

# Decision Notice 054/2021

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## Record of Radio Interview

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**Applicant: The Applicant**

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

**Case Ref: 202000569**



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for a record, audio or written, of an interview broadcast to the public on Radio Scotland on 8 January 2017.

Police Scotland advised that no information was held, but provided a link to the interview available to the public on Moray Firth Radio's website.

The Commissioner investigated and found that Police Scotland had complied with the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held)

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 7 October 2019, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:  
*any record, audio or written of former Police Scotland Chief Constable Phil Gormley's interview with Mrs June McLeod, as broadcast to the public on Radio Scotland, on 8 January 2017.*
2. Police Scotland responded on 4 November 2019, notifying the Applicant, in terms of section 17 of FOISA, that they did not hold the information. To assist, Police Scotland provided a link to a recording of the interview available on Moray Firth Radio website.
3. On the same day, the Applicant wrote to Police Scotland requesting a review of its decision on the basis that he did not accept that the information was not held. He considered that the information was held by Police Scotland for administrative purposes and should be made available for public scrutiny.
4. Police Scotland notified the Applicant of the outcome of its review on 2 December 2019 upholding the original response that the information was not held.
5. On 22 May 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland's review because he disagreed that the information is not recorded. He considered it was not credible that the information was not held. He also said that Police Scotland did not provide any advice or guidance in terms of where else he could obtain a copy of the recorded information.

## 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 11 August 2020, Police Scotland was 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 to answer specific questions. These related to the searches that were undertaken, any requirement for Police Scotland to hold the information and whether advice and assistance was or could be in the circumstances.

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

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9. In coming to a decision on this matter, 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.
10. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received subject to qualifications which are not applicable in this case.
11. Police Scotland issued a notice to the Applicant to the effect that it did not hold the information he sought. Under section 17(1) of FOISA, where an authority receives a request for information that it does not hold, it must give the requester notice in writing to that effect.

### **Information held by Police Scotland**

12. Police Scotland were asked for details and evidence of searches conducted for information falling within the scope of the request.
13. Police Scotland explained that they do not have a copy (audio or written) of former Chief Constable Gormley's radio interview on 8 January 2017. The phone-in took place at Bauer Radio, Glasgow (not BBC Radio Scotland as stated in the original request). The phone-in was broadcast across the Bauer network which includes Moray Firth, Forth 2 Radio, Tayside 2, West Sound, West FM and Borders. Police Scotland provided details of the specific work areas and staff involved in the searches undertaken.
14. Police Scotland confirmed that the media officer who assisted in compiling the response was involved in setting up the phone-in interview on 8 January 2017. She had confirmed that she had checked their logs which confirmed that Police Scotland did not record the phone-in, or subsequently ask for a copy from Bauer. She confirmed that this would not normally happen. The Chief Constable's staff were also consulted and confirmed that there is no known requirement to record the Chief Constable's media interviews or appearances.
15. Police Scotland's Media Service, as the relevant department, was contacted and asked to conduct searches. It confirmed the phone in took place and that there were no means of recording interviews (i.e. no equipment) and that they had not subsequently asked Bauer for a copy of the phone-in.
16. The Homicide Governance and Review team had ownership of the Police Scotland investigation into the unexplained death at the centre of this request, which is currently with Merseyside Police (Merseyside Police are conducting an independent review into the unexplained death). In August 2019, Homicide Governance and Review inventoried paperwork, correspondence and productions on behalf on Merseyside Police. A search of this inventory using the keyword 'Radio' was carried out. No reference to the Radio phone-in was identified in the inventory. A search of the Homicide Governance Review network drive

(Y Drive), using the same keyword, was undertaken and no written or audio copy to the Radio phone-in was identified.

17. Police Scotland located a copy of a Daily Express news clipping from 3 February 2017, held in the Y Drive which references the interview on Clyde 2 talk show and provided this to the Commissioner.

### **The Commissioner's findings**

18. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
19. Having considered the submissions provided, and having taken account of the reasons why the information would not be held, namely that there was no reason to record the information, no equipment available to record the interview and no requirement to record or request a copy from the radio company, the Commissioner is satisfied that Police Scotland do not hold the information.
20. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities that Police Scotland do not (and did not, on receiving the request), hold the information requested by the Applicant in terms of section 17(1) of FOISA.

### **Provision of advice and assistance**

21. Under section 15(1) of FOISA, a Scottish public authority must, so far as it reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
22. The Applicant stated, in his application to the Commissioner, that Police Scotland had not provided any advice or assistance to him in locating the information. However, the Commissioner notes that Police Scotland provided the Applicant with a link to a transcription of the interview, available on Moray Firth Radio.
23. Police Scotland told the Commissioner this was done to assist the Applicant in identifying and contacting the most likely place to access the information sought. They considered that this was the only advice and assistance they could provide, given that they themselves did not hold the information.
24. Given that the Commissioner is satisfied that Police Scotland do not hold the information requested by the Applicant, he cannot identify any other means by which Police Scotland could have reasonably assisted the Applicant. The Commissioner is therefore satisfied that Police Scotland provided the Applicant with reasonable advice and assistance.

## **Decision**

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The Commissioner finds that the Chief Constable of the Police Service for 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**

**27 April 2021**

## Appendix 1: Relevant statutory provisions

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### 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.

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- (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.

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#### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

#### 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.

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