

Decision Notice

Decision 197/2016: Mr Andrew Brunton and the Chief Constable of the Police Service of Scotland

Police deployment in Dundee

Reference No: 201502320

Decision Date: 19 September 2016



Scottish Information
Commissioner

Summary

On 4 August 2015, Mr Brunton asked the Chief Constable of the Police Service of Scotland (Police Scotland) for information concerning an incident at a specified location in Dundee.

Police Scotland informed Mr Brunton that some of the information requested was exempt from disclosure in terms of section 35(1)(a) and (b) of FOISA (the exemptions relating to the prevention or detention of crime and the apprehension or prosecution of offenders). Police Scotland also informed Mr Brunton that it did not hold some of the information requested.

The Commissioner investigated and found that Police Scotland had properly responded to Mr Brunton's request, in accordance with Part 1 of FOISA .

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 35(1)(a) and (b) (Law enforcement)

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 4 August 2015, Mr Brunton made a request for information to Police Scotland. The request related to an incident witnessed by Mr Brunton at a specified location in Dundee on a specified date. The information requested was as follows:
 - (a) How many Police Scotland Officers were on duty in Dundee on [date], between 16.00 and 16.15 hours?
 - (b) How many Police Scotland Officers were in the vicinity of [specified locations in Dundee] between 16.00 and 16.15 on [date]?
 - (c) How many marked Police Scotland vehicles were being used by a Police Scotland Officer within Dundee on (date) between 16.00 and 16.15 hours?
 - (d) Were there any marked Police Scotland vehicles in the vicinity of (specified locations) on (date) between 16.00 and 16.15 hours?
2. Mr Brunton received Police Scotland's response on 24 September 2015. Police Scotland informed Mr Brunton that the information requested in part (a) of his request was exempt from disclosure in terms of sections 35(1)(a), 35(1)(b) and 39(1) of FOISA. Police Scotland also informed Mr Brunton that they did not hold the information requested In relation to the remaining parts of the request.
3. On 5 October 2015, Mr Brunton wrote to Police Scotland requesting a review of their decision. Mr Brunton considered there was a public interest in the disclosure of the information.

4. Mr Brunton received the outcome of Police Scotland's review on 20 November 2015. Police Scotland upheld their previous decision without modification.
5. On 9 December 2015, Mr Brunton wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Brunton stated he was dissatisfied with the outcome of Police Scotland's review because he believed disclosure of the information was in the public interest. In his view, Police Scotland were being obstructive in their handling of his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Brunton made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 27 January 2016, Police Scotland were notified in writing that Mr Brunton had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Brunton. Police Scotland 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. Police Scotland were invited to comment on this application and answer specific questions. The questions focused on the exemptions applied in responding to Mr Brunton and on the searches undertaken to establish that Police Scotland did not hold any information falling within the scope of parts (b) to (d) of the request.
9. Police Scotland responded, providing submissions on the exemptions applied to the withheld information, with details of the searches and enquiries they had undertaken.
10. During the investigation, the investigating officer visited Police Scotland's headquarters in Dundee in order to gain a fuller understanding of the systems used by Police Scotland which could potentially track the whereabouts of individual officers. The investigating officer also viewed a sample of vehicle log books to ascertain the nature and level of information recorded by Police Scotland in relation to vehicle usage.

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 her by both Mr Brunton and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 35(1)(a) and (b) – Law Enforcement

12. Police Scotland applied the exemptions in section 35(1)(a) and (b) of FOISA to the information sought in part 1 of Mr Brunton's request.
13. Section 35(1)(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. As the Commissioner's guidance on this exemption highlights¹, the term "prevention or detection of crime" is wide ranging,

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.

14. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance also states, there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime". She considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as investigative processes and the use of police intelligence).
15. There is no definition of "substantial prejudice" in FOISA, but the Commissioner is of the view that authorities have to be able to establish harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
16. The exemptions in section 35(1) are also subject to the public interest test in section 2(1)(b) of FOISA.
17. Police Scotland submitted that the withheld information provided significant insight as to the baseline number of police officers who would be deployed in a particular area at a particular time. Police Scotland considered this information would be invaluable to individuals intent on committing crime or causing public disorder, amounting to highly credible intelligence on the basis of which such individuals could plan, with some accuracy, the likely police response to their actions.
18. Police Scotland also considered the information would provide significant insight into what level of disruption, for example, would be required in order to divert the majority of available police resources. In their view, this was particularly dangerous as it would allow individuals the opportunity to effectively ensure that the majority, if not all, of the officers in a particular location at a particular time were engaged with one incident whilst a further, potentially far more serious, incident was created.
19. Police Scotland contended that, if someone were planning an attack on a major target in the area, the information requested would provide them with the days and times of the week when fewer resources were typically deployed. It would also provide them with sufficient detail regarding those resources to allow them to stage another incident to require approximately that particular amount of resource.
20. In his review request to Police Scotland, Mr Brunton stated that he was dissatisfied with the reasons provided by Police Scotland for withholding the information. In his application to the Commissioner, Mr Brunton suggested that Police Scotland were being obstructive and hiding behind exemptions, thereby undermining FOISA.
21. The Commissioner has considered carefully all of Police Scotland's and Mr Brunton's submissions. Having done so, she is satisfied that the deployment of officers at a local level is a strategy utilised by Police Scotland in relation to both the "prevention or detection of crime" and "the apprehension or prosecution of offenders".
22. In the Commissioner's view, a breakdown of the numbers of officers deployed in a specific area, within a narrow timeframe (as requested by Mr Brunton), would provide a very clear indication of the resources typically available to Police Scotland at that time. She is satisfied

that the disclosure of the information would assist those intent on criminal behaviour in the manner described in Police Scotland's submissions.

23. In the Commissioner's view, it would also be possible for a "mosaic" pattern to be built up by submitting similar requests covering different time periods. This would enable an accurate picture of Police Scotland's deployment of resources in an area to be generated.
24. In this case, the Commissioner considers the disclosure of the information requested would therefore significantly undermine Police Scotland's duty to prevent and detect crime and apprehend and prosecute offenders. Accordingly, she is satisfied that disclosure of the information would, or would be likely to, prejudice substantially both the prevention and detection of crime and the apprehension and prosecution of offenders.

The public interest test

25. As the Commissioner has found that the exemptions in section 35(1)(a) and (b) were correctly applied to the withheld information, she is required to consider the public interest test in section 2(1)(b) of FOISA. She has therefore considered whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by that in maintaining the exemptions.
26. Police Scotland stated that they had a statutory duty with regard to the prevention or detection of crime and the apprehension or prosecution of offenders. In their view, there was a significant public interest in ensuring that they were as efficient and effective as possible, which extended to ensuring that they had every tactical advantage.
27. Police Scotland also noted that they published quarterly figures on officer numbers throughout Scotland, to divisional level². In their view, the publication of these figures struck a balance between ensuring that the public were informed and also ensuring their safety. They acknowledged a significant public interest in being assured they were using their resources effectively.
28. Overall, Police Scotland considered the public interest must lie in favour of maintaining the exemptions when there was any risk that disclosure would lead to Police Scotland being more vulnerable, not only in terms of a major attack but also to lower level crime and disorder.
29. In Mr Brunton's view, there was a public interest in the disclosure of the information. He provided additional reasons explaining why the disclosure of the information to him was necessary, in pursuit of concerns he had about a specific incident.
30. The Commissioner has already acknowledged that disclosure of the information would, or would be likely to, lead to substantial prejudice for the purposes of section 35(1)(a) and (b) of FOISA. While she accepts that disclosure of the specific information requested might give the public some greater insight into the levels of deployment in an area, she also has to acknowledge the substantial risks associated with such disclosure.
31. In the Commissioner's view, it is not in the public interest to disclose information which would jeopardise public safety and Police Scotland's ability to prevent crime and apprehend offenders.

² <http://www.scotland.police.uk/about-us/police-scotland/212598>

32. The Commissioner also acknowledges that the figures published by Police Scotland concerning officer numbers in Scotland go some way towards satisfying the public interest in officer numbers and geographic deployment generally.
33. On balance, therefore, the Commissioner considers the arguments against disclosure should prevail in this particular case. Consequently, she is satisfied that the public interest in disclosing the information is outweighed by that in maintaining the exemptions.
34. The Commissioner therefore finds that Police Scotland were entitled to withhold the information sought in part 1 of Mr Brunton's request under the exemptions in section 35(1)(a) and (b) of FOISA.
35. As the Commissioner accepts that this information is properly withheld in terms of section 35(1)(a) and (b) of FOISA, she is not required to consider Police Scotland's application of the exemption in section 39(1).

Section 17 – information not held

36. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1), where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.
37. Police Scotland gave notice to Mr Brunton that they did not hold the information requested in parts (b) to (d) of his request.
38. In their submissions to the Commissioner, Police Scotland explained that they did not hold the information. They noted that the ability to "track" officers and vehicles varied across the country, as different command and control systems were currently utilised in different parts of Scotland.
39. Police Scotland stated that the legacy Command and Control system used in the former Tayside area had only limited capabilities in this regard. They explained that the system held records of incidents and their locations and the officers tasked to attend them, but did not include a facility whereby an officer's location could be "tracked" throughout the course of a day. Additionally, the system referred only to the location of any incidents themselves and not where the officers were before and afterwards – which would be required in order to ascertain whether any of them passed the location in question.
40. Police Scotland noted that, throughout the course of a day, officers would be tasked in a variety of ways. While allocation to an incident might be recorded on their system, any enquiries relating to other ongoing crimes and incidents would not be specifically recorded. For example, while some officers might spend their entire shift at one location, others might be tasked to attend at various locations over the day (for example, to take witness statements). In that regard, their activities could be recorded in the sense that a witness statement might exist, but there was no "diary" of their activities over the course of a particular day.
41. The police also noted that the location in question was on a main thoroughfare: if the vehicle referred to by Mr Brunton was a Police Scotland vehicle, it could be from any area of Scotland on any enquiry. It could have belonged to British Transport Police, given the relative proximity to a railway station.

42. Police Scotland stated that they had carried out extensive enquiries to try and identify any officers who may have passed the location in question, but none could be identified.
43. Specifically in relation to the use of vehicles, Police Scotland stated that the only relevant record was the vehicle log book. However, this contained limited information; only start/stop times and mileage were recorded and there was no means of mapping the vehicle journey over the whole day.
44. As noted above, the investigating officer visited Police Scotland's Dundee headquarters during the investigation. The investigating officer was provided with a demonstration of ARLS (automatic resource location system), the only system currently used in Tayside to track the whereabouts of individual officers. This system can be used to track officers via their police radio, but only in real time, and there is no audit record whereby an officer's whereabouts can be recovered for previous dates.
45. The investigating officer also viewed a sample of vehicle log books and confirmed that the information in them was limited and provided no indication of the specific journeys undertaken in any given day.
46. In his application to the Commissioner, Mr Brunton indicated that he would have expected Police Scotland to hold the information.
47. The Commissioner has considered carefully all of Police Scotland's submissions and their explanation of why the specific information sought by Mr Brunton is not held.
48. The Commissioner accepts that Police Scotland have limited capabilities for tracking the exact, past whereabouts of officers and vehicles in Dundee. The Commissioner accepts that Police Scotland took reasonable, proportionate steps in the circumstances to establish whether they held the information. Given the explanation provided, she is satisfied that Police Scotland do not (and did not, on receiving Mr Brunton's request) hold the information sought in parts (b) to d) of Mr Brunton's request.
49. The Commissioner is therefore satisfied that Police Scotland were correct to give Mr Brunton notice, in terms of section 17(1) of FOISA, that they held no information falling within the scope of parts (b) to (d) of his request. In doing so, Police Scotland responded in accordance with section 1(1) of FOISA.
50. As stated in previous decisions, the Commissioner's remit in carrying out investigations of this nature extends to the consideration of whether Police Scotland actually holds the relevant information requested. She cannot comment on whether a public authority ought to hold information of this nature (as Mr Brunton believes) or whether she considers the systems used are adequate or fit for purpose.

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 Brunton.

Appeal

Should either Mr Brunton 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.

Rosemary Agnew
Scottish Information Commissioner

19 September 2016

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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.

...

35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;

...

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