

Decision Notice

Decision 275/2016: Mr Marc Ellison and the Chief Constable of the Police Service of Scotland

Referrals under the “Prevent” Professional Concerns Process

Reference No: 201601520

Decision Date: 20 December 2016



Summary

Police Scotland were asked for information on the number of referrals made under the “Prevent” Professional Concerns Process (which relates to preventing people from being drawn into terrorism).

Police Scotland withheld the information under exemptions relating to national security, law enforcement and personal information.

As part of her deliberations, the Commissioner considered Police Scotland’s interpretation of “information”. She did not agree with Police Scotland’s approach and found that they did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17 (Notice that information is not held); 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 13 July 2016, Mr Ellison made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The request concerned the Counter-Terrorism and Security Act 2015 and the “Prevent” Professional Concerns Process. The information requested was as follows:
 - i. The number of people referred to Police Scotland between 1 July 2015 and 13 July 2016.
 - ii. The number of referrals of students between the same dates.Mr Ellison also requested a breakdown of this information by authority, religion, age and gender.
2. Police Scotland responded on 8 August 2016, informing Mr Ellison that the information was exempt from disclosure in terms of sections 31(1) (National security), 35(1)(a) (Law enforcement) and 38(1)(b) (Personal information) of FOISA.
3. On 8 August 2016, Mr Ellison wrote to Police Scotland, requesting a review of their decision. Mr Ellison stated that he was content to receive the total number of people referred for each part of the request. He believed this would ensure that confidentiality and trust were maintained.
4. Police Scotland notified Mr Ellison of the outcome of their review on 22 August 2016. Police Scotland upheld their previous decision without modification.
5. On 23 August 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 as he did not consider disclosure of the information

would cause the harm claimed. He reiterated that he was content to receive only the overall numbers of people and students referred.

Investigation

6. 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 its response to that request before applying to her for a decision.
7. On 25 August 2016, Police Scotland were notified in writing that Mr Ellison had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Ellison.
8. In response, Police Scotland submitted that they did not actually hold any recorded information providing an answer to either part of Mr Ellison's request (although the appropriate answers could be deduced from interrogation of the authority's records). The case was then allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were invited to comment on this application. At this stage, the investigating officer pointed out to Police Scotland that they could not claim the information requested was exempt from disclosure under any of the exemptions in Part 2 of FOISA if they did not in fact hold any recorded information falling within the scope of Mr Ellison's request.
10. Police Scotland responded, providing submissions on why they considered this information was held by them and was exempt from disclosure.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of 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.

Definition of "information"

12. Section 73 of FOISA defines "information" (subject to conditions that are not relevant here) as meaning information recorded in any form.
13. Police Scotland explained that information relating to each individual referred through the Prevent process was recorded on a "tracker" spreadsheet, which included the personal data of the individual along with other contextual information relevant to the case.
14. Police Scotland stated that they made an assessment as to whether or not any individuals on the list fell into the time periods specified by Mr Ellison. Police Scotland confirmed that there was no specific record detailing that no individuals fell within the parameters of Mr Ellison's request; the only way they knew the answer was zero was by interrogating the "tracker" spreadsheet.
15. In Police Scotland's view, although the answer did not exist in a specific record, it could be calculated (from the information that was held). Consequently, they considered the information was held and should be exempt from disclosure.

16. The Commissioner disagrees with Police Scotland's interpretation. In her view, the definition of "information" contained in section 73 of FOISA is unequivocal; it can apply only to information that is held in recorded form. She does not accept that the absence of information (in this case, the absence of recorded information regarding individuals within the specified parameters) comprises "information" for the purposes of FOISA.
17. Similarly, the Commissioner does not accept that, because the answer "zero" can be calculated from information that is recorded (as Police Scotland has argued), that this answer comprises "information" for the purposes of FOISA. "Zero" would only have comprised recorded information for the purposes of FOISA if the relevant record had included, as part of its content, the figure "0" or the word "zero".
18. The Commissioner does not accept that Police Scotland can apply exemptions to information which is not recorded and, consequently, not held. The scheme established by Part 1 of FOISA is quite clear in this regard: unless the authority wishes to apply the provisions of section 18 of FOISA (i.e. refuse to reveal whether the information exists or is held, where revealing this would be contrary to the public interest), a Scottish public authority's only option where it does not hold information is to give notice to that effect in terms of section 17(1) of FOISA.
19. By failing to give Mr Ellison notice under either section 17 or section 18, the Commissioner finds that Police Scotland failed to comply with Part 1 (in particular section 17) of FOISA. In the case, the Commissioner has received no submissions in relation to section 18 and must conclude simply that Police Scotland did not hold the information in question.

Decision

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

The Commissioner finds that Police Scotland failed to give an appropriate response: either to give notice, in terms of section 17(1) of FOISA, that they did not hold the information requested, or, in terms of section 18 of FOISA, that it was not in the public interest to reveal whether the information existed or was held by them.

Appeal

Should either Mr Ellison or the Chief Constable of the Police Service of 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 December 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.

...

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.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

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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