

Decision Notice

Decision 059/2019: Mr F and Chief Constable of the Police Service of Scotland

Schedule 7 to the Terrorism Act 2000

Reference No: 201800681
Decision Date: 15 April 2019



Scottish Information
Commissioner

Summary

Police Scotland were asked for information related to examinations under Schedule 7 to the Terrorism Act 2000.

In response, Police Scotland:

- provided some information,
- withheld information under a number of exemptions,
- refused to confirm or deny whether they held some information, and
- stated that some of the information was not held.

Following an investigation, the Commissioner accepted that some of the information had been correctly withheld. However, the Commissioner required Police Scotland to issue a new review response in relation to other parts of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 18(1) (Further provision as respects responses to request); 21(4) (Review by Scottish public authority); 31(1) (National security and defence); 35(1)(a) and (b) (Law enforcement); 39(1) (Health, safety and the environment)

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 3 November 2017, Mr F made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). Mr F requested information relating to Schedule 7 to the Terrorism Act 2000 (the 2000 Act). The information requested was:
 - a) electronic copies of policy/guidance/training documents provided to the relevant Police Scotland officers in relation to the use of Schedule 7, and specifically documents relating to (i) demanding/asking for passwords/passcodes to mobile phones and other electronic devices and (ii) laptops and other computers.
 - b) electronic copies of policy/guidance/training documents provided to the relevant Police Scotland officers in relation to making charging decisions based on failure to provide passwords/passcodes to devices that were sought in reliance on Schedule 7.
 - c) the number of stops made by Police Scotland under Schedule 7 in the last 12 months.
 - d) regarding these stops, how many:
 - (i) of these individuals were asked for their passcodes/passwords to mobile phones/laptops/electronic devices;
 - (ii) refused, and

(iii) were charged on refusing.

2. Police Scotland responded on 11 December 2017.
 - In response to parts (a) and (b), Police Scotland provided Mr F with links to electronic documentation but also advised him to make requests to the College of Policing and the National Police Chiefs' Council for additional documentation.
 - In response to part (c) Police Scotland relied on section 18 of FOISA (neither confirming nor denying whether the information existed or was held), read in conjunction with sections 31(1), 34(1)(b), 35(1)(a) and (b) and 39(1) of FOISA.
 - In response to part (d), Police Scotland stated that they did not record (and therefore would not hold) the information requested.
3. On 12 December 2017, Mr F wrote to Police Scotland, requesting a review of their responses to parts (c) and (d) on the basis that he did not accept they were entitled to respond as they had.
4. Police Scotland notified Mr F of the outcome of their review on 15 January 2018. Police Scotland maintained their position in relation to part (c), but also sought to rely on section 18 of FOISA in relation to part (d) of the request (acknowledging that the information could, potentially, be held).
5. Following an application to the Commissioner, Police Scotland provided another review outcome on 6 April 2018. Police Scotland no longer sought to rely on section 18 of FOISA in relation to part (c), acknowledging that there had been a well-publicised use of the powers in question.
6. In relation to part (c), Police Scotland sought to rely on sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA to withhold the information. In relation to parts (d)(i) and (ii), Police Scotland stated that they did not hold the information, while in relation to part (d)(iii) Police Scotland maintained their reliance on section 18.
7. On 16 April 2018, Mr F wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr F stated he was dissatisfied with the outcome of Police Scotland's review, because he did not accept that information was not held, or that the exemptions relied on by Police Scotland were correctly applied for the information it acknowledged it held.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr F made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
9. On 14 May 2018, Police Scotland were notified in writing that Mr F had made a valid application. They were asked to send the Commissioner the information withheld from Mr F. Police Scotland provided the information and the case was allocated to an investigating officer.
10. 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 to answer specific questions, focusing on the provisions relied on by Police Scotland.

Commissioner's analysis and findings

11. 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 F and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Part (c) – number of stops in last 12 months

12. Police Scotland sought to rely on the exemptions contained in sections 31(1), 35(1)(a), (b) and 39(1) of FOISA to withhold this information.

Section 31(1) – National security and defence

13. Section 31(1) of FOISA provides that information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
14. The expression “national security” is not defined in FOISA. The Commissioner considers the phrase covers matters such as defence of the realm; the prosecution of war; the disposition of armed forces; nuclear weapons; security and intelligence services, and potential threats to the economic wellbeing of the UK (including terrorism, espionage and subversion).
15. It should be noted that section 31 of FOISA specifies that information is exempt from disclosure if exemption is required for the purposes of safeguarding national security, a condition which has a narrower scope than information which simply relates to national security.
16. Police Scotland explained that the international security landscape was increasingly complex and unpredictable and that the UK faced a sustained threat from violent terrorists and extremists. Police Scotland made detailed submissions to the Commissioner, providing operational background, structure and set up and explanations behind the deployment of resources. Although a Great Britain figure is publicly available, Police Scotland argues that disclosure would provide a new sub-total figure for the rest of UK, set a worrying precedent for other force-level disclosures and give a clear indication as to the level of counter terrorism activity in Scotland.
17. Police Scotland, were specifically asked to address the following:
 - a) How disclosure of the national total could result in the harm suggested
 - b) Why disclosure of Police Scotland's figures would have an impact on the other forces within the UK, and
 - c) How disclosure would affect Police Scotland's own operations (as separate from any impact on the rest of the UK)
18. Police Scotland were asked to provide submissions directly from their operational officers in the counter-terrorism unit to support their position. Police Scotland provided further details and an operational insight to support its position in relation to this request.
19. Providing further details of the submissions made by Police Scotland in this decision notice would in itself provide operational information which could compromise the service.
20. Having taken into account all the relevant factors, the Commissioner accepts that Police Scotland has demonstrated a link between disclosure of the information and direct risks to national security. He is satisfied that the information under consideration is sensitive and that exemption from section 1(1) is required for the purpose of safeguarding national

security. It is worth noting that it was only after receiving submissions from the operational area that the Commissioner was satisfied that the exemption applied.

21. The Commissioner accepts that disclosure of this information would provide an operational insight into the deployment of resource, not only in Scotland, but throughout the UK.
22. As the Commissioner is satisfied that the information is exempt under section 31(1), he will now go on to consider the public interest test set down in section 2(1)(b) of FOISA.

The public interest test

23. Police Scotland acknowledged that the public must be able to hold them to account in terms of financial and resourcing decisions, and publication of this information would better inform the public as to the extent of Police Scotland's activity in this area.
24. Police Scotland also recognised that the threat faced by terrorism in the UK is a matter of significant public concern. Increased public awareness might lead to more information from the public, as they would be more observant in reporting suspicious activity.
25. In favour of maintaining the exemption, Police Scotland suggested that ongoing or future operations to protect the security and infrastructure of the UK would be compromised as terrorists could map the level of counter-terrorist activity across the country, providing them with the knowledge of individual force capability.
26. Police Scotland also stated that safeguarding the national security of Scotland and the rest of the UK had to be their overwhelming priority, and where they genuinely believed disclosure of information would prevent them from doing this to the best of their ability, the public interest had to lie in maintaining the exemption and refusing to provide the information sought.
27. In conclusion, Police Scotland considered the public interest in disclosure did not outweigh the public interest in maintaining the exemption.

Submissions from Mr F

28. Mr F provided limited arguments in relation to the public interest test, but submitted that he did not accept that releasing the information would result in the harm suggested by Police Scotland. He considered their response to be alarmist, highlighting that he simply sought a national total as opposed to geographical or monthly breakdowns.

The Commissioner's conclusion

29. The Commissioner has carefully balanced the competing public interest arguments. As noted above, the Commissioner accepts that Police Scotland has demonstrated that, in this case, there is a sufficient link between disclosure of this information and compromised national security. In this case, the Commissioner must give a greater weight to the risk of harm to the public in disclosure of information which may compromise national security than the public interest in transparency in resourcing and the extent of Police Scotland's activity in this area.
30. The Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure.
31. Consequently, the Commissioner is satisfied the Police Scotland were entitled to withhold the information sought under section 31(1) of FOISA. Having reached this conclusion, he is not

required to consider Police Scotland's application of sections 35(1)(a), (b) and 39(1) to this information.

Parts (d)(i) and (ii) – requests for passcodes and refusals

32. In response to these parts, Police Scotland claimed they did not hold the information requested.
33. Police Scotland explained that not every examination would result in a request for a passcode and that not all refusals would constitute an offence: someone could refuse to provide a passcode, but if the officers believed the refusal was due to genuinely being unaware of the passcode, no offence would occur.
34. Police Scotland stated that the absence of any reference to a passcode having been requested in the paperwork associated with an examination could not be taken as a definitive answer as to whether or not one was requested. It was Police Scotland's position that it therefore did not hold statistical information regarding the incidence of people being asked for/refusing to provide their passcodes. Police Scotland explained that it was feasible that someone could be asked for a passcode and provide it without any mention of this in the paperwork
35. Police Scotland submitted that it did consider whether a section 12 (Excessive cost of compliance) response would have been more appropriate. They concluded that, even if they were to go through the paperwork for all examinations, they did not consider it possible to respond to this request.
36. The Commissioner has considered Police Scotland's submissions in detail. He notes that a record of all examinations is to be kept. He is of the view that this request could be responded to by Police Scotland by reference to the information that is held. He has been provided with no evidence which would suggest a widespread failure to record what is a statutory question, to which the failure to answer can amount to an offence. Simply stating that it is feasible that not every instance has been recorded does not necessarily equate to not holding information.
37. As the Commissioner is not satisfied that Police Scotland were entitled to provide notice under section 17 of FOISA that this information was not held, he requires Police Scotland to reconsider its response to this part of the request and provide Mr F with a response otherwise than under section 17 of FOISA.

Part (d)(iii) – numbers charged on refusing

38. In response to this element of the request, Police Scotland sought to rely on section 18 of FOISA.
39. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - a) a request has been made to the authority for information which may or may not be held by it;
 - b) if the information existed and was 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

- c) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest test.

40. 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 establish whether, 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.
41. 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.
42. In any case where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any detail on the reliance by the public authority on any of the exemptions listed in relation to section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held.
43. Police Scotland submitted that confirming whether or not information of relevance is held by Police Scotland would provide a clear insight as to the extent of counter terrorist activity in Scotland during the period in question.
44. Police Scotland relied on section 18 read in conjunction with sections 31(1), 34(1), 35(1)(a), (b) and 39(1) in response to this request.

Section 31(1) – National security and defence

45. As stated in paragraphs 13 to 15, section 31(1) of FOISA provides that information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
46. Police Scotland submitted that disclosure of the information sought, if held, would provide a clear insight as to the extent of counter terrorism operations and activity in Scotland and elsewhere in the UK.
47. Police Scotland referred the Commissioner to national statistics published by the Home Office, highlighting that the number of individuals charged with Terrorism Act offences was, in 2017/18 (as an example) just 114, with 108 prosecuted or awaiting prosecution.
48. As the annual figure for the whole of the UK was substantially lower than national examination figures, Police Scotland argued that different considerations applied.
49. Police Scotland submitted that, in safeguarding national security and protecting the UK against the threat of terrorism, police forces must have every tactical advantage possible available to them. Police Scotland stated that ensuring that terrorists are not informed as to the extent of police activity at individual police force level is a key strand of the overall counter-terrorist effort.

50. Police Scotland highlighted that, although policing is devolved, national security is a reserved activity and they could not in good conscience agree to the disclosure of a figure that would hamper this wider effort and put Police Scotland and other force areas at increased risk.
51. The Commissioner has considered these submissions, but is not satisfied that disclosing the number of people charged, if held, would identify areas of the country where counter-terrorism activities had taken place, or give an insight as to the level of counter-terrorism activity. The number of charges does not necessarily correlate directly to resource deployment. Consequently, the Commissioner does not accept the arguments presented by Police Scotland and does not accept the exemption in section 31(1) would apply, if the information existed and were held. As the Commissioner is not satisfied that the exemption applies, he is not required to consider the public interest test.

Sections 35(1)(a) and (b) – Law Enforcement

52. Section 35(1)(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention and detection of crime.
53. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension of prosecution of offenders.
54. There is likely to be a considerable overlap between information relating to the apprehension or prosecution of offenders and information relating to the prevention or detection of crime.
55. These are qualified exemptions which are subject to the public interest test in section 2(1)(b) of FOISA, should they be found to apply to the information, if held.
56. As the Commissioner's guidance¹ on this exemption indicates, the term "prevention or detection of crime" is wide-ranging, encompassing actions taken to anticipate and prevent crime, or to establish the identity and secure the prosecution of persons suspected of being responsible for committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and prevention.
57. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, more than simply a remote possibility.
58. Police Scotland submitted that providing a Scottish total, if held, would by default provide an equivalent for the rest of the UK, given a Scottish figure could be subtracted from the published UK total.
59. Police Scotland argued that the provision of such data would provide a clear insight as to the level of policing activity on Scotland and, consequently, the remainder of the UK, which would enable those engaged in criminal activity to use this information to their advantage and plan an attack on the more vulnerable parts of the UK.
60. Disclosure of more detailed information than that already published, if held, Police Scotland suggested, would allow for comparison of Counter Terrorism Units across the country and enable terrorists to build a picture of what resources are in place and where they are currently deployed.

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

61. The Commissioner has considered the submissions made by Police Scotland, but is not satisfied with arguments presented. He notes that the request seeks the number of charges made at a national level. The information requested does not seek a geographically, monthly or quarterly breakdown. Indeed, the information requested does not directly correlate to the resources deployed in a particular area.
62. The Commissioner does not accept the exemptions in sections 35(1)(a) and (b) could be upheld were the information held in this case. Given the exemptions have not been found to apply, the Commissioner is not required to go on and consider the public interest test in section 2(1)(b) of FOISA.

Section 39(1) – Health, safety and environment

63. Section 39(1) of FOISA states that the information is exempt if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA, if held.
64. Section 39(1) does not contain the usual harm test. Instead of the “substantial prejudice” test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the “endangerment” of health or safety.
65. Police Scotland referred the Commissioner to the arguments already made, as detailed above. Police Scotland argued that their ability to keep people safe from harm would be significantly prejudiced as a result of disclosure and therefore withholding information was a necessary measure to keep people safe from harm.
66. As above, the Commissioner is not satisfied with the arguments presented by Police Scotland. He does not accept that disclosure of the information requested would result in the harm claimed, noting that the disclosure of the number of times someone has been charged for this one specific offence cannot be said to identify areas of the country where counter terrorist activity had taken place, or give any insight into the extent of counter terrorism activity in Scotland during this period.
67. Consequently the Commissioner cannot accept the application of section 39(1) to this information, if in existence and held.

Section 18(1) – Neither confirm nor deny

68. The Commissioner has found that, were the information held, none of the exemptions cited by Police Scotland in conjunction with section 18(1) of FOISA could be upheld. Accordingly, he does not accept that Police Scotland could issue a refusal notice under section 16(1) of FOISA on the basis that the information was exempt from disclosure by virtue of any of the exemptions in sections 31(1), 35(1)(a), (b) and 39(1).
69. In these circumstances, the Commissioner is not required to go on to consider whether it would be contrary to the public interest to confirm or deny whether the information existed or was held by Police Scotland but finds that Police Scotland were not entitled to refuse to confirm or deny whether they held the information.
70. The Commissioner requires Police Scotland to issue a new response to Mr F for this part of the request, under section 21(4)(b) of FOISA, i.e. substituting a different decision for its previous application of section 18(1).

Decision

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

The Commissioner finds that by withholding information in relation to part (c) of this request Police Scotland complied with Part 1.

The Commissioner is not satisfied with Police Scotland's response to part (d)(i) and (ii) of Mr F's request, claiming that information was not held. He also finds that Police Scotland were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether the information requested in part (d)(iii) of Mr F's request existed or was held by them. In both respects, Police Scotland failed to deal with the request in accordance with section 1(1) of FOISA.

The Commissioner therefore requires Police Scotland to carry out a review, in terms of section 21(4)(b) of FOISA and respond otherwise than by reference to sections 17(1) and 18(1) to parts (d)(i), (ii) and (iii) of Mr F's request, by **30 May 2019**.

Appeal

Should either Mr F 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.

Enforcement

If Police Scotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

15 April 2019

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.

...

- (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.

...

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.

...

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.

...

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.

...

31 National security and defence

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.

...

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;

...

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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