

Decision Notice 100/2021

Police investigation reports

The Applicants

Public authority: Chief Constable of the Police Service of Scotland

Case Ref: 202100082



Scottish Information
Commissioner

Summary

Police Scotland were asked for a copy of a police investigation reports concerning specified investigations. Police Scotland refused to confirm or deny whether the information existed or was held by them.

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) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 34(1)(a) and (b) (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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 1 June 2020, the Applicants made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). They asked Police Scotland, in respect of various incidents, for copies of the police investigation reports explaining why no action was taken.
2. On receiving no response, the Applicants wrote to Police Scotland on 17 August 2020 requesting a review of their decision not to respond to his request.
3. Police Scotland wrote to the Applicants on 27 August 2020 and provided them with a website link to where they could make a formal request for information.
4. On 22 September 2020, the Applicants again wrote to Police Scotland as they had not received a response to their request of 1 June 2020.
5. Police Scotland responded to their review request on 20 October 2020. They refused to confirm or deny whether they held the information requested or whether it existed, relying on section 18(1) of FOISA (in conjunction with sections 34(1)(a) and (b)).
6. On 18 January 2021, the Applicants wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicants stated they were dissatisfied with the outcome of Police Scotland's review because they believed that the information existed and should be placed in the public domain.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicants 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.
8. On 10 February 2021, Police Scotland were notified in writing that the Applicants had made a valid application and the case was allocated to an investigating officer.

9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland was invited to comment on this application and to answer specific questions. These related to their reasoning for neither confirming nor denying that the information existed or was held.
10. The Applicants were also asked to provide their submissions on the public interest in relation to both section 18(1) and 34(1) of FOISA.
11. Submissions were received from both the Applicants and Police Scotland.

Commissioner's analysis and findings

12. 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 Applicants and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Section 18(1) of FOISA - "neither confirm nor deny"

13. Section 18 of FOISA 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;
 - (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 the information exists or is held by it would be contrary to the public interest.
14. Where an authority has chosen to rely on section 18, the Commissioner must establish:
 - (i) whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose it because it was exempt under one of the exemptions listed in section 18(1). The authority must satisfy the Commissioner that:
 - (a) an exemption would apply and, if it did
 - (b) that the balance of the public interest would favour withholding the information, and then,
 - (ii) whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
15. It is not sufficient simply 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 it existed and was 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 disclosing any relevant information it held.

16. In this case, Police Scotland submitted that, if the information existed and was held by them, it would be exempt from disclosure by virtue of the exemptions in sections 34(1)(a) and (b) of FOISA.
17. The Commissioner will firstly consider whether Police Scotland could have issued a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held. He will consider the exemptions in section 34 of FOISA.

Section 34(1)(a) and (b) of FOISA - Investigations by Scottish public authorities and proceedings arising out of such investigations

18. Section 34(1)(a) and (b) of FOISA provide that information is exempt from disclosure if, at any time, it is held for the purposes of:
 - (i) an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - (ii) an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii)); or
 - (iii) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b)).
19. The exemptions in section 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. The exemptions are subject to the public interest test contained in section 2(1)(b) of FOISA.
20. Police Scotland submitted that information of the nature requested, if it existed and was held by them, would be held for the purposes of an investigation of the types described in section 34(1)(a) and (b). Although the Applicants' submissions refer to Police Scotland's internal complaint handling process, it is clear to the Commissioner that, if the information was held, it would clearly fall within the categories as set out in sections 34(1)(a) and (b) of FOISA.
21. The Commissioner agrees with Police Scotland's position on this matter. It is clear that any information, if held, would relate to a specific allegation which Police Scotland would have a duty to investigate. It could be held for no other reason than for the purposes of the investigation.
22. Even if Police Scotland concluded that no grounds existed to commence a criminal enquiry at that time, such information would form part of their assessment of whether any grounds existed.
23. The Commissioner accepts, therefore, that any such information, if it existed and was held, would fall within the exemptions in section 34(1)(a) and (b) of FOISA.
24. As these exemptions are subject to the public interest test, the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and was held by Police Scotland) would be outweighed by that in maintaining the exemptions.

The public interest for 34(1)(a) and (b)

Submissions from the Applicants

25. It was the view of the Applicants that Police Scotland were implicated in alleged criminal acts and that these alleged criminal acts needed to be investigated.
26. The Applicants referred to the independent review of Police Scotland's criminal complaint investigation process¹ to support their public interest submissions and stated that disclosure of the information requested would be relevant to the Justice Committee's consideration of this report, submitting that it would show that Police Scotland continue to corrupt the proper criminal complaint investigation process.

Submissions from Police Scotland

27. Police Scotland submitted that the process of conducting an investigation was, by necessity, a confidential process. Those affected by criminal activity were entitled to have their information protected and there would need to be an overwhelming public interest to overturn this stance. It was Police Scotland's view that the process of investigating incidents was an obligation placed by statute upon the force. To undertake this obligation, the service relies heavily upon the co-operation of many individuals to provide evidence during investigations.
28. Witnesses and other sources of information do so on the understanding that the information provided will remain confidential unless they are required to give evidence in court. Police Scotland argued that there was no public interest in the release of information into the public domain which could compromise the future flow of information to them and, in turn, compromise the ability of the Force to effectively fulfil its statutory obligations. Public disclosure would damage the relationship between Police Scotland and those individuals who they seek to protect and keep safe, who engage with the Force in the expectation that the relationship and the information exchanged is confidential. Police Scotland emphasised that the breakdown of this relationship would be seriously detrimental to the ability of the Force to gain the trust of individuals, which was of critical importance.
29. Police Scotland stated that, while a requester may have a genuine interest in the information they have 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. A release under FOISA is a release to the public at large and not just to the person who has requested the information.

The Commissioner's findings

30. The Commissioner has considered carefully all of the arguments presented by the Applicants and Police Scotland.
31. The Commissioner concurs with Police Scotland that the disclosure of information falling within the scope of the request would, if it existed and was held, undermine the public's expectation that such information would be handled in a confidential manner. He also agrees that disclosure of this type of information would jeopardise the interests of any individuals linked to any such allegations. In his view, neither of these outcomes would be in the public interest.

¹ [Policing - complaints handling, investigations and misconduct issues: independent review - preliminary report - gov.scot \(www.gov.scot\)](http://www.gov.scot)

32. The Commissioner is satisfied that Police Scotland took into account only factors which were relevant in considering the public interest, and that they carried out the associated balancing exercise appropriately.
33. Therefore, having considered all of the submissions made to him, the Commissioner has concluded that, in all the circumstances, the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA would outweigh that in disclosure of the information, if it existed and was held.
34. In all the circumstances, therefore, the Commissioner has concluded that Police Scotland could have given a refusal notice under section 16(1) of FOISA, on the basis that the information (if it existed and was held) was exempt from disclosure under section 34(1)(a) and (b).

Section 18(1) - the public interest

35. Having accepted that Police Scotland could give a refusal notice under section 16(1) of FOISA, he must now consider whether Police Scotland were entitled to conclude (for the purposes of section 18) that it would be contrary to the public interest to reveal whether the information existed or was held.

Submissions from Police Scotland

36. Police Scotland stated that, where an exemption is applied to information, it is because there is a perceived harm in the disclosure of the information held by a public authority. As such, the application of such an exemption mean that the world becomes aware that there is relevant information held on the matter concerned.
37. Whilst generally this is an accepted position and it is in the public interest to be aware that relevant may be held, there are occasions where it is not in the public interest that specific information is confirmed or an inference can be drawn that information exists. Examples of this are police investigation cases where individuals have been the subject of police attention.
38. Police Scotland submitted that they had advised the Applicants that FOISA was “applicant blind”, meaning that any information disclosed under FOISA would be available to any person so requesting it. In instances such as this, it is recognised that harm exists even in confirming or denying in the public domain that the information is held. Any confirmation of the existence of information cannot be built around the interests of an individual; rather, any release of information must be made in the wider public interest. A release under FOISA is considered a release to the world and not just to the person who has requested it. It is in effect, a public disclosure.
39. Police Scotland stated that it understood that this principle was recognised by the Scottish Government and that this is why information of a personal nature is now encompassed under section 18 of FOISA (section 18(2) of FOISA was amended in 2013 to include the personal information exemption – section 38 – in the list of exemptions section 18(1) could be applied to).

The Commissioner’s findings

40. Having considered the submissions, 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 reveal whether the information requested by the Applicants existed or was held by them.

41. In particular, the Commissioner recognises the prejudicial impact on future investigations that would likely result were Police Scotland to reveal the existence (or otherwise) of the information. Such a detrimental effect would clearly not be in the public interest.
42. The Commissioner also recognises Police Scotland's point that a disclosure under FOISA is not simply disclosure to the person requesting the information, but rather is a public disclosure. This must always be borne in mind when considering the effects of disclosure. A disclosure of this kind to one individual cannot, therefore, be considered in isolation.
43. As a result, the Commissioner is satisfied that Police Scotland were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by the Applicants, or whether that 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 the Applicants.

Appeal

Should either the Applicants 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

18 June 2021

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.

...

- (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, 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.

...

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
- (ii) prosecuted for an offence is guilty of it;
- (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...

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