

Decision Notice

Decision 205/2016: Mr Marc Ellison and the Chief Constable of the Police Service of Scotland

Notable incident reports

Reference No: 201601310

Decision Date: 06 October 2016



Scottish Information
Commissioner

Summary

On 24 May 2016, Mr Ellison asked the Chief Constable of the Police Service of Scotland (Police Scotland) for information about Notable Incident Reports.

Police Scotland responded by providing Mr Ellison with descriptive information about the Notable Incident Reports, but they withheld the actual Reports and the spreadsheets that Mr Ellison had requested. Following a review, Mr Ellison remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Police Scotland had failed to respond to Mr Ellison's request for information in accordance with Part 1 of FOISA. This was because they wrongly withheld some information under section 30(c) of FOISA. She required Police Scotland to disclose redacted versions of the documents to Mr Ellison.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

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 May 2016, Mr Ellison made the following request for information to Police Scotland:
 - (i) Provide me with electronic copies of any completed Police Scotland 'C3 Notable Incident Report' forms submitted since 15 April 2016. Please redact any personal information including name/numbers of reporting officer, supervisor, witnesses, etc.
 - (ii) Provide me with an export (spreadsheet is preferable) of the notable incident database – referenced in document ('16-0880 C3 Notable Incidents Briefing paper redacted.pdf') from request IMM-FOI-16-0880. Again, please redact any personal information.
 - (iii) Provide me with electronic copies of any agendas and meeting minutes from Police Scotland 'Friday Grip' meetings (referenced in document '16-0880 C3 Notable Incidents Briefing paper redacted.pdf') that involved discussion of 'notable incidents', since 25 April 2016.
2. Police Scotland responded on 22 June 2016.
 - (i) In relation to requests (i) and (ii), Police Scotland confirmed that there were 24 Notable Incident Report forms submitted during the specified time period, but this information was being withheld under section 38(1)(b) of FOISA (Personal information). Police Scotland explained that if they redacted all of the personal data it would render the remaining information meaningless.
 - (ii) In response to request (iii) Police Scotland advised Mr Ellison that agendas and minutes are not created for "Friday Grip" meetings, and gave him notice under section

17(1) of FOISA that this information was not held. Police Scotland also provided Mr Ellison with a table that listed the nature of each reported notable incident.

3. On 23 June 2016, Mr Ellison wrote to Police Scotland requesting a review of their decision. He did not accept that the redaction of personal data would render the remainder of the information meaningless. He believed that if dates, places, names, divisions and ranks were redacted it would still leave enough information to indicate what the document was reporting. Mr Ellison argued there was a considerable public interest in the information that outweighed concerns over confidentiality. He also contended that the summary table provided by Police Scotland was “so vague as to be of no use”.
4. Police Scotland notified Mr Ellison of the outcome of their review on 21 July 2016. They maintained their previous view that the information was exempt from disclosure under section 38(1)(b) of FOISA, and they also found the information to be exempt under section 30(b) of FOISA (Prejudice to effective conduct of public affairs).
5. On 25 July 2016, Mr Ellison applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of Police Scotland’s review in relation to requests (i) and (ii) because he did not accept that the exemption in section 30(b) of FOISA had been correctly applied, and he disputed Police Scotland’s claim that redacting all necessary information would “render the remaining information meaningless”. Mr Ellison accepted that Police Scotland did not hold any information regarding request (iii).

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison 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 29 July 2016, Police Scotland were notified in writing that Mr Ellison had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Ellison. 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 including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner’s analysis and findings

9. 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 Ellison and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Withheld information

10. Police Scotland are withholding 25 Notable Incident report forms as well as two spreadsheets that contain summaries of the information from the forms. The Commissioner notes that all of the information contained in report 14 is duplicated in report 15 (both reports discuss the same incident). To avoid any confusion, the Commissioner will exclude report 14

from her considerations, and this Decision Notice will only consider reports 1 to 13 and 15 to 25.

11. In his information request and request for review, Mr Ellison made it clear that he was not seeking personal data and that he was content for all names, ranks, dates, places and divisions, etc. to be redacted. Given this, the Commissioner will not consider personal data in this Decision Notice. She will proceed on the basis that any information which could identify a living individual, either on its own or in conjunction with other information, does not require to be considered.
12. During the investigation, Mr Ellison also indicated that he did not require details of an operational email address contained in the Notable Incident report forms. Accordingly, the Commissioner will not consider this information further in this Decision Notice.

Section 30(c) of FOISA – prejudice to effective conduct of public affairs

13. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the effective conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
14. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).
15. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

Submissions from Police Scotland

16. Police Scotland explained that the Notable Incident reporting process was introduced in line with Recommendation 26 of Her Majesty's Inspectorate of Constabulary's (HMIC's) publication *Independent Assurance Review Scotland – Call handling final report November 2015*¹, which states on page 16:

Police Scotland should promote an improvement culture where staff are encouraged to report adverse incidents or "near misses" and introduce processes as soon as possible where these can be recorded, assessed and any improvement identified and implemented.

17. The HMIC review was directed by the Cabinet Secretary of Justice following the tragic incident involving the deaths of John Yuill and Lamara Bell. This review did not investigate the circumstances surrounding that incident, but rather provided a "wider independent assurance of the operation, systems and processes in place within police Contact, Command and Control centres across Scotland".
18. During its review, HMIC found that:

¹ <http://www.hmics.org/publications/hmics-independent-assurance-review-police-scotland-call-handling-final-report>

There is no systematic process for recording adverse incidents or “near misses”, where staff or supervisors identify or are made aware of specific incidents that highlight potential weaknesses in processes, systems and training. During our review, staff highlighted a small number of adverse incidents, which served to illustrate potential weaknesses or unforeseen consequences and identified areas for improvement...Some staff reported that they rarely had time to record or escalate such incidents, whilst others did not always feel confident.

19. In response to the HMIC review, a proposal was agreed with the senior management team of C3 division (the Contact, Command and Control Division) to address and discharge this recommendation, but also to extend its scope to include incidents of notable good practice, in order to fully exploit the full range of learning and involvement opportunities available to the Division. Police Scotland explained that a Notable Incident is defined as:

Any incident or event where the effectiveness of the C3 Division response is likely to have a significant impact on the reputation of the Division, Police Scotland or our partners and from which learning could potentially be obtained as a result of the manner in which it was dealt with.

20. Police Scotland submitted that this process ensures collation, review, feedback and governance for C3 and provides a standard format for the way C3 records, allocates and responds to Notable Incidents which negates situations of unnecessary review and duplication. Importantly, Police Scotland argued that this process provides sound internal governance at C3 relating to Notable Incidents that is supported by a clear auditable system. They stated that a key determinant of the likely success of this process is the creation of a culture where staff are encouraged and feel supported in reporting incidents themselves, particularly adverse incidents. The process is delivered under the auspices of Police Scotland’s “Shaping our future” programme learning theme – “*to strive to continuously improve by promoting a positive learning culture*”.
21. In relation to the effective conduct of public affairs, Police Scotland argued that this would be adversely affected by disclosure of the information because this would undermine the Notable Incident process implemented in response to Recommendation 26. Following the incident involving Ms Bell and Mr Yuill, Police Scotland explained that they were, justifiably, subject to increased scrutiny as were the processes they had in place with regard to their call handling. However, individual staff members, whose details were publicly disclosed in the press, also faced personal criticism and Police Scotland were concerned that there was a real possibility that their improvement efforts would be hampered as a result of disclosure under FOISA.
22. Police Scotland contended that the Notable Incident process relies on employees having the confidence and support to report incidents, particularly those which are “adverse”. They argued that any reports made under this process should be viewed as a positive development as it demonstrates that the culture required to inform good practice is in place, which will undoubtedly improve the organisation’s practices and procedures, and, in turn, will improve the service provided to the public. Police Scotland maintained that it is only by staff reporting incidents that the next stages of the process can operate effectively, and can ensure that they are doing as much as they can to prevent a similar incident occurring again.
23. Police Scotland feared that, instead of viewing the process and the recording of incidents as a positive change, the disclosure of information from the Notable Incident forms is likely to lead to negative coverage in the press, which would substantially prejudice the success of the reporting process. They asserted that employees are highly unlikely to feel confident or

comfortable reporting adverse incidents if done so in the knowledge that their actions may later be publicly disclosed and criticised.

24. Police Scotland argued that it was likely that the staff members involved would perceive any disclosure as unfair, which would undermine the trust and support that they are being told they should expect when using the Notable Incident reporting process. They noted that they rely on their staff to provide this essential call handling service and to report matters of concern as they occur, and stated that they will do all they can to ensure that those undertaking the role feel empowered and confident to do so effectively. Any actions which could undermine this relationship are likely to have an adverse effect on the service provided to the public and would therefore have a harmful effect on the conduct of public affairs.

Submissions from Mr Ellison

25. Mr Ellison disputed the application of section 30(c) of FOISA to the withheld information. He stressed that he had always asked for the information to be redacted (to protect the identities of those involved) and, given this, questioned whether individuals who reported incidents (or who may report incidents in the future) would not feel confident or comfortable doing so if the information he requested was disclosed.
26. Mr Ellison contended that the arguments put forward by Police Scotland appeared more concerned with hiding shortcomings than protecting an individual's confidence or comfort. Mr Ellison argued that most officers would be aware that Police Scotland are covered by FOISA and that any documents could be the subject of a request under FOISA. He also suggested that some officers may be more than happy for "the whistle to be blown on any shortcomings in procedure".
27. Mr Ellison did not accept that disclosure would undermine the Notable Incidents process or that it would hamper Police Scotland's ability to comply with the recommendations from HMIC. He stated that HMIC recommended a process be put in place and that Police Scotland has implemented such a process. Disclosing the Notable Incident reports would not hamper compliance with the HMIC recommendation, as Police Scotland have already complied by implementing the process. Mr Ellison argued that how employees react to it or use it, is another matter entirely.

Commissioner's conclusions on the application of section 30(c) of FOISA

28. The Commissioner has considered the nature and content of the withheld information, along with the submissions from both parties.
29. The Commissioner acknowledges that in order for the Notable Incident process to be as successful as possible, Police Scotland staff must work in a supportive environment that encourages them to report incidents or matters of concern. Police Scotland staff that experience criticism or public disclosure over errors made during call handling are unlikely to draw attention to future oversights or mistakes. If call handling staff fail to report their own shortcomings or errors, it is likely that "near misses" would not be identified. The Commissioner accepts that the reporting of "near misses" identifies training needs, which, when addressed, can enable Police Scotland to prevent these "near misses" from becoming future critical events.
30. In short, the Commissioner considers that disclosing information which would identify call handling staff and the "near miss" in which they were involved will not help Police Scotland develop the supportive culture they require to ensure that their Notable Incident process is a success.

31. In their review outcome, Police Scotland acknowledged that Mr Ellison was content for personal information to be redacted, but they maintained that due to the high level of personal information contained within the documents that a substantial amount of data would have to be redacted, the result of which would render the remaining information meaningless. Mr Ellison has challenged this argument.
32. The Commissioner has reviewed the withheld information and she is satisfied that it would be possible to redact all information that could lead to the identification of a living individual. The call handler and other employees (or the member(s) of the public involved in the incident) could not then be identified.
33. The Commissioner notes that all of the submissions made by Police Scotland focus on the argument that the success of the Notable Incident process would be jeopardised if disclosure led to staff being identified and associated with the Notable Incident being reported (because staff will fail to report near misses for fear of public criticism). If the call handler (and the incident itself) cannot be identified, then the risk of the harm cited by Police Scotland is removed.
34. Police Scotland have also argued that the media is unlikely to view the Notable Incident process and the reporting of incidents as a positive change and that disclosure of the information is likely to lead to negative coverage in the press, which would substantially prejudice the success of the Notable Incident process. The Commissioner has some sympathy with this view, and acknowledges that the media may not portray the Notable Incident process as a positive change. However, she does not accept that the risks posed by negative media coverage are sufficient to engage the exemption contained in section 30(c) of FOISA. She notes that, again, the reasoning put forward by Police Scotland relates to the reaction of employees if their actions are publicly disclosed and criticised. These arguments fall away if all information capable of identifying an individual is withheld. The Commissioner considers that it is still possible for Police Scotland to promote “an improvement culture” whilst being the focus of some negative press.
35. The Commissioner has excluded from consideration all information which would be capable of identifying any individual associated with the incidents described in the Notable Incident reports. In all the circumstances, the Commissioner cannot accept that disclosure of the remaining information would, or would be likely to, prejudice substantially the effective conduct of public affairs. Therefore, the Commissioner does not accept that Police Scotland were correct to withhold this information under the exemption in section 30(c) of FOISA.
36. Given that the Commissioner does not accept that section 30(c) applies, she is not required to consider the public interest test in section 2(1)(b) of FOISA.
37. The Commissioner will provide Police Scotland with a marked up version of the information which has been withheld from Mr Ellison, specifying what information should be disclosed.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Ellison, by wrongly withholding information under section 30(c) of FOISA.

The Commissioner therefore requires Police Scotland to provide Mr Ellison with a redacted version of the information by 21 November 2016.

Appeal

Should either Mr Ellison 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.

Enforcement

If Police Scotland fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland have failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

06 October 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.

...

- (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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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