

Decision Notice

Decision 125/2016: Mr Alastair Tibbitt and North Lanarkshire Council

“Prevent” duty guidance and related information

Reference No: 201502033

Decision Date: 02 June 2016



Scottish Information
Commissioner

Summary

On 30 August 2015, Mr Tibbitt asked North Lanarkshire Council (the Council) for information relating to the “Prevent” duty guidance for Scotland.

The Council informed Mr Tibbitt initially that the information was exempt from disclosure in terms of section 30(c) of FOISA, confirming this on review. During the Commissioner’s investigation, the Council submitted that it did not hold some of the information. It argued that the information it did hold was also exempt from disclosure in terms of section 31(1) of FOISA (National security and defence).

The Commissioner investigated and found that the Council failed to respond to Mr Tibbitt’s request for information in accordance with Part 1 of FOISA. She did not accept that the information held by the Council was exempt from disclosure. She accepted that the Council did not hold the remaining information Mr Tibbitt asked for, but found that the Council should have given Mr Tibbitt 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); 31(1) (National security and defence)

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 2015 (the 2015 Act)².
2. The information requested was as follows:
 2. *Please supply me with all training materials distributed to Council staff in support of the local authority obligation to ensure front line staff are aware of “Prevent” and of “available programmes to deal with any individual who is vulnerable to being drawn into terrorism”.*
 3. *Please confirm how many staff have received these training materials in the last 36 months.*

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>

4. *Please confirm how many individuals have been referred, by Council staff, into the “Prevent” Professional Concerns process as described in the above guidance in the last 36 months.*
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.*
7. *Please confirm whether the Council has received funding from any other public body in order to implement any CONTEST or “Prevent” activities. If so, how much has been received to date and what activity has been funded?*

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

3. The Council responded on 25 September 2015. The Council informed Mr Tibbitt that the information was exempt from disclosure in terms of section 30(c) of FOISA, on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
4. On 25 September 2015, Mr Tibbitt wrote to the Council requesting a review of its decision. Mr Tibbitt considered there was a public interest in understanding how local authorities were implementing the “Prevent” guidance.
5. The Council notified Mr Tibbitt of the outcome of its review on 27 October 2015. The Council upheld its previous decision without modification.
6. On 31 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, because he did not believe the Council should have applied a blanket exemption to his entire request and considered the public interest in disclosure of the information outweighed that in maintaining the exemption.

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 13 November 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 Mr Tibbitt.
9. In response, the Council provided information it considered fell within the scope of parts 5 and 6 of the request. The Council stated it did not hold any information falling within the scope of parts 2, 3, 4 and 7 of the request.
10. At this stage, the Council appeared to argue it was applying section 18 of FOISA to part 5 of the request, i.e. it was not revealing whether it held the information or whether it existed. It referred to section 18 in conjunction with the exemptions in sections 30(c) and 31(1) of FOISA. In relation to part 6, the Council confirmed that the information was exempt from

disclosure in terms of section 30(c) of FOISA. The case was allocated to an investigating officer.

11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions on the provisions of FOISA it was applying. In relation to the information it now confirmed was not held, the Council was asked whether it would inform Mr Tibbitt directly of its amended position.
12. Additionally, the Council was asked to clarify whether it considered the information supplied to the Commissioner concerning part 6 of the request actually fell within the scope of that part of the request.
13. The Council confirmed that it did not wish to apply section 18 of FOISA to part 5 of the request: it continued to argue that sections 30(c) and 31(1) of FOISA applied to this part. It confirmed that it did not consider any of the information supplied to the Commissioner to fall within the scope of part 6 of the request: it added part 6 to the parts of the request for which it held no information.
14. In relation to the information it now claimed was not held, the Council stated that it was not prepared to provide a further response to Mr Tibbitt. It suggested that section 18 of FOISA would have been applicable to this information, had it been apparent that it was not held when the Council responded to the request.
15. During the investigation, Mr Tibbitt informed the investigating officer that he was content for any personal data within the withheld information to be discounted from consideration.

Commissioner's analysis and findings

16. 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 17 – Notice that information is not held

17. As noted above, the Council amended its position during the investigation and stated that it did not hold any information falling within the scope of parts 2, 3, 4, 6 and 7 of the request.
18. The Commissioner has considered the information the Council supplied to her initially and which it indicated fell within the scope of part 6 of the request. As noted above, the Council subsequently amended its position and acknowledged that this information did not fall within the scope of part 6 of the request. The Commissioner agrees that this information does not comprise a current or previous action plan and so is not within the scope of part 6.
19. In relation to parts 2 and 3 of the request, the Council confirmed that some awareness sessions for staff had been conducted by Police Scotland. No training materials were distributed to staff at these sessions.
20. In relation to part 4, the Council stated that no individuals had been referred into the "Prevent" Professional Concerns process.
21. In relation to part 6, the Council submitted that, at the time it received Mr Tibbitt's request, its local implementation plan was still under development. It explained that the information

previously supplied to the Commissioner simply detailed the actions it intended taking to fulfil its duty to prepare and implement such a plan.

22. In relation to part 7, the Council stated that it had received no funding to implement any such activities.
23. The Commissioner has considered the Council's submissions and its explanation of why no information is held for parts 2, 3, 4, 6 and 7 of the request. Having done so, she is satisfied, on the balance of probabilities, that the Council did not (on receiving the request) hold the information sought in these parts of the request.
24. By failing to give notice that it did not hold the information requested in parts 2, 3, 4, 6 and 7 of the request, the Commissioner must find that the Council failed to comply with Part 1 (and, in particular, section 17(1)) of FOISA in responding to Mr Tibbitt's request. Section 17(1) contains a strict requirement that a Scottish public authority will give an applicant notice to that effect whenever it does not hold the information that applicant has requested. Only where it refuses the request under section 18 of FOISA is it not required to give such a notice: as the Council has acknowledged, it did not respond under section 18 in this case.

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

25. The Council considered the information covered by part 5 of the request to be exempt from disclosure in terms of section 30(c) of FOISA.
26. The Commissioner does not consider that all of the information provided by the Council falls within the scope of this part of the request, insofar as some of it is not related specifically to duties under the "Prevent" guidance and the 2015 Act. Therefore, the Commissioner has discounted those parts from consideration in what follows.
27. 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.
28. 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).
29. The Council submitted that, the information, if disclosed, would advertise what counter-terrorism strategies were in place and where vulnerabilities might lie. In the Council's view, this was clearly prejudicial to the effective conduct of public affairs under the 2015 Act.
30. The Council notes that it is a "specified authority" for the purposes of the 2015 Act and is entrusted with the responsibility to prevent people from being drawn into terrorism as part of its functions. In the Council's view, it was axiomatic that preventing persons from becoming involved in terrorism was the purpose of Councils being specified under the 2015 Act.

31. The Council argued that advertising any counter-terrorism initiatives to a general audience had the effect of communicating those strategies and plans in advance, including communication to those who would wish to undermine the Council's ability to fulfil its duty under the 2015 Act. In the Council's view, this would have the effect of forewarning those concerned in the promulgation of terror (including recruitment) those actions of state agencies designed to frustrate them.
32. The Council submitted that this would introduce a vulnerability to its ability to effectively implement those strategies and would empower those against whom the strategies were specifically targeted. In the Council's view, the undermining of its ability to effectively conduct its affairs would be the necessary outcome of disclosure.
33. The Commissioner has considered the nature and content of the relevant information withheld under part 5 of the request, along with the Council's submissions.
34. In the Commissioner's view, the information is general background information about the evolution of the Lanarkshire multi-agency strategy group, its objectives, actions the group has initiated and plans for the future.
35. The Commissioner considers the information to be innocuous and uncontentious in nature. It does not contain any information that would not be expected to appear in any generic report outlining a Council's responsibilities under legislation and its broad plans for the future.
36. In all the circumstances, the Commissioner cannot accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs. Therefore, the Commissioner does not accept that the Council was correct to withhold this information under the exemption in section 30(c) of FOISA.
37. As the Commissioner is not satisfied that the information is exempt from disclosure under section 30(c), she is not required to consider the public interest test in section 2(1)(b) of FOISA.

Section 31(1) – National security and defence

38. The Commissioner will now consider the exemption in section 31(1) of FOISA, which the Council has applied to the same information.
39. Section 31(1) provides that information is exempt information if exemption from section 1(1) (i.e. the right to request information from a Scottish public authority) is required for the purpose of safeguarding national security.
40. The expression "national security" is not defined in FOISA. In the Commissioner's considers that the phrase covers matters such as defence of the realm; the prosecution of war; the disposition of the armed forces; nuclear weapons; security and intelligence services, and potential threats to the economic wellbeing of the UK including terrorism, espionage and subversion.
41. It should be noted that section 31(1) specifies that the 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 *relates* to national security. (See the Commissioner's briefing on section 31(1)³.)

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section31/Section31.aspx>

42. The Council considered its reasons for applying the exemption in section 30(c) were equally applicable to section 31(1) in this case.
43. In the Council's view, public affairs concerned with its fulfilment of its duties under the 2015 Act were public affairs associated with national security. The Council referred to the explanatory memorandum to the Bill (for the 2015 Act) as introduced to Parliament, which identified its purpose as "reducing the terrorist threat" to the United Kingdom. The Council stated also that the explanatory memorandum referred to a "heightened threat to our national security", and to the contributions which the provisions of the 2015 Act were intended to make to, among other things, the prevention of individuals being drawn into terrorism.
44. In the Council's view, the framers of the legislation had not drawn any distinction between those measures aimed at "reducing the terrorist threat to the UK" and those aimed at preserving or protecting "our (i.e. the United Kingdom's) national security". The Council submitted that the proper way to understand its functions contained in the 2015 Act was as simultaneously encompassing a "counter-terrorism" and "national security" concern: this was also the proper way to understand counter-terrorism and national security more generally.
45. The Commissioner has considered these submissions carefully. She acknowledges that there is a close relationship between preventing terrorism and protecting national security. It does not follow that all information relating to performance of the Council's functions under the 2015 Act will require to be exempted under section 31(1) of FOISA, for the purposes of safeguarding national security. The Commissioner must consider each case, and the information withheld in it, individually.
46. In this case, she is not persuaded that that the information under consideration is highly sensitive or contentious, or that there is any other reason why exemption from section 1(1) of FOISA is required for the purpose of safeguarding national security.
47. As noted above, in the Commissioner's view, the information under consideration is entirely innocuous and uncontentious and contains no information which could be said to present any threat to national security in the event of its disclosure. The exemption in section 31(1) is not subject to a test of substantial prejudice, but exemption must still be "required". The Commissioner would expect some link to be demonstrated between disclosure and national security being compromised: nothing of that kind has been demonstrated here and it is not evident from the information itself.
48. Consequently, the Commissioner is not satisfied that the Council was entitled to withhold this information under the exemption in section 31(1) of FOISA. As the Commissioner is not satisfied that the information is exempt from disclosure under section 31(1), she is not required to consider the public interest test in section 2(1)(b) of FOISA.
49. As the Commissioner is not satisfied that the information is exempt from disclosure under the exemptions in either section 30(c) or 31(1) of FOISA, she now requires the Council to disclose it to Mr Tibbitt.
50. With this decision, the Commissioner will provide the Council with a marked up copy of the information under consideration, indicating the information that should be disclosed.

Decision

The Commissioner finds that North Lanarkshire Council (the Council) failed to comply 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 not entitled to withhold the information covered by part 5 of the request under the exemptions in sections 30(c) and 31(1) of FOISA. In doing so, the Council failed to comply with section 1(1) of FOISA. The Commissioner requires the Council to disclose this information to Mr Tibbitt, by **18 July 2016**

The Commissioner finds also that the Council failed to give notice, as it was required to do by 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 North Lanarkshire 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.

Enforcement

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

Rosemary Agnew
Scottish Information Commissioner

02 June 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.

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info