

# Decision Notice

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## Decision 144/2015: Mr Hutcheon and the Scottish Ministers

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### Applications for Interception warrants

Reference No: 201500213

Decision Date: 8 September 2015



Scottish Information  
Commissioner

## Summary

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On 11 November 2015, Mr Hutcheon asked the Scottish Ministers (the Ministers) for statistical breakdowns of applications for interception warrants in financial years 2012/3 and 2013/4.

The Ministers responded by providing some information, but also refusing some information. Following a review, Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had properly responded to Mr Hutcheon's request for information, in accordance with Part 1 of FOISA.

## 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)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure)

Regulation of Investigatory Powers Act 2000 (RIPA) section 19 (Offence for unauthorised disclosures)

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. It may be helpful to explain that Mr Hutcheon's request pertains to statistical data about activities regulated under the Regulation of Investigatory Powers Act 2000 or "RIPA". The activities regulated under RIPA includes that in relation to warrants obtained for the interception of communications. Under RIPA, an Interception of Communications Commissioner, or "ICC", is appointed by the Prime Minister. The ICC publishes an annual report containing statistical data collected from those bodies regulated by RIPA.
2. On 11 November 2014, Mr Hutcheon made a five part request for information to the Ministers. He asked:
  - 1) How many applications for an interception warrant were made to the Scottish Government in a) financial year 2012/13, b) financial year 2013/4?
  - 2) Regarding question 1, please provide a breakdown of which bodies made the applications.
  - 3) How many applications to the Scottish Government for an interception warrant were both approved and rejected in a) financial year 2012/13, b) financial year 2013/4?
  - 4) How many applications to the Scottish Government for an interception warrant by Police Scotland were both approved and rejected in financial year 2013/14?

- 5) How many applications to the Scottish Government for an interception warrant by legacy police forces were both approved and rejected in financial year 2012/13?
3. The Ministers responded on 2 December 2014, providing information (UK-wide totals) for part 1 of Mr Hutcheon's request. In response to part 2 of the request, the Ministers referred Mr Hutcheon to section 6 of RIPA, where all the bodies covered by RIPA are listed. The Ministers did not provide a comprehensive direct response to parts 3 to 5, while explaining that they did not hold information for refusals. They referred once again to the statistics published in the ICC's Annual Report.
4. On 6 December 2014, Mr Hutcheon wrote to the Ministers requesting a review. He complained that, where information had been provided, he should have been given Scottish figures and not UK figures. He did not believe part 2 of the request had been answered. In respect of parts 1, 3, 4 and 5, Mr Hutcheon complained that no exemptions were cited for information which had not been provided.
5. The Ministers notified Mr Hutcheon of the outcome of their review on 8 January 2015, modifying their original decision. They agreed that they should have provided Mr Hutcheon with details of exemptions under which information was being withheld and cited sections 35(1)(a) and 28(1) of FOISA.
6. On 2 February 2015, Mr Hutcheon wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Hutcheon stated he was dissatisfied with the outcome of the Ministers' review because, although they had now identified the exemptions being relied upon, he believed there was a strong public interest in the information being published. He also commented that the information he sought was not capable of identifying individuals or individual cases.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Hutcheon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 9 February 2015, the Ministers were notified in writing that Mr Hutcheon had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, asking them to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
10. The Ministers responded on 16 April 2015 by confirming that some of the information Mr Hutcheon was seeking (on warrants rejected) was not held. The Ministers also indicated they were now relying upon the exemption in section 26(a) of FOISA to withhold information, in addition to those in sections 28(1) and 35(1)(a) of FOISA. They also confirmed to the investigating officer that they had updated Mr Hutcheon on their reliance on this additional exemption.

## Commissioner's analysis and findings

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11. 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 her by both Mr Hutcheon and the Ministers. She is satisfied that no matter of relevance has been overlooked.
12. In his application, Mr Hutcheon did not contest the Ministers' position that they did not hold information on rejected warrants, so the Commissioner cannot consider this here. Mr Hutcheon did express dissatisfaction that the Ministers continued to withhold information from him under exemptions in FOISA and the Commissioner will now consider the withheld information and the application of exemptions.

### Section 26 of FOISA – prohibitions on disclosure

13. As set out above, the Ministers confirmed they wish to rely upon section 26(a) of FOISA to withhold information from Mr Hutcheon.
14. Section 26(a) of FOISA exempts information from disclosure under FOISA where that disclosure is prohibited by or under an enactment. This is an absolute exemption, in that it is not subject to the public interest test in section 2(1)(b) of FOISA. In this case, the Ministers contended that a prohibition was created by section 19 of RIPA.
15. The Ministers referred to section 19(3) of RIPA which requires the existence and contents of any warrant, along with any details of its issue, to be kept secret. The Ministers explained that they could not address parts 1, 3, 4 and 5 of Mr Hutcheon's request without breaching section 19(3). With regard to parts 2, 4 and 5, they also considered they would be in breach of section 19(3)(b) if they revealed which bodies had applied for a warrant.
16. The Ministers further explained that identifying a body which applied for a warrant, particularly in the context of a calendar or financial year, could be interpreted as disclosure of a detail of the issue of a warrant, even if the details of the warrant's content were not disclosed.
17. The Ministers noted that the ICC's Annual Report provides some information on numbers of warrants at UK level, having determined what it is safe to divulge and without posing a risk to national security, and also having first agreed that disclosure with the Prime Minister in accordance with section 58(7) of RIPA. RIPA requires the ICC to produce an annual report which is laid in both the UK and Scottish Parliaments but that, in the Ministers' view, did not permit them to divulge any information about the existence or details of warrants without the ICC's express permission (which they did not have here).
18. During the investigation, the investigating officer contacted Mr Hutcheon inviting his comments on section 19 of RIPA. Mr Hutcheon gave no comment on this exemption.
19. The Commissioner has considered the submissions for this case carefully. The issue here is whether another enactment, in this case RIPA and specifically section 19(3), applies to the information withheld from Mr Hutcheon. It should be noted there is no public interest test for section 26 of FOISA: it is an absolute exemption.

20. It is clear from the terms of Mr Hutcheon's request that the information he is seeking in each part of his request does come under RIPA. Mr Hutcheon has not contested this point in his correspondence with the Ministers, or in his comments during this investigation.
21. The Commissioner has considered carefully the level of detail Mr Hutcheon is seeking here. Scottish statistics for the dates he specifies in his request are not already in the public domain, as the Ministers have explained. None of the defences listed in section 19 are applicable here and the Commissioner acknowledges that the ICC's consent to disclosure is neither present nor remotely likely in the circumstances. Having looked at section 19 of RIPA, the Commissioner is satisfied that to furnish the level of detail Mr Hutcheon requires would breach this enactment: it would disclose the existence of individual warrants, contrary to section 19(3)(a).
22. In all the circumstances, therefore, the Commissioner finds that the disclosure of the withheld information is (and was, at the time the Ministers responded to Mr Hutcheon's request and requirement for review) prohibited by section 19 of RIPA. Accordingly, the Ministers were entitled to apply section 26(a) of FOISA in relation to Mr Hutcheon's request.
23. Having accepted that the Ministers were entitled to withhold the information under section 26(a) of FOISA, the Commissioner is not required to (and will not) consider the other exemptions applied by the Ministers.

## Decision

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The Commissioner finds that, in respect of the matters specified in the application, the Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Hutcheon

## Appeal

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Should either Mr Hutcheon or the Ministers 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**

**8 September 2015**

## 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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- (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 –

...

- (b) section 26;

...

#### 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

## Regulation of Investigatory Powers Act 2000

### 19 Offence for unauthorised disclosures

- (1) Where an interception warrant has been issued or renewed, it shall be the duty of every person falling within subsection (2) to keep secret all the matters mentioned in subsection (3).
- (2) The persons falling within this subsection are-
  - (a) the persons specified in section 69(2);
  - (b) every person holding office under the Crown;
  - (e) every person employed by or for the purposes of a police force;
  - (f) persons providing postal services or employed for the purposes of any business of providing such a service;
  - (g) persons providing public telecommunications services or employed for the purposes of any business of providing such a service;
  - (h) persons having control of the whole or any part of a telecommunication system located wholly or partly in the United Kingdom.
- (3) Those matters are-
  - (a) the existence and contents of the warrant and of any section 8(4) certificate in relation to the warrant;
  - (b) the details of the issue of the warrant and of any renewal or modification of the warrant or of any such certificate;
  - (c) the existence and contents of any requirement to provide assistance with giving effect to the warrant;
  - (d) the steps taken in pursuance of the warrant or of any such requirement; and
  - (e) everything in the intercepted material, together with any related communications data.
- (4) A person who makes a disclosure to another of anything that he is required to keep secret under this section shall be guilty of an offence and liable-
  - (a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both;
  - (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

- (5) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that he could not reasonably have been expected, after first becoming aware of the matter disclosed, to take steps to prevent the disclosure.
- (6) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that-
  - (a) the disclosure was made by or to a professional legal adviser in connection with the giving, by the adviser to any client of his, of advice about the effect of provisions of this Chapter; and
  - (b) the person to whom or, as the case may be, by whom it was made was the client or a representative of the client.
- (7) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that the disclosure was made by a legal adviser-
  - (a) in contemplation of, or in connection with, any legal proceedings; and
  - (b) for the purposes of those proceedings.
- (8) Neither subsection (6) nor subsection (7) applies in the case of a disclosure made with a view to furthering any criminal purpose.
- (9) In proceedings against any person for an offence under this section in respect of any disclosure, it shall be a defence for that person to show that the disclosure was confined to a disclosure made to the Interception of Communications Commissioner or authorised –
  - (a) by that Commissioner
  - (b) by the warrant or the person to whom the warrant is or was addressed;
  - (c) by the terms of the requirement to provide assistance; or
  - (d) by section 11(9).



**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**