

Decision Notice

Decision 030/2015: Mr Ewan McLean and the Chief Constable of the Police Service of Scotland

Information on police vehicles

Reference No: 201402691

Decision Date: 9 March 2015



Scottish Information
Commissioner

Summary

On 9 September 2014, Mr McLean asked the Chief Constable of the Police Service of Scotland (Police Scotland) for information relating to vehicles deployed by the Police in Scotland.

Police Scotland disclosed some information, but withheld the remainder under the exemptions in sections 35(1)(a) and (b) (Law enforcement) and 39(1) (Health, safety and the environment) of FOISA.

The Commissioner investigated and found that Police Scotland were entitled to withhold the information under the exemptions in section 35(1)(a) and (b) of FOISA. The Commissioner was also satisfied that Police Scotland had dealt with Mr McLean's requirement for review in accordance with Part 1 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(4)(a) and (5) (Review by Scottish public authority); 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 9 September 2014, Mr McLean made a request for information to Police Scotland via the [whatdotheyknow](http://www.whatdotheyknow.com) website¹. The information requested was:

"A list of all vehicles used/owned/operated by Police Scotland. The data I'd like is Registration number, Make, Model, Base colour, Marking type (full high [visibility]/basic markings/unmarked), Primary use (dog, public order, traffic, etc.) and primary location/base."

Mr McLean also requested other information that is not the subject of this decision notice.
2. Police Scotland responded on 13 October 2014. Police Scotland disclosed the vehicle registration number, make, model and colour of high visibility vehicles. Police Scotland withheld the primary use and primary location/base of all vehicles under the exemptions in sections 35(1)(a) and (b) and 39(1) of FOISA.
3. On 18 October 2014, Mr McLean emailed Police Scotland requesting a review of their decision. Mr McLean asked Police Scotland to reconsider their application of the exemptions. He also pointed out that other Police forces had disclosed similar information in the past.
4. Police Scotland notified Mr McLean of the outcome of their review on 12 November 2014. Police Scotland upheld their original decision without modification.

¹ https://www.whatdotheyknow.com/request/vehicle_list_2#outgoing-393083

5. On 18 November 2014, Mr McLean wrote to the Commissioner. Mr McLean applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr McLean stated he was dissatisfied with the outcome of Police Scotland's review. Mr McLean did not consider the exemptions had been applied correctly by Police Scotland and believed it was in the public interest for the information to be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr McLean 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 26 November 2014, Police Scotland were notified in writing that Mr McLean had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from him. 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.
9. Police Scotland responded with submissions in support of its position that the information was properly withheld from Mr McLean in terms of sections 35(1)(a) and (b) and 39(1) of FOISA.

Commissioner's analysis and findings

10. 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 McLean and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Section 35(1)(a) and (b) of FOISA – Law enforcement

11. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime (section 35(1)(a)) and/or the apprehension or prosecution of offenders (section 35(1)(b)). There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
12. 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 highlights², the term "prevention or detection of crime" is wide ranging, 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.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

13. 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 that 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 use of police intelligence).
14. Police Scotland submitted that the disclosure of the information relating to the function and location of vehicles would indicate the force's resource capability in specific areas, particularly in relation to specialist vehicles.
15. Police Scotland considered that disclosure of this information would allow criminals or terrorists to assess the likelihood of obstructing the deployment of vehicle resources (including specialist resources) during the commission of crimes, particularly in areas where smaller numbers of vehicles are based. In Police Scotland's view, this would have an adverse effect on their ability to carry out their law enforcement role effectively, thereby prejudicing substantially the prevention and detection of crime.
16. Mr McLean argued that there was no substantial threat posed by disclosing the information and noted that other Police forces had disclosed similar information in the past. To his knowledge, none of these other forces had experienced crime waves as a result of disclosing the information.
17. Having fully considered the submissions from both Mr McLean and Police Scotland, the Commissioner is satisfied that information identifying non-high visibility vehicles and information on the location and primary use of all vehicles relates both to "the prevention or detection of crime" and "the apprehension or prosecution of offenders". Consequently, she is satisfied that this information falls within the scope of the exemptions in section 35(1)(a) and (b) of FOISA.
18. In this case, the Commissioner agrees with Police Scotland that disclosure of this information would allow an assessment to be made of their capacity in relation to specialist resources and the location of those resources. The Commissioner also considers that disclosure of information on non-high visibility vehicles would allow an assessment of Police Scotland's overall capacity across Scotland. The Commissioner considers this could be extrapolated easily to allow an assessment of capacity in smaller geographical areas.
19. The Commissioner is satisfied that the disclosure of the information would assist individuals of criminal intent in the manner described by Police Scotland. That in turn would, or would be likely to, prejudice substantially both the prevention and detection of crime and the apprehension and prosecution of offenders. Accordingly the Commissioner is satisfied that both exemptions are engaged.

The public interest test

20. As the Commissioner has found that the exemptions in section 35(1)(a) and (b) were correctly applied to the withheld information, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemptions in section 35(1)(a) and (b).

21. Police Scotland submitted that there was no public interest in disclosing information which was likely to damage the efficient and effective conduct of Police Scotland in relation to their law enforcement role. In their view, the information sought by Mr McLean could be used to predict the operational response to incidents in specific areas. They argued that this would afford those intent on wrong-doing an opportunity to circumvent the ability of Police Scotland to deliver effective law enforcement provision. In Police Scotland's view, this would place the public and the Police force at increased risk.
22. Police Scotland acknowledged Mr McLean's observation that similar information had been disclosed by different forces in the past. They submitted, however, that those disclosures had been made at a time when the threat level published by the UK Government was lower than the present threat level of "severe". They stated that the international security landscape had become increasingly complex and unpredictable, and argued that to disclose the information in the current climate of heightened security and threat levels would not be in the public interest.
23. Police Scotland accepted that there was a public interest in the transparency of policing, but contended that there was a strong public interest in safeguarding the integrity of investigations and operations in the highly sensitive areas of work in which they operate.
24. Police Scotland also submitted that modern day policing was intelligence led, and that intelligence changed on a daily basis. In their view, disclosing information about non-high visibility vehicles could show where policing interest has or has not occurred in specific areas. They argued that any information showing the focus of this activity could be used to the advantage of terrorists or criminal organisations to plan an attack on the more vulnerable parts of the UK. In Police Scotland's view, this would have a negative impact on both national security and law enforcement.
25. Mr McLean argued that FOI should have a presumption in favour of disclosure and that only significant detrimental factors should be allowed to block this.
26. The Commissioner acknowledges the general public interest in transparency and accountability. She accepts that disclosure of the information would allow public scrutiny of the level of resources available to Police Scotland and how these resources are deployed.
27. On the other hand, the Commissioner has already acknowledged that disclosure of the information requested would, or would be likely to, lead to substantial prejudice for the purposes of section 35(1)(a) and (b) of FOISA. Whilst she accepts that disclosure may give the public some greater insight into the resources deployed by Police Scotland, she does not believe this would outweigh the substantial prejudice likely in the event of disclosure, with all the consequent risks.
28. Having balanced the public interest for and against disclosure, the Commissioner has concluded that the arguments against disclosure should prevail in this particular case. Consequently, she is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemptions in section 35(1)(a) and (b) outweighs that in disclosure of the information under consideration.
29. The Commissioner therefore finds that Police Scotland were entitled to withhold the information under the exemptions in section 35(1)(a) and (b) of FOISA.
30. As the Commissioner has concluded that the information is exempt from disclosure in terms of section 35(1)(a) and (b) of FOISA, she is not required to consider whether it is also exempt from disclosure under the exemption in section 39(1).

Section 21 of FOISA – Review by Scottish public authority

31. In his application to the Commissioner, Mr McLean expressed dissatisfaction with Police Scotland's response to his requirement for review. Specifically, he submitted that a genuine review had not been carried out and that the points raised by him in his requirement for review had not been considered.
32. Section 21(4)(a) of FOISA provides that an authority which receives a requirement for review may confirm a decision complained of, with or without such modifications as it considers appropriate. Section 21(5) requires authorities to notify an applicant of the outcome of the review and give a statement of its reasons.
33. In this case, Police Scotland notified Mr McLean on 7 November 2014 that the original response provided to him had been upheld. Police Scotland explained their reasons for upholding the original decision.
34. Although Mr McLean submitted that the points raised in his requirement for review had not been considered, there is no requirement in FOISA for authorities to provide a point by point rebuttal of each and every argument presented by an applicant. In this case, Police Scotland's review response clearly indicated that they had reviewed the information afresh and concluded that the exemptions and public interest test had been correctly applied.
35. Accordingly, the Commissioner is satisfied that Police Scotland did not breach the requirements of section 21(4) and (5) of FOISA in responding to Mr McLean's requirement for review.

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 McLean.

Appeal

Should either Mr McLean 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.

Margaret Keyse
Head of Enforcement

9 March 2015

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.

...

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-

- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;

...

- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

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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