

# Decision Notice

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## **Decision 104/2017: Mr Martin Conaghan and the Chief Constable of the Police Service of Scotland**

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### **Alleged complaints against an individual**

Reference No: 201700440

Decision Date: 4 July 2017



## Summary

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Police Scotland were asked for information about reports of alleged criminal behaviour. Police Scotland refused to confirm or deny whether the information existed or was held by them

The Commissioner accepted that it would not be in the public interest for Police Scotland to reveal whether the information existed or was held.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 35(1)(a) and (b) (Law enforcement)

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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 5 January 2017, Mr Conaghan made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). He asked for details of any reports or complaints concerning a named individual (Mr X) between 1 January 1990 and 31 December 1990 and details of any subsequent action taken by Strathclyde Police.
2. Police Scotland responded on 2 February 2017. They refused to confirm or deny whether they held the information or whether it existed, applying section 18(1) of FOISA. Police Scotland informed Mr Conaghan that they were applying section 18(1) in conjunction with sections 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35 (Law enforcement) of FOISA.
3. On 7 February 2017, Mr Conaghan wrote to Police Scotland requesting a review of their decision. In his view, it was unrealistic to regard any historic investigation carried out by a predecessor police force into a deceased suspect as ongoing. In his view, the information could be redacted in order to remove the names of any sources or suspects. Additionally, he stated that, since Mr X is now deceased, he could not be the subject of a prosecution and had not been convicted of an offence.
4. Police Scotland notified Mr Conaghan of the outcome of their review on 7 March 2017, confirming their position that section 18(1) of FOISA applied. At this stage, Police Scotland also applied the exemptions in sections 38(1)(b) (Personal information) and 39(1) (Health and safety of an individual) in conjunction with section 18(1), in addition to those applied in their initial response. They clarified which subsections of sections 34 and 35 they considered applicable.

5. On 7 March 2017, Mr Conaghan wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Conaghan stated he was dissatisfied with the outcome of Police Scotland's review because he considered the information could be disclosed without divulging the personal data of any individuals.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Conaghan made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 23 March 2017, Police Scotland were notified in writing that Mr Conaghan had made a valid application. 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, focussing on the provisions of section 18 and the exemptions cited in that connection.
9. Police Scotland responded with submissions on 11 May 2017.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Conaghan and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

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

11. 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.
12. 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 listed 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.
13. 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 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.
  14. In this case, Police Scotland submitted that, if the information existed and was held by them, it would be exempt from disclosure in terms of sections 34(1)(a) and (b), 35(1)(a) and (b), 38(1)(b) and 39(1) of FOISA.
  15. The Commissioner will firstly consider whether Police Scotland could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held. In this regard, she will consider firstly the exemptions in section 35 of FOISA.

### **Section 35(1)(a) and (b) – Law enforcement**

16. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime (section 35(1)(a)) and/or the apprehension or prosecution of offenders (section 35(1)(b)). There is no definition of “substantial prejudice” in FOISA, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility. The exemptions are subject to the public interest test contained in section 2(1)(b) of FOISA.
17. As the Commissioner's guidance<sup>1</sup> on the section 35(1)(a) exemption highlights, the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate and 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 a specific (anticipated) crime or wider strategies for crime reduction and detection.
18. In relation to section 35(1)(b), the Commissioner's guidance states that there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime". She considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as the investigative processes used).
19. Police Scotland submitted that any such information contained within a police report, such as witness statements, would engage the exemptions given the substantial prejudice which would ensue from disclosure.
20. Police Scotland stated that, in the course of a criminal investigation, they interview and gather evidence from any person who may be in a position to assist them. They submitted that there is an acceptance that the information gathered in an investigation will not be

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

disclosed to a third party, other than in the course of criminal proceedings. In Police Scotland's view, to do so would undermine this expectation and might deter victims or witnesses from reporting matters to the police. In their view, this would be likely to prejudice substantially the investigation and detection of crime and the apprehension or prosecution of offenders.

21. The Commissioner has considered carefully the arguments presented by Mr Conaghan and Police Scotland. Having done so, she is satisfied that any information held by Police Scotland regarding the reporting of such allegations would be held for purposes relating to the prevention or detection of crime and/or the apprehension or prosecution of offenders.
22. The Commissioner has noted Mr Conaghan's view that any such information could be redacted in order to remove the names of any sources or suspects. However, she considers that any witnesses or victims providing information to the police in these circumstances would do so in the expectation that the content and nature of the information provided would not be disclosed into the public domain.
23. In all the circumstances, she is satisfied that disclosure of any relevant information held would carry with it sufficient risk of substantial prejudice for the exemptions to apply.
24. The Commissioner accepts, therefore, that (assuming the information requested by Mr Conaghan existed and was held by them) Police Scotland would have been entitled to respond to Mr Conaghan's request by applying either or both of the exemptions in section 35(1)(a) and (b) of FOISA.

#### *The public interest*

25. Police Scotland submitted that, if the information existed and was held, the public interest would be better served by withholding any such information. In their view, it could not be in the greater public interest to compromise the efficiency of the police service and public safety.
26. Police Scotland submitted that a high proportion of such information (if it existed and was held) would comprise names, investigation material and tactical information. They stated that they had a duty to protect life and ensure the safety of the public. In their view, the disclosure of such detailed information would jeopardise this role and have a negative impact on operational work.
27. Police Scotland submitted also that disclosure of such information (if it existed and was held) would inform awareness amongst others who might yet be identified and investigated of the range of tools and tactics available to, and deployed by, the Police. In their view, disclosure of such information could compromise policing methods and enable criminals to engage measures to counter these techniques.
28. The Commissioner accepts that there is a clear public interest in maintaining the flow of information and evidence in this area, as in other areas where serious crime is being investigated.
29. The Commissioner accepts, too, that there will be a degree of public interest in knowing whether any allegations were made and whether (and to what extent) any investigations were carried out subsequently.
30. However, the Commissioner is satisfied that the likely effect of disclosing any relevant information would be the results envisaged by Police Scotland. Given the harm she has already acknowledged, and taking into account the less persuasive arguments for disclosure

in the public interest, the Commissioner accepts that Police Scotland could have given a refusal notice under section 16(1) of FOISA in this case, on the basis that the information requested by Mr Conaghan (if it existed and was held) would have been exempt from disclosure under section 35(1)(a) and (b) of FOISA.

31. The Commissioner is not required, therefore, to go on to consider whether the information would also be exempt from disclosure under any of the other exemptions applied by Police Scotland. She must still consider whether revealing whether the information existed and was held would have been contrary to the public interest.

### **Section 18(1) – public interest**

32. Police Scotland considered that revealing whether the information existed or was held would be contrary to the public interest. In their view, to confirm whether or not a criminal allegation had been made to the Police, or that a person was the subject of an investigation, would seriously inhibit their ability to investigate crime and undermine the role of the police and procurator fiscal.
33. Police Scotland argued that simply confirming the existence of the information requested (if it existed and was held) would, by default, confirm that an individual had made an allegation of criminal behaviour to the police. It would also confirm that a named individual had been the subject of an allegation and that the police had carried out enquiries into the allegations made.
34. In the Police Scotland's view, there is rarely any discernible public interest in confirming or otherwise that a particular criminal investigation had taken place. They submitted that this applies equally to the confirmation that a particular allegation had been made in the first place.
35. Mr Conaghan did not provide any specific submissions explaining why he did not consider it would be contrary to the public interest to reveal whether the information existed or was held.
36. The Commissioner has considered Police Scotland's submissions, and all of the circumstances surrounding the request.
37. The Commissioner recognises that disclosure under FOISA is essentially disclosure into the public domain. This must always be borne in mind when considering the effects of disclosure; a disclosure of this kind to one individual cannot, therefore, be considered in isolation.
38. In these circumstances, bearing in mind the nature and importance of the matters under consideration, 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 reveal whether the information requested by Mr Conaghan existed or was held by them.
39. In particular, the Commissioner recognises the prejudicial impact on future investigations that would likely result were Police Scotland to reveal the existence (or otherwise) of the information. Such a detrimental impact would clearly not be in the public interest.
40. As a result, the Commissioner accepts that Police Scotland were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr Conaghan, or whether that 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 Mr Conaghan.

## **Appeal**

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Should either Mr Conaghan or the Chief Constable of the Police Service of 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**  
**Acting Scottish Information Commissioner**

**4 July 2017**

### 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 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.

...

#### 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;
- (b) the apprehension or prosecution of offenders;

...



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