

Decision Notice

Decision 088/2017: Mr Chris Marshall and the Chief Constable of the Police Service of Scotland

Recorded Police Warnings for cannabis possession

Reference No: 201700210

Decision Date: 30 May 2017



Scottish Information
Commissioner

Summary

Police Scotland were asked for the number of Recorded Police Warnings (RPWs) issued for cannabis possession since the RPW scheme began. Police Scotland refused to disclose the information. The Commissioner found that Police Scotland had wrongly withheld the information and she required them to disclose it.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 35(1)(a) (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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 23 November 2016, Mr Marshall made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked:
 - (i) How many Recorded Police Warnings (RPWs) have been issued since the introduction of the scheme in January? Please provide a monthly breakdown of the figures. I would also like to know the reason for each individual warning being issued.
 - (ii) Secondly, how many of the warnings were issued for cannabis possession?
2. Police Scotland responded on 14 December 2016. They provided the number of RPWs issued each month since January 2016, but they withheld the reason for each warning being issued. Police Scotland stated that they had analysed the data only up until 10 July 2016 and that they were withholding the reasons for each RPW under section 35(1)(a), (b) and (c) of FOISA (Law enforcement). Police Scotland argued that analysing the number of RPWs issued after 10 July 2016 would exceed the £600 cost ceiling, and they relied on section 12(1) of FOISA (Excessive cost of compliance) for this part of the request.
3. On 14 December 2016, Mr Marshall wrote to Police Scotland requesting a review of their response to the second part of his request (the number of warnings given for cannabis possession) on the basis that it was in the public interest to know how Police Scotland were using RPWs to tackle crime on the streets.
4. Police Scotland notified Mr Marshall of the outcome of their review on 10 January 2017, upholding their original decision to withhold the information under section 35(1)(a), (b) and (c) of FOISA. Police Scotland made no reference to section 12(1) of FOISA in their review response.

5. On 1 February 2017, Mr Marshall applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of Police Scotland's review because he considered that disclosure was in the public interest, for reasons which he explained in his application.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Marshall 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 23 February 2017, Police Scotland were notified in writing that Mr Marshall had made a valid application, and were asked to send the Commissioner the information withheld from Mr Marshall. Police Scotland provided the information and 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, including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

9. 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 Marshall and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Withheld information

10. Police Scotland are withholding the number of RPWs issued for cannabis possession between 11 January 2016 and 23 November 2016.
11. During the investigation, Police Scotland withdrew their reliance on section 35(1)(b) and (c) of FOISA. They confirmed that they were relying only on section 35(1)(a) of FOISA to withhold information from Mr Marshall. They also confirmed that they had withdrawn reliance on section 12(1) of FOISA.

Section 35(1)(a) of FOISA – Law enforcement

12. In order to accept that the exemption in section 35(1)(a) applies to the withheld information, the Commissioner has to be satisfied that its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. 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 more than simply a remote possibility.
13. As the Commissioner's guidance¹ on this exemption highlights, the term "prevention or detection of crime" is wide ranging, encompassing actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of people suspected of being

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

responsible for committing a crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.

Police Scotland's submissions

14. Police Scotland noted that they routinely publish statistical information regarding recorded and detected offences, including drugs offences. They argued that public disclosure of the ultimate disposal of these offences, i.e. how many were dealt with by RPW, would serve to provide an accurate insight as to the most likely outcome for particular offence types. In terms of crime prevention, Police Scotland asserted that they would be strongly opposed to the creation of a public perception that certain types of drug offending were somehow less serious than others.
15. Police Scotland submitted that the number of RPWs issued for cannabis possession, if examined in isolation, does not provide a true reflection of Police Scotland's activity towards the detection and prevention of drug use within Scotland, nor does it provide a comprehensive picture of the work that is subsequently undertaken as a result of that warning to provide further rehabilitation opportunities for individual offenders.
16. Police Scotland contended that if the information was viewed in isolation it could potentially undermine the work carried out not only by Police Scotland, but also their partner agencies in drug prevention by creating the false impression that an RPW is the only disposal open to prosecutors.
17. Police Scotland stressed that they wanted to convey the exact opposite to this message: possession of cannabis, irrespective of the exact circumstances, is illegal and could potentially lead to a prosecution disposal. They stated that the issue of an RPW is not a default position as could perhaps be perceived if the RPW figures were released without surrounding context, or if that context were to be ignored for whatever reason.
18. Police Scotland noted that there was a significant difference in terms of consequence for an individual between the issue of an RPW and a prosecution. They argued that fear of detection and the consequences thereafter was a powerful crime prevention tool. In their view, disclosure of the information would lead to a situation whereby cannabis possession is considered somehow tolerable by Police Scotland on the basis that it *only* attracts a warning.
19. Police Scotland argued that RPWs provide an intervention mechanism that is timely and proportionate; the scheme complements the discretion a police officer already has to administer an on-the-spot verbal warning for minor offences. They explained that issuing an RPW for low level offending serves to minimise bureaucracy and maximise officers' operational availability to deal with other offences, while allowing strict criteria to be applied to offenders in offering them this "chance" to prevent their offending from resulting immediately in more serious consequences.
20. Police Scotland noted that the Crown Office and Procurator Fiscal Service (COPFS) has deliberately chosen not to publish the Lord Advocate's guidance on the offences and circumstances in which an RPW might be suitable. Police Scotland argued that the provision of statistical information regarding the issue of RPWs would significantly undermine the position taken by both agencies (Police Scotland and COPFS), which is that details of the offences and circumstances which might attract an RPW are not appropriate for public disclosure because it would prejudice Police Scotland's ability to prevent and detect crime. Ultimately, this could lead to the withdrawal of the scheme, leaving no alternative but to report all offenders. This would reduce capability for both COPFS and Police Scotland to

provide a proportionate response to lower level offending within communities and therefore reduce capacity to combat more serious offences.

The Commissioner's conclusions on section 35(1)(a)

21. The Commissioner has considered all of the submissions made by Police Scotland in relation to the application of section 35(1)(a) of FOISA and she is not satisfied that disclosure of the number of RPWs issued for cannabis possession would, or would be likely to, prejudice substantially the prevention or detection of crime.
22. Police Scotland appear to be suggesting that disclosure of the information could lead the general public to conclude (wrongly) that the possession of cannabis is not treated as a serious crime, and will automatically be dealt with by an RPW rather than prosecution. If individuals consider that cannabis possession is a less serious drugs offence because it could receive a less serious penalty, this could harm the drug prevention work (and therefore the crime prevention work) of Police Scotland as well as their partner agencies.
23. The Commissioner is not persuaded by the arguments put forward by Police Scotland. The RPW figures do not have to be provided "in isolation": Police Scotland can provide as much or as little explanatory guidance to accompany the disclosure as they see fit. They could choose to disclose the information with an explanation which puts the figures in context, while stressing that, despite the option of a RPW, cannabis possession is still a serious crime which can attract a penal sentence.
24. Police Scotland expressed concerns that, even if the context surrounding RPWs were known, it could still be ignored. The Commissioner acknowledges that this is a possibility. However, information should not be withheld simply because an authority suspects that members of the public may disregard the accompanying notes or may wilfully misinterpret the data they obtain. Police Scotland cannot predict or control how people understand or use information, but this does not mean that information should be withheld for fear that it might be misused or misrepresented.
25. Police Scotland referred to the Lord Advocate's guidance on RPWs, noting that both they and COPFS have agreed that this guidance should not be published. They asserted that the scheme might be withdrawn, which would be to the detriment of both COPFS and Police Scotland, as it would prevent them from providing a proportionate response to lower level offending.
26. The Commissioner is not persuaded by the argument that if the requested information was disclosed there was a chance that the entire RPW scheme would have to be disbanded, and notes that Police Scotland offered no evidence to support this view. It is no secret that RPWs are sometimes used in cases involving cannabis possession. Police Scotland has effectively confirmed that this happens, by choosing to withhold the number of such RPWs under section 35(1)(a) of FOISA. In addition, the Chief Constable has previously commented publicly² on the potential use of RPWs for cannabis possession. The Commissioner is therefore satisfied that it is public knowledge that RPWs may be used in cases of cannabis possession and disclosure of statistics confirming that fact will not be revealing any new information on this point, whether or not the Lord Advocate's guidance is disclosed.
27. In the circumstances, the Commissioner cannot see how disclosure of the specific number of RPWs issued for cannabis possession could, in any way, lead to the disbanding of the RPW

² <https://www.pressreader.com/uk/scottish-daily-mail/20160927/281904477661554>

scheme. Police Scotland has not made it clear to the Commissioner why disclosure of the number of RPWs for cannabis possession would undermine the entire RPW scheme to the extent that it is no longer viable.

28. Similarly, the Commissioner has not seen any evidence to support Police Scotland's assertion that disclosure of the number of RPWs for cannabis possession would affect their ability to prevent crime by engaging in work with partners to prevent drug-related offences.
29. In conclusion, the Commissioner does not accept that disclosure of the withheld information to Mr Marshall (and thereby into the public domain), would cause, or would be likely to cause, prejudice substantially the prevention or detection of crime. She does not believe such a conclusion can be reached on the basis of the arguments provided by Police Scotland.
30. The Commissioner therefore does not accept that the exemption in section 35(1)(a) of FOISA should be upheld in this case. Given that this exemption does not apply to the withheld information, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in wrongly withholding the information requested by Mr Marshall under the exemption in section 35(1)(a) of FOISA.

The Commissioner requires Police Scotland to provide Mr Marshall with the information by 14 July 2014.

Appeal

Should either Mr Marshall 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.

Enforcement

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

Margaret Keyse
Acting Scottish Information Commissioner

30 May 2017

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.

...

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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info