

Decision Notice

Decision 045/2017: Dr Julia Davidson and the Scottish Ministers

Funding provided in connection with the “Prevent” strategy

Reference No: 201601758

Decision Date: 24 March 2017



Scottish Information
Commissioner

Summary

The Scottish Ministers were asked for the name of each non-governmental organisation to which they had given “Prevent” funding to in the past five years and how much funding each of the organisations had received. The Ministers refused to disclose some of the information on the grounds that to do so would endanger the mental or physical health or the safety of individuals.

The Commissioner agreed that the information was exempt from disclosure.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(1) (Health, safety and the environment)

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 6 July 2016, Dr Davidson made a request for information to the Ministers. The request concerned the Government’s “Prevent” strategy¹ in relation to the Counter-Terrorism and Security Act 2015². The information requested was as follows:

For each of the last 5 years, please let me know:

The name of each non-governmental organisation to which the Scottish Government has provided funding in connection with the Prevent Counter-Extremism programme, or for any purpose otherwise connected with counter-radicalisation, and the sum provided in each case.
2. The Ministers responded on 4 August 2016, informing Dr Davidson that the information was exempt from disclosure under sections 31(1) (National security) and 35(1)(a) (Law enforcement) of FOISA.
3. On 18 August 2016, Dr Davidson wrote to the Ministers requesting a review of their decision. She did not believe the exemptions applied.
4. The Ministers notified Dr Davidson of the outcome of their review on 14 September 2016. They disclosed the names of some of the organisations which had been given funding, together with the year in which the payment was made and the amount of the funding. The Ministers continued to withhold the remaining information on the basis that it was exempt from disclosure under sections 31(1) and 35(1)(a) of FOISA.
5. On 27 September 2016, Dr Davidson wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Dr Davidson stated she was dissatisfied with the outcome of the Ministers’ review because she did not believe that

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf

² <http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>

the exemptions cited by the Ministers applied to the remaining withheld information. She stated that it was in the public interest for the information to be disclosed and pointed out an instance where such information was already in the public domain, via the recipient body's accounts.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Dr Davidson 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 6 October 2016, the Ministers were notified in writing that Dr Davidson had made a valid application. They were asked to send the Commissioner the information withheld from Dr Davidson. The Ministers 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. The Ministers were invited to comment on Dr Davidson's application.
9. Both the Ministers and Dr Davidson provided further submissions to the investigating officer during the course of the investigation.
10. The Ministers argued that, in addition to the exemptions in sections 31(1) and 35(1)(a) of FOISA, the information was exempt from disclosure under section 28(1) (Relations with the United Kingdom); section 38(1)(b) (Personal information) and section 39(1) (Health, safety and the environment).
11. Dr Davidson provided further reasoning to support why she felt it was in the public interest for the information to be disclosed. This is addressed below.

Commissioner's analysis and findings

12. 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 Dr Davidson and the Ministers. She is satisfied that no matter of relevance has been overlooked.

The information disclosed on review

13. After carrying out a review, the Ministers disclosed some information to Dr Davidson (see paragraph 4 above). The Commissioner asked the Ministers to explain why it had been possible to disclose this information while arguing that other information was exempt from disclosure.
14. The Ministers explained that there are number of different types of grant awards. For example, some grants are for developing a multi-agency approach to address risk/ vulnerability in a particular geographic location or in respect of a particular individual, others address risk/ vulnerability across Scotland as a whole.
15. The grants disclosed at review were not specific in terms of location or individuals and so the Ministers considered that the level of harm was not sufficient to justify use of the exemptions. The Commissioner agrees and accepts the explanation for the difference in approach.

16. The Commissioner will now consider the Ministers' application of exemptions to the remaining withheld information, beginning with section 39(1) of FOISA.

Section 39(1) of FOISA (Health, safety and the environment)

17. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
18. As the Commissioner notes in her briefing on this exemption³, section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. This test is less demanding than the "substantial prejudice" test.

Submissions from the Ministers

19. Dr Davidson asked for the names of the non-governmental organisations which had received Prevent funding from the Ministers over the past five years, and how much that funding was. The Ministers claimed this would identify the specific individuals and organisations involved in the delivery of the Prevent programme
20. The Ministers accepted that there was already information in the public domain regarding the broad categories or sectors of organisations involved in the delivery of the Prevent (such as the NHS and education sector), but took the view that disclosing information which could allow specific individuals or organisations to be identified would be highly likely to endanger the physical or mental health or the safety of those individuals.
21. Disclosure of the information would, the Ministers believed, put individuals and organisations working with Prevent at serious risk of reprisal, injury, harm or harassment from those who support and endorse terrorism and/ or those who have been vociferous in their condemnation of Prevent. The fear of serious injury, harm or harassment, or a breach of trust by disclosure of organisations, would deter individuals and organisations from undertaking Prevent activities. The Ministers provided the Commissioner with written statements from some of their key Prevent stakeholders outlining the risks to their individual safety and the detrimental effect disclosure of the information would have on their work, not only during their day-to-day life in Scotland, but also when travelling overseas.
22. The Ministers submitted that even to disclose the amounts of the grants, without naming the recipient bodies, would allow identification: a sufficiently determined individual could ascertain who the recipient bodies were, for example by combing through accounts held at Companies House.

Submissions from Dr Davidson

23. Dr Davidson did not believe that disclosure of the information would, or would be likely to, endanger health or safety. She believed that the Ministers had created an inflated sense of danger and had not provided balanced and objective consideration. She accepted that stress or embarrassment and maybe even a critical or hostile response could be possible. However, she took the view that, if hostile reactions were to reach a level where they would, or would be likely to, endanger health and safety, the danger would arise mainly from a

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

reaction to the point of view being expressed and not as a direct result of the disclosure of the information itself.

24. Dr Davidson submitted that the question of whether individuals and organisations were deterred from continuing with their organisation's activities was not in itself a health and safety issue. She believed that the fear would only be sufficient to trigger section 39(1) if it endangered the peoples' mental health.

The Commissioner's conclusions

25. The phrase "endanger" is broad enough to apply where there is a threat, direct or indirect, to the safety of a person. Since the exemption does not specify that any threat should be imminent before it applies, the threat may be either immediate, or one which would foreseeably arise in the future, The Commissioner believes that for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
26. Having considered the written statements from various stakeholders provided by the Ministers, the Commissioner accepts that there would be a considerable risk of endangerment to stakeholders in the event that details of their funding was placed in the public domain.
27. The Commissioner notes Dr Davidson's view that any endangerment would result primarily from the views held by the stakeholders themselves, rather than from the disclosure of the fact that they had received funding. However, these are intrinsically linked: disclosing the identity of the non-governmental organisations in receipt of Prevent funding would indicate that they are amenable to co-operating with the Prevent programme.
28. In all the circumstances, the Commissioner is satisfied that disclosure of the information would, or would be likely to, endanger the physical or mental health or the safety of the individuals involved. Consequently, she must conclude that the exemption in section 39(1) of FOISA was correctly applied by the Ministers. In reaching this conclusion the Commissioner has taken account of some information from the Ministers which cannot be discussed here for security reasons.
29. Having reached this conclusion, the Commissioner is required to consider the public interest test in relation to this information.

The public interest test

30. Section 39(1) is a qualified exemption, which means that its application is subject to the public interest test in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 39(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. If it is, she must order the Ministers to disclose the information.

Submissions from the Ministers

31. The Ministers put forward the following arguments in favour of disclosure of the information:
 - (i) There is a general public interest in the disclosure of the information for the purposes of openness and transparency.
 - (ii) Disclosure could provide reassurance that funding was reaching the right organisations and would provide transparency over the use of public funds.

32. The Ministers put forward the following arguments in favour of maintaining the exemption:
- (i) There is a far greater public interest in safeguarding the health and safety of the groups and individuals engaged in the Prevent programme. There is a need to protect organisations, and individuals within those organisations who are, or have been, engaged in the delivery and support of a range of activities aimed at reducing crime, terrorism and extremism.
 - (ii) The public interest lies in avoiding substantial prejudice to the objectives of the Prevent programme from extremists seeking to damage the Scottish and UK Government's ability to counteract their objectives. It is not in the public interest to make it possible for terrorist or extremist groups to identify those working on Prevent and for them to be subject to fear of retaliation, harassment, or attack.
 - (iii) It is not in the public interest to prejudice the ability to identify and support vulnerable individuals and communities and/ or to discourage community groups from engaging with the Scottish and UK Governments. In order to safeguard national security, it is imperative that Governments are able to work alongside communities and community groups and that the groups feel safe engaging in the Prevent programme.
33. The Ministers considered that the public interest in maintaining the exemption significantly outweighed the public interest in disclosure. However, they stated that they would now be prepared to disclose some aggregated data about the amounts of public funding in a way which would not allow for identification of individuals or groups.

Submissions from Dr Davidson

34. Dr Davidson argued that the public interest lay in disclosing the information. Her arguments on the public interest were mostly made in the light of other exemptions applied by the Ministers, but are equally valid here:
- (i) The United Kingdom's Strategy for Countering Terrorism states that the Prevent strategy must be proportionate and transparent as well as effective. Disclosing the information would contribute to this public interest.
 - (ii) Prevent contributes to a sense of insecurity and alienation, especially amongst young Muslims. This is likely to create a range of social problems. Disclosure would mitigate these problems.
 - (iii) "Covert funding" is likely to be uncomfortable and demoralising for the staff of organisations which receive it, and alienate their service users. Organisations which receive Prevent funding may do valuable work, but this is undermined by the fact that public funding is provided on condition of secrecy. Disclosure would be healthy for these organisations and beneficial for the work they do.
 - (iv) Suspicions about covert funding are likely to undermine the confidence of people using the services of bodies which do not receive Prevent funds. This is damaging to the Third Sector.
 - (v) Covert funding undermines the ability of the public and the media to assess the independence of those bodies in receipt of funding. Disclosure would improve the quality of public debate.
 - (vi) Those organisations that do not receive Prevent funding are undermined by the unwarranted suspicion that they do. The policy of "non-disclosure" makes it very

difficult for such organisations either to state openly that they do not receive Prevent funding, or to persuade people that any such statement is accurate. Disclosure of the information would remove any stresses placed on bodies that do not receive funding, but are suspected of receiving funding.

The Commissioner's conclusions on the public interest

35. The Commissioner is aware that the Prevent strategy is considered by some to be highly controversial. For example, a study by the Open Society Justice Initiative, published in October 2016, described the policy as flawed and potentially counterproductive.⁴ In this context, there is clearly a public interest in the disclosure of information about Prevent, including which bodies have received funding.
36. The Commissioner accepts that there is a public interest in transparency and in the disclosure of information relating to costs met from the public purse. It is clear that disclosing the information would provide openness and transparency and could, as the Ministers themselves have suggested, provide reassurance that funding is reaching the right organisations.
37. Nevertheless, a balancing exercise must be undertaken. The Commissioner has found that disclosure of the information would, or would be likely to, endanger the physical or mental health or the safety of individuals. This means, the public interest arguments in favour of disclosure must be strong to outweigh the public interest in ensuring that individuals are not endangered as a result of such disclosure.
38. In all of the circumstances of the case, the Commissioner finds that the public interest arguments put forward by Dr Davidson are not strong enough to outweigh the public interest in ensuring that individuals are not endangered. She therefore finds that the public interest in maintaining the exemption in section 39(1) of FOISA outweighs that in making the information available and that the Ministers were entitled to withhold the information under section 39(1) of FOISA.
39. As the Commissioner has determined that the information has been correctly withheld under section 39(1), she is not required to go on to consider the application of the other exemptions.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dr Davidson.

⁴ <https://www.opensocietyfoundations.org/reports/eroding-trust-uk-s-prevent-counter-extremism-strategy-health-and-education>

Appeal

Should either Dr Davidson or the Ministers 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.

Rosemary Agnew
Scottish Information Commissioner

24 March 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.

...

39 Health, safety and the environment

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info