

Decision Notice

Decision 116/2016: Mr Marc Ellison and the Chief Constable of the Police Service of Scotland

Electronic devices

Reference No: 201600278

Decision Date: 20 May 2016



Scottish Information
Commissioner

Summary

On 4 November 2015, Mr Ellison asked the Chief Constable for the Police Service of Scotland (Police Scotland) for information relating to the number of a specific type of electronic device held by Police Scotland, their cost and the use made of them.

Police Scotland responded and refused to confirm or deny whether they held the information, or whether the information existed.

The Commissioner investigated and found that Police Scotland were entitled to issue a response in terms of section 18 of FOISA, neither confirming nor denying that the information was held, or whether it existed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1) (Refusal of request); 17(1) and (3) (Notice that information is not held); 18 (Further provisions as respects responses to request); 35(1)(a) and (b) (Law enforcement); 73 (Interpretation) (definition of “information”)

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 4 November 2015 Mr Ellison made a request for information to Police Scotland. The information requested was:
 - a) How many “IMSI catchers” or “Stingray” devices does Police Scotland have?
 - b) What is the cost per device?
 - c) How many of these are (a) currently in use, and (b) when and where (i.e. town/city and/command division).
 - d) For each instance where they have been used, please give a high level reason as to why they were deemed necessary.
2. Police Scotland responded on 30 December 2015, notifying Mr Ellison (in accordance with section 18 of FOISA) that they could neither confirm nor deny whether they held the information. In this, they stated that to confirm or deny whether Police Scotland held any information would in itself disclose exempt information.
3. Police Scotland further explained that, if held, the information would be exempt from disclosure in terms of sections 31, 34 and 35 of FOISA.
4. On 18 January 2016, Mr Ellison wrote to Police Scotland, requiring a review of their decision on the basis that any relevant equipment would have been purchased from public funds and there was a public interest in disclosing the information. He did not believe disclosure would cause the harm required to engage the exemptions identified by Police Scotland.

5. Police Scotland notified Mr Ellison of the outcome of their review on 12 February 2016. Police Scotland confirmed that they wished to neither confirm nor deny whether such technology was owned or used by the Force, as maintaining this position gave them a “tactical advantage” in crime prevention.
6. Police Scotland further explained that in relation to part a) of his request, their wish to neither confirm nor deny could be achieved by a refusal to provide the information sought. They explained that they did not see the harm in confirming whether or not they held the information sought, as the answer could be zero or a positive number. It, refused, however to say whether that number was a zero or a positive number, stating that they considered the exemptions in section 34 and 35 of FOISA to apply.
7. As further discussed below, the Commissioner notes that Police Scotland did not say whether it held information falling within the scope of part a) of the request.
8. Police Scotland maintained that a response in terms of section 18(1) of FOISA was appropriate in relation to parts b), c) and d) of the request.
9. On 15 February 2016, Mr Ellison wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Ellison stated he was dissatisfied with the outcome of Police Scotland’s review in relation to parts a), b) and d) of his request, acknowledging their arguments in relation to current use.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr Ellison made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
11. On 7 March 2016, Police Scotland were notified in writing that Mr Ellison had made a valid application.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 6 April 2016, Police Scotland were invited to comment on this application and answer specific questions, with specific reference to their application of sections 18, 34 and 35 of FOISA.
13. Police Scotland responded on 21 April 2016, confirming that they were applying section 18 to each part of Mr Ellison’s request, on the basis that (if it existed and was held) the information could be withheld under sections 31(1) and 35(1)(a) and (b) of FOISA. They provided arguments in support of this position.
14. They confirmed that in responding to part a) of Mr Ellison’s request in terms of section 16 it was not their intention to confirm or deny that Police Scotland was in possession of IMSI catchers, nor would they wish to do so.
15. Mr Ellison was also given the opportunity to provide further submissions. He noted that the initial response by Police Scotland contained similar arguments to a similar information request, responded to by an English police force in 2015.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mr Ellison and Police Scotland. She is satisfied that no matter of relevance has been overlooked.
17. Taking account of the submissions to the Commissioner by Police Scotland and the content of both the initial response to Mr Ellison and the and the review outcome, the Commissioner considers it necessary to first of all comment on the application of sections 16, 17 and 18 of FOISA, and the content of responses (notices) thereto.

Content of Notices (responses) under FOISA

18. In their submissions to the Commissioner, Police Scotland argued that their response to the review in terms of section 16 of FOISA (in relation to part a) of the request) was appropriate. In the circumstances, they believed it had the same effect as neither confirming nor denying whether they held information falling within the scope of that part of the request.
19. In this regard, the Commissioner cannot fully disclose the exchanges with Police Scotland during the investigation, as to do so might reveal whether information requested by Mr Ellison was held by Police Scotland, or whether it existed.
20. Police Scotland submitted that where a request asked "how many" (as was the case here), the information held could be zero or a positive number. By issuing a response in terms of section 16, and withholding the information held (which could be zero or a positive number), Police Scotland submitted they were still achieving the outcome of neither confirming nor denying that the information requested was held.
21. This is not an approach the Commissioner can recommend. It is certainly does not appear to be an approach intended by the scheme established under FOISA.
22. The Commissioner has considered the definition of "information" in section 73 of FOISA – subject to qualifications which are not relevant here, "information" means information recorded in any form. Firstly, therefore, there would need to be a specific record to that effect before a nil return, or "zero", could be information held in relation to a given question "how many."
23. In addition, sections 16, 17 and 18 of FOISA are quite clear as to the circumstances in which notices (responses) under these sections should be given and the content of such notices.
24. Where information is not held, section 17(1) of FOISA is quite clear. Subject to section 17(3), which applies when the authority gives the applicant notice under section 18, wherever a Scottish public authority does not hold the requested information it **must** give the applicant notice in writing that it does not hold it.
25. Much the same applies where information is held. There are a number of things a Scottish authority **must** tell the applicant in any case where it is refusing a request under section 16 of FOISA. Only where it is refusing the request under section 18 is it permitted not to provide this information. Among the things it must tell the applicant is that it holds the requested information (section 16(1)(a)) – in other words, that it holds a specific record that will answer the request.

26. In other words, responding under section 16 or section 17 is not intended to be compatible with refusing to reveal whether the information exists or is held. That is why section 18 is there.
27. In this case, however, it is apparent to the Commissioner that Police Scotland's reference to section 16 within their review outcome was based on a mistaken premise. That premise was reflected in the review outcome, where Police Scotland made clear to Mr Ellison that they still wished to neither confirm nor deny whether such technology was owned or used by the Force. They believed they could achieve this through use of a refusal notice under section 16.
28. It is not clear why Police Scotland considered this to be a useful approach. As indicated above, it is certainly not one intended by FOISA. It might be true in some circumstances that confirming you hold an answer to the question "how many" is nothing more than that – confirming that a figure is held, without giving any indication what that figure is. However, there must be practical dangers in that approach: how can it be said that the figure "zero", where that is the answer, is actually held in recorded form? An authority taking this approach might well give away more than it intends.
29. As indicated above, however, the Commissioner is satisfied in this case that Police Scotland did not reveal whether it held the information requested, or whether that information existed. It remained open to it to confirm its application of section 18 when making submissions to the Commissioner.
30. Taking account of all the circumstances, the Commissioner will now decide whether Police Scotland were entitled to rely upon section 18(1) of FOISA, in relation to parts a), b) and d) of Mr Ellison's request.

Section 18 of FOISA – "neither confirm nor deny"

31. As mentioned above, Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr Ellison's request, or whether such information existed. Police Scotland adhered to this position in their submissions to the Commissioner.
32. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it;
 - 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;
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
33. Where an authority has chosen to rely on section 18, 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. She must also establish whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose that information by virtue of any of the exemptions listed in section 18(1).

34. The Commissioner must ensure that her decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the authority's reliance on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held.
35. 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 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.
36. The Commissioner must first, therefore, consider whether Police Scotland could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and was held.
37. Having reviewed Police Scotland's submissions, the Commissioner considers those on section 35(1)(a) and (b) to be most relevant in this case and consequently has focused on these below.

Section 35(1)(a) and (b) of FOISA - Law enforcement

38. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that the 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.
39. As the Commissioner's guidance on the section 35(1)(a) exemption 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.
40. 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". She 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).
41. Having fully considered the submissions from both Mr Ellison and Police Scotland, the Commissioner is satisfied that if information was held relative to possession or use of IMSI Catchers or Stingrays, as requested by Mr Ellison, then such information would relate to strategies employed by Police Scotland in relation to both the "prevention or detection of crime" and the "apprehension or prosecution of offenders". Consequently, she is satisfied that, if it existed and was held, such information would fall within the scope of the exemptions in section 35(1)(a) and (b) of FOISA.

42. Mr Ellison submitted that he did not see that disclosure of the information requested would cause any harm as claimed by Police Scotland. In particular, he believed he had provided Police Scotland with the opportunity to provide “high level” geographic information and that disclosing, for example, that one such unit was used would not tip off any criminal organisation.
43. Police Scotland submitted that, if such information was held, disclosure would cause substantial prejudice to their (and other law enforcement agencies’) ability to prevent and detect crime, and to apprehend and prosecute offenders. Amongst other submissions, Police Scotland submitted that disclosure could only serve to increase public knowledge/ awareness in this area, particularly amongst those individuals involved in serious and organised crime or terrorist offences, who would be best placed to use such technology to their advantage and ultimately impact on the effectiveness of policing operations.
44. They further submitted that, whilst the associated technology is complex, disclosure of the information would assist any technically knowledgeable person to undermine Police Scotland systems and technologies.
45. Police Scotland submitted that whilst there is a level of public awareness regarding such techniques, at present no UK police force or law enforcement agency has admitted to the use or otherwise of IMSI catchers. This position is intended to ensure that the vulnerabilities of those forces which do not have access to the technology are not exposed, and also that those forces which do are not identified.
46. Without going into further detail on the submissions made by Police Scotland (as to do so could increase the risk of causing the substantial prejudice claimed), the Commissioner is satisfied (having considered these submissions in full) that disclosure would assist those of criminal intent in the manner described by Police Scotland.
47. In reaching this conclusion, she acknowledges the extent to which those in organised crime will go to, to avoid or reduce the risk of detection. She is therefore satisfied that the disclosure of the information requested would, or would be likely to, prejudice substantially both the prevention and detection of crime, and the apprehension and prosecution of offenders.
48. Section 35(1)(a) and (b) of FOISA are both qualified exemptions, which means that their application is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner will go on to consider the public interest arguments provide by both parties, to determine whether the information, if it existed and was held, could have been withheld under sections 35(1)(a) and (b) (or either of them).

Public interest test

49. Mr Ellison submitted in his review request that there was a public interest in knowing how public funds were spent by the Police, be it on the purchase of weapons, vehicles or IMSI catchers.
50. Mr Ellison also submitted that there was a concern that such devices would be used to monitor individuals who were not under any suspicion, and in this regard made reference to an IOCCO (Interception of Communications Commissioner’s Office) report¹, which found that

¹ <http://www.iocco-uk.info/docs/Press%20statement%2025-11-2015.pdf>

Police Scotland had failed to comply with the relevant Code of Practice and had obtained communications data without judicial approval on five occasions.

51. Police Scotland identified the following factors as favouring disclosure of the information:

- Public awareness: disclosure of the information sought would better inform the public as to the covert tactical measures engaged by Police Scotland.
- Accountability for public funds: disclosure of the information sought would better inform the public as to the whether or not public funds had been used by Police Scotland to purchase this specific type of equipment.
- Accountability: disclosure of the information sought would better inform the public as to the tactical capabilities of Police Scotland in this area and the corresponding effectiveness of the Service.

52. On the other hand, Police Scotland submitted there was a public interest in withholding, for the following public interest reasons:

- Efficient and effective conduct of the Service: disclosure of the information sought would provide valuable intelligence to criminals and terrorists as to the technological capabilities of Police Scotland. Police Scotland have a statutory duty with regards the prevention and detection of crime and the apprehension or prosecution of offenders. There is a significant public interest in ensuring that the Service is as efficient and effective as possible and this extends to ensuring every tactical advantage possible.
- Public safety: any negative impact on the ability of Police Scotland with regard to the prevention and detection of crime, the apprehension or prosecution of offenders and the safeguarding of national security has a parallel negative impact on the safety both of police officers and members of the public.
- Existing procedures: Police Scotland is subject to annual inspection by the Office of the Surveillance Commissioner (OSC) which is judge-based and entirely independent of Government and all other public authorities and further information regarding the inspections is published on their website. Therefore, there is a robust legislative inspection framework in place to oversee, manage and govern the deployment of such equipment. It also described the authorisation process should such equipment be used.

53. On balance, Police Scotland submitted that the public interest favoured upholding the exemptions, as disclosure of any information which would increase the awareness of criminals as to where IMSI technology was in use, and the details of the techniques deployed against them, would allow for the development and engagement of counter-techniques which could not be in the public interest.

54. In considering the submissions made by Police Scotland and Mr Ellison as outlined above, the Commissioner is conscious that there is already some public knowledge of the availability of equipment of the kind described in Mr Ellison's request. She also acknowledges the role of the OSC, whose oversight goes some way towards satisfying the public interest in disclosure, should any information exist and be held.

55. The Commissioner has already acknowledged that disclosure of the information requested would, or would be likely to, lead to substantial prejudice for the purposes of section 35(1)(a) and (b) of FOISA. Whilst she also acknowledges that disclosure of the detailed information requested, if held, might give the public some greater insight into the strategies used by

Police Scotland, she has to also acknowledge the substantial risks associated with such disclosure.

56. On balance, therefore, the Commissioner considers the arguments against disclosure should prevail in this particular case. Consequently, she is satisfied, in all the circumstances of the case, that the public interest in disclosing the information (should it exist and be held) is outweighed by that in maintaining the exemptions.
57. The Commissioner is therefore satisfied that, if it existed and was held, the information requested by Mr Ellison could correctly be withheld under the exemptions in section 35(1)(a) and (b) of FOISA.

The public interest - section 18

58. Police Scotland provided reasons for concluding, on balance, that it would not be in the public interest to reveal whether they held the requested information, or whether it existed. These were in line with the public interest submissions considered above in relation to the exemptions in section 35(1)(a) and (b).
59. As noted above, Mr Ellison did not accept that disclosure would cause any of the claimed risks and believed disclosure was in the public interest.
60. The Commissioner is satisfied, in all the circumstances of this case, that were Police Scotland to reveal whether the information requested by Mr Ellison existed or was held, that would have the prejudicial impact on investigations claimed by Police Scotland. This would not be in the public interest.
61. As a result, the Commissioner is satisfied Police Scotland were entitled to refuse to confirm or deny, in line with section 18 of FOISA, whether they held the information requested by Mr Ellison, or whether that information existed.
62. The Commissioner notes the similar response provided in 2015 by an English police force, as drawn to her attention by Mr Ellison. This appears to show a consistent approach across the UK, but it does not follow that such an approach is wrong. As Police Scotland have argued, there would appear to be sound reasons for seeking to achieve such consistency.

Decision

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

Appeal

Should either Mr Ellison 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

20 May 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.

...

- (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.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

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.

...

- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

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.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given 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;

...

73 Interpretation

In this Act, unless the context requires a different interpretation—

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

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