

Decision Notice

Decision 048/2018: Mr M and the Chief Constable of the Police Service of Scotland

Investigation of death: records of specified person

Reference No: 201702184

Decision Date: 11 April 2018



Summary

Police Scotland were asked for information concerning records of a deceased person. Police Scotland refused to confirm or deny whether the information existed or was held by them.

The Commissioner accepted that it would not be in the public interest for Police Scotland to reveal whether the information existed or was held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects response to request); 35(1)(a) and (b) (Law enforcement)

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 20 January and 28 February 2017, Mr M made two substantially similar requests for the same information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested in both requests was all recorded information held by Police Scotland pertaining to a specified (deceased) person.
2. Police Scotland responded on 4 May 2017, refusing to confirm or deny whether they held the information or whether it existed. Police Scotland applied section 18(1) of FOISA, in conjunction with sections 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(a) and (b) (Law enforcement) of FOISA.
3. On 11 July 2017, Mr M wrote to Police Scotland requesting a review of their decision to decline his request for information. He did not accept the reasons given in Police Scotland's response.
4. Police Scotland notified Mr M of the outcome of their review on 8 August 2017, confirming their position that section 18(1) of FOISA applied.
5. On 6 December 2017, Mr M wrote to the Commissioner. Mr M applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of Police Scotland's review, because he did not accept that disclosing the information he had requested under FOISA would cause any harm.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr M 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.
7. On 9 January 2018, Police Scotland were notified in writing that Mr M had made a valid application. The case was allocated to an investigating officer.

8. 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 and answer specific questions, with reference to their application of section 18(1) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr M and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Section 18 of FOISA – “neither confirm nor deny”

10. Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr M's request.
11. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by the authority;
 - (ii) if the information were held by the authority (and it need not be), the authority 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;
 - (iii) the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
12. Where a public authority has chosen to rely on section 18(1), 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. He must also establish whether, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions listed in section 18(1) and cited by the authority.
13. 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 were 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 therefore be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) would outweigh any public interest in disclosing any relevant information, if it existed and were held.
14. In this case, Police Scotland submitted that, if they held any information falling within the scope of Mr M's request, it would be exempt from disclosure by virtue of the exemptions in sections 35(1)(a) and (b), as well as 34(1), of FOISA. The Commissioner will consider the exemptions in section 35(1) of FOISA first.

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

15. Mr M believed that the information that he requested was capable of disclosure, assuming it existed and were held. He did not accept that harm would occur if it were disclosed under FOISA. He explained the context in which he had made his request, identifying concerns about the accuracy of information held by Police Scotland.
16. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that 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.
17. As the Commissioner's guidance¹ 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.
18. 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". He 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).
19. Police Scotland submitted that disclosure of the requested information, if it existed and were held by them, would erode the general principles of trust and confidentiality the public expect of the police service in handling their personal data. Police Scotland believed that this would in turn substantially prejudice their ability to prevent and detect crime and apprehend offenders, as it would result in a loss of invaluable co-operation and provision of information.
20. Having considered the submissions from both Mr M and Police Scotland, the Commissioner is satisfied that any information held by Police Scotland and falling within the scope of Mr M's request would be held for purposes relating to the prevention or detection of crime and/or the apprehension or prosecution of offenders. Not all of Police Scotland's submissions on the relevant circumstances can be narrated here, given the need to avoid confirming or denying whether any relevant information exists. In all the circumstances, the Commissioner is satisfied that disclosure of any relevant information if held would carry with it sufficient risk of substantial prejudice for the exemptions to apply.
21. The Commissioner accepts, therefore, that (assuming the information requested by Mr M existed and were held by them) Police Scotland would have been entitled to respond to Mr M's request by applying either or both of the exemptions in section 35(1)(a) and (b) of FOISA.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

The public interest

22. Police Scotland recognised the importance of justice to an individual and acknowledged that the public interest might be served by disclosure of information about a particular person and their situation, assuming the information existed and were held. It had to bear in mind, however, that disclosure under FOISA could not be confined to Mr M: fairness to Mr M might not, in such circumstances, extend to the deceased or others known to them. It also had to bear in mind the scope for speculation in the event that any relevant if held information were disclosed.
23. Police Scotland also highlighted the expectations of those who engaged with the Police, submitting that they did so in the expectation that their information would remain confidential, or at least processed subject to strict safeguards and not disclosed publicly. They considered it highly likely that individuals would be less willing to engage with the Police if they knew that their information could enter the public domain in this way. That reduced willingness, they argued, would not be in the public interest.
24. The Commissioner has considered carefully the submissions he has received as to where the public interest might lie here. He accepts there is a clear public interest in ensuring Police Scotland is able to continue to investigate crime and protect the public. For it to do so requires a degree of trust and confidentiality, as suggested above. There may be a degree of public interest in Mr M himself knowing about the circumstances pertaining to his request, assuming any relevant information existed and were held by Police Scotland. It is less likely, however, that this could extend to the wider public, given the specific nature of this request. The Commissioner is not persuaded by Mr M's suggestion that there would be no harm in disclosing here, and is more inclined to accept Police Scotland's submissions as to harm which would clearly not be in the public interest.
25. On balance, the Commissioner is satisfied that Police Scotland could have given a refusal notice under section 16(1) of FOISA here, on the basis that the information requested by Mr M (if it existed and were held) would have been exempt from disclosure under section 35(1)(a) and (b).
26. The Commissioner is not required therefore, to go on to consider whether any relevant information would also be exempt from disclosure under section 34(1) of FOISA. He must still consider whether revealing whether the information existed and was held would have been contrary to the public interest.

Section 18(1) - public interest

27. Mr M raised concerns in his application as to the accuracy of any relevant information held by Police Scotland. Clearly there is a general public interest in a Scottish public authority holding accurate information, especially in the fields under consideration here: this co-exists here with the more particular interest for Mr M in the exact circumstances pertaining to the person who is the focus of his request.
28. Police Scotland's public interest submissions are integrally connected with those advanced on the application of the section 35 exemptions (above). Naturally, there are aspects of the relevant submissions which the Commissioner cannot disclose without tending to reveal whether information was indeed held, or whether it existed.
29. Police Scotland submitted that confirming whether the information sought by Mr M existed or was held would damage the relationship between the Police and those they protected, given

the confidential relationship described above. They contended that the resulting loss of trust would be seriously detrimental to the efficient and effective conduct of policing.

30. The Commissioner is satisfied that revealing (to the public, not solely to Mr M) whether or not Police Scotland held the requested information, or whether it existed, would compromise the relationship between Police Scotland and the public, as discussed above. In the circumstances, the Commissioner is satisfied that this would be contrary to the public interest.
31. Police Scotland were therefore entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr M, or whether that information existed.

Decision

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

Appeal

Should either Mr M 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

11 April 2018

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.

...

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.

...

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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info