

Decision Notice 071/2020

Registered Sex Offenders: Disclosure of status

Applicant: The Applicant

Public authority: The Chief Constable of the Police Service of Scotland

Case Ref: 201902249



Scottish Information
Commissioner

Summary

Police Scotland were asked for procedural information regarding the disclosure of Registered Sex Offenders' status and convictions to third parties. Police Scotland provided some information and advised that that no further information was held. Following investigation, the Commissioner accepted this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 12 August 2019, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). As part of his request he asked for:
 - (a) information pertaining to the number of search warrants issued in particular circumstances, and
 - (b) procedures undertaken by Police Scotland prior to their informing a third party about a Registered Sex Offender's (RSO) status and convictions.
2. Police Scotland responded on 3 September 2019. In response to part (a), they advised that no search warrants were issued in the circumstances specified within the geographical area stated. In response to part (b), they provided the Applicant with a list of factors that would be taken into account when deciding to inform a third party, and stated that a decision as to whether to inform or not would be taken on a case by case basis.
3. On 17 September 2019, the Applicant wrote to Police Scotland requesting a review of their decision on the basis that he believed they held further information in relation to part (b) of his request. He stated that he believed Police Scotland has procedures in place that they must follow to prevent unlawful disclosure and required a copy of such procedures. He made reference to Police Circular 4/07.
4. Police Scotland notified the Applicant of the outcome of their review on 16 October 2019. They provided him with a copy of their Data Protection Policy and information about Article 6 of the General Data Protection Regulation (GDPR)¹. They also made him aware that they have a Sex Offender Community Disclosure Scheme and provided him with a copy of that. They advised the Applicant that they did not hold a comprehensive list/flowchart/workflow exhausting all scenarios whereby disclosure of special category data can be made to a third party. Police Scotland provided the Applicant with a notice under section 17(1) of FOISA that no further information was held by them.

¹ <https://gdpr-info.eu/art-6-gdpr/>

5. On 11 December 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland's review because he did not believe that no further information was held.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 18 December 2019, Police Scotland were notified in writing that the Applicant 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 to answer specific questions.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Information held by Police Scotland

10. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

Submissions from the Applicant

12. The Applicant disagreed with the application of section 17(1) of FOISA and made reference to the wording in Scottish Executive Police Circular No. 4/2007 which he said stated that "ACPOS [Association of Chief Police Officers in Scotland] has agreed to provide guidelines to forces to cover the handling of the release of information" and "A framework should underpin any consideration of the release of police information to third parties including the need for a risk assessment to be carried out in all cases and the need for decision-making to be documented."
13. The Applicant believed that ACPOS had issued guidelines and that there should be documented risk assessments. He stated that what he was looking for was a tick box of precisely what conditions must be met before the sensitive personal data of RSOs is disclosed to an adult third party. He argued that procedures would have had to be followed and evidenced through a paper trail if a decision to disclose the information was taken and that such a paper trail was likely to contain the information he was looking for.

Submissions from Police Scotland

14. Police Scotland submitted that they had provided the Applicant with all of the information which they held which would answer the terms his request. They highlighted that the Applicant had been provided with a list of factors for consideration in their initial response to his request, which included:
 - the nature and pattern of previous offender behaviour
 - compliance by the offender with any previous sentences or Court Orders
 - the risk that further offences will be committed
 - the harm such offences would cause
 - the potential adverse consequences of disclosure to the offender and their family and the need to disclose whether the offender was vulnerable
 - the effect of disclosure on the level of risk posed by the offender and the potential consequences
 - licence of Community Payback Order conditions to which the offender is subject
 - the possibility of the offender absconding as a result of disclosure
 - a plan to manage the risk posed by the offender following disclosure
 - the extent of the information that needed to be disclosed
15. Police Scotland also submitted that they had provided the Applicant with a copy of their Data Protection Policy and provided information to the Applicant explaining Articles 6, 9 and 10 of the GDPR and the relevant parts of Schedule 1 to the Data Protection Act 2018². They outlined what was considered lawful processing of sensitive personal data.
16. Police Scotland confirmed that they had advised the Applicant about their Sex Offender Community Disclosure Scheme and had provided him with a copy of this Standard Operating Procedure.
17. Police Scotland submitted that they did not hold a comprehensive list or flowchart exhausting all scenarios whereby Special Category Data could be made available to a third party, explaining that disclosure had to be assessed strictly on a case by case basis.
18. Police Scotland explained to the Commissioner that there were no ACPOS guidelines held by them and pointed out that ACPOS had ceased to exist when Police Scotland was formed. They stated that they had spoken to the Offender Management Unit (OMU) as they were the most appropriate department to contact as they manage all the RSOs. The Detective Superintendent of the OMU also confirmed that no ACPOS guidelines were held. No further information falling within the scope of the Applicant's request was held by Police Scotland.

The Commissioner's findings

19. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

² <http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

20. The Commissioner understands that the Applicant believes Police Scotland should hold information consisting of a paper trail of evidence supporting a decision whether or not to disclose the status of RSOs to third parties, and believes that such a paper trail is likely to contain the information he is looking for.
21. However, it is likely that any such information would be held only in the personal files of each individual RSO and that it would differ from offender to offender. The Commissioner accepts that such paper trails are not something that he would expect to be part of the information openly available to the public, as more generalised procedures might be.
22. Having considered all relevant submissions and the terms of the request which is the subject of the application, the Commissioner accepts that Police Scotland interpreted the Applicant's request reasonably and took adequate, proportionate steps in the circumstances to establish what information they held. Given the explanations and other submissions provided, he is satisfied that Police Scotland do not hold any further information falling within the scope of his request and were correct to give him notice, in terms of section 17(1) of FOISA, that they held no further information falling within part (b) of his request.

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 the Applicant.

Appeal

Should either the Applicant or Police 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

15 June 2020

Appendix 1: 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.

...

- (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.

...

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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