

# Decision Notice 015/2022

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## Allegations against the Applicant

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**Applicant: the Applicant**

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

**Case Ref: 202100275**



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked about allegations made about the Applicant. Police Scotland refused to confirm or deny whether they held any information, but stated if the information was held, it would be the Applicant's personal data and its disclosure under FOISA would be unlawful. The Commissioner investigated and found that Police Scotland were entitled to refuse to confirm or deny whether they held the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 38(1)(a) and (5) (definitions of "data subject", "personal data" and "processing") (Personal information)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (5) and (14) (Terms relating to the processing of personal data)

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

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1. On 26 December 2020, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked for details of allegations which had been made about him.
2. Police Scotland responded on 14 January 2021. They refused to confirm or deny whether they held the information, relying on section 18(1) of FOISA in conjunction with section 38(1)(a).
3. Later the same day, the Applicant wrote to Police Scotland requesting a review of their decision. He believed the information should not be withheld and said he consented to the information, if held, being disclosed.
4. Police Scotland notified the Applicant of the outcome of their review on 3 February 2021. They upheld their original decision without modification.
5. On 21 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of Police Scotland's review and considered his request had been refused on improper grounds.

## Investigation

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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 30 March 2021, Police Scotland were notified in writing that the Applicant had made a valid application, 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.

## **Commissioner's analysis and findings**

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9. In coming to a decision, the Commissioner considered all of 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.

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

10. Police Scotland refused to confirm or deny whether they held any information falling within the scope of the Applicant's request.
11. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
  - a request has been made to the authority for information which may or may not be held by it;
  - if the information existed and was 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;
  - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
12. In any case where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment on matters which could have the effect of indicating whether the information existed or was held by the authority.
13. In this case, Police Scotland submitted that, if they held any information falling within the scope of the Applicant's request, it would be exempt from disclosure under section 38(1)(a) of FOISA.

### **Section 38(1)(a) – Personal information of the data subject**

14. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. (It is not subject to the public interest test set out in section 2(1)(b) of FOISA.)
15. Personal data are defined in section 3(2) of the DPA 2018 which, read with section 3(3), incorporates the definition of personal data in Article 4(1) of the GDPR (see Appendix 1):

“ ... any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

16. Police Scotland considered that the information sought by the Applicant in his request would, if held, comprise his own personal data, as he was seeking details of allegations made about him.
17. Having considered the terms of the Applicant's request, the Commissioner is satisfied that, if held, all of the information would be the Applicant's own personal data and would therefore be exempt from disclosure under section 38(1)(a) of FOISA.
18. The Commissioner notes that the Applicant has consented for his own personal data, if held, to be disclosed. It has been explained several times to the Applicant, that if the information is held and relates to him as an individual, then the Commissioner must conclude that the exemption in section 38(1)(a) of FOISA applies.

### **The public interest – section 18(1)**

19. Having accepted that Police Scotland could have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information, if held, would be exempt information by virtue of section 38(1)(a) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether Police Scotland were entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.
20. In his application to the Commissioner, the Applicant provided reasons why he believed the information he was seeking, if held, should be disclosed.
21. Police Scotland submitted that it was in the public interest that they neither confirm nor deny whether they held any information covered by the Applicant's request.
22. Police Scotland submitted that this request sought to confirm whether or not a named individual had been the subject of allegations/police inquiry. Police Scotland explained that there are processes in place whereby offending behaviour is disclosed - but only where appropriate and to whom it is appropriate - for example PVG/disclosure checks for employment and volunteering. Outwith these very tightly managed processes, even a yes/no answer as to whether information is held by the police would amount to individuals being able to "background check" anyone they choose.
23. In their view, it was clearly contrary to the public interest lies to reveal whether the information existed or was held, particularly given that any personal data disclosed under FOISA is deemed to be placed into the public domain. The Commissioner is also satisfied that this would, in itself, be contrary to data protection legislation, which cannot be in the public interest.
24. Having considered the arguments submitted by both parties, the Commissioner is satisfied, in all the circumstances of this case, that it would have been contrary to the public interest for Police Scotland to disclose whether the information requested by the Applicant existed or was held by them.
25. As a result, the Commissioner is satisfied that Police Scotland were entitled to refuse to confirm or deny, in accordance with section 18(1) of FOISA, whether they held the information requested by the Applicant, or whether such information existed.

## **Decision**

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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 the Applicant.

## **Appeal**

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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.

**Margaret Keyse**  
**Head of Enforcement**

**7 February 2022**

### 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 –

(a) the provision does not confer absolute exemption; and

...

(2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

(e) in subsection (1) of section 38 –

(i) paragraphs (a), (c) and (d); and

...

#### 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.

...

#### 38 Personal information

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;

...

(5) In this section-

...

“data subject” has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

...

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act)

...

## **Data Protection Act 2018**

### **3 Terms relating to the processing of personal data**

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
  - (a) an identifier such as a name, an identification number, location data or an online identifier, or
  - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (5) “Data subject” means the identified or identifiable living individual to whom personal data relates.

...

- (14) In Parts 5 to 7, except where otherwise provided –
    - (a) references to the UK GDPR are to the UK GDPR read with Part 2;
- ...
- (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;
  - (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

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