

# Decision Notice

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**Decision 222/2016: Mr Paul Hutcheon and the Chief Constable of the Police Service of Scotland**

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## **Covert Human Intelligence Sources**

Reference No: 201600673

Decision Date: 17 October 2016



Scottish Information  
Commissioner

## Summary

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On 14 January 2016, Mr Hutcheon asked the Chief Constable of the Police Service of Scotland (Police Scotland) for information regarding Covert Human Intelligence Sources. Police Scotland initially failed to respond to the request. Following a review request they subsequently refused to provide some of the information requested, under the exemptions relating to law enforcement and health and safety.

The Commissioner found that Police Scotland were not entitled to withhold the information from Mr Hutcheon and required them to disclose it.

## 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); 35(1)(a) and (b) (Law enforcement); 39(1) (Health, safety and the environment)

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 14 January 2016, Mr Hutcheon made a request to Police Scotland for the following information:
  - (a) Since Police Scotland was formed, how much has been paid to informants/Covert Human Intelligence Sources (CHIS)?
  - (b) Since Police Scotland was formed, how many CHIS has Police Scotland had?
  - (c) Please provide me with all Police Scotland Standard Operating Procedures (SOP) in relation to CHIS.
2. On 22 February 2016, Mr Hutcheon wrote to Police Scotland, requiring a review on the basis that Police Scotland had failed to respond to his request.
3. Police Scotland notified Mr Hutcheon of the outcome of their review on 17 March 2016. They provided information in response to part a) of his request, but in relation to parts b) and c) informed him that they were withholding the information under sections 35(1)(a) and (b) (Law enforcement) and 39(1) (Health, Safety and the Environment) of FOISA.
4. On 18 April 2016, Mr Hutcheon wrote to the Commissioner's office. 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 Police Scotland's review because he considered the exemptions had been wrongly applied to parts b) and c) of his request, and that disclosure was in the public interest.

## Investigation

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5. 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 their response to that request before applying to her for a decision.
6. On 13 May 2016, Police Scotland were notified in writing that Mr Hutcheon had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Hutcheon. Police Scotland provided the information and the case was allocated to an investigating officer.
7. 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, focussed on their application of sections 35(1) and 39(1) of FOISA to the information requested.
8. During the investigation, Police Scotland reconsidered their position regarding part c) of the request and provided Mr Hutcheon with a copy of the SOP requested.
9. Police Scotland provided submissions to the effect that the information requested at part b) of the request was exempt from disclosure in terms of sections 35(1)(a) and (b), and 39(1) of FOISA.

## Commissioner's analysis and findings

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10. 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 Police Scotland. She is satisfied that no matter of relevance has been overlooked.

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

11. 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 in FOISA of what is deemed to be substantial prejudice, 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.
12. Section 35(1)(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. As the Commissioner's guidance on this exemption highlights<sup>1</sup>, 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 include activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection. The Commissioner accepts that such strategies would include the use of CHIS.
13. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance

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

also states, 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 that 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). The Commissioner accepts that such techniques would include the use of CHIS.

14. 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.

*Police Scotland's submissions.*

15. Police Scotland explained to the Commissioner that in relation to CHIS statistics, they submitted figures on an annual basis to Office of the Surveillance Commissioner (OSC). They further submitted that the OSC published figures at a UK level and these were available within the OSC Annual report<sup>2</sup>. Police Scotland, in particular drew attention to section 4.4 of the OSC Annual Report, which states that figures "will not be broken down on a force, regional or national basis for obvious reasons".
16. Police Scotland submitted that while the request in itself, in isolation, did not appear harmful, it had the potential to become so over time.
17. In relation to section 35(1)(a) of FOISA, Police Scotland submitted that disclosure of the figure requested would enable Serious Organised Crime Groups (SOCG) to increase their knowledge of the number of CHIS that had operated or were continuing to operate within Scotland. They submitted that the figures from the OSC report, taken in conjunction with CHIS numbers requested here, would allow SOCGs to conduct simple calculations using population figures to calculate the likelihood of CHIS working within their crime group.
18. Additionally, Police Scotland commented that the Scottish Government had published its Serious Organised Crime Strategy<sup>3</sup> and within this document the number of SOCGs and members of these, along with other key statistics were made available. Police Scotland explained the risk is that as more information was disclosed, either through FOISA or other routes, the knowledge at the disposal of SOCGs increased.
19. Police Scotland identified a concern that over time, and if future figures were disclosed, criminals could begin to identify trends and spikes in the number of CHIS and then map these into their own knowledge of individuals within their networks. Police Scotland raised a concern that disclosure of the information requested might set a precedent and future requests would confirm if there was any increase/decrease over specific periods.
20. Police Scotland made further submissions that the disclosure of the information would allow SOCGs to put in place counter measures against undercover officers, which in turn would jeopardise ongoing operations and frustrate their attempts to bring offenders to justice. They further submitted that to their knowledge, no other forces disclosed the information and this

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.asp>  
<https://osc.independent.gov.uk/wp-content/uploads/2015/06/OSC-Annual-Report-2014-15-web-accessible-version.pdf>

<sup>3</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.asp>  
<http://www.gov.scot/Resource/0047/00479632.pdf>

would set a wider precedent and create an untenable position for other (particularly smaller) forces.

21. With regard to section 35(1)(b) of FOISA, Police Scotland submitted that police operations often depend on the use of covert techniques and methodologies. They stated that disclosure of the information would provide an insight into the use of CHIS and allow SOCGs to link this to their own knowledge in an effort to expose any undercover operation.
22. Police Scotland submitted that those involved in criminal activity were likely to take steps to prevent being brought to justice, such as destroying evidence or severing links within their network. They explained that evidence and witnesses were key to both the apprehension and prosecution of offenders. They did not believe the figures requested here should be disclosed if they could be used to the advantage of those intent on criminality.
23. In addition, Police Scotland submitted that disclosure could substantially prejudice the ability to apprehend and prosecute offenders if they were able to identify that their criminal enterprise had been infiltrated by a CHIS. They could depart the country legally prior to arrest and travel to areas with non-existent or complex extradition procedures. This would result in costly and lengthy processes, or mean persons could remain as fugitives to avoid prosecution.
24. Police Scotland also submitted that if the figures were disclosed, they would find it increasingly difficult to convince members of the public providing assistance to the police that the police would do their utmost to protect their identities. This would result in trust and confidence with currently authorised CHIS or potential CHIS being eroded.
25. As a result, Police Scotland submitted that members of the public would be less likely to engage with the police in this role and the prevention and detection of crime would be severely prejudiced, due to this lack of trust and confidence and the resultant effect of a reduction in intelligence sources.

*The Commissioner's conclusions on section 35(1)(a) and (b)*

26. The Commissioner has considered all of the submissions made by Police Scotland in relation to the application of section 35(1)(a) and (b).
27. In relation to the OSC Report, the Commissioner notes that paragraph 4.4 relates to the use and deployment of undercover officers, or "relevant sources". Taken in the context of the report, it is apparent that paragraph 4.4 should be read in conjunction with paragraph 4.3, which outlines what was agreed with the Chair of the National Undercover Working Group regarding publication of statistics.
28. The information under consideration here does not relate to the number of "relevant sources" but to the overall number of CHIS.
29. The Commissioner is not satisfied that any of the submissions made by Police Scotland have explained how the effective use of any "relevant source", or any other CHIS, could be compromised by disclosure of the information requested.
30. The Commissioner notes that the UK CHIS figures are published at 4.14 of the OSC Report, but it is not apparent what bearing the reference in paragraph 4.4 has on the overall CHIS figures, if any.
31. Even if the Commissioner was to accept that paragraph 4.4 of the OSC report related to the overall UK CHIS figures at 4.14, the Commissioner has to consider whether disclosure of the

figures requested here would cause the substantial prejudice required for section 35(1)(a) and/or (b) to be engaged.

32. In the circumstances, the Commissioner is not satisfied that Police Scotland have provided sufficient submissions to show that disclosure of the information requested would allow any SOCG, or any individual with criminal intentions (or anyone else, for that matter) to carry out further calculations that would allow any CHIS, including any "relevant source", to be identified or linked to any specific area of Scotland, time, class of crime, or any SOCG. The request is for a single figure for Scotland as a whole, since Police Scotland was created in 2013.
33. The OSC has openly reported and disclosed figures at UK level. Police Scotland has provided the amounts paid to CHIS as per part a) of the request and so it is well known that CHIS are part of Police Scotland's strategies and techniques used in carrying out their functions. The Commissioner is not persuaded (and has not been provided any evidence to demonstrate) that disclosure of the Scottish figure requested here would, or would be likely to, result in any of the harm claimed by Police Scotland.
34. The decision on substantial prejudice has to be based on the information available at the time. It is well documented that each request for information has to be considered on its own merits. It will not necessarily follow that any further request for CHIS-related data must be approached on the same basis and, in the case of the information requested here, the required link between disclosure of the information requested and any harm that might follow has not been established.
35. Whilst accepting the need for Police Scotland to protect its ability to conduct its functions under section 35(1)(a) and (b) of FOISA, the Commissioner considers the submissions she has received are general in nature, speculative, and do not evidence how disclosure of the information requested would be the catalyst of any of the harm claimed by Police Scotland.
36. For the reasons set out above, the Commissioner does not accept that disclosure of the withheld information to Mr Hutcheon, and thereby into the public domain, would have caused, or would have been likely to cause, substantial prejudice to Police Scotland's ability to prevent or detect crime or apprehend or prosecute offenders. She does not believe such a conclusion can be reached on the basis of the general arguments provided here.
37. 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.
38. Given that she is not satisfied that section 35(1)(a) and (b) of FOISA, was correctly applied, the Commissioner will now consider the application of section 39(1) of FOISA.

### **Section 39(1) – Health, safety and the environment**

39. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.

40. In the Commissioner's briefing<sup>4</sup> on this exemption, it is noted that section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test found in various other exemptions contained in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. The briefing also notes that the test of "endangerment" is less demanding than the "substantial prejudice" test applied in other exemptions.
41. The Commissioner's view is that the term "endanger" is broad enough to apply where there is a (direct or indirect) threat to the safety of a person which would foreseeably arise in the future, as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner believes that for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.

*Police Scotland's submissions.*

42. Police Scotland submitted that CHIS undertook their work at great risk to themselves and those known to them, operating in highly pressurised environments. This in itself, Police Scotland submitted, impacted on their wellbeing, both mentally and physically. Police Scotland argued that if a CHIS' "cover" or "legend" were to be questioned or compromised, this would place them at further risk of harm, either actual or perceived.
43. Police Scotland submitted that the request under consideration here would in itself add to the burden placed on those officers and cause them additional stress.
44. Police Scotland believed they looked to prevent the disclosure of any information which could assist criminals in identifying CHIS, as SOCGs were often known to use severe violence and other tactics, such as extortion, in order to exert influence over others.
45. In their submissions, Police Scotland suggested that senior officers, responsible for authorising the conduct and use of CHIS, were best placed to comment on what SOCGs would do with this information if it were made available. They commented that such views were not "idle speculation", but rather professional and expert opinions based on many years of direct and operational experience.
46. Police Scotland also made further submissions that, in the opinion of senior officers, there is a real and significant risk that SOCGs would endanger individuals they suspected (rightly or wrongly) of being CHIS, and their families, if the information requested was disclosed.
47. Police Scotland provided the Commissioner with a number of examples of occasions where SOCGs had harmed CHIS, or entirely innocent members of the public wrongly suspected of being CHIS. They also provided detailed submissions to show that research had demonstrated the endangerment CHIS might face, which was of a serious nature. They submitted that they had a duty of care to all CHIS and their family members.
48. Police Scotland further suggested that it is foreseeable that disclosure of the information sought, coupled with other information already in the public domain, would have the disproportionate effect of increasing the efforts of SOCGs and terrorists to identify CHIS, and would therefore pose a serious risk to those acting as CHIS and also those merely suspected of doing so.
49. Police Scotland provided a number of examples which demonstrated the actions those involved in serious organised crime would take to identify the presence of CHIS within their

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<sup>4</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>



SOCGs, and of the consequences disclosure could have on the operation and management of CHIS and the difficulties that could result. In their view, disclosure of the information was likely to seriously interfere with the rights those acting as CHIS, or suspected of being a CHIS, under Article 2 of ECHR (the right to life).

50. Police Scotland drew reference to the Commissioner's *Decision 084/2010 Sarah Beech of the Digger and the Chief Constable of Strathclyde Police*<sup>5</sup>, where (at paragraph 24) the Commissioner "*acknowledges that disclosures of the information requested, together with the information released by the SCDEA, could lead to correlation of data and speculation by others that individuals might or might not be receiving protection, thereby giving rise to the fears, particularly the fear of reprisal, expressed by Strathclyde Police*".
51. They also referred to *Decision 037/2009 Mr Stephen Stewart of the Daily Record and the Chief Constables of Central, Grampian, Lothian & Borders, Strathclyde and Tayside Police*<sup>6</sup> which concerned a request for information about payments made to CHIS and the reasons for payment. The Commissioner had accepted (at paragraph 43) that: "*in a smaller force area, an extraordinary payment could indeed (rightly or wrongly) be linked with a specific event or the disruption of criminal activity (knowledge of which would be limited to criminal enterprise), from which inferences could be drawn about informant activity*".
52. Police Scotland submitted that the reasoning in the above two decisions was relevant to this particular application, on the basis that the Commissioner had accepted previously that SOCGs could use information disclosed by the police to their advantage.
53. Police Scotland also submitted that they have duty of care, amongst other things, to protect life in terms of section 20(1)(c) of the Police & Fire Reform (Scotland) Act 2012 (the 2012 Act). They also referred to their duty their duty in terms of section 6(1) of the Human Rights Act (the HRA) to act in a manner which is compatible with the European Convention on Human Rights. In particular, Police Scotland stated they have a duty to act in a manner compatible with individuals' right to life, protected by Article 2 of the Convention. Arguably, and with reference to relevant case law, it considered this to be the most fundamental human right.

*The Commissioner's conclusions on section 39(1)*

54. In coming to a decision on the application of section 39(1) of FOISA, the Commissioner has taken cognisance of all of the submissions made by Police Scotland, including the submissions listed under section 35(1)(a) and (b) above where they relate to safety of individuals.
55. It is already publicly known that Police Scotland operate CHIS. The Commissioner fully accepts that those who are classified as CHIS are at times in dangerous positions, and are operating in situations where there is well-founded apprehension of danger. She also accepts the lengths SOCGs and those involved in criminal or terrorist activities will go to identify CHIS (including "relevant sources"), and consequent actions that may be taken against CHIS or innocent individuals wrongly identified as such. She accepts the need for Police Scotland to consider its own duty of care and its statutory duties in respect of the protection of life.

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<sup>5</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200901924.aspx>

<sup>6</sup> [http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800345\\_556\\_633\\_635\\_636.aspx](http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800345_556_633_635_636.aspx)



56. What the Commissioner must consider here is whether, and to what extent, disclosure of the information withheld by Police Scotland would, or would be likely to, make any of the associated risks any greater, to the extent that the endangerment of any person would be made more likely.
57. The Commissioner notes the content of *Decision 084/2010* as referred to by Police Scotland and comments that in this case, Police Scotland would have to show how disclosure of the figure requested here would, by itself or with other publicly available information, lead to the "endangerment" of health or safety of an individual.
58. The Commissioner also notes that the comment at paragraph 43 of *Decision 037/2009* makes reference to a "smaller" force area: in this case, Police Scotland's can hardly be described as a small force area. In any case, each request for information and subsequent application to the Commissioner has to be considered on its own merits. The Commissioner has to consider whether the disclosure of the figure requested here, in the circumstances of this case, which relates to the whole of Scotland over a period of years, makes the risks any greater.
59. The Commissioner fails to see how disclosure of the information requested would place anyone at the remotest risk of identification, or provide any SOCG with the remotest indication that it has been infiltrated, as claimed by Police Scotland. There may be scope for speculation as to whether a SOCG has been infiltrated, but Police Scotland has not explained how disclosure of this information would make the risk of identification any greater.
60. It is not enough to submit that Senior Officers are best placed to decide what SOCGs may do with the information, without making the link to how disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual. Without making such a link, or providing evidence to support this, such opinion can only be described as speculative. In the circumstances, the Commissioner is not satisfied that Police Scotland has evidenced how disclosure of the information would or would be likely to, endanger the physical or mental health or the safety of an individual.
61. In this case, therefore, the Commissioner is not persuaded by the arguments presented by Police Scotland. In her view, these arguments do not demonstrate why the actual information Mr Hutcheon is seeking here would be likely to increase the risk of endangerment to the health or safety of individuals, and in particular CHIS. The authority needs to establish a link between disclosure and such endangerment: in all the circumstances of this case, the Commissioner does not find such a link to have been established.
62. Having concluded that disclosure of the withheld information in this case would not, and would not be likely to, endanger the physical or mental health or safety of any person, the Commissioner finds that the exemption in section 39(1) was incorrectly applied to the withheld information by Police Scotland.
63. Having reached this conclusion, the Commissioner is not required to consider the public interest test in relation to this information.
64. Given that the Commissioner has concluded that none of the exemptions applied by Police Scotland can be applied to the withheld information, she concludes that Police Scotland were not entitled to withhold the information.
65. The Commissioner requires Police Scotland to provide Mr Hutcheon with the information requested at part b) of his 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 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Hutcheon.

She finds that Police Scotland wrongly applied the exemptions in sections 35(1)(a), 35(1)(b) and 39(1) of FOISA to the information they withheld from Mr Hutcheon.

The Commissioner therefore requires Police Scotland to provide Mr Hutcheon with the information requested by **1 December 2016**.

## Appeal

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Should either Mr Hutcheon 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**17 October 2016**

### 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 –

...

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

...

#### 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;

...

#### 39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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