

Decision Notice

Decision 138/2018: Mr M and the Chief Constable of the Police Service of Scotland

Allegations of sexual abuse: Lothians and Borders area

Reference No: 201800330

Decision Date: 31 August 2018



Summary

Police Scotland were asked for details of allegations of sexual abuse in Lothians and Borders by 86 named priests. Police Scotland, having given advice previously on the framing of such a request, refused to confirm or deny whether the information regarding these 86 individuals existed or was held by them.

While commenting on Police Scotland's handling of the request, 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 response to request); 35(1)(a) and (b) (Law enforcement)

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. Mr M engaged with the Chief Constable of the Police Service of Scotland (Police Scotland), seeking assistance in framing a request on a particular topic which would ensure information was capable of disclosure. The request under consideration here is a narrowed version of two previous requests: this one is more specific geographically and it contains a list of names.
2. On 19 December 2017, Mr M made a request for information to Police Scotland in which he sought the following information:
 - 1) Were there any police investigations during 2015 into allegations of either sexual abuse in the Lothian & Scottish Borders Division of Police Scotland by any of the following Priests of the Roman Catholic Church or historical sexual abuse in either the Lothian & Scottish Borders Division of Police Scotland or the Lothian & Borders Police area by any of the following Priests of the Roman Catholic Church?

[List of 86 names provided – Mr M appears to have obtained the names from the 2017 Catholic Directory for the Archdiocese of St Andrews and Edinburgh]
 - 2) If so, for each such investigation please provide the following information:
 - (i) the date the police were informed of the allegation;
 - (ii) the date the police investigation was started;
 - (iii) the date the police investigation ended;
 - (iv) whether or not the matter was discussed with the Procurator Fiscal Service;
 - (v) whether or not the matter was referred to the Procurator Fiscal Service;

- (vi) what the result of the investigation was (e.g. investigation discontinued, decision made to prosecute);
 - (vii) the city, town or area of Lothian and Borders where the alleged abuse had taken place;
 - (viii) whether or not the Bishop had been informed about the alleged abuse and the alleged abuser and the date this was done
 - (ix) the status of the Priest being investigated during the period of the investigation (e.g. deceased, still in active ministry, removed from active ministry, retired)
 - (x) the rank of the investigating officer
 - (xi) whether or not the investigating officer was a Roman Catholic
3. Police Scotland responded on 19 January 2018, by refusing to reveal whether they held the information requested or whether it existed, relying on section 18(1) of FOISA. Police Scotland informed Mr M 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), 35(1)(a) and (b) (Law enforcement) and 38(1)(b) (Personal information) of FOISA.
 4. On 22 January 2018, Mr M wrote to Police Scotland, requesting a review of its decision on the basis that he could not understand the rationale for the application of section 18 here, or the citing of the other exemptions (listed above).
 5. Police Scotland notified Mr M of the outcome of its review on 14 February 2018. Police Scotland explained that disclosure under FOISA results in information being placed in the public domain: sometimes, therefore, even the act of publicly confirming its existence or otherwise could be problematic, as it believed to be the case here.
 6. On 14 February 2018, Mr M wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr M stated he was dissatisfied with the outcome of Police Scotland's review because he considered the use of section 18 in this way to be an abuse of FOISA. He believed the information requested should be disclosed to the public and did not accept that he was seeking information about a specific individual.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr M 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.
8. On 16 March 2018, Police Scotland were notified in writing that Mr M had made a valid application. The case was allocated to an investigating officer.
9. 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 requirements of section 18 of FOISA.

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 him by both Mr M and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Section 18 of FOISA – “neither confirm nor deny”

11. Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr M’ request.
12. Section 18(1) 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 the authority;
 - (ii) if the information were held by the authority (and it need not be), the authority 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;
 - (iii) the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
13. Where a public authority has chosen to rely on section 18(1), the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. He must also be satisfied that, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions listed in section 18(1) and cited by the authority.
14. It is not sufficient 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 were held, would be exempt information under one or more of the listed exemptions. Where the exemptions are subject to the public interest test in section 2(1)(b) of FOISA, the authority must therefore be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) would outweigh any public interest in disclosing any relevant information, if it existed and were held.
15. In its review outcome (14 February 2018) Police Scotland explained that, if they held any information falling within the scope of Mr M’ request, it would be exempt from disclosure by virtue of the exemptions in sections 35(1)(a) and (b), as well as 34(1) and 38(1)(b), of FOISA. Police Scotland confirmed during this investigation (20 June 2018) that its position on section 18(1), and the exemptions cited in the review outcome, remained unchanged. It maintained it would be contrary to the public interest to reveal whether or not the information sought existed or was held. In Police Scotland’s view, there would be harm even in confirming or denying in the public domain that any information may be held linked to the names of those listed.
16. The Commissioner will consider the exemptions in section 35(1) of FOISA first.

17. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime (section 35(1)(a)) and/or the apprehension or prosecution of offenders (section 35(1)(b)). There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
18. As the Commissioner's guidance¹ on section 35(1)(a) highlights, 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 detection.
19. In relation to section 35(1)(b), the Commissioner's guidance states that 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". He considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders, or to more general techniques (such as the investigative processes used).
20. In his application, Mr M was concerned that such a refusal (to confirm whether the information existed or was held) was inappropriate here. He referred to the current inquiry undertaken by Lady Smith, i.e. the Scottish Child Abuse Inquiry.
21. Mr M submitted that the information he requested was capable of disclosure, if it existed and were held. He explained that he had followed advice on framing his request based on his discussions with Police Scotland. He did not accept that harm would occur, given that he had not asked about a specific individual: asking about a group of people meant the exemptions claimed should not apply.
22. Mr M explained that the procedures of the Roman Catholic Church in Scotland require a priest who is under a police investigation into a safeguarding matter to be removed from ministry until that investigation is completed. He submitted that, if these procedures were followed, the identity of any priest subject to a police investigation into a safeguarding matter would already be in the public domain.
23. Police Scotland submitted that the purpose of FOISA is to provide access to information which is suitable for public disclosure. Any response under FOISA is applicant and purpose blind, they submitted, so information disclosed under such circumstances becomes available to any person requesting it (i.e. to the public at large).
24. Police Scotland submitted that the public had an expectation of confidentiality when dealing with the police: there was a relationship of trust, which it could not be in the public interest to jeopardise. They had concerns, therefore, about the effect of disclosing this kind of information on the reporting of crime.
25. Disclosure of this information, if it existed and was held, could also (Police Scotland argued) result in offenders inadvertently being informed that an incident had not been reported: this, in turn, would alert them to the fact that the victim had not made the offence known and

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

potentially increase the risk of their re-offending on this basis. Police Scotland contended it was essential that such information be protected, to avoid putting at risk any potential for proceedings to be brought against an individual, particularly one who considered themselves beyond detection.

26. Police Scotland also noted that they had a duty of care to individuals in the community. Crimes such as the allegations covered by this request were under-reported, they explained. If the Police service were to provide information into the public domain which undermined victims and investigations, then victims of this type of crime would be less likely to come forward. Modern-day policing is intelligence led, they explained, and intelligence changes on a day-to-day basis. Police Scotland contended that any information disclosed here and identifying the focus of this activity would enable those engaged in criminal activity to have an advantage over the police. Information undermining the operational integrity of these activities would adversely affect public safety and, further, have a negative impact on current and future police investigations and operations in this highly sensitive area.

Conclusions

27. Having considered the submissions from both Mr M and Police Scotland, the Commissioner is satisfied that any information held by Police Scotland and falling within the scope of Mr M' request would be held for purposes relating to the prevention or detection of crime and/or the apprehension or prosecution of offenders. It is not possible to narrate all of Police Scotland's submissions on the relevant circumstances here, as to do so might confirm or deny whether any relevant information exists. In all the circumstances, however, the Commissioner is satisfied that disclosure of any relevant information, if held, would carry with it sufficient risk of substantial prejudice for the exemptions to apply.
28. The Commissioner has also considered Mr M' comments carefully, in the context of his request. He is not satisfied that providing a list of named individuals, as opposed to one specific name, mitigates the risk of harm sufficiently for the exemption(s) in question not to be capable of applying. With a list of this kind there will always, in addition, be the risk that suspicion will be misdirected, with obvious consequent detriment to the individual concerned.
29. The Commissioner has also noted Mr M' comments about the procedures of the Roman Catholic Church in relation to priests under criminal investigation, but it does not follow from a priest being removed from the ministry temporarily that he is under investigation in relation to a crime of a particular nature: the Church, like an employer in similar circumstances, may be required to take action in relation to a particular employee while also being required to take care (in the interests of fairness to the employee) not to let it be widely known why that action has been taken.
30. The Commissioner accepts, therefore, that (assuming any information requested by Mr M existed and were held by them) Police Scotland would have been entitled to respond to Mr M' request by applying either or both of the exemptions in section 35(1)(a) and (b) of FOISA.

The public interest

31. Mr M referred to the Church's procedures in relation to priests under investigation (see above) and submitted that there would be a clear public interest in knowing if the Church was not following these procedures.
32. Police Scotland submitted that any confirmation of the existence of information could not be built around the interests of one individual; rather, any release of information must be made in the wider public interest. Referring to the public expectation of confidentiality when dealing

with the police service, Police Scotland submitted that it could not be in the public interest to jeopardise the consequent relationship of trust. It did not accept that disclosure here, if any such information existed, would serve the public interest in the way Mr M suggested.

33. The Commissioner has considered carefully the submissions he has received as to where the public interest might lie here. He accepts there is a clear public interest in ensuring Police Scotland are able to continue to investigate crime and protect the public. For it to do so requires a degree of trust and confidentiality, as Police Scotland have argued. That said, the Commissioner also recognises a clear public interest in being satisfied that procedures on safeguarding matters are being applied appropriately: that, however, would appear to be capable of being addressed within the terms of reference of the Scottish Child Abuse Inquiry², subject to appropriate procedures and without the risks identified above and inherent in a request of the kind made here.
34. Weighing up these competing arguments, the Commissioner accepts that the greater detriment here would be in impeding Police Scotland's ability to perform its core functions in relation to the prevention and detection of crime. On balance, therefore, the Commissioner is satisfied that Police Scotland could have given a refusal notice under section 16(1) of FOISA here, on the basis that the information requested by Mr M (if it existed and were held) would have been exempt from disclosure under section 35(1)(a) and (b).
35. The Commissioner is not required therefore, to go on to consider whether any relevant information would also be exempt from disclosure under any other exemptions claimed by Police Scotland in conjunction with section 18(1). He must still, however, consider whether revealing whether the information existed and was held would have been contrary to the public interest.

Section 18(1) – the public interest

36. Mr M's public interest submissions are essentially as set out in paragraph 31 above.
37. Police Scotland's public interest submissions are integrally connected with those advanced on the application of the section 35 exemptions (see above). Naturally, there are aspects of the relevant submissions which the Commissioner cannot disclose without tending to reveal whether information was indeed held, or whether it existed.
38. The Commissioner accepts that revealing (to the public, not solely to Mr M, as is the nature of FOISA) whether or not Police Scotland held the requested information, or whether it existed, would compromise the vital relationship between Police Scotland and the public, as discussed above. In the circumstances, the Commissioner is satisfied that this would be contrary to the public interest.
39. Police Scotland were therefore entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr M, or whether that information existed.

Other matters

40. It is unfortunate that Police Scotland did not consider fully the implications of any advice given to Mr M when he sought assistance in framing this and earlier requests. The request under consideration was the last of a number of requests in relation to which guidance was sought and given, with no reasonable prospect of disclosure (or confirmation of information

² <https://www.childabuseinquiry.scot/about-us/terms-of-reference/>

held) at the end of the process. Police Scotland may wish to reflect on what can be done in future to advise requesters realistically, with a view to framing requests (where practicable) which have a reasonable prospect of eliciting at least some information.

Decision

The Commissioner finds that, in respect of the matters specified in the application, 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 M.

Appeal

Should either Mr M 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.

Margaret Keyse
Head of Enforcement

31 August 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.

...

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.

...

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;

...

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