

Decision Notice

Decision 081/2016: Mr Alastair Tibbitt and Aberdeenshire Council

“Prevent” duty guidance and related information

Reference No: 201501855

Decision Date: 08 April 2016



Scottish Information
Commissioner

Summary

On 30 August 2015, Mr Tibbitt asked Aberdeenshire 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 section 30(c) of FOISA. During the investigation, the Council submitted that it did not hold this information.

The Commissioner investigated and found that the Council did, in fact, hold some of the information. To the extent that the information was held, she found that the Council was entitled to withhold it under section 30(c) of FOISA. Where it was not held, she found that the Council should have given Mr Tibbitt due notice of this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 30(c) (Prejudice to effective conduct of public affairs)

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:
 - 1 *Please supply me with a copy of the Emerging and Residual Threat Local Profile (ERTLP) that covers the local authority area. If the full ERTLP document is not held, I understand a summary document will have been provided. Please supply me with this summary document in addition to the full document if possible.*
 - 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.*
 - 6 *Please supply a copy of the Council’s current CONTEST and/or Prevent action plan, and any previous plans.*

Mr Tibbitt also requested other information which is not the subject of this Decision Notice.

¹

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>

3. The Council responded on 16 September 2015. The Council informed Mr Tibbitt that the information requested would not be disclosed, on the basis that it was exempt from disclosure in terms of section 30 of FOISA. The Council stated that disclosure of the information would, or would be likely to, prejudice substantially the effective conduct of its public affairs.
4. On 16 September 2015, Mr Tibbitt wrote to the Council requiring a review of its decision. Mr Tibbitt disagreed that all of the information was exempt from disclosure and submitted that the public interest favoured its disclosure.
5. The Council responded on 7 October 2015. The Council confirmed that it considered the exemption in section 30(c) of FOISA to apply.
6. On 11 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. He considered the public interest in understanding how public bodies were implementing the "Prevent" guidance should militate against the blanket use of the exemption applied by the Council.

Investigation

7. The application was accepted as valid. 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.
8. On 30 October 2015, the Council was notified in writing that Mr Tibbitt had made a valid application. The Council was asked to send the Commissioner the information withheld from him.
9. In response, the Council stated that it did not hold any information falling within the scope of those parts of Mr Tibbitt's request under consideration in this case. The Council stated that it had reviewed the wording of its original response and its review response and concluded that it had never in fact stated it was withholding any information.
10. 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 the searches and enquiries it had undertaken in order to locate any information falling within the scope of Mr Tibbitt's request.
11. The Council subsequently provided an explanation of its searches and enquiries, and reiterated its position that it did not hold any relevant information.
12. The investigating officer subsequently contacted Police Scotland in order to clarify the process by which ERTLP documents were supplied to local authorities in Scotland (part 1 of the request). Police Scotland explained that a senior police officer had attended each Council in person to deliver the document. One copy was handed personally to the Chief Executive of the Council, who signed for it. A further copy was retained and taken away by Police Scotland.
13. The investigating officer contacted the Council again and asked it to carry out further enquiries to establish whether it held the ERTLP, taking into account the information supplied by Police Scotland concerning delivery.

14. In response, the Council confirmed, contrary to its earlier assertion, that it did in fact hold the ERTLP. Following further correspondence with the investigating officer, the Council provided a copy of the ERTLP to the Commissioner.
15. At this stage, the investigating officer asked the Council to clarify whether it considered the ERTLP to be exempt from disclosure and, if so, to provide submissions explaining its position. The investigating officer also asked the Council to carry out additional searches to ascertain whether it held any information falling within the scope of parts 5 and 6 of the request.
16. The Council subsequently provided an explanation of the searches and enquiries it had undertaken in order to identify whether any additional information was held. The Council also stated that it considered the information in part 1 of Mr Tibbitt's request (the ERTLP) to be exempt from disclosure in terms of section 30(c) of FOISA. It provided submissions explaining its position.

Commissioner's analysis and findings

17. 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 her by both Mr Tibbitt and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 30(c) – Prejudice to effective conduct of public affairs

18. The Council considered the information contained in the ERTLP (part 1 of the request) to be exempt from disclosure in terms of section 30(c) of FOISA.
19. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
20. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).
21. The Council explained that the ERTLP was produced by Police Scotland and the Council did not have consent for its disclosure. The Council also submitted that the disclosure of how people (and who) are perceived to be a threat would prejudice substantially how those threats are dealt with, as there will be specific measures in place to deal with each threat. In the Council's view, disclosure was likely to have a detrimental impact on the effectiveness of any measures in place, which would in turn impact on public safety.
22. The Council considered it must have the ability to consider all information and advice relating to the ERTLP, without officers or advisers being inhibited in any way from disclosing or

sharing advice or information. Additionally, by the very nature of the purpose of the ERTLP, the Council argued that it must be able to consider all measures available, without exposing itself to the risk of compromising the plan by disclosing details of the plan or by disclosing confidential or sensitive information relating to systems or procedures being relied upon.

23. Finally, the Council submitted that it must be able to plan its response to CONTEST and “Prevent” without the risk that those intent on promoting terrorism being assisted by disclosure of the information.
24. Mr Tibbitt did not consider that all of the information withheld by the Council would be exempt from disclosure. He suggested that some of it could be disclosed, in redacted form, to militate against data protection issues or wider national security.
25. The Commissioner has considered the nature and content of the information withheld under this exemption, i.e. the ERTLP, along with the Council’s submissions.
26. In this case, the Commissioner is satisfied that disclosing the information contained in the ERTLP would prejudice substantially the effective conduct of public affairs. The Commissioner accepts that the content of the ERTLP is particularly sensitive and contains information which would be of assistance to individuals and groups contemplating acts (or threats) of terrorism or other extremist activity in the Aberdeenshire area or wider afield.
27. In the Commissioner’s view, the disclosure of this information would significantly affect the ability of the Council, and other bodies, to effectively carry out their responsibilities under the “Prevent” duty guidance and CONTEST. In her view, this would be likely to cause substantial prejudice to the effective conduct of public affairs.
28. In all the circumstances, the Commissioner accepts that the Council was correct to apply the exemption in section 30(c) of FOISA to this particular information.
29. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must, therefore, go on to consider whether, in all the circumstances of the case, the public interest in disclosing this information is outweighed by that in maintaining the exemption.

The public interest

30. The Council acknowledged that there was a public interest in transparency and accountability, particularly in areas involving public money and services provided to the public. The Council also acknowledged there was a public interest in understanding the progress Scottish local authorities were making in implementing anti-terrorism guidance.
31. However, the Council submitted that people who would like to exploit the information contained in the ERTLP would also have an interest in obtaining it. In the Council’s view, the danger from the information being made public was that the very people from whom the public needed to be protected would also have access to it and could take advantage of it. The Council considered this issue so serious that it would only be prudent to come down on the side of caution: the public would not want this information to get into the wrong hands.
32. In Mr Tibbitt’s view, there was a considerable public interest in understanding the progress Scottish local authorities were making in implementing the “Prevent” guidance and considered this should militate against the application of the exemption.

33. The Commissioner accepts there is a general public interest in transparency and accountability, and in scrutinising whether authorities are fulfilling their responsibilities in relation to public safety effectively and appropriately.
34. However, the Commissioner acknowledges that the information in the ERTLP is particularly sensitive and could be misused. In the Commissioner's view, there is a strong public interest in ensuring that the Council is able to carry out its responsibilities under the "Prevent" duty guidance effectively, in the interests of public safety and security both locally and nationally. In her view, disclosure of this information would seriously jeopardise the effectiveness of the ERTLP, which would in turn have a detrimental effect on public safety: that would not be in the public interest.
35. On balance, having taken account of all the submissions before her, the Commissioner considers the public interest in maintaining the exemption in relation to this information outweighs that in disclosing it.
36. The Commissioner therefore finds that the Council was entitled to withhold this information under section 30(c) of FOISA.

Section 17 – Notice that information is not held

37. The Council amended its position during the investigation and stated that it did not hold any information falling within the scope of parts 5 and 6 of the request.
38. In Mr Tibbitt's view, this was unlikely. He considered it hard to understand how the Council could participate in any multi-agency group if no paperwork were supplied to that group covering its own actions as part of the duty (under "Prevent").
39. The Council stated that it had conducted a search of the email inboxes of the officers within the Council with responsibility for "Prevent" and CONTEST. Similarly, it had carried out a search of the relevant folders within those officers' electronic directories. The Council had not identified any monitoring or evaluation reports. The Council stated that it had also contacted its previous representative on the CONTEST group, who stated that any reports to that group had been made verbally by police officers.
40. In relation to its action plan (part 6 of the request), the Council stated that, at the time it received Mr Tibbitt's request, the action plan was still being drawn up and therefore (as a current plan) did not exist. The Council explained that it had started drawing up a draft "Prevent" strategy implementation plan, which was still in very rough draft form and had not yet been agreed by senior officers. The Council provided a copy of this draft plan to the investigating officer.
41. The Commissioner has considered the Council's submissions and its explanation of why it does not hold any information falling within the scope of these parts of the request. Having done so, she is satisfied that, by the end of the investigation, the Council had conducted reasonable, proportionate searches to establish whether it held any relevant information. She accepts that any information falling within the scope of these parts of the request would have been identified using these searches and enquiries.
42. In relation to part 6 of the request, the Commissioner accepts that the Council did not have a current action plan at the time it received Mr Tibbitt's request. The draft implementation plan which the Council provided during the investigation is clearly a very rough, early draft and could not be construed as a "current" working plan.

43. The Commissioner is therefore satisfied, on the balance of probabilities, that the Council did not (on receiving the request) hold the information sought in parts 5 and 6 of the request.
44. However, by failing to give notice that it did not hold the information requested in parts 5 and 6, the Commissioner must find that the Council failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA in responding to Mr Tibbitt's request.

The Commissioner's observations on the Council's handling of the request

45. The following observations are not part of the Commissioner's findings on compliance in this case, but cover practice issues she has identified during this investigation about which she has concerns.
46. In its initial response to Mr Tibbitt and in its response to his requirement for review, the Council clearly indicated that it held information falling within the scope of those parts of the request under consideration in this investigation. The Council stated that this information was exempt from disclosure in terms of section 30(c) of FOISA.
47. It subsequently transpired that the Council did not hold some of the information which it had claimed was exempt from disclosure under FOISA. The Commissioner is concerned at the Council's approach. She considers it unacceptable that the Council applied an exemption to information without checking whether or not that information was actually held.
48. The Council further amended its position during the investigation, initially claiming that it held no relevant information at all. The Council claimed it had never stated (to Mr Tibbitt) that it was withholding any information from him.
49. The Commissioner is unable to understand how the Council could claim that it never informed Mr Tibbitt that it was withholding any information. The terms of its correspondence to Mr Tibbitt were unequivocal and left no doubt that it was stating that the information was held, but would not be disclosed. In any event, it follows from any refusal to disclose information under FOISA that the public authority has concluded it holds the information in question.
50. Whilst the position was subsequently clarified during the investigation that some information was actually held by the Council, the Commissioner considers its statement to have been ill-considered and unhelpful to the investigation.
51. The Commissioner is particularly concerned that, during the investigation, the Council erroneously claimed not to hold the ERTLTP and asserted that it had carried out adequate searches before so claiming. Clearly, the Council had not conducted searches which were remotely adequate in order to locate a document of such importance and sensitivity.
52. In all the circumstances, therefore, the Commissioner considers the Council's handling of this request, and its engagement with her investigation, fell far short of good practice. She would urge the Council to reflect on these points, with a view to ensuring that accurate responses are provided to requesters (and the Commissioner) in future.

Decision

The Commissioner finds that Aberdeenshire Council (the Council) partially complied with Part 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 entitled to withhold some information under section 30(c) of FOISA.

However, the Commissioner found that the Council had failed to respond to Mr Tibbitt's request for information in accordance with Part 1 of FOISA. This was because it had failed to give notice, in terms of section 17(1) of FOISA, that it did not hold some of the information requested. The Commissioner accepts that the Council did not hold this information.

Appeal

Should either Mr Tibbitt or Aberdeenshire 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.

Rosemary Agnew
Scottish Information Commissioner

08 April 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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

(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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info