

Decision Notice 024/2020

Health and Safety Policy for Lone Working

Applicant: The Applicant

Public authority: Crown Office and Procurator Fiscal Service

Case Ref: 201901096



Scottish Information
Commissioner

Summary

COPFS was asked for the Health and Safety Policy/Procedure for Lone Working applicable to employees in its Kirkcaldy Office.

COPFS refused to provide the Applicant with its Health and Safety Policy for Lone Workers and relied on the exemption relating to health and safety for withholding that information.

When the Applicant appealed to the Commissioner for a decision, COPFS argued that there was no right of appeal as the information was held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland. The Commissioner did not accept this argument.

The Commissioner investigated and found that COPFS had been entitled to withhold some, but not all, of the information on the basis that disclosure would endanger health and safety.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(1) (Health, safety and the environment); 48(c) (When application excluded)

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 17 April 2019, the Applicant made a request for information to the Crown Office and Procurator Fiscal Service (COPFS). The information requested was a copy of the Health and Safety policy/procedure for lone working applicable to employees in the Kirkcaldy Office of COPFS.
2. COPFS responded on 21 May 2019. It confirmed that it held a Lone Worker Policy falling within the scope of the request, but explained that it considered this to be exempt under section 39(1) of FOISA. In COPFS's view, disclosure of the information would, or would be likely to, endanger an individual's safety. COPFS also believed, in line with section 48(c) of FOISA, that there was no right of appeal to the Commissioner under section 47(1) of FOISA, as the information appeared to be held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.
3. On 24 May 2019, the Applicant wrote to COPFS, requesting a review of its decision to rely on an exemption for withholding the Lone Worker Policy from him.
4. COPFS notified the Applicant of the outcome of its review on 20 June 2019. In its response, COPFS explained that it was upholding its original decision to withhold the information under section 39(1) of FOISA. COPFS continued to argue that disclosure of the requested information would, or would be likely to, endanger an individual's safety. With regard to the public interest, it also asserted that the policy contained sensitive information relating to safety procedures, which could be exploited by anyone seeking to cause harm, and

publication would allow anyone suitably motivated to target and potentially circumvent the specific measures designed to protect the safety of these workers. On balance, it considered there to be a greater public interest in protecting the individuals concerned.

5. On 27 June 2019, the Applicant wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of COPFS's review because he did not consider that COPFS could meet the requirements of section 39(1) of FOISA.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision. In reaching this conclusion, the Commissioner has been mindful of the content of the Scottish Executive's policy memorandum which accompanied the Freedom of Information (Scotland) Bill. This sets out the reason for the exception in section 48(c) and explains that "Ministers considered that because of section 48 of the Scotland Act 1998 (SA), it would not have been competent for the Bill to provide for the Commissioner to require disclosure of information held by the Lord Advocate as head of the systems of criminal prosecution and of investigation of deaths in Scotland. Section 48(5) of the SA provides that any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken independently of any other person." Justification for the provision for the independence of this role was discussed during the passage of the Scotland Bill in 1998.
7. The memorandum indicated that Ministers would not have considered it appropriate to permit the Commissioner to investigate and rule upon the Lord Advocate's decision under FOI. Given the damage that disclosure of information provided to prosecuting authorities might cause, Ministers reached the following conclusions:

"It was considered that any provision which allowed the Commissioner to require the disclosure of such information would create uncertainty and be detrimental to the effective operation of the criminal justice system. It was considered vital that the Lord Advocate and procurators fiscal retain their autonomy in deciding what information should be disclosed and it was thought that it would be inappropriate for the Commissioner to be given powers to overrule the Lord Advocate or Procurators Fiscal and require disclosure."
8. Having considered the withheld information and submissions from COPFS on the application of section 48(c) of FOISA, together with the reasons for its inclusion in FOISA, the Commissioner took the view that, as the policy in question is a corporate policy, applicable to all staff within COPFS (as made clear at para 2.1 of the Policy) whether engaged in the functions covered by section 48(c) or not, he does not accept that this information relates directly to decisions taken by the Lord Advocate in his role as head of the systems of criminal prosecution and investigation of deaths in Scotland. Furthermore, the Commissioner considers that, if the exclusion in section 48(c) was designed to cover any recorded information held by the Lord Advocate, it would not have been drafted the way it is. In the circumstances, the Commissioner concluded that he was required to carry out an investigation and issue a decision.

9. On 24 July 2019, COPFS was notified in writing that the Applicant had made a valid application. The withheld information had already been obtained for the purposes of validation. 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. COPFS was invited to comment on this application and to answer specific questions. These related to its reliance on the exemption in section 39(1) of FOISA for withholding information in the Health and Safety Lone Workers Policy.

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 the Applicant and COPFS. He is satisfied that no matter of relevance has been overlooked.
12. In its submissions to the Commissioner, COPFS explained that, having reviewed the withheld information, it was of the view that a redacted version of the Lone Worker Policy could be disclosed to the Applicant. This redacted version was provided to the Applicant on 24 September 2019. Following receipt of this, the Applicant submitted that the redacted version was not sufficient to fulfil his request and he still required the full policy.
13. In its submissions, COPFS explained that it was continuing to rely on the exemption in section 39(1) of FOISA for the information contained in the Lone Worker Policy at para 3.14. It is this information which will be considered in the Commissioner's decision. The Applicant has informed the Commissioner that he is not concerned about receiving the personal data redacted from the final page of the policy.

Section 39(1) – Health, safety and the environment

14. Section 39(1) of FOISA states that information is exempt information 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.
15. As the Commissioner notes in his briefing on this exemption¹, 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. This test is less demanding than the "substantial prejudice" test.
16. COPFS submitted that all grades of its staff were engaged in the prosecution of crime and the investigation of deaths, and release of the redacted information in the Lone Worker Policy would potentially risk the safety of COPFS staff.
17. COPFS explained that the risk of harm to its staff was not a theoretical one and referred specifically to the results of a survey published by the Law Society of Scotland in September 2018. This survey found that 19% of prosecutors had been the victims of violence and 61% of prosecutors had been the victims of threatening behaviour.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

18. It also referred the Commissioner to records it maintained of internal reports of violence and aggression against its staff, and noted that, since January 2019, there had been 38 reported incidents against COPFS staff.
19. COPFS stated that its Lone Worker Policy recognises the evidence that the risk of violence and aggression to its staff was a real one. It asserted that the policy contained details of the steps taken to mitigate that risk and protect its staff. COPFS was concerned that disclosure of the redacted information would create a risk that those protective measures would be overcome and that, as a consequence, violence and aggression would continue to be directed at staff and their safety jeopardised.
20. In his application to the Commissioner, the Applicant has commented that, from his “experience of employee safety procedures knowing when staff are leaving, and returning to, a place of safety are of paramount importance; otherwise you would not know when they are exposed to risk on leaving the office; you would also not know when to become concerned for a colleague and initiate a check on their whereabouts, for example checking with their last known/planned place of attendance if overdue/failing to arrive at their destination.”
21. The Applicant submitted that he did not consider COPFS had met the requirements of the application of the exemption. He did not believe it was “able to evidence not just that such an eventuality is within the bounds of possibility, but that such an eventuality has some realistic prospect or degree of likelihood of occurring.” In seeking to support his view that the requested information should be disclosed to him, the Applicant made reference to the Commissioner’s *Decision 182/2014 Mr Andrew Picken and the Scottish Ministers*.
22. Having considered the information withheld at para 3.14 of the Lone Worker Policy, the Commissioner accepts that disclosure of certain of the information would, or would be likely to, endanger the health and safety of COPFS staff.
23. The Commissioner recognises that the matters addressed at para 3.14 do give an indication of some of the steps taken by COPFS to monitor and support lone workers. He also accepts that, if this information is disclosed, it would enlighten the public as to some of the mechanisms in place. He considers that parts of this information could be used to endanger the safety of COPFS staff, but the Commissioner does not accept that this is the case in relation to all of the withheld information.
24. The Commissioner considers that the measures detailed at the first, second and fifth bullet points relate to common-sense processes an organisation would reasonably be expected to put in place to support lone workers. The same can be said, in part, of the fourth bullet point. Indeed, these measures are similar to those recommended in publicly available guidance produced by the Health and Safety Executive for bodies to follow when considering how they can keep lone workers safe. Furthermore, COPFS has not provided any submission to the Commissioner to demonstrate how knowledge of these processes would enable an individual to overcome these protected measures to endanger the health and safety of a member of their staff. The Commissioner is therefore not satisfied that the exemption in section 39(1) of FOISA has been engaged in relation to this information.
25. Having considered the information contained in the third bullet point, and the remainder of the fourth, the Commissioner acknowledges that this information relates to more specific measures in place to protect lone workers. The Commissioner recognises that, if this information were released, it would be likely to reduce the effectiveness of these procedures and expose COPFS staff to the risk of violence or threatening behaviour. The Commissioner is also satisfied, on the basis of the submissions received from COPFS, that the threat of

violence or aggression against its staff is a real and distinct possibility. The Commissioner therefore accepts that all of the information in the third bullet point and certain of the information in the fourth bullet point would be exempt from disclosure under section 39(1) of FOISA.

26. As the Commissioner is satisfied that some information is exempt from disclosure under section 39(1) of FOISA, he is required to go on to consider the application of the public interest test in relation to that information.

Public interest test

27. Section 39(1) is a qualified exemption, which means that its application is subject to the public interest test in section 2(1)(b) of FOISA. Therefore, having decided that all of the information in bullet point 3 and some of the information in bullet point 4 is exempt under section 39(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If it is not, he must order COPFS to disclose the information.
28. COPFS acknowledged the following arguments in favour of disclosure of the information:
- (i) that HR policies might generally be expected to be disclosed;
 - (ii) sections of the Policy might be described as generic and release of those sections might not be objectionable.
29. In seeking to argue that the public interest favoured maintaining the exemption, COPFS submitted that its staff had a critical role in relation to the prosecution of crime and investigation of deaths, which meant that they were at real risk from those who wished to disrupt this public service.
30. In his submissions on the public interest test, the Applicant stated that he found it profoundly concerning that COPFS did not appear to know the times its staff left or returned to the office, which in turn led to it to not knowing where its staff were.
31. The Applicant explained that his motivation for requesting this information was to facilitate him in calculating the amount of time spent on, and cost associated with, specific actions taken by COPFS. He also asserted that, in making his request for information, he had stated “a helpful focus on signing in/out procedures”, which he considered would allow COPFS to demonstrate that it had relevant procedures in place.
32. The Applicant also submitted that COPFS was not being as open, honest and transparent as it should be. He contended that if COPFS did have procedures which actively ensured the safety of their personnel (in the form of this policy), then their employees were not adhering to it and line management in the Kirkcaldy COPFS office was not meeting its legal “Duty of Care” obligations in enforcing these requirements.
33. The Applicant submitted that he required the whole policy as part of his evidence to COPFS senior officers and appropriate parliamentarians, including the Justice Secretary, that COPFS was failing in regards to its Health and Safety duties and responsibilities towards its staff; specifically those in the COPFS Kirkcaldy office. He also highlighted questions of organisational competence and claimed release of this policy would provide enhanced scrutiny of decision-making processes and thereby improve accountability and participation of this organisation.

34. The Commissioner acknowledges that there is a clear public interest in ensuring that organisations have appropriate policies and procedures in place to protect the safety and well-being of workers. This public interest also extends to ensuring that these are fully implemented and enforced. Sight of the relevant policy (as was requested here), however, does not evidence whether it is being implemented and enforced.
35. In any case, a balancing exercise must be undertaken. The Commissioner has found that disclosure of the information in the third bullet point and part of the fourth bullet point would, or would be likely to, endanger the physical or mental health or safety of individuals. This means the public interest arguments in favour of disclosure must be strong to outweigh the public interest in ensuring that individuals are not endangered as a result of such disclosure.
36. The information that has already been disclosed to the Applicant provides evidence that COPFS does have a Health and Safety policy in place for Lone Workers. This, together with the remaining (withheld) information the Commissioner has not found to be exempt under section 39(1) of FOISA, gives insight into the nature of the mechanisms/processes in place to protect staff, including the role that management has in this and goes some way to satisfying the public interest in this case.
37. The Commissioner does not consider the public interest arguments advanced by the Applicant for disclosure are strong enough to outweigh the public interest in ensuring that individuals are not endangered by the information he has found to be exempt under section 39(1) of FOISA. In reaching this conclusion, he has borne in mind that disclosure of this information would not contribute significantly to addressing the public interest concerns identified by the Applicant. He therefore finds, on balance, that the public interest in maintaining the exemption in section 39(1) of FOISA outweighs that in making the information available and that COPFS was entitled to withhold the information in bullet point three and some of the information in bullet point four under section 39(1) of FOISA.
38. The information the Commissioner has not found to be exempt must, of course, be disclosed to the Applicant. The Commissioner will provide COPFS with a marked-up copy of the policy, indicating that part of bullet point four which is to be disclosed.

Decision

The Commissioner finds that the Crown Office and Procurator Fiscal Service (COPFS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by relying on the exemption in section 39(1) of FOISA for withholding information against the third and part of the fourth bullet point in para 3.14 of the Lone Worker Policy, COPFS complied with Part 1.

However, by relying on the exemption in section 39(1) for withholding the Lone Worker Policy and latterly the information against bullet points one, two, five and part of four in para 3.14 of the Lone Worker Policy, COPFS failed to comply with Part 1 of FOISA.

The Commissioner therefore requires COPFS to disclose to the Applicant all of the information against bullet points one, two and five and part of the information against bullet point four (as indicated on a marked-up copy provided to COPFS) at para 3.14 of the Lone Worker Policy, by 20 March 2020.

Appeal

Should either the Applicant or Crown Office and Procurator Fiscal Service 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 the Crown Office and Procurator Fiscal Service fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Crown Office and Procurator Fiscal Service has failed to comply. The Court has the right to inquire into the matter and may deal with the Crown Office and Procurator Fiscal Service as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

4 February 2020

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.

...

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.

...

48 When application excluded

No application may be made to the Commissioner for a decision under section 47(1) as respects a request for review made to -

...

- (c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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