

Decision Notice

Decision 127/2016: Mr Alastair Tibbitt and East Renfrewshire Council

“Prevent” duty guidance and related information

Reference No: 201501856

Decision Date: 10 June 2016



Scottish Information
Commissioner

Summary

On 30 August 2015, Mr Tibbitt asked East Renfrewshire Council (the Council) for information relating to the “Prevent” duty guidance for Scotland.

The Council informed Mr Tibbitt that it did not hold some of the information requested. It refused to confirm or deny whether it held the remainder of the information requested (in terms of section 18 of FOISA).

During the investigation, the Council withdrew its reliance on section 18 in relation to parts of the request, instead informing the Commissioner that this information was not held. It continued to maintain that such information was exempt from disclosure.

The Commissioner investigated and found that the Council partially failed to respond to Mr Tibbitt’s request for information in accordance with Part 1 of FOISA.

The Commissioner accepted that the Council was entitled to conclude that some of the information requested was not held. It should have informed Mr Tibbitt of this, and not applied an exemption to information it did not hold. The Commissioner also concluded that the Council was not entitled to apply section 18 of FOISA in response to one part of Mr Tibbitt’s request for review: she required the Council to respond to this part otherwise than in terms of section 18.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1) (Refusal of request); 17(1) (Notice that information is not held); 18(1) (Further provision as respects responses to requests); 30(c) (Prejudice to effective conduct of public affairs); 73 (Interpretation) (definition of “information”)

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 30 August 2015, Mr Tibbitt made a request for information to the Council. The request concerned the “Prevent” duty guidance for Scotland¹. This guidance provides advice for specified Scottish authorities on their duties under the Counter-Terrorism and Security Act 2015² (the 2015 Act).
2. The information requested was as follows:
 - 2 *Please supply me with all training materials distributed to Council staff in support of the local authority obligation to ensure front line staff are aware of “Prevent” and of*

¹

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445978/3799_Revised_Prevent_Duty_Guidance_Scotland_V2.pdf

² <http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>

“available programmes to deal with any individual who is vulnerable to being drawn into terrorism”.

- 3 *Please confirm how many staff have received these training materials in the last 36 months.*
- 4 *Please confirm how many individuals have been referred, by Council staff, into the Prevent Professional Concerns process as described in the above guidance in the last 36 months.*
- 5 *Please supply all monitoring and/or evaluation reports provided to the local Multi-Agency CONTEST [Counter-Terrorism Strategy] group, or the Scottish Government, in the last 36 months.*
- 6 *Please supply a copy of the Council’s current CONTEST and/or “Prevent” action plan, and any previous plans.*
- 7 *Please confirm whether the Council has received any funding from any other public body in Scotland in order to implement any CONTEST or Prevent activities. If so, how much has been received to date and what activity has been funded?*

Mr Tibbitt also requested other information which is not the subject of this decision notice.

3. The Council responded on 10 September 2015. The Council informed Mr Tibbitt that “any information that we hold in relation to Prevent” was exempt from disclosure under section 35(1)(a) of FOISA (which relates to the prevention or detection of crime). The Council did not specify whether or not it actually held any information falling within the scope of the request.
4. On 10 September 2015, Mr Tibbitt wrote to the Council requesting a review of its decision. He did not consider it was appropriate to apply the exemption to the information requested. Additionally, he considered there was a public interest in understanding how the “Prevent” guidance was being implemented by Scottish local authorities.
5. The Council notified Mr Tibbitt of the outcome of its review on 8 October 2015. At this stage, the Council gave notice, in terms of section 17(1) of FOISA, that it did not hold the information requested in parts 2, 3 and 6 of the request. In relation to parts 4, 5 and 7 of the request, the Council notified Mr Tibbitt (in accordance with section 18 of FOISA) that it would neither confirm nor deny whether it held the information. The Council stated that it did not consider it in the public interest to do so. It also informed Mr Tibbitt that, if it did hold the information, it would be exempt from disclosure under sections 31(1) (which relates to national security) and 35(1)(a) of FOISA.
6. On 11 October 2015, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Tibbitt was dissatisfied with the outcome of the Council’s review. He did not consider it appropriate to apply exemptions to the information in a “blanket” fashion and challenged the Council’s application of section 18. In addition, he did not consider the Council’s arguments that no information was held to be tenable.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt 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.
8. On 30 October 2015, the Council was notified in writing that Mr Tibbitt had made a valid application. The case was then 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. The Council was invited to comment on this application, being asked specific questions in relation to its application of section 18 of FOISA. It was also asked to explain the steps taken to identify and locate the information requested, in relation to parts 2, 3 and 6 of the request.
10. The Council provided submissions, explaining why it did not hold any information falling within the scope of parts 2, 3 and 6 of the request. It added section 30(c) of FOISA to those exemptions it was applying in conjunction with section 18.
11. In subsequent correspondence, the Council the Council withdrew its reliance on section 18 of FOISA in relation to parts 4 and 7 of the request. It confirmed that it did not hold the information, but continued to argue that the exemptions in sections 30(c), 31(1) and 35(1)(a) of FOISA applied.
12. In relation to part 5 of the request, the Council confirmed that it still wished to apply section 18 of FOISA.

Commissioner's analysis and findings

13. 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 Tibbitt and the Council. She is satisfied that no matter of relevance has been overlooked.

Parts 2, 3 and 6 of the request

14. As noted above, in its response to Mr Tibbitt's request for review, the Council gave notice (in terms of section 17(1) of FOISA) that it did not hold any information falling within the scope of these parts of the request.
15. In relation to parts 2 and 3 of the request, the Council stated that, at the time it received Mr Tibbitt's request and when it carried out a review, it did not hold any training materials. The Council explained that, at that time, all training materials regarding "Prevent" were held by Police Scotland as the principal trainers. However, no specific training had actually been provided to Council staff at the time.
16. In relation to part 6 of the request, the Council explained that it had contacted the relevant officer within the Council with responsibility for the development of its action plan, who confirmed that the action plan did not exist at the time of Mr Tibbitt's request.
17. The Commissioner has considered the Council's submissions and its explanation of why it did not hold any information falling within the scope of these parts of the request. Having done so, she is satisfied that the Council made reasonable, proportionate enquiries to establish whether it held any relevant information. She accepts that any information falling

within the scope of these parts of the request would have been identified as a result of these enquiries.

18. The Commissioner is therefore satisfied, on the balance of probabilities, that the Council did not (on receiving the request) hold the information sought in parts 2, 3 and 6 of the request.

Parts 4 and 7 of the request

19. As noted above, the Council's final position during the investigation was that the answer to parts 4 and 7 of the request was "none" and "none" respectively (i.e. it did not hold any information falling within the scope of these parts of the request).
20. The Council submitted that, even though no information was held, the exemptions in sections 30(c), 31(1) and 35(1)(a) of FOISA still applied.

Interpretation of "information"

21. Section 73 of FOISA defines "information" (subject to conditions that are not relevant here) as meaning information recorded in any form.
22. In the Commissioner's view, the definition of information contained in section 73 of FOISA is unequivocal; it can apply only to information that is held in recorded form. She does not accept that the absence of information comprises "information" for the purposes of FOISA. The absence of information means that information is not held.
23. The Commissioner does not accept that a Scottish public authority can apply exemptions to information which is not recorded (and therefore is not held). The provisions in section 16(1) of FOISA, which relate to refusing a request under an exemption, apply only where the information in question is held. Where the information is not held, and the authority does not choose to apply section 18 of FOISA, the position is clear: section 17(1) of FOISA requires the authority to give the applicant notice to that effect. Here, the Council withdrew its reliance on section 18 and therefore was obliged, if it did not consider the information to be held, to give Mr Tibbitt notice under section 17(1).
24. The Commissioner has gone on to consider the Council's explanation of why the information requested in parts 4 and 7 was not held.

Was information held?

25. The Council explained that it had again contacted the relevant officer with responsibility for its "Prevent" duties. That officer undertook a search of the relevant "Prevent" files. Having done this, the Council concluded that no relevant information was held.
26. The Commissioner has considered the Council's submissions and its explanation of why it does not hold any relevant information falling within the scope of these parts of Mr Tibbitt's request. Having done so, she is satisfied that the Council made reasonable, proportionate enquiries and searches to establish whether it held any relevant information. She accepts that any information falling within the scope of parts 4 and 7 of the request would have been identified as a result of those enquiries.
27. The Commissioner is therefore satisfied, on the balance of probabilities, that the Council did not (on receiving Mr Tibbitt's request) hold the information sought in parts 4 and 7 of the request. However, by failing to give notice that it did not hold the information requested in parts 4 and 7 of the request, the Commissioner must find that the Council failed to comply with Part 1 (and, in particular section 1(1)) of FOISA in responding to Mr Tibbitt's request.

Part 5 of the request

28. As noted above, in its review outcome of 8 October 2015, the Council refused to confirm or deny whether it held any information falling within the scope of part 5 of Mr Tibbitt's request. The Council maintained this position in its submissions to the Commissioner.

Section 18(1) of FOISA – “neither confirm nor deny”

29. 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.

30. 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 cited 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.

31. 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.

32. In this case, the Council submitted that, if the requested information existed and was held by it, it would be exempt from disclosure by virtue of any of the exemptions in sections 30(c), 31(1) and 35(1)(a) of FOISA.

33. The Commissioner will first of all consider whether the Council would be entitled to rely upon the exemption in section 30(c) of FOISA.

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

34. 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 section 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 conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.

35. The Council submitted that its duties under the 2015 Act may be interpreted as public affairs for the purposes of FOISA. In its view, prejudice to its own affairs and/or those of its partners would justify withholding the information, if it existed and was held. The Council submitted that disclosing information which outlined its and/or others' specific responses to implementing these duties would be likely to substantially prejudice the ability of the Council and others to carry out those duties.
36. The Council stated that its interventions, and those of others, in this area were a matter of sensitivity and were part of the response to the threat of terrorism outlined in the 2015 Act. The Council submitted that the strategies surrounding interventions in specific circumstances should not be made known to persons who might be minded to attempt to avoid or undermine those strategies.
37. Having considered the Council's submissions, the Commissioner is satisfied that, should any such information exist and be held by the Council, it would be exempt from disclosure under section 30(c) of FOISA. The Commissioner accepts that such information, if it existed, would be highly sensitive and could be of assistance to individuals and groups seeking to ascertain levels of awareness and preparedness in the Council's area.

The public interest test in relation to section 30(c)

38. As this exemption is 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 the Council) would be outweighed by that in maintaining the exemption.
39. Mr Tibbitt submitted that there was a considerable public interest in this matter. In his view, given widely publicised concerns over the way in which public bodies might be implementing the "Prevent" guidance, it was vital that they acted with greater transparency.
40. The Council argued that there was a public interest in its implementation of the "Prevent" guidance being (and being seen to be) effective. The Council submitted that the public interest in disclosure of any such information had to be measured against the contribution which would be made to the effectiveness of the implementation of its duties by maintaining the exemption. In the Council's view, there was a substantial public interest in ensuring that it and its partners were able to perform their functions under the 2015 Act fully and effectively, particularly as they contributed substantially to the protection and maintenance of public safety.
41. The Commissioner has considered carefully the submissions made by both Mr Tibbitt and the Council when balancing the public interest test in relation to section 30(c).
42. The Commissioner accepts that there is a general public interest in transparency and accountability and in scrutinising whether (and how) authorities are fulfilling their responsibilities in relation to matters of public safety effectively and appropriately.
43. The Commissioner also acknowledges that the information under consideration here, if it existed and was held by the Council, would be particularly sensitive and could potentially be

open to misuse. In her view, there is a public interest in allowing the Council to undertake its duties under the “Prevent” guidance effectively, in the interests of public safety and security. Disclosure of the content of this information, if it existed and was held by the Council, could have a detrimental effect on public safety, which would not be in the public interest.

44. On balance, and taking account of all the submissions before her, the Commissioner considers the public interest in maintaining the exemption in relation to this information (if it existed and was held by the Council) outweighs that in disclosing it.
45. Given that the Commissioner is satisfied that, if it existed and was held by the Council, the information would be withheld in terms of section 30(c) of FOISA, she is not required to consider the application of sections 31(1) and 35(1)(a) as also claimed by the Council.
46. Having accepted that the Council would have been entitled to give a refusal notice under section 16(1) of FOISA, assuming the information existed and was held, the Commissioner is also required to consider whether the Council was entitled to conclude that revealing whether the information sought in part 5 of Mr Tibbitt’s request existed (or whether it held that information) would be contrary to the public interest.

The public interest test in relation to section 18(1)

47. The Council submitted that disclosing whether the information existed or was held would be contrary to the public interest, as it is the existence or otherwise of the information, rather than its possible content, that created the risk. In the Council’s view, it was in the public interest to prevent activities such as terrorism or radicalisation so as to avoid the threat of violence, harm and risk.
48. The Council provided the Commissioner with additional submissions which she is unable to set out in this decision, as doing so might indicate whether or not relevant information existed or was held. However, she has considered all of the Council’s submissions fully.
49. In the Commissioner’s view, the role of FOISA is important, not only in enabling transparency in relation to substantive information held by public authorities, but also in enabling transparency regarding information about process.
50. In this case, the Commissioner has concluded that, if the information existed and was held by the Council, it would be entitled to issue a refusal notice under section 16(1). Nonetheless, she considers it is in the public interest to know the progress that the Council is making in implementing its duties under the “Prevent” guidance.
51. The Commissioner acknowledges that it is a matter for the Council to take the approach it considers appropriate in relation to its duties. However, knowing the progress that is being made would enable the public to be informed, and form an opinion, on the Council’s actions and the steps it is taking in relation to its duties under the “Prevent” guidance and the 2015 Act.
52. On balance, the Commissioner is not satisfied in this case that it would be contrary to the public interest for the Council to reveal whether the information sought in this part of Mr Tibbitt’s request existed or was held by it. In particular, the Commissioner considers there is a strong public interest in enabling scrutiny and better understanding of the action (if any) undertaken by the Council in fulfilment of its duties. In the circumstances, she is satisfied that this is stronger than any countervailing public interest in refusing to reveal whether the information exists or is held.

53. Consequently, the Commissioner concludes that the Council was not entitled to refuse to reveal whether the requested information existed or was held by it, in terms of section 18(1) of FOISA. She therefore requires the Council to respond to this part of Mr Tibbitt's request in accordance with section 21 of FOISA, otherwise than by applying section 18 of FOISA (that is, a response in terms of section 21(4)(b)).

The Commissioner's observations on the handling of the request

54. As noted above, in its initial response to Mr Tibbitt, the Council informed him that "any information that we hold in relation to Prevent" was exempt from disclosure. Although not raised as an issue in Mr Tibbitt's application, the Commissioner wishes to comment on this.
55. The Commissioner considers this response to have been very ambiguous; it did not specify the parts of the request where information was (or was not) held. Additionally, she considers it did not fulfil the requirements of sections 16 and 17 of FOISA, which set out the steps an authority must take when issuing a refusal notice.
56. It was only when the Council issued its review response to Mr Tibbitt that it indicated that some of the information requested was not held, and that it was refusing to confirm or deny whether the remaining information existed or was held.
57. The Commissioner would urge Scottish public authorities to ensure that responses to information requests in future clearly indicate what information is (or is not) held, and the exemptions that are being applied to specific withheld information. The only exception to this should be where section 18 is being applied, in which case the authority should make it clear it is doing this (and, where it is doing it in relation to parts of a request only, identify those parts clearly).
58. The Commissioner would also reiterate that exemptions cannot be applied to information which is not held, and unless the authority is applying section 18 it must be clear as to whether information is held or not. See paragraphs 21-23 above.

Decision

The Commissioner finds that East Renfrewshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tibbitt.

The Commissioner finds that the Council was entitled to give notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of parts 2, 3 and 6 of Mr Tibbitt's request.

The Commissioner is also satisfied that the Council did not hold information falling within the scope of parts 4 and 7 of Mr Tibbitt's request. In failing to give Mr Tibbitt notice to that effect, the Council failed to comply with section 17(1) of FOISA.

The Commissioner also finds that the Council was not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether the information requested in part 5 of Mr Tibbitt's request existed or was held by it. The Commissioner therefore requires the Council to respond to part 5 of Mr Tibbitt's request, by providing him with a review outcome other than in terms of section 18 of FOISA, by **25 July 2016**.

Appeal

Should either Mr Tibbitt or East Renfrewshire Council 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 East Renfrewshire Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

10 June 2016

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.

...

- (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.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

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.

...

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.

...

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.

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

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