

Decision Notice 032/2022

Ethnicity of those stopped under Schedule 7 to the Terrorism Act 2000

Applicant: The Applicant

**Public authority: Chief Constable of the Police Service of
Scotland**

Case Ref: 202100083



Summary

Police Scotland was asked for information regarding the ethnicity of individuals examined under Schedule 7 to the Terrorism Act 2000.

Police Scotland withheld this information, arguing that disclosure could endanger national security, hamper their ability to prevent terrorist attacks, and cause harm to individuals.

The Commissioner investigated and found that Police Scotland were not entitled to withhold the information and he ordered them to disclose it.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 31(1) (National security and defence); 35(1)(a) (Law enforcement); 39(1) (Health, safety and the environment)

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 22 July 2020, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The Applicant referred to the Schedule 7 form used by Police Scotland to examine people at ports and borders under the Terrorism Act 2000 (the Act), and she made the following information request:
 - (i) Since I received the form, has it been amended to include a category for religion?
 - (ii) Your form has a box where officers can record people's ethnicity codes. Please could you provide me with the number of Schedule 7 examinations your force conducted in the periods 1 July 2015 to 31 August 2015, 1 July 2016 to 31 August 2016, 1 July 2017 to 31 August 2017, 1 July 2018 to 31 August 2018, and 1 July 2019 to 31 August 2019, broken down by ethnicity code please? Please provide this information by year and in an Excel spreadsheet. Please also provide me with the key for the ethnicity codes you use (e.g. B1 = Black Caribbean).
2. Police Scotland responded on 6 August 2020. In response to request (i), they confirmed that the form had not been updated. In response to request (ii), Police Scotland withheld the information under sections 31(1), 35(1)(a) and (b), and 39(1) of FOISA, arguing that disclosure would adversely affect public safety and have a negative impact on both national security and law enforcement.
3. On the same day, the Applicant wrote to Police Scotland requesting a review of their decision on the basis that she did not accept their reasons for applying the exemptions contained in sections 31(1), 35(1)(a) and (b), and 39(1) of FOISA to the information she had requested.
4. Police Scotland notified the Applicant of the outcome of their review on 7 September 2020. Police Scotland upheld their original response, arguing that the exemptions contained in sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA, were correctly applied to the request.

5. On 18 January 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of Police Scotland's review. She disagreed with their reasons for upholding the exemptions and she could not understand how compliance with her request could jeopardise national security.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
7. On 4 February 2021, Police Scotland were notified in writing that the Applicant had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from the Applicant. 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 to answer specific questions. These related to their reasons for applying the exemptions contained in sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA.

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 him by both the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.
10. During the investigation, Police Scotland withdrew their reliance on section 35(1)(b) of FOISA.

Section 31(1) – National security and defence

11. Section 31(1) of FOISA provides that information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
12. The expression "national security" is not defined in FOISA. The Commissioner considers the phrase covers matters such as defence of the realm; the prosecution of war; the disposition of armed forces; nuclear weapons; security and intelligence services, and potential threats to the economic wellbeing of the UK (including terrorism, espionage and subversion).
13. It should be noted that section 31 of FOISA specifies that information is exempt from disclosure if exemption is required *for the purposes of safeguarding national security*, a condition which has a narrower scope than information which simply *relates* to national security. (See the Commissioner's briefing on section 31(1)¹).
14. Police Scotland submitted that the effective policing of Scotland's (and the UK's) borders is a key factor in preserving the integrity of the national counter terrorism effort.

¹ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section31/Section31.aspx>

They provided submissions relating to examinations conducted under Schedule 7 to the Act and submitted that any disclosure of information as to the extent of such examinations would provide clear insight as to their counter terrorism effort.

15. Police Scotland argued that, in request (ii), the level of detail sought is particularly concerning given not only the very short time periods covered but also the ethnic breakdown of those individuals examined. Police Scotland referred to an earlier appeal on this subject (*Decision 059/2019 Chief Constable of the Police Service of Scotland*²) which upheld section 31(1) of FOISA, in a case where the applicant had sought an annual total of examinations conducted, with no further breakdown.
16. Police Scotland explained that Counter Terrorism is not a devolved matter and Police Scotland are part of the UK Counter Terrorism Network, which is why the Home Office publishes data in this area. Police Scotland stressed that the “safe” level of disclosure for Schedule 7 activity has been assessed by the experts involved to be at UK /annual level (as per the Home Office publications on the matter).
17. Police Scotland provided submissions setting out operational information, which is not set out in detail in this decision.
18. While Police Scotland acknowledged that some of the information could be argued to be historic given the passage of time since the request was submitted, they stressed that it was important not to consider the case in isolation, but to think about the impact of *any* disclosures in providing insight as to their counter-terrorism effort.
19. Police Scotland argued that, if the Commissioner ordered disclosure for figures in July/August for a given year, it was reasonable to presume they may receive another request for the equivalent figures for May/June, etc. Police Scotland argued that, if this occurred, there was a very real chance that, such disclosure would provide essentially “real time” intelligence to criminals and terrorists of matters including how Police Scotland resources are being used.
20. Police Scotland also argued that, if they received numerous requests for two months’ worth of data, the result would not only be disclosure of the same annual total that was found to be exempt in *Decision 059/2019*, but also a further breakdown of that information. Police Scotland argued that the exemption on the grounds of safeguarding national security is more critical in relation to data for shorter time periods. Police Scotland contended that such disclosure provides an even clearer insight as to not only the level of activity across Scotland as a whole but also how that varies over the course of a year.
21. Police Scotland submitted that these arguments extend to the UK as a whole, arguing that as soon as data for one area is available, it is thereafter possible to calculate the extent of counter terrorist activity across the UK when the data is taken in combination with the Home Office publications on the subject.
22. Police Scotland argued that disclosure is harmful to counter terrorism efforts in Scotland, noting that this is clearly a national issue and not a force level issue. Police Scotland argued that consistency amongst UK police forces, the National Police Chiefs Council and the Home Office is crucial in order to protect the integrity of counter terrorist policing.

² <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201800681.aspx>

23. Police Scotland stressed that the threat from terrorism is not hypothetical, noting that recent attacks have taken place on UK soil, and the threat is both sustained and serious.
24. Withholding information in this case ensures that the national security of the whole of the UK is safeguarded effectively. Police Scotland argued that it was impossible to gauge with any accuracy an exact value that can be attributed to the information sought if it were in the hands of an individual intent on committing an act of terrorism. However, they contended that a better-informed terrorist poses a greater risk than an uninformed terrorist.
25. The Applicant disputed the arguments put forward by Police Scotland. She questioned how knowledge of the ethnicity of individuals stopped under Schedule 7 to the Act could compromise national security.

Commissioner's view on section 31(1)

26. The Commissioner has considered all of these submissions carefully.
27. In this case, the Applicant is seeking a breakdown of the ethnicity of individuals examined under Schedule 7 to the Act for the months of July and August in the years 2015, 2016, 2017, 2018 and 2019. As noted above, her request for information was made on 22 July 2020, almost a year on from the data she had requested in 2019.
28. As noted above, Police Scotland have argued that "*any disclosure of information as to the extent of such examinations would provide clear insight as to the counter terrorism effort*" Having carefully considered the withheld information and the submissions made, the Commissioner must disagree with this assertion. In his view, the information requested by the Applicant only provides a historical snapshot of how Police Scotland responded to intelligence led reports for two months in a number of given years.
29. The Commissioner notes that, by the time that the Applicant requested the information (in July 2020), the most recent data was already nearly a year old, and the oldest data was nearly six years old. It is not current data and Police Scotland have not explained how terrorists could use this obsolete information in the planning of an attack. The Commissioner is not satisfied that even 12-month-old data provides an insight into current terrorism awareness levels and Police Scotland have not provided him with any evidence to persuade him otherwise.
30. Police Scotland have expressed concerns that if data for July and August is published in a particular year, then subsequent requests could be made for examinations conducted in additional months until a whole year's worth of data has been disclosed. They argue that, if this occurred, it would essentially provide "real time" intelligence to criminals and terrorists. Again, the Commissioner is not persuaded, on the basis of the withheld information and submissions, that this is the case.
31. Each decision the Commissioner issues is based on the circumstances and arguments provided in each individual case. The Commissioner may not be persuaded that the exemption contained in section 31(1) applies to the information requested by the Applicant in this case, but that does not mean that he will reach the same view if a different set of data is requested in the future.

32. The Commissioner has previously issued two decisions which have considered Schedule 7 examinations and section 31(1) of FOISA, namely; *Decision 063/2019 Chief Constable of the Police Service of Scotland*^b and *Decision 059/2019 Chief Constable of the Police Service of Scotland*^d. In both of these decisions, based on the particular circumstances and arguments provided in each case, the Commissioner upheld the exemption. The Commissioner would reiterate that each case is considered on its own merits, and Police Scotland cannot argue that disclosure in this case would lead to further disclosures, which would in turn, enable terrorists to pinpoint weaknesses in Scotland's (or the UK's) border controls. Such an argument is hypothetical and based on future requests and decisions that have not been made, and indeed which may never be made.
33. Police Scotland have argued that the only "safe" level of data that can be disclosed in relation to Schedule 7 examinations is that already published by the Home Office. Again, the Commissioner is not persuaded by this argument. The Commissioner notes that Northern Ireland (a smaller country) publishes data on its own Schedule 7 examinations⁵, which are more detailed than that published by the Home Office⁶, although neither contain information on the ethnic breakdown of those stopped. The Commissioner notes that Northern Ireland publishes data on the numbers of examinations that have taken place there since 2013, and therefore the disclosure of such figures (for Northern Ireland) must be considered "safe".
34. The Home Office report⁷ states "*An examining officer may stop and question individuals entering and leaving the country through ports, airports, international rail stations and the border area.*" The Commissioner would point out that Scotland has a large number of entry points, and the figures requested by the Applicant are figures for the whole of Scotland; she is not seeking information on, for example, examinations conducted at particular airports. The Commissioner questions the value of intelligence that can only indicate the ethnic breakdown of those stopped a year ago across the whole of Scotland. Police Scotland have not explained, to his satisfaction, why disclosure of this information would jeopardise national security.
35. The exemption in section 31(1) is not subject to a test of substantial prejudice, but exemption must still be "required". The Commissioner would expect some link to be demonstrated between disclosure and national security being compromised.
36. In this case, Police Scotland did not provide any evidential basis to support their submissions as to how disclosure of the requested data would compromise national security. Neither did they provide any evidential basis for concluding that disclosure would be harmful to counter terrorism efforts in Scotland.

³ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201800709.aspx>

⁴ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2019/201800681.aspx>

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932621/N_I_Terrorism_Legislation_Annual_Statistics_2019_20.pdf

⁶ <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-financial-year-ending-march-2020>

⁷ <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-financial-year-ending-march-2021/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-search-great-britain-year-ending>

37. In the Commissioner's view, Police Scotland's assertions about the threat to national security as a result of disclosure of the information requested in this case are unsubstantiated and essentially hypothetical. He does not accept that Police Scotland have demonstrated any tangible link between the withheld information and any direct bearing disclosure would have on national security and the safeguarding of that security.
38. The Commissioner fully understands the importance of the exemption contained in section 31(1) of FOISA. However, Police Scotland have failed to persuade the Commissioner that, in this case, exemption from section 1(1) is required for the purpose of safeguarding national security.
39. Consequently, the Commissioner is not satisfied that Police Scotland were entitled to withhold the information under the exemption in section 31(1). As the Commissioner is not satisfied that the information is exempt from disclosure under section 31(1), he is not required to consider the public interest test in section 2(1)(b) of FOISA.

Section 35(1)(a) – Law enforcement

40. Section 35(1)(a) of FOISA 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 highlights⁸, the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate or 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
41. There is no definition in FOISA of what is deemed to be "substantial prejudice", but the Commissioner considers that 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.
42. This is a qualified exemption which is subject to the public interest test in section 2(1)(b) of FOISA, should it be found to apply to the information.
43. Police Scotland submitted that disclosure of the information sought would hamper the ability of Police Scotland and other UK police forces to prevent terrorist attacks. They argued that disclosure would cause significant prejudice to the ability of Police Scotland and other UK police forces to prevent crimes associated with terrorism and detect those offenders involved. Police Scotland argued that, if the information was disclosed, terrorists could use it in a number of stated ways.
44. Police Scotland submitted that the ability to conduct a Schedule 7 examination is a unique opportunity to engage with an individual suspected of being involved in terrorism for whatever reason.
45. Police Scotland noted that they have a statutory duty to prevent crime and keep the people of Scotland safe; any prejudice to their ability to do so places communities at direct risk of harm.
46. The Applicant rejected the application of section 35(1)(a) of FOISA. She argued that people stopped under Schedule 7 are not necessarily suspected of having committed a crime nor of being offenders.

⁸ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

The Applicant expressed concern that Police Scotland were conflating ethnicity with detecting criminality. She questioned whether Police Scotland were arguing that her knowing (and possibly publishing) the ethnic makeup of people stopped under Schedule 7 would make it harder for them to prevent terrorism.

Commissioner's view on section 35(1)(a)

47. The Commissioner has considered carefully the submissions made by both Police Scotland and the Applicant. Having done so, he is unable to conclude, on the basis of the arguments presented, that the exemption is engaged in relation to the information under consideration.
48. He notes that the request seeks the ethnic breakdown of individuals examined under Schedule 7 to the Act at a national level, for two months, in given years. The information requested does not seek a geographical breakdown. Indeed, the information requested does not directly correlate to the resources deployed in a particular area, given that it covers the whole of Scotland.
49. The Commissioner notes that Police Scotland have argued that disclosure of the information would assist would-be terrorists in planning an attack. The Commissioner would reiterate that the information requested by the Applicant in this case was relatively historic, ranging from almost six years old to almost a year old. The Commissioner cannot see how this information would give insight to would-be terrorists about current Police Scotland operations or enable terrorists to plan a more effective attack.
50. In addition, disclosure of information relating to Scotland does not, in the Commissioner's opinion, give such insight to would-be terrorists about wider UK police operations or enable terrorists to plan a more effective attack. The figures provided by the Home Office are figures for the whole of the UK; they do not apply to specific coasts, ports or named airports. The coastline of England and Wales is vast and there are many airports and entry points available. Police Scotland have not explained, to the Commissioner's satisfaction, how removing the Scotland figures from the Home Office published data would create the harm they have suggested.
51. As with the exemption in section 31(1), the Commissioner is not satisfied that Police Scotland have properly explained or evidenced any link between the information under consideration and the prevention or detection of crime, and particularly any substantial prejudice that would (or would be likely to) ensue from disclosure.
52. In the Commissioner's view, Police Scotland's arguments are essentially speculative and hypothetical in nature, and he is unable to accept that they have provided any cogent argument for the exemptions being engaged.
53. The Commissioner does not accept that the disclosure of the withheld information would have caused, or would have been likely (at the time they responded to the Applicant's requirement for review) to cause, substantial prejudice to Police Scotland's ability to prevent or detect crime or apprehend or prosecute offenders. He does not agree that such a conclusion can be reached on the basis of the general assertions made by Police Scotland in this case.
54. Accordingly, the Commissioner is unable to conclude that Police Scotland were entitled to withhold the information under the exemption in section 35(1)(a) of FOISA.

As the Commissioner is not satisfied that the information is exempt from disclosure under section 35(1)(a), he is not required to consider the public interest test in section 2(1)(b) of FOISA.

Section 39(1) – Health, safety and the environment

55. Section 39(1) of FOISA states that the information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and so is subject to the public interest test required by section 2(1)(b) of FOISA.
56. As the Commissioner notes in his briefing on this exemption⁹, section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the "endangerment" of health and safety. The briefing also notes that the test of "endangerment" is less demanding than the "substantial prejudice" test applied in other exemptions.
57. The Commissioner's view is that the term "endanger" is broad enough to apply where there is a (direct or indirect) threat to the safety of a person which would foreseeably arise in the future, as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner believes that, for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could reasonably be regarded as a distinct possibility.
58. Police Scotland submitted that the individuals whose physical or mental health or safety would be endangered by disclosure are members of the public and police officers. Police Scotland contended that the only reason they want to exempt information from disclosure in this case is to prevent terror attacks on UK soil and keep the people of Scotland's communities and police officers safe from harm.
59. Police Scotland commented that they have seen the devastation and serious physical harm, and loss of life that can result from terror attacks and that the current threat level is assessed at substantial. They stressed that the risks could not be more real.
60. Police Scotland argued that Schedule 7 examinations are a vital tool available to police forces in the fight against terrorism. Any prejudice to the effectiveness of that tool has a direct impact on the efficacy of the national counter terrorism effort and, in turn, the safety of our communities. Police Scotland maintained that the intelligence value of the information requested by the Applicant cannot be underestimated and it must be borne in mind that the behaviour they are trying to prevent is behaviour specifically intended to result in large scale loss of life and physical harm.
61. The Applicant did not accept that section 39(1) of FOISA was relevant, but questioned how her request could endanger someone's mental or physical health or safety.

Commissioner's view on section 39(1)

62. The Commissioner has to be satisfied that the health or safety of individuals would, or would be likely to, be endangered as a direct result of the disclosure of the withheld information.

⁹ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

63. The Commissioner acknowledges that Police Scotland have raised serious concerns about the risk of danger to life from terrorist attacks and that their sole interest in withholding the information requested by the Applicant, is to protect Scottish communities and individuals from the horrors of such attacks.
64. However, the Commissioner is not satisfied that Police Scotland have established that disclosure of the information requested by the Applicant in this case would, or would be likely to, endanger the health or safety of any individual. The Commissioner acknowledges the dangers to life posed by a terrorist attack, but he is not satisfied that the information requested by the Applicant would result in, or increase the risks of, a terrorist attack. Although Police Scotland have asserted that the intelligence value of the requested information cannot be underestimated, the Commissioner notes the historic and limited nature of the information.
65. The Applicant is seeking the ethnic breakdown of individuals examined under Schedule 7 to the Act, in Scotland in July and August in the years 2015 to 2019. This is not current information, it does not relate to any specific point of entry and Police Scotland have not established why knowledge of the ethnicity of those stopped (during those periods in the last few years) would increase the risks or result in a terrorist act now. The Commissioner is not satisfied that Police Scotland have provided any evidential basis for concluding that disclosure would, or would be likely to, increase the risk of terrorist attacks, thereby endangering the physical, mental health or safety of an individual.
66. Having concluded that disclosure of the information in this case would not, and would not be likely to, endanger the physical or mental health or safety of any person, the Commissioner finds that the exemption in section 39(1) was incorrectly applied to the withheld information by Police Scotland.
67. Given that the exemption in section 39(1) of FOISA was wrongly applied, the Commissioner is not obliged to consider the public interest test in section 2(1)(b) of FOISA.

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 the Applicant.

The Commissioner finds that Police Scotland incorrectly withheld the information requested under the exemptions in sections 31(1), 35(1)(a) and 39(1) of FOISA. By doing so, they failed to comply with section 1(1) of FOISA.

The Commissioner requires Police Scotland to disclose the withheld information to the Applicant by 28 April 2022.

Appeal

Should either the Applicant or Police 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 fails 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.

Daren Fitzhenry
Scottish Information Commissioner

14 March 2022

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

...

31 National security and defence

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.

...

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;

...

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

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