

Decision Notice



Decision 116/2013 Mr Donnie Mackenzie and the Chief Constable of the
Police Service of Scotland

Surveillance operations

Reference No: 201300648 and 201300703
Decision Date: 24 June 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 3 and 13 January 2013, Mr Mackenzie requested from the Chief Constable of Northern Constabulary (the Police) information relating to joint agency surveillance operations. The Police responded to both requests in terms of section 12(1) of FOISA, notifying Mr Mackenzie that the cost of ascertaining whether information was held relative to each of his requests would exceed £600 and, therefore, that they were not obliged to comply with the requests.

Following an investigation, the Commissioner found that the Police were entitled to neither confirm nor deny whether they held information which would address Mr Mackenzie's requests.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18 (Further provisions as respects responses to request); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Note: Mr Mackenzie's information request was made to the Chief Constable of Northern Constabulary. However, the decision has been issued in the name of the Chief Constable of the Police Service of Scotland (Police Scotland) as the statutory successor to the Chief Constable of Northern Constabulary under the Police and Fire Reform (Scotland) Act 2012.

Background

1. On 3 January 2013, Mr Mackenzie, who had been in previous correspondence with the Police, wrote to them requesting the following information (request 1):
 - a) *Please could you tell me if Northern Constabulary is involved in any joint agency operations which include surveillance?*
 - b) *If so, could you please specify how many operations and how many staff were committed to these for the date of my original request? (15/10/2012)*



- c) *Could you also please specify the total number of people who were the target of these operations for the same date?*
2. On 13 January 2013, Mr Mackenzie wrote to the Police requesting the following information (request 2):
- Could you tell me how many surveillance operations Northern Constabulary is involved in where the target or targets of the surveillance have not been charged with anything and they have been under surveillance for:*
- A - more than 1 year,*
B - more than 2 years,
C - more than 4 years,
D - more than 8 years,
E - more than 11 years?
- I would note that the wording above does not explicitly state that Northern Constabulary be involved in the operation throughout the entire period, only in some capacity at present.*
- Could you also tell me for any results, how many of these people have no criminal record?*
3. The Police responded to request 1 on 30 January 2013 and to request 2 on 8 February 2013. In each case, they explained that, by virtue of section 12 of FOISA, they were not obliged to comply with his request. This was because the cost of identifying whether any operations or investigations fell within the scope of his requests would exceed £600.
4. On 3 (request 1) and 15 (request 2) February 2013, Mr Mackenzie wrote to the Police requesting a review in respect of the responses he had received, providing reasons why he disagreed with each outcome.
5. The Police responded to Mr Mackenzie's requirements for review on 1 and 14 March 2013, respectively. In relation to each request, they upheld the original response that, by virtue of section 12 of FOISA, they were not required to comply.
6. On 6 (request 1) and 14 (request 2) March 2013, Mr Mackenzie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Police reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The applications were validated by establishing that Mr Mackenzie made requests for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review the responses to those requests. The cases were then allocated to an investigating officer.



Investigation

8. By virtue of the Police and Fire Reform (Scotland) Act 2012, on 1 April 2013 the Chief Constable of the Police Service of Scotland (Police Scotland) became the statutory successor of the Chief Constables of the previous eight Scottish police forces. This included the statutory responsibilities set out in FOISA.
9. On 28 March 2013 (request 1) and 11 April 2013 (request 2), the investigating officer notified Police Scotland in writing that the applications had been received from Mr Mackenzie. Police Scotland were given an opportunity to provide comments on the applications (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions.
10. It was drawn to the attention of Police Scotland that, when relying on section 12(1) of FOISA, an authority may not take into account any costs incurred in determining whether it actually holds the information requested. In these particular cases, the Police informed Mr McKenzie that to ascertain whether they held information relevant to his requests would exceed the cost limit of £600. They did not indicate whether or not information was actually held.
11. Responding in respect of both cases, Police Scotland confirmed that they no longer wished to rely upon section 12(1) of FOISA. Instead, they now wished to rely on section 18(1) of FOISA and neither confirm nor deny whether they held the information requested. They indicated that, if held, the information could be withheld under sections 34 and 35 of FOISA.
12. Mr Mackenzie was invited to provide his comments on this case, and in particular on the public interest in confirming whether or not the information he had requested existed or was held by Police Scotland.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Mackenzie and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 18(1) of FOISA – “neither confirm nor deny”

14. As mentioned above, in their submissions to the Commissioner, Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr Mackenzie's requests.
15. Section 18 allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it;



- if the information were held by the authority (and it need not be), it 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, 39(1) or 41 of FOISA;
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
16. Where a public authority has chosen to rely on section 18(1) of FOISA, 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. She 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 in sections 28 to 35, 39(1) or 41 of FOISA.
17. Whilst doing so, the Commissioner must ensure that her decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.
18. In this case, Police Scotland submitted that, if they did hold any information falling within the scope of Mr Mackenzie's requests, it could be withheld under exemptions in sections 34 and 35 of FOISA.
19. 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 it held would be exempt information under one or more of the listed exemptions. The exemptions claimed by Police Scotland are subject to the public interest test in section 2(1)(b) of FOISA, so the authority must also be satisfied that the public interest in maintaining the exemptions outweighs any public interest there would be in releasing any relevant information they held.
20. The Commissioner must first, therefore, consider whether the Police could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and was held.
21. Having reviewed Police Scotland's submissions, the Commissioner considers those on section 34(1)(a)(i) to be most relevant in this case and consequently has focused on these below.

Section 34(1)(a)(i) of FOISA

22. Section 34(1)(a)(i) of FOISA provides that information is exempt from disclosure if it has been held at any time for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence.



23. The exemptions in sections 34 are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies.
24. In this case, having considered the submissions presented by Police Scotland, the Commissioner accepts that, if the requested information in this case existed and was held by the Police, it would be held for the purposes of an investigation which they had a duty to conduct for the purposes specified above. The Commissioner accepts, therefore, that such information would fall within the exemption in section 34(1)(a)(i) of FOISA.
25. This exemption in section 34(1)(a)(i) is subject to the public interest test in section 2(1)(b) of FOISA.

The public interest test – section 2(1)(b)

26. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. it must serve the interests of the public.
27. The Commissioner is aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on this exemption, the then Justice Minister, Jim Wallace, argued that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecutions and investigations, and the role of criminal proceedings as the appropriate forum for bringing information of this kind into the public domain. He also said: "We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."

Submission from the Police

28. Police Scotland submitted that it was never in the public interest to disclose information which would hinder their ability to investigate crimes using a variety of methodologies, nor was it in the public interest to prevent an individual receiving a fair trial. Co-operation in investigations, both by other authorities and by those providing information, would be undermined by such disclosure.



The Commissioner's view

29. Having carefully considered all of the arguments presented by Police Scotland and by Mr Mackenzie (and noting that she is not able to summarise all of these in this decision), the Commissioner has concluded, in all the circumstances of this case, that the public interest in maintaining the exemption in section 34(1)(a)(i) of FOISA would outweigh the public interest in disclosure of the information, if in existence and held.
30. Having accepted that the Police could give a refusal notice under section 16(1) of FOISA on the basis that any relevant information would be exempt information by virtue of section 34(1)(a)(i) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether the Police were entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.

The public interest – section 18(1)

31. Mr Mackenzie's submissions focused on the importance of transparency in this area, to ensure that the agencies involved were operating within the law.
32. Police Scotland concluded that, on balance, it would not be in the public interest to confirm or deny whether they held the requested information. They highlighted the risk of providing information of advantage of those subject to such operations, enabling them to take evasive action, interfere with the flow of intelligence and (in the absence of surveillance) operate with greater confidence, potentially to the risk of public safety.
33. The Commissioner is satisfied that, were Police Scotland to reveal whether any of the information requested by Mr Mackenzie existed or was held by it, that would have the prejudicial impact described on their investigative ability, and might well be used to advantage by the criminally minded. Clearly, this would not be in the public interest.
34. Having considered the submissions of both parties, the Commissioner is satisfied that, in all the circumstances of this case, it would be contrary to the public interest for the Police to reveal whether the information requested by Mr Mackenzie existed or was held by them.
35. As a result, the Commissioner is satisfied the Police Scotland are entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr Mackenzie.

Decision 116/2013
Mr Donnie Mackenzie and
the Chief Constable of the Police Service of Scotland



DECISION

The Commissioner finds that the Chief Constable of the Police Service of Scotland was entitled, under section 18(1) of the Freedom of Information (Scotland) Act 2002, to refuse to reveal whether the information requested by Mr Mackenzie existed or was held.

Appeal

Should either Mr Mackenzie or the Chief Constable of the Police Service of Scotland wish to appeal against this decision, there is an 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
24 June 2013



Appendix

Relevant statutory provisions

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, 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.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.



34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence; or
 - ...