

# Decision Notice

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**Decision 174/2015: Mr Rab Wilson and the Chief Constable of the Police Service of Scotland**

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**Report about Ayrshire and Arran Health Board**

Reference No: 201501163

Decision Date: 10 November 2015



Scottish Information  
Commissioner

## Summary

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On 20 April 2015, Mr Wilson asked the Chief Constable of the Police Service of Scotland (Police Scotland) about aspects of the investigation upon which a report about NHS Ayrshire and Arran was based. Police Scotland told Mr Wilson they could neither confirm nor deny whether the information existed. Following a review, Mr Wilson remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, Police Scotland confirmed to Mr Wilson that they held no information falling within his request.

The Commissioner found that Police Scotland had not been entitled to refuse to confirm or deny whether they held the information. As Police Scotland have now confirmed that they do not hold the information, she did not require Police Scotland to take any action.

## 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); 17(1) (Notice that information is not held); 18(1) (Further provisions as respects responses to request); 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 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.

## Background

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1. On 20 April 2015, Mr Wilson made an information request to Police Scotland. He referred to a report compiled by a named police officer, which considered allegations of criminal negligence by NHS Ayrshire and Arran and asked whether the Health and Safety Executive's "EMM enforcement management model code" was used in the investigation or inquiries, and whether the officer had looked at breaches of the Health and Safety at Work etc. Act 1974. Mr Wilson explained that he simply wanted a "Yes or No" reply and was not seeking a copy of the report.
2. Police Scotland responded on 19 May 2015. They relied on section 18 of FOISA and would neither confirm nor deny that the requested information existed. They stated that if the information was held, Police Scotland would regard it as exempt from disclosure in terms of section 34(1)(a) and (b), and section 35(1)(a) and (b) of FOISA.
3. On 19 May 2015, Mr Wilson wrote to Police Scotland requesting a review of their decision as he disagreed that the information he had asked for fell within the exemptions cited.
4. Police Scotland notified Mr Wilson of the outcome of their review on 18 June 2015. Police Scotland upheld their initial decision and continued to rely on section 18, in conjunction with sections 34 and 35 of FOISA.
5. On 18 June 2015, Mr Wilson wrote to the Commissioner. Mr Wilson applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He explained that he was

dissatisfied with the outcome of Police Scotland's review because he did not believe the information he had requested was exempt from disclosure.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Wilson 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.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland was invited to comment on this application and to answer specific questions, including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
8. During the investigation, Police Scotland agreed that they would respond to Mr Wilson otherwise than in terms of section 18 of FOISA. That is, Police Scotland agreed that they would confirm to Mr Wilson whether they held the information he had requested.
9. Police Scotland wrote to Mr Wilson on 23 September 2015 and gave notice, in terms of section 17 of FOISA, that they did not hold the information he had requested.
10. Mr Wilson accepted that Police Scotland did not hold the information, but he was aggrieved that it had taken Police Scotland such a long time to let him know. Mr Wilson confirmed that he wished the Commissioner to decide whether Police Scotland had dealt with his request for information in accordance with Part 1 of FOISA.

## Commissioner's analysis and findings

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

### **Section 18(1) of FOISA - "neither confirm nor deny"**

12. Initially, and at review, Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr Wilson's request. Mr Wilson disagreed with Police Scotland's reliance on section 18 and put forward a number of reasons why he believed Police Scotland should confirm or deny whether they held the requested information. Mr Wilson was strongly of the view (for reasons he explained to the Commissioner) that Police Scotland did not hold the information he had requested and that they should confirm this.
13. 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.

14. In this case, Police Scotland argued that the information would be exempt by virtue of sections 34(1)(a) and (b) and 35(1)(a) and (b) of FOISA.
15. The Commissioner will go on to consider whether any of these exemptions could apply to the requested information.

**Section 34(1)(a) and (b) - Investigations by Scottish public authorities and proceedings arising out of such investigations**

16. Section 34(1)(a) of FOISA provides that information is exempt from disclosure if it has been held at any time for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i)) or whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii)).
17. Section 34(1)(b) of FOISA provides that information is exempt from disclosure if it has been held at any time for the purposes of an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted.
18. The exemptions in sections 34 are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept that the exemption applies to the information. There is no harm test associated with these exemptions: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies.
19. Mr Wilson wanted to find out whether the police investigation into certain allegations of criminal negligence had involved the Health and Safety Executive's "EMM enforcement management model code" and whether breaches of health and safety legislation had been considered. He stated that a "Yes or No" answer would suffice.
20. The Commissioner is of the view that such information (the yes/no answer) would be covered by the exemptions in section 34(1)(a)(i) and section 34(1)(b) of FOISA. The investigation in question was one which Police Scotland had a duty to conduct, to ascertain whether a person should be prosecuted for an offence, and whether a report should be made to the Procurator Fiscal. Information about the methodology of the investigation would be held by Police Scotland only in relation to this purpose.
21. The exemptions in section 34(1)(a)(i) and (b) are subject to the public interest test in section 2(1)(b) of FOISA.

*Public Interest test - section 2(1)(b)*

22. Even where the Commissioner accepts that the information is covered by the exemption in section 34(1)(a) or (b), she must order the information to be disclosed unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.
23. As stated in previous decisions, the "public interest" is not defined in FOISA, but has been described as something which is of serious concern and benefit to the public, not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. it must serve the interests of the public.

24. Police Scotland's submissions on the public interest were that, if the information existed and was held, its disclosure would be likely to jeopardise future investigations of a similar nature, by demonstrating what evidence Police Scotland would seek to obtain. Police Scotland argued that the public interest lay in preventing any such negative impact on law enforcement.
25. Police Scotland provided other, general, public interest arguments on issues such as the risk to the public, the flow of information to the Police, and the undermining of the right to a fair trial.
26. Against this, Police Scotland identified that the public interest would be served by ensuring the accountability of the police in relation to the thoroughness and effectiveness of its investigation. Police Scotland also noted the public interest in enabling scrutiny of public spending and public debate on the use of increasingly scarce resources. Police Scotland acknowledged that there "may be an element of high profile or national interest in this matter", but questioned whether the level of such interest was at the level perceived by Mr Wilson.
27. Having carefully considered all of the arguments presented by Police Scotland, the Commissioner has concluded, in all the circumstances, that the public interest in maintaining the exemptions in section 34(1)(a) and (b) of FOISA would not outweigh the public interest in disclosure of the information.
28. As stated in previous decisions, the Commissioner recognises that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. The Commissioner accepts that there are strong arguments supporting the view that it is generally in the public interest to preserve the integrity of information relating to the investigation of a crime or potential crime. She considers that, in general, it will not be in the public interest to disclose information if this would undermine the confidence of the public in that part of the justice system or the ability of police officers to gather comprehensive information for such investigations.
29. However, the wider interest in the subject matter of the report must also be considered, and the Commissioner recognises there is a public interest in providing an insight into police methods and actions, so that the actions of the police may be scrutinised, contributing to transparency and accountability in relation to a matter of public concern.
30. The Commissioner was unconvinced by the argument put forward by Police Scotland that disclosure of the information requested by Mr Wilson would have the detrimental effect suggested on the ability of the police to gather information for such investigations, or would undermine the confidence of the public in any part of the justice system. The information requested was whether a specific methodology known as EMM, which is used by the Health and Safety Executive (HSE), was used by the Police in this investigation and whether the investigation considered alleged breaches of Health and Safety legislation. The Commissioner does not think that disclosure of information that would answer such question would be likely to jeopardise future investigations of a similar nature, by demonstrating what evidence Police Scotland would seek to obtain. She does not accept there would be any negative impact on law enforcement. Nor does she accept that there would be a risk to the public, or to the flow of information to the Police, or that disclosure would undermine the right to a fair trial.
31. Having carefully considered all of the arguments presented, the Commissioner has concluded, in all the circumstances of this case, that the public interest in maintaining the

exemptions in section 34(1)(a) and (b) of FOISA would not outweigh the public interest in disclosure of the requested information.

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

32. At review, Police Scotland also argued that the information would be exempt by virtue of section 35(1)(a) and (b).
33. Section 35(1)(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. 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. These are qualified exemptions which are subject to the public interest test in section 2(1)(b) of FOISA, should they be found to apply to the withheld information.
34. As the Commissioner's guidance<sup>1</sup> on this exemption indicates, the term "prevention or detection of crime" is wide ranging, encompassing actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and prevention.
35. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, more than simply a remote possibility.
36. Police Scotland produced similar arguments in respect of section 35(1)(a) and (b) of FOISA as they did for section 34(1). They commented that any information publicly identifying the use of policing techniques will likely be used to the advantage of those intent on committing similar offences now or in future. Public disclosure would confirm the focus of police enquiries and what steps to take to avoid possible detection. They argued that information that undermines the operational integrity of these activities will adversely affect future investigations and have a negative impact on law enforcement.
37. Police Scotland stated that if they were to confirm publicly their investigation strategies then the likelihood of future offences being suspected or detected would greatly reduce as offenders become more aware of what steps they need to take to avoid detection. Or, it could be argued that such information could be used to incriminate others who would automatically be the subject of police enquiries in such matters.
38. The Commissioner must consider whether disclosure would (or would be likely to) cause substantial prejudice to the prevention or detection of crime (section 35(1)(a)) or to the apprehension or prosecution of offenders (section 35(1)(b)).
39. The Commissioner cannot accept that these exemptions would apply to the information which Mr Wilson requested. She is not satisfied (in all the circumstances of this case) that Police Scotland have established that disclosure would result in the harm anticipated by Police Scotland. As stated above, Mr Wilson asked whether a police investigation had involved a publicly-known evaluation methodology used by HSE, or had considered

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

breaches of health and safety legislation. She does not accept that this information would be capable of producing the harm described above, or harm at the level of substantial prejudice in relation to the prevention or detection of crime or the apprehension or prosecution of offenders.

40. The Commissioner does not, therefore, accept that the exemptions in section 35(1)(a) and (b) of FOISA should be upheld in this case. Given that these exemptions have not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to these exemptions.

### **Section 18(1) – refusal to confirm or deny whether information is held**

41. The Commissioner has found that none of the exemptions cited by Police Scotland in conjunction with section 18(1) of FOISA would be upheld. Accordingly, she does not accept that Police Scotland could issue a refusal notice under section 16(1) of FOISA on the basis that the information was exempt from disclosure by virtue of any of the exemptions in sections 34(1)(a) and (b) or 35(1)(a) and (b) of FOISA.
42. In these circumstances, Police Scotland were not entitled to refuse to confirm or deny whether they held the information. The Commissioner does not need to go on to consider whether it would be contrary to the public interest to confirm or deny whether the information exists or is held by Police Scotland.

### **Other matters**

43. Mr Wilson made several points about the way in which the report was compiled, with respect to the methodology he would have expected the police to use. The Commissioner cannot consider what Police Scotland should have done in relation to any investigation or report. The Commissioner can only consider whether Police Scotland complied with FOISA in responding to Mr Wilson's request.

## **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 Wilson.

The Commissioner finds that Police Scotland were not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the information requested by Mr Wilson existed or was held by them. Given that, following his application to the Commissioner, Police Scotland told Mr Wilson that they do not hold the information, the Commissioner does not require Police Scotland to take any action in respect of this failure.

## **Appeal**

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Should either Mr Wilson 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**

**10 November 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.

...

(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.

...

#### 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.

...

#### 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.

....

**34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
- (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
    - (i) should be prosecuted for an offence; or
    - (ii) prosecuted for an offence is guilty of it;
  - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...

**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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