

Decision Notice

Decision 016/2018: Mr Z and the Chief Constable of the Police Service of Scotland

Name of Chief Inspector who attended meeting

Reference No: 201701723

Decision Date: 7 February 2018



Summary

Police Scotland were asked for the name of the Chief Inspector who attended a particular meeting. Police Scotland refused to confirm or deny whether the information existed or was held by them.

In the circumstances, 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), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 18(1) (Further provision as respects responses to requests); 38(1)(a) and (5) (Definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data")

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 24 July 2017, Mr Z made an information request to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked for the name of a Chief Inspector who had (allegedly) attended a specified meeting and had subsequently instructed that a "concern report" should be created regarding the actions of Mr Z.
2. Police Scotland responded on 18 August 2017. They refused to confirm or deny whether they held the requested information, relying on section 18(1) of FOISA in conjunction with section 38(1)(b) of FOISA (Personal information).
3. On 18 August 2017, Mr Z wrote to Police Scotland requesting a review of their decision. He did not accept that section 18(1) of FOISA was applicable or a valid reason not to provide the name of the Chief Inspector. He explained that he had a letter, received from a named police officer, which stated that a Chief Inspector had attended the meeting he had referred to in his request. Mr Z argued that the Chief Inspector would have been attending this meeting in an official capacity and that disclosure under FOISA would not breach the Chief Inspector's right to privacy.
4. Police Scotland notified Mr Z of the outcome of their review on 14 September 2017. Police Scotland continued to refuse to confirm or deny whether they held the information, under section 18(1) of FOISA. However, they withdrew their previous reliance on section 38(1)(b) of FOISA in conjunction with section 18(1). Instead, they argued that if the information existed and was held it would comprise Mr Z's own personal data and would be exempt from disclosure under section 38(1)(a) of FOISA. Police Scotland therefore relied on section 18(1) in conjunction with section 38(1)(a) of FOISA.
5. On 2 October 2017, Mr Z applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Z stated that he was dissatisfied with the outcome of Police Scotland's

review because he did not agree with their reasons for withholding the information he had requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Z 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 27 October 2017, Police Scotland were notified that Mr Z had made a valid application 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.
9. Police Scotland confirmed they were relying upon section 18(1) of FOISA in conjunction with section 38(1)(a), and provided reasons for maintaining this position.
10. The investigating officer also wrote to Mr Z explaining the provision in section 18(1) of FOISA, specifically in relation to the consideration of personal data. Mr Z was invited to provide his comments on the case, and to explain why he considered that there was a public interest in compelling Police Scotland to reveal (under FOISA) whether the information existed.

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 Mr Z and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

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

12. Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr Z's request. They adhered to this position in their submissions to the Commissioner.
13. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information 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;
 - (ii) if the information existed and was 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;
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
14. 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).

15. In any case where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he 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.
16. 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 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 also be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in releasing any relevant information, if held.
17. In this case, Police Scotland submitted that if they held any information falling within the scope of Mr Z's request, it would be exempt from disclosure under section 38(1)(a) of FOISA.
18. The Commissioner must first consider whether Police Scotland could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held; in other words, whether Police Scotland could have refused to provide the information on the grounds that it was exempt from disclosure under section 38(1)(a) of FOISA, if they held it.

Section 38(1)(a) - Personal information of the data subject

19. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is an absolute exemption means that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
20. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data, commonly known as a SAR, under section 7 of the DPA. This ensures that such information is disclosed to the data subject (rather than to the world at large, which is the effect of disclosure under FOISA) under a regime designed for such purposes.
21. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in Appendix 1).
22. Police Scotland argued that the information sought by Mr Z in his request, if held, would comprise his own personal data. Police Scotland explained that Mr Z did not simply ask for the name of the Chief Inspector who (allegedly) attended a particular meeting; he asked for the name of the Chief Inspector who received verbal information regarding him at a meeting and who thereafter instructed another officer to create a "concern report" regarding him on the Force Vulnerable Person's database.

23. Police Scotland submitted that if it was to publicly confirm whether or not Mr Z was the subject of a discussion by a police officer which led to the submission of a report on the Vulnerable Person's Database, it would breach Mr Z's rights in terms of the DPA.
24. The Commissioner has considered the precise wording of Mr Z's request for information. He accepts that while Mr Z is ostensibly seeking only the name of the Chief Inspector who attended a particular meeting, the context created by the wording of his request means that the information, if held, would comprise his own personal data, as defined by section 1(1) of the DPA. The alleged actions of the Chief Inspector relate to an alleged discussion of Mr Z and his actions. The Commissioner therefore accepts that the information covered by Mr Z's request, if it exists and is held, would be exempt from disclosure under section 38(1)(a) of FOISA. Disclosure of the Chief Inspector's name, in response to the request as worded, would effectively disclose Mr Z's personal data.
25. Disclosure under FOISA is accepted to be disclosure into the public domain. The Commissioner is satisfied that disclosure of Mr Z's personal data in the circumstances described above would breach the first data protection principle.
26. Having accepted that Police Scotland could have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information, if held, would be exempt information by virtue of section 38(1)(a) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether Police Scotland were entitled to conclude that it would be contrary to the public interest to reveal whether the information exists or is held.

The public interest – section 18(1)

27. In his submissions to the Commissioner, Mr Z provided reasons why he believed the information he was seeking, if held, should be disclosed. He argued that the information he was seeking was the name of senior police officer who attended an inter-agency meeting on police business and that this information should be in the public domain. He stressed that he was not seeking his own personal data and he expressed concerns about the way that Police Scotland's Information Management unit conducted its business: he stated that on numerous occasions he had been given contradictory information (or told untruths) by its staff.
28. Mr Z alleged that the unnamed Chief Inspector had, by act or omission, taken a decision which had affected him negatively and which appeared to be an act of misconduct. Mr Z submitted that he was pursuing this issue with the Police Investigations and Review Commissioner (PIRC) and argued that he, and the public, had a right to know the name of the senior officer involved.
29. Police Scotland reiterated that if it was to publicly confirm whether or not Mr Z was the subject of a discussion by a police officer which led to the submission of a report on the Vulnerable Person's Database, it would comprise a breach of Mr Z's rights in terms of the DPA. They argued that confirming whether or not such information was held would significantly undermine the trust and confidence the general public have in Police Scotland to process their personal data in accordance with the DPA.
30. Police Scotland acknowledged that, in terms of justice to the individual, there was a public interest in providing individuals with information of particular relevance to them and their situation. Police Scotland submitted that while Mr Z does have a genuine public interest in the information he has requested, this must be balanced with the wider public interest considerations of protecting the statutory role of the Police Service and preserving the relationship between the Police Service and the public.

31. For these reasons, Police Scotland took the view that the public interest lay in refusing to confirm or deny whether they held the information requested by Mr Z, by applying section 18(1) of FOISA.
32. Having considered the arguments submitted by both parties, the Commissioner is satisfied, in all the circumstances of this case, that it would have been contrary to the public interest for Police Scotland to disclose whether the information requested by Mr Z existed or was held by them, given that it would constitute his own personal data and disclosure would breach the first data protection principle in the DPA.
33. As a result, the Commissioner is satisfied that Police Scotland were entitled to refuse to confirm or deny, in accordance with section 18(1) of FOISA, whether they held the information requested by Mr Z, or whether such 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 Z.

Appeal

Should either Mr Z 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

7 February 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.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

(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 –

(a) the provision does not confer absolute exemption; and

...

(2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

(e) in subsection (1) of section 38 –

(i) paragraphs (a), (c) and (d); and

...

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.

...

38 Personal information

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

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