

Decision Notice

Decision 181/2018: Mr Alastair Tibbitt and Community Safety Glasgow

Referrals to procurator fiscal

Reference No: 201800994

Decision Date: 13 November 2018



Scottish Information
Commissioner

Summary

CSG was asked for the numbers of specific types of fixed penalty notices referred to the procurator fiscal for non-payment. CSG withheld the information on the basis that disclosure would, or would likely to, substantially prejudice the prevention or detection of crime and the apprehension or prosecution of offenders.

Following an investigation, the Commissioner found that CSG did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 16(1) (Refusal of request); 17(1) and (3) (Notice that information is not held); 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 25 April 2018, Mr Tibbitt made a request for information to Community Safety Glasgow (CSG). He asked for information concerning Fixed Penalty Notices (FPNs) it had issued for dog fouling, litter and fly-tipping over the last three financial years. This included the number of FPNs of each type that were referred to the procurator fiscal for non-payment.
2. CSG responded on 30 April 2018. It confirmed that it held some of the information. It explained that it considered his request to be a request for environmental information under the Environmental Information (Scotland) Regulations 2004 (the EIRs), and issued Mr Tibbitt with a fees notice. It advised that it would, however, provide some of the information free of charge.
3. On 4 May 2018, Mr Tibbitt wrote to CSG, requesting a review of its decision. Noting that it was unclear from CSG’s response what information was held and what would be provided in return for payment, and also questioning the claimed cost of provision, he disagreed with the fee applied by CSG.
4. On 17 May 2018, CSG provided Mr Tibbitt with the information it had agreed to provide free of charge in its initial response of 30 April 2018.
5. Later that day, Mr Tibbitt again wrote to CSG and advised that he had not received a response to his review request of 4 May 2018.
6. CSG notified Mr Tibbitt of the outcome of its review on 5 June 2018. CSG advised that it had reconsidered its position and now agreed that the request fell to be considered under FOISA. It apologised for initially considering the request under the EIRs. CSG provided Mr Tibbitt with some other information he had requested and explained why it did not report dog fouling or fly-tipping to the procurator fiscal.
7. In relation to the number of FPNs for litter referred to the procurator fiscal for non-payment, CSG advised that it considered this information to be exempt from disclosure. It considered the exemptions in section 35(1)(a) and (b) of FOISA applied as disclosure would, or would be

likely to, prejudice substantially both the prevention and detection of crime and the apprehension and prosecution of offenders. It advised Mr Tibbitt that it believed the public interest favoured upholding the exemptions.

8. On 12 June 2018, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Tibbitt stated he was dissatisfied with the outcome of CSG's review because he believed that it was in the public interest that the number of FPNs referred to the procurator fiscal be disclosed.
9. Mr Tibbitt submitted that the payment rates were relatively low, so there were a large number of FPNs that could be referred to the procurator fiscal. He argued that disclosing this information was in the public interest. He commented that if CSG had referred every unpaid FPN to the procurator fiscal and they had subsequently taken action then, by CSG's own argument, the figures would have a potentially positive effect on payment rates.

Investigation

10. 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 him for a decision.
11. On 23 July 2018, CSG was notified in writing that Mr Tibbitt had made a valid application. CSG was asked to send the Commissioner the information withheld from Mr Tibbitt. CSG provided the Commissioner with a number of spreadsheets, with supporting explanations. The case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. CSG was invited to comment on this application, and to answer specific questions. CSG was specifically asked to clarify what information it held relating to the number of litter FPNs that had been referred to the procurator fiscal for non-payment.
13. CSG also provided submissions as to why it wished to rely on section 35(1)(a) of FOISA, as disclosure of the information would, or would be likely to prejudice substantially the prevention or detection of crime. It withdrew its earlier reliance on section 35(1)(b).

Commissioner's analysis and findings

14. 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 him by both Mr Tibbitt and CSG. He is satisfied that no matter of relevance has been overlooked.
15. The Commissioner will first of all consider whether CSG held recorded information as to the number of referred to the procurator fiscal for non-payment.

Information held

Interpretation of "information"

16. Section 73 of FOISA defines "information" (subject to conditions that are not relevant here) as meaning information recorded in any form.
17. 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. He does not

accept that the absence of recorded information comprises “information” for the purposes of FOISA. The absence of information means that information is not held.

18. 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.
19. The Commissioner has gone on to consider CSG’s explanation of why it considered it held the information.

Was information held?

20. CSG explained that it held information on FPNs on a database. It provided an explanation of the information it considered to be held in relation to referrals to the procurator fiscal, attempting to address perceived inaccuracies. From these submissions, the investigating officer was not satisfied that the number of referrals was actually recorded.
21. During the investigation, CSG provided further submissions to the Commissioner as to why it considered it held, in recorded form, the number of cases that had been referred to the procurator fiscal. In CSG’s view, this was evidenced by email correspondence.
22. Having considered all of the submissions made by CSG, the Commissioner considers that, in effect, these submissions amount to CSG advising that the figure in question could be inferred from the information that was held.
23. The Commissioner disagrees with CSG’s interpretation. He does not exclude the possibility that the answer to a question such as that under consideration here might follow (by necessary implication, as the only possible answer in the circumstances) from other information held by the authority. In such circumstances, it might be possible to say that the information was held. The Commissioner is not satisfied that such a position is reflected in the information held and produced by CSG, however. Even if the information could be said to offer clear and unequivocal confirmation of the situation claimed by CSG at a particular point in time (and the Commissioner is not satisfied that it does), that point predates CSG’s receipt of Mr Tibbitt’s request by a number of months.
24. The Commissioner is not satisfied, therefore, on the balance of probabilities, that CSG (on receiving Mr Tibbitt’s request) held information confirming the number of FPNs referred to the procurator fiscal for non-payment.
25. Further, the Commissioner does not accept that CSG can apply exemptions to information which is not recorded and, consequently, not held. The scheme established by Part 1 of FOISA is quite clear in this regard: unless the authority wishes to apply the provisions of section 18 of FOISA (and refuse to reveal whether the information exists or is held, where revealing this would be contrary to the public interest), a Scottish public authority’s only option where it does not hold information is to give notice to that effect in terms of section 17(1) of FOISA. At no point in CSG’s handling of this case has any reference been made to section 18.
26. Given that the Commissioner does not accept that CSG held the information under consideration here, CSG had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.

27. By failing to give Mr Tibbitt notice under section 17(1) that it did not hold the information requested in part 3 of his request, as it related to litter FPNs, the Commissioner must find that CSG failed to comply with Part 1 (and, in particular section 17(1)) of FOISA in responding to Mr Tibbitt's request.
28. While no useful purpose would be served by requiring CSG to take any further specific action in this case, the Commissioner would urge CSG to ensure that, in response to future information requests, it takes reasonable steps to establish whether it actually holds any relevant information before purporting to withhold that information from requesters. In all cases, it should address the question of whether it actually holds information in recorded form, as defined by section 73 of FOISA, with clear and relevant explanations, where necessary, if it does not.

Decision

The Commissioner finds that Community Safety Glasgow failed to comply with Part 1 (specifically section 17(1)) of the Freedom of Information (Scotland) Act 2002, by not providing Mr Tibbitt with a notice that it did not hold information relating to the number of litter FPNs that had been referred to the procurator fiscal for non-payment.

Appeal

Should either Mr Tibbitt or CSG 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

13 November 2018

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.

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.

...

(3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info