers under the legislation in question.
22. Police Scotland recognised that disclosure would contribute to a debate on a matter of apparent public interest, and accepted that there was a public interest in disclosing information upon which the public could assess whether Police Scotland had handled the case appropriately.
23. On the other hand, Police Scotland submitted that disclosure would undermine their role with regard to the investigation of crime. They believed public disclosure would send a message that information gathered in police investigations was not private or confidential and could be publicly disclosed as a result of a campaign. If the public lost confidence that the forum for investigation and deliberation existed only within the appropriate legal processes, then Police Scotland believed the public would undoubtedly be far less willing to co-operate with police investigations. This, they submitted, would have a significantly detrimental impact on the ability of Police Scotland to fulfil their statutory functions.
24. The Commissioner is fully aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on this exemption, the then Justice Minister, Jim Wallace, argued that there were considerations relating to
 - the presumption of innocence
 - the privacy and reputation of witnesses and informants
 - the effective conduct of prosecutions and investigations, and

- the role of criminal proceedings as the appropriate forum for bringing information of this kind into the public domain.

He also said:

"We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."

25. In many decisions to date, the Commissioner has accepted a general public interest in making available information which could lead to an increase in accountability and scrutiny of public officials' actions. The Commissioner also recognises that Mr C, as a journalist, has an interest in disclosure of the information requested. This would appear to be a matter of wider public debate.
26. However, the Commissioner is also satisfied that it is generally in the public interest to allow Police Scotland to investigate potential crime, reach a decision and, where appropriate, report the matter to the Procurator Fiscal, without information on that process being exposed to wider public scrutiny. There is clearly a considerable public interest in ensuring that the results of investigations covered by section 34(1) of FOISA can be considered and, where appropriate, prosecuted effectively, subject to the protections afforded to the accused by a fair trial. Public disclosure outwith that context is likely to lead to "trial by media", something which is not generally considered to be in the public interest and which, as noted above, the exemptions in section 34(1) of FOISA are designed to avoid.
27. Having considered all relevant submissions, the Commissioner sees no reason why these considerations (regarding the integrity of the criminal justice process) should not have force in this case. Here, in particular, Police Scotland have emphasised the importance of maintaining public confidence in the process, by maintaining the assurance that information gathered in police investigations will generally remain private, for consideration only subject to the appropriate legal protections.
28. Taking account of all of the submissions provided by Mr C, and the content of the information held by Police Scotland, the Commissioner is satisfied in this case that the public interest in maintaining the exemption outweighs that in disclosure of the information. The Commissioner therefore concludes that Police Scotland were correct in their application of section 34(1)(a)(i) of FOISA to withhold the requested information. Having reached this conclusion, he is not required to consider the application of the other exemptions identified by Police Scotland.

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 C.

Appeal

Should either Mr C 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.

Daren Fitzhenry
Scottish Information Commissioner

11 July 2018

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.

...

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

...

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