

# Decision Notice



Decision 247/2011 Martin McGartland and the Chief Constable of Strathclyde Police

Refusal to confirm or deny that information exists or is held

Reference No: 201101575  
Decision Date: 14 December 2011

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr McGartland requested from the Chief Constable of Strathclyde Police (Strathclyde Police) information relating to a specified matter. Strathclyde Police responded in terms of section 18(1) of FOISA, on the basis that it would be contrary to the public interest to confirm whether the information existed or was held. Following a review, Mr McGartland remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Mr McGartland's request for information in accordance with Part 1 of FOISA, being satisfied that section 18(1) applied in the circumstances. He did not require Strathclyde Police to take any action.

## Relevant statutory provisions and other sources

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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 provisions as respects responses to request); 34(1)(a)(i) (Investigations by a Scottish Public Authority and proceedings arising out of such investigations)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 21 June 2011, Mr McGartland wrote to Strathclyde Police requesting specified information relating to a particular matter.
2. Strathclyde Police responded on 26 July 2011, citing section 18(1) of FOISA and refusing to reveal whether it held the information requested by Mr McGartland. They also indicated that were any of the information to be held, it would be considered exempt under sections 31, 34 and 35 of FOISA.
3. On 27 July 2011, Mr McGartland wrote to Strathclyde Police requesting a review of their decision.
4. Strathclyde Police notified Mr McGartland of the outcome of their review on 24 August 2011, explaining why they were upholding the initial response without amendment.

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5. On 27 August 2011, Mr McGartland wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of Strathclyde Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr McGartland had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. The investigating officer contacted Strathclyde Police on 19 September 2011, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking a number of specific questions in relation to the requirements of section 18(1).
8. Mr Gartland also contacted the investigating officer on 17 October 2011, setting out why he considered it would be in the public interest for the information he had requested to be disclosed.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr McGartland and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

### Section 18(1) of FOISA

10. Section 18(1) of FOISA gives Scottish public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:
  - (a) a request has been made to the authority for information which may or may not be held by it;
  - (b) if the information were held by the authority (and it need not be), it could be withheld under any of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and
  - (c) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.



11. Where a public authority has chosen to rely on section 18(1), the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.
12. Strathclyde Police provided a number of arguments as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. They submitted that, in the circumstances, confirming or denying the existence of the type of information Mr McGartland described could be harmful to the interests of an individual and to the investigative role of the police.
13. Mr McGartland submitted that he was seeking to establish whether such information was held and whether certain actions had been taken. For certain reasons, he did not believe these actions to be secret. Accordingly, he believed there was a public interest in Strathclyde Police disclosing the information he had requested to make the public aware of the matter.
14. While the Commissioner is unable to summarise all of the comments made to him in this case, he has considered them fully. Having considered the submissions of both parties, he is satisfied in the circumstances that it would be contrary to the public interest for Strathclyde Police to reveal whether the relevant information requested by Mr McGartland existed or was held by them.
15. The Commissioner has gone on to consider the exemptions put forward by Strathclyde Police in conjunction with their use of section 18(1). Strathclyde Police submitted that if the information sought by Mr McGartland existed and was held by them, it could be withheld under the exemptions in sections 31(1), 34(1)(a)(i), and 35(1)(a) and (b) of FOISA.
16. Having reviewed Strathclyde Police's submissions, the Commissioner considers those on section 34(1)(a)(i) to be most relevant in this case and consequently has focused on these below.

### **Section 34 of FOISA**

17. Section 34(1)(a)(i) of FOISA provides that information is exempt from disclosure if it is held 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.
18. The Commissioner accepts that if the requested information in this case existed and was held by Strathclyde Police, it would be held for the purposes of an investigation which they had a duty to conduct for the purposes specified above. The Commissioner accepts, therefore, that such information would fall within the exemptions in section 34(1)(a)(i) of FOISA.

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19. This exemption is subject to the public interest test and the Commissioner is therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information (if it existed and if it was held by Strathclyde Police) would be outweighed by that in maintaining the exemption under section 34(1)(a)(i).
20. In their submissions, Strathclyde Police argued that the disclosure of such information, if it existed and was held, would have the potential to prejudice current investigations, the right to a fair trial and (given the potential impact on sources) future law enforcement activity and consequently the prevention or detection of crime. Further information was provided in support of these contentions.
21. Strathclyde Police also acknowledged in their submissions that disclosure of this type of information might facilitate public debate on the matters raised by Mr McGartland and the relevant use of public funds, which would be in the public interest. On balance, however, Strathclyde Police did not consider these arguments to outweigh the public interest in protecting the interests highlighted in the previous paragraph.
22. As indicated above, Mr McGartland gave detailed reasons why he considered disclosure of the requested information would be in the public interest.
23. Having carefully considered all of the arguments presented by Strathclyde Police and by Mr McGartland (and again noting that he is not able to summarise all of these in this decision), the Commissioner has concluded, in all the circumstances, that the public interest in maintaining the exemption in section 34(1)(a)(i) of FOISA would outweigh the public interest in disclosure of the information, if in existence and held.
24. Accordingly, the Commissioner is satisfied in the circumstances that Strathclyde Police were entitled under section 18(1) of FOISA to refuse to reveal whether the information requested by Mr McGartland existed or was held.

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## DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr McGartland.

## Appeal

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Should either Mr McGartland or the Chief Constable of Strathclyde Police wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**14 December 2011**



## Appendix

### Relevant statutory provisions

#### 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, 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-

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(i) should be prosecuted for an offence; or

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