

Decision Notice

Decision 116/2014

Mr Tom Taylor and the Chief Constable of the Police Service of Scotland

Website forum exchanges

Reference No: 201400260

Decision Date: 30 May 2014



Scottish Information
Commissioner

Summary

On 22 November 2013, Mr Taylor asked the Chief Constable of the Police Service of Scotland (the Police) for website forum exchanges relating to a specified complaint. Following a review, the Police notified Mr Taylor that they would neither confirm nor deny whether any such information existed or was held. Following an investigation, the Commissioner concluded that the Police were not entitled to do this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 18(1) (Further provision as respects responses to requests)

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.

Background

1. On 22 November 2013, Mr Taylor wrote to the Police, requesting copies of all website forum exchanges obtained by or on behalf of a named police officer during the investigation of a specified complaint against the Police. He requested other information at the same time but, by the close of the investigation, did not seek a decision from the Commissioner in relation to that information.
2. The Police responded on 16 December 2013, applying section 18 of FOISA to the request. In other words, they refused to reveal whether the requested information existed or whether they held it. As required by section 18, they listed the exemptions in FOISA which they considered would apply if the information existed and was held.
3. On 6 January 2014, Mr Taylor wrote to the Police requesting a review of their decision. He considered the application of section 18 to be erroneous.
4. The Police notified Mr Taylor of the outcome of their review on 28 January 2014. They upheld their original response without modification.
5. On 4 February 2014, Mr Taylor wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Taylor made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted the Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. These focused on their application of section 18 of FOISA
8. The Police provided comments. Mr Taylor also provided comments during the investigation.
9. During the investigation, the Police provided Mr Taylor with copies of the web forum exchanges they understood him to be seeking. They did this following compliance with the recommendations made by the Police Investigations and Review Commissioner (PIRC) in relation to the complaint specified in Mr Taylor's request.
10. Mr Taylor informed the Commissioner that he wished her to consider whether the Police had been correct to respond in terms of section 18(1) of FOISA in carrying out their review. The Police adhered to the position that they had been correct to respond in this way.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Taylor and the Police. She is satisfied that no matter of relevance has been overlooked.

Section 18 of FOISA

12. 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 it, and
 - (ii) 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, 38, 39(1) or 41 of FOISA, and
 - (iii) the authority considers that to reveal whether it holds the information, or whether it exists, would be contrary to the public interest.
13. The Police described the information sought by Mr Taylor as relating to a "live" complaint. Therefore, its existence could not be publicly confirmed. Their position on confirmation (and disclosure) changed once it had been confirmed that that all the relevant PIRC recommendations had been complied with. They made other submissions which they considered to be relevant, but which were not directly related to the information sought by Mr Taylor.
14. Mr Taylor noted that the PIRC investigation had been completed by July 2013, the report being published on PIRC's website on 3 July. He also highlighted correspondence he had received from the Police, dated 6 November 2013, confirming that they had considered the web forum exchanges in response to PIRC's recommendation. Clearly, all of this happened before Mr Taylor made his request.

The Commissioner's findings

15. The Commissioner has examined the PIRC report referred to in Mr Taylor's submissions, along with the Police letter of 6 November 2013. The report makes findings on the Police's failure to consider the web forum exchanges in handling the complaint, and recommends that the Police consider these to complete their consideration of the complaint. On that basis, the Police appear to have concluded that the complaint investigation remained live.
16. The investigation may have remained "live" at the time the Police dealt with Mr Taylor's information request and requirement for review, although the letter of 6 November 2013 would suggest that it did not (at least insofar as it related to the issue of the web forum exchanges). The issue of the Police's consideration of these exchanges as part of a complaint investigation had clearly been in the public domain for some time before Mr Taylor's request, as evidenced by the PIRC report if nothing else.
17. In any event, it does not follow automatically from the existence of a live investigation that it will be contrary to the public interest to reveal whether any information pertinent to that investigation exists or is held by the public authority concerned.
18. In all the circumstances, and having considered Police Scotland's submissions fully, the Commissioner fails to understand how (at the point when the Police dealt with Mr Taylor's requirement for review) it could have been contrary to the public interest to reveal the existence of this information. It was already a matter of public record that they had been asked to consider the web forum exchanges, by the relevant regulator. They had confirmed that they had done so, albeit not publicly. From the submissions provided by the Police, it is not evident what harm there could have been to the public interest in confirming (under FOISA, and therefore to the world at large) that they held the information, in the context of either this particular complaint investigation or anything of wider import.
19. In the absence of any convincing arguments as to why it would have been contrary to the public interest to reveal whether the requested information (the web-forum exchanges) existed or was held by them, the Commissioner must find that, the Police were not entitled to apply section 18(1) of FOISA in this case. In the circumstances, she does not find it necessary to consider the applicability of the exemptions cited by the Police.
20. As the web-forum exchanges have now been provided to Mr Taylor the Commissioner does not require the Police to take any further action in response to this decision.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (the Police) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Taylor. She finds that the Council was not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the requested information existed or was held by it.

Given that the Police have since disclosed the information to Mr Taylor, the Commissioner does not require them to take any action in respect of this failure in response to Mr Taylor's application.

Appeal

Should either Mr Taylor 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
30 May 2014

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.

...

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.

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