

# Decision Notice

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## **Decision 008/2019: Mr L and the Chief Constable of the Police Service of Scotland**

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### **Incident information**

Reference No: 201801399

Decision Date: 29 January 2019



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for information and evidence regarding a specific incident. Police Scotland refused to disclose the information as it related to a criminal investigation.

Following his investigation, the Commissioner found that Police Scotland had been entitled to withhold the information under section 34(1)(a)(i) of FOISA, because it was held by a public authority for the purposes of an investigation as to whether a person should be prosecuted for an offence (and the public interest favoured maintaining the exemption).

## 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); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

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 1 March 2018, Mr L made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The request was for information relating to a specific incident. In particular, he asked for details of how items had been seized and under what legislation, copies of notebook entries, receipts and evidence tags relating to the seizure, and transfers of the evidence to the HSE (Health and Safety Executive).
2. Police Scotland responded on 16 May 2018, notifying Mr L that they considered the information to be exempt from disclosure in terms of sections 34(1)(a)(i) & (ii) (Investigations by Scottish public authorities and proceedings arising out of such investigations), 38(1)(a) and (b) (Personal information) and 39(1) (Health, safety and the environment). Police Scotland also advised Mr L that he could request the information that was his own personal data by submitting a subject access request under the Data Protection Act 1998.
3. On 13 June 2018, Mr L wrote to Police Scotland, requesting a review of their decision as he disagreed with the application of the exemptions claimed by Police Scotland. He noted his understanding that the matter would not be reported to the procurator fiscal
4. Police Scotland notified Mr L of the outcome of their review on 3 July 2018, upholding their original decision with some additional explanations but without modification.
5. On 22 August 2018, Mr L wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr L stated he was dissatisfied with the outcome of Police Scotland's review because he disagreed that the exemptions applied, with reasoning.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr L 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.
7. On 3 October 2018, Police Scotland were notified in writing that Mr L had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr L. Police Scotland provided the information and the case was allocated to an investigating officer.
8. 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, with particular reference to the exemptions cited in their review outcome.
9. Police Scotland responded, with reasons why they considered the exemptions to apply.

## 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 him by both Mr L and Police Scotland. He is satisfied that no matter of relevance has been overlooked.
11. The Commissioner will first of all consider whether the information could properly be withheld under section 34(1)(a)(i) of FOISA. Only if he concludes that this exemption does not apply will he go on to consider the other exemptions claimed by Police Scotland.

### **Section 34(1)(a)(i) – Investigations by Scottish public authorities and proceedings arising out of such investigations**

12. Police Scotland withheld the information Mr L sought under the exemption in section 34(1)(a)(i) of FOISA, which provides that information is exempt from disclosure if it is held at any time by a Scottish public authority 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.
13. 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 it as exempt. There is no harm test: 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. The exemptions are, however, subject to the public interest test in section 2(1)(b) of FOISA.
14. Mr L provided submissions to the effect that while the information was initially held by Police Scotland, that information – and primacy in the investigation – was passed to the HSE. As he understood neither Police Scotland nor the HSE would be submitting a report to the procurator fiscal, he contended that section 34 of FOISA did not apply.
15. Police Scotland submitted that the information in question had been obtained by them in carrying out their statutory duties under the Police and Fire Reform (Scotland) Act 2012, in order to ascertain whether a person should be prosecuted for an offence. They further explained that where the investigation results in suspicion that a serious criminal offence

(other than a health and safety offence) may have caused the incident, the police will assume primacy in the investigation and work in partnership with the HSE, the local authority or other enforcing authority.

16. Police Scotland advised that where it becomes apparent during the investigation that there is insufficient evidence that a serious criminal offence (other than a health and safety offence) caused the incident, the investigation should then (by agreement) be taken over by the HSE, the local authority or other enforcing authority. They submitted that the actual outcome of the investigation was immaterial to whether the information fell within the scope of section 34(1)(a)(i) of FOISA: it was held for the purposes specified in section 34(1)(a)(i) and as such fell within that exemption.
17. In this case, the Commissioner has considered the information held by Police Scotland and the submissions provided. While the Commissioner cannot publish Police Scotland's full submissions or his full reasoning, as to do so would involve making reference to the information withheld, the Commissioner accepts that the withheld information has been held by Police Scotland for the purposes of an investigation covered by section 34(1)(a)(i) of FOISA. Consequently, he must conclude that the exemption applies.

#### *Public interest test*

18. As noted above, the exemptions in section 34 are subject to the public interest test contained in section 2(1)(b) of FOISA. This requires the Commissioner to consider the public interest factors favouring both disclosure of the information and the maintenance of the relevant exemption. The Commissioner must then carry out a balancing exercise. Unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers the information can be withheld under one or more other exemptions in FOISA).
19. 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."
20. In this case, Mr L provided the Commissioner with reasoning as to why he considered the information should be made public. This focused on his right to see evidence being used by HSE, which he believed he required with a view to receiving a fair hearing.
21. Police Scotland recognised that there was a public interest in disclosure, as this would allow the public to assess whether Police Scotland had handled the case appropriately.
22. On the other hand, Police Scotland submitted that there is no provision in the Scottish justice system to allow case materials to be subject of public scrutiny following the conclusion of investigations by the relevant authorities. They believed disclosure would lead to a loss of confidence in the police service to protect the well-being of the community, in that any information supplied to the police, in confidence, would be released. Individuals would be less inclined to assist with investigations which in turn would seriously inhibit the ability of Police Scotland to investigate crime, and undermine the role of the Procurator Fiscal.
23. If the public lost confidence that the forum for investigation and deliberation existed only within the appropriate legal processes, then Police Scotland believed the public would be far less willing to co-operate with police investigations. This, they submitted, would have a

significantly detrimental impact on the ability of Police Scotland to fulfil their statutory functions.

24. The Commissioner is fully aware of the concerns surrounding the disclosure of information falling within section 34(1). During Parliamentary debates on this exemption, the then Justice Minister, Jim Wallace, argued that there were considerations relating to

- the presumption of innocence
- the privacy and reputation of witnesses and informants
- the effective conduct of prosecutions and investigations, and
- the role of criminal proceedings as the appropriate forum for bringing information of this kind into the public domain.

He also said:

"We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."

25. In many decisions to date, the Commissioner has accepted a general public interest in making available information which could lead to an increase in accountability and scrutiny of public officials' actions. The Commissioner also recognises that Mr L, as the subject of the investigation, has an interest in disclosure of the information requested.

26. However, the Commissioner is also satisfied that it is generally in the public interest to allow Police Scotland to investigate potential crime, reach a decision and, where appropriate, report the matter to the Procurator Fiscal, or in this case provide that information to another regulatory authority, without information on that process being exposed to wider public scrutiny. There is clearly a considerable public interest in ensuring that the results of investigations covered by section 34(1)(a)(i) of FOISA can be considered and, where appropriate, prosecuted effectively, subject to the protections afforded to the accused by a fair trial. Public disclosure outwith that context is likely to lead to "trial by media", something which is not generally considered to be in the public interest and which, as noted above, the exemptions in section 34(1) of FOISA are designed to avoid.

27. Having considered all relevant submissions, the Commissioner sees no reason why these considerations (regarding the integrity of the criminal justice process) should not have force in this case. Here, in particular, Police Scotland have emphasised the importance of maintaining public confidence in the process, by maintaining the assurance that information gathered in police investigations will generally remain private, for consideration only subject to the appropriate legal protections.

28. Taking account of all of the submissions provided by Mr L as well as those from Police Scotland, and the content of the information held by Police Scotland, the Commissioner is satisfied in this case that the public interest in maintaining the exemption outweighs that in disclosure of the information. The Commissioner therefore concludes that Police Scotland were correct in their application of section 34(1)(a)(i) of FOISA to withhold the requested information. Having reached this conclusion, he is not required to consider the application of the other exemptions identified by Police Scotland.

## **Decision**

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

## **Appeal**

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Should either Mr L 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**

**29 January 2019**

### 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.

...

#### 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

...

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