

# Decision Notice

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## **Decision 146/2018: Mr H and the Chief Constable of the Police Service of Scotland**

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### **North Ayrshire Council Schools PPP project**

Reference No: 201801270

Decision Date: 1 October 2018



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked about an investigation into North Ayrshire Council Schools PPP project. Police Scotland stated that they did not hold any information.

During the investigation, Police Scotland confirmed they had identified some information falling within the scope of the request, but were withholding this information under various exemptions.

As Police Scotland have now confirmed that they do, in fact, hold information falling within the scope of the request, and have withheld this information, the Commissioner requires Police Scotland to carry out a new review of their handling of the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(1) and (4)(b) (Review by Scottish public authority); 17(1) (Notice that information is not held); 47(4) and (5) (Application for decision by Commissioner)

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 20 October 2016, Mr H made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:
  - (i) Any reports submitted by Strathclyde Police to the Procurator Fiscal / Crown Office in 2006 relating to the police enquiry into the North Ayrshire Council Schools PPP (Public Private Partnership) Project and/or bidding process.
  - (ii) All correspondence, hard copy or digital, between Strathclyde Police and the Procurator Fiscal / Crown Office in relation to the North Ayrshire Council Schools PPP (Public Private Partnership) Project and/or bidding process.
  - (iii) All correspondence, hard copy or digital, between Strathclyde Police and North Ayrshire Council or individual councillors of the local authority in relation to the North Ayrshire Council Schools PPP (Public Private Partnership) Project and/or bidding process.
  - (iv) All correspondence, hard copy or digital, between Strathclyde Police and Members of the Scottish Parliament in relation to the North Ayrshire Council Schools PPP (Public Private Partnership) Project and/or bidding process.
2. Police Scotland responded on 16 November 2016. They gave Mr H notice, in terms of section 17(1) of FOISA, that no information was held. They also explained that, under their retention schedule, correspondence relating to enquiries only required to be retained for the current year plus six years.
3. On 25 November 2016, Mr H wrote to Police Scotland requesting a review of their decision on the basis that he did not accept that the information he had requested had been destroyed. He argued that the information related to an investigation and it should have been retained as proof that (apparently) no criminality was found.

4. Police Scotland notified Mr H of the outcome of their review on 17 February 2017. They upheld their original response in full and provided Mr H with a web link to their records retention policy.
5. On 27 July 2018, Mr H wrote to the Commissioner. Mr H applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr H stated he was dissatisfied with the outcome of Police Scotland's review because he had obtained evidence that indicated that at least some of the information he had requested was still held by Police Scotland. Mr H provided the Commissioner with an email he had received from a named police officer, which referred to the documentation he had asked for.
6. In terms of section 47(4)(a) of FOISA, an application to the Commissioner must be made within six months after the date of receipt of the authority's review response. In this case, the application made by Mr H was submitted to the Commissioner outwith the six month period.
7. The Commissioner may, however, by virtue of section 47(5) of FOISA, consider an application after the expiry of the six month period if he considers it appropriate to do so. In this case, and after having considered the circumstances surrounding Mr H's application, the Commissioner applied the discretion granted to him under section 47(5) of FOISA and agreed to consider Mr H's application in full.

## **Investigation**

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8. The application was then validated by establishing that Mr H had 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.
9. On 14 August 2018, Police Scotland were notified in writing that Mr H had made a valid application and the case was allocated to an investigating officer.
10. 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 including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

## **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 him by both Mr H and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

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

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority.
13. Section 1(4) of FOISA provides that the information to be given to the applicant is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold, although the applicant's reasons may be relevant to the investigation of what is actually held.
14. In their submissions to the Commissioner, Police Scotland explained that, on receipt of Mr H's information request, Ayrshire Division was identified as the most appropriate police

division to contact, as most likely to hold relevant information. Police Scotland submitted that extensive searches were conducted by Ayrshire Division and retired officers were even contacted in an attempt to locate relevant information.

15. Police Scotland contended that it was unknown to the divisional personnel and FOI officers that the information was not held at Ayrshire division, but by the Economic Crime Unit at Gartcosh. As the extensive searches of Ayrshire division proved negative, Police Scotland gave Mr H notice that they did not hold the information. They submitted that reference was made to Police Scotland's retention policy as it was assumed that the documents would have been destroyed as a result of that policy.
16. Once Police Scotland were notified that Mr H had made an application to the Commissioner, and appeared to have proof that Police Scotland held information covered by his request, they contacted the named officer who had emailed Mr H and asked him for the information he had referred to. The named officer provided the FOI officer with this information, which was then compared to the information request made by Mr H. Through this process, Police Scotland identified 11 documents that met the terms of Mr H's original request of 20 October 2016. They provided the Commissioner with copies of these documents.
17. The Commissioner has considered the content of each of the 11 documents identified by Police Scotland and he is satisfied that they fall within the scope of Mr H's information request. The Commissioner would note that he cannot be sure, at this stage, that this is the *only* relevant information held by Police Scotland, but he is satisfied that Police Scotland do hold some information falling within the scope of Mr H's request.
18. In the circumstances, the Commissioner finds that Police Scotland failed to comply with section 1(1) of FOISA as they failed to identify and locate information falling within the scope of Mr H's request for information. Given that some information has now been identified, it follows that Police Scotland was wrong to give notice under section 17(1) of FOISA that they did not hold any information covered by Mr H's request.
19. It is disturbing to note that the information covered by Mr H's request would not have been identified if he had not pursued enquiries on this matter with the named officer. It goes without saying that the searches conducted by Police Scotland were inadequate, in being restricted to a police division which appears not to have carried out the 2006 investigation to which Mr H's request relates, and failing to establish that the information was held in another police department.
20. The Commissioner notes that Police Scotland are now seeking to withhold all of the identified information under one or more exemptions in FOISA.
21. In light of this discovery of information falling within the scope of Mr H's request and Police Scotland's subsequent refusal to disclose this information, the Commissioner requires Police Scotland to carry out a new review of their handling of Mr H's request and (in terms of section 21(4)(b) of FOISA) provide him with a different decision.

## Decision

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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 Mr H. Police Scotland failed to identify information covered by Mr H's request and wrongly gave notice under section 17(1) of FOISA that it did not hold any information. In doing so, it failed to comply with section 1(1) of FOISA.

Given that Police Scotland has now identified information that falls within the scope of Mr H's information request, and that it is seeking to withhold this information under various exemptions, the Commissioner has required Police Scotland to issue a revised review outcome, in terms of section 21(4)(b) of FOISA, by **15 November 2018**.

## Appeal

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Should either Mr H 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

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If Police Scotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if it had committed a contempt of court.

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

**1 October 2018**

## 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.

...

- (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.

...

#### 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.

...

#### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (4) The authority may, as respects the request for information to which the requirement relates-

...

(b) substitute for any such decision a different decision; or

...

## **47 Application for decision by Commissioner**

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- (4) Subject to subsection (5), an application to the Commissioner under subsection (1) must be made-
  - (a) where the application concerns a matter mentioned in paragraph (a) of subsection (1), before the expiry of six months after the date of receipt by the applicant of the notice complained of; or
  - (b) where the application concerns a matter mentioned in paragraph (b) of that subsection, before the expiry of six months after the period allowed in section 21(1) for complying with a requirement for review has elapsed.
- (5) The Commissioner may consider an application under subsection (1) made after the expiry of the time allowed by subsection (4) for the making of that application if, in the opinion of the Commissioner, it is appropriate to do so.

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