

**Decision 167/2007 Dr Gordon Macdonald and the Scottish Ministers**

*Records of phone calls between the Justice Minister and Strathclyde Fire and Rescue*

**Applicant: Dr Gordon Macdonald  
Authority: The Scottish Ministers  
Case No: 200700286  
Decision Date: 25 September 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## **Decision 167/2007 Dr Gordon Macdonald and the Scottish Ministers**

### ***Records of phone calls between the Justice Minister and Strathclyde Fire and Rescue***

#### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held) and 21(1) (Review by Scottish public authority).

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

#### **Facts**

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Dr Macdonald requested copies of the Justice Minister's telephone and mobile records for a nine month period, and asked in particular for "details of the time and date of any telephone conversations between the Justice Minister and Strathclyde Fire and Rescue". The Scottish Ministers (the Ministers) initially considered this information to be exempt from disclosure under FOISA.

Dr Macdonald was not satisfied with the Ministers' response and asked them to review their decision. After review, the Ministers informed him that the records requested were not held. Dr Macdonald then applied to the Commissioner for a decision.

During the investigation the Ministers explained that it was impossible to know who made or received each call listed in the phone records, and therefore it could not be stated that phone records identifying calls between the Minister for Justice and Strathclyde Fire and Rescue Service exist; accordingly, the Ministers took the view that the requested information was not held, in terms of section 17(1) of FOISA.

Following an investigation, the Commissioner upheld the argument that the information requested was not held by the Ministers.



## Background

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1. In this Decision Notice, any reference to “the Justice Minister” or “the Minister” is a reference to the former Justice Minister, Cathy Jamieson MSP, who held this post until May 2007.
2. On 29 November 2006, Dr Gordon Macdonald wrote to the Ministers requesting the following information:
  - a) copies of the Justice Minister’s telephone and mobile records for a nine month period, asking in particular for “details of the time and date of any telephone conversations between the Justice Minister and Strathclyde Fire and Rescue”.
  - b) copies of any correspondence between the Justice Minister and Strathclyde Fire and Rescue during the previous nine months on matters of equality and diversity.
3. On 10 January 2007, the Ministers wrote to Dr Macdonald in response to his request for information. They advised him that there was no correspondence between the Minister for Justice and Strathclyde Fire and Rescue which fell within the terms of his request. In relation to the first part of his request, the Ministers refused to provide copies of the phone records he had asked for, considering this information to be exempt from disclosure under the following sections of FOISA: 30(b)(i) (Prejudice to effective conduct of public affairs); 38(1)(b) (Personal information); 39(1) (Health, safety and the environment).
4. On 22 January 2007, Dr Macdonald wrote to the Ministers requesting a review of their decision. In his letter Dr Macdonald made it clear that he was not seeking full telephone and mobile records, but only the dates and times of the Justice Minister’s calls to Strathclyde Fire & Rescue and to a named MSP.
5. On 8 March 2007, the Ministers notified Dr Macdonald of the outcome of its review. The Ministers advised Dr Macdonald that it was not normal policy for officials to note the details of phone conversations between the Minister for Justice and third parties, and that the records he had requested were not held. The Ministers also advised Dr Macdonald that the Minister for Justice had confirmed that there were no phone calls between herself and Strathclyde Fire and Rescue Service to discuss the issues he had raised with the Ministers.



6. On 9 March 2007, Dr Macdonald wrote to my Office, expressing his dissatisfaction with the outcome of the Ministers' review and his concerns about the way in which his request had been dealt with. He applied to me for a decision in terms of section 47(1) of FOISA. His application related only to the first part of his request, that is, the records of the Justice Minister's calls to and from Strathclyde Fire and Rescue, not his request for correspondence or calls to a named MSP.
7. The application was validated by establishing that Dr Macdonald had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.
8. On 13 March 2007, the Ministers were notified in writing that an application had been received from Dr Macdonald and were asked to provide my Office with information and comments required for the investigation.

## The Investigation

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9. During the investigation Dr Macdonald explained he had made his information request after his attention had been drawn to a newspaper article which reported that the Justice Minister had made a phone call to Strathclyde Fire and Rescue in relation to the Pride Scotia event in Glasgow on 24 June 2006.
10. Dr Macdonald then agreed that the phone records from September to November 2006 could be excluded from his request.
11. On 29 March 2007, the Ministers wrote to my Office and acknowledged that they held telephone and mobile phone records. However, the Ministers argued that while it was possible to identify individual numbers and the initial destination of a call from these records, it was impossible to know who made the call, the ultimate destination of the call (in cases where a call is transferred), who received the call, or the content of the call. The Ministers therefore considered that it could not be stated that phone records identifying calls made between the Minister for Justice and Strathclyde Fire and Rescue Service exist; accordingly, under section 17(1) of FOISA, the Ministers did not hold the information requested.
12. The Ministers added that it was not normal policy for officials to note details of phone conversations between the Minister for Justice and third parties.



13. The investigating officer wrote to the Ministers on 25 April 2007 to ask about the type of phone records kept, and to find out whether contact details for Strathclyde Fire and Rescue Service were kept within the Justice Department. The Ministers were advised that if it could be established that some calls were made to Strathclyde Fire and Rescue Service in the period covered by Dr Macdonald's request, I would ask why it was believed that the Justice Minister was not a participant in these calls, and what potential existed for other people to have used the phones or phone extensions used by the Minister.
14. The Ministers replied on 15 May 2007. They confirmed that there were no systems or procedures in place for recording details of calls received or made by the Justice Minister.
15. The Ministers questioned the value of searching through the phone records, reiterating that even if records did show calls made from the Justice Minister's phone to particular numbers, this was not evidence that the Minister herself had made these calls. The Ministers explained that the Justice Minister does not have sole use of her phone and calls could be made by other people for entirely legitimate reasons. Equally, the Justice Minister could make calls from any number of other phones.
16. In my view it was appropriate for me to enquire further into what information may be held or known by the Ministers. After further discussion, the Ministers provided my Office with copies of the phone records for the period March to August 2006 for the Justice Minister's mobile phone and Blackberry, and for six phone extensions within the Scottish Government. Four of those extensions were described as belonging to the Justice Minister, while two belonged to her Deputy.
17. The Ministers also provided a list of phone numbers for members of the Board of Strathclyde Fire and Rescue, and officers within Strathclyde Fire and Rescue.
18. Whilst this helped progress this investigation it did not encompass all of the sources of information which I had requested be considered, so after further discussion with my Office on 31 July 2007, the Ministers were issued with an information notice under section 50 of FOISA. The Ministers were advised that I did not accept that they had carried out an adequate search to establish whether they held information covered by Dr Macdonald's request. I therefore required the Ministers to search or consult a range of sources for supplementary information which might show whether or not any information falling within the scope of Dr Macdonald's request was held.
19. The Ministers responded to the information notice on 17 August 2007. Their letter described some additional inquiries into the matter, and provided some information about general access to the office accommodation used by the Justice Minister.



## The Commissioner's Analysis and Findings

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20. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Dr Macdonald and the Ministers and I am satisfied that no matter of relevance has been overlooked.
21. The main question for me to consider in this decision notice is whether the Ministers complied with Part 1 of FOISA in maintaining that the information requested by Dr Macdonald is not held, and in otherwise dealing with Dr Macdonald's request.
22. The Ministers do not dispute that they hold phone records listing calls which were made and received from various phone extensions used by the Justice Minister and her Deputy, and records of calls made and received from the Minister's mobile phone.
23. For the Ministers, the key question is whether it can be established that the Justice Minister herself was involved in the phone calls listed in the phone records: as noted previously, the Ministers consider that this is something which would be impossible to prove and therefore they did not consider that they were under any obligation to search the records which they held.
24. My own view is that this is a somewhat a priori approach which does not take into account the variety of information which may be held to evidence that a particular call was made. For example - and without any reference to the circumstances of this case - it appears to me that a phone record may show that a call was made from a particular extension to a third party on a certain date. Whilst it may not prove who made the call (or indeed who ultimately received it), it might indicate the probability or possibility of a call between two named parties. In turn this could mean that other records could be looked at e.g. whether there is correspondence to or from the parties concerned. If such correspondence contained a phrase such as 'Further to our telephone call of ... ' then this would indicate that a call had taken place. Indeed such correspondence of itself without recourse to the phone records would be sufficient to indicate that a call had taken place, and the purpose of a search of the phone records would assist in narrowing down the likely date or period of any such related correspondence. However it was conducted it seems to me that a search of a variety of information sources could have been undertaken, rather than starting from the premise that it was not possible to prove who had participated in any given call,.



25. In this particular case, it seems reasonable to me to expect that an attempt to establish whether the information requested by Dr Macdonald was held would entail consideration of the phone records held by the Ministers (as supplied to my Office). I accept that it is possible that other people used the Justice Minister's phone extensions, and that the Minister would also have had access to other phones. I also accept that, from the phone records alone, it is impossible to be sure who made particular calls or where a call may have been transferred. However, I believe that the Ministers should have examined further whether it was possible to identify the information requested by Dr Macdonald among the phone records which were most likely to represent the calls made by the Minister, and that all reasonable steps should have been taken to establish whether any additional information about the phone calls in the phone records was available.
26. In that respect some significant steps were taken. In particular I accept that the Justice Minister's own confirmation that no call was made greatly strengthens the Ministers' argument that no relevant information is held; however, I note that it is now not possible to be completely clear about the terms of her confirmation. In the letter of 29 March 2007 referred to above, the Ministers advised that this confirmation was received verbally and no written record of it existed.
27. The Ministers told Dr Macdonald (email of 8 March 2007):
- “...the Minister for Justice has confirmed there were no phone calls between the Justice Minister and the Strathclyde Fire and Rescue Service to discuss the issues you have raised with the Scottish Executive [Ministers].”
28. Dr Macdonald's request did not make any reference to the content of the phone calls, but was limited to the date and time of any phone contact between the Justice Minister and Strathclyde Fire and Rescue. He had made a separate request for correspondence on matters of equality and diversity, and it may be that those are the issues referred to by the Ministers. However, this is not completely clear.
29. Nevertheless, as a result of the investigation carried out by my Office, it is clear that not only has the Minister stated that she has not participated in any telephone calls with the Strathclyde Fire and Rescue Service, on the issues raised by Dr Macdonald with the (then) Executive, but also no member of staff from the Justice Minister's office has any recollection of a call being made which would correspond to Dr Macdonald's request and there is nothing in the Minister's diary to show that a call was made or planned with Strathclyde Fire and Rescue.
30. On this basis the Ministers can now be said to have carried out a reasonable search for information relating to any calls covered by Dr Macdonald's request, and I am satisfied that no such information has been found.



31. I therefore accept that in terms of section 17(1) of FOISA, the information requested is “not held” by the Ministers.

***Failure to comply with timescales***

32. The Ministers have acknowledged that the response to Dr Macdonald’s request for review was not sent within the 20 working days stipulated by section 21(1) of FOISA. The Ministers commented that the reviewer had made several unsuccessful attempts to contact Dr Macdonald in order to update him with progress, by phone and by email, and submitted a copy of an email sent on 22 February 2007 (the 20<sup>th</sup> working day) in which the reviewer advised Dr Macdonald that he had been trying to return his call. However, I note that the response to Dr Macdonald’s request for review was not dispatched until 8 March 2007.
33. The initial response to Dr Macdonald’s email request of 29 November 2006 also took longer than the 20 working day period allowed by section 10(1) of FOISA, being sent on 10 January 2007.
34. I therefore find that the Ministers failed to comply with section 21(1) and section 10(1) of FOISA.

**Decision**

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I find that the Scottish Ministers (the Ministers) failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Dr Gordon Macdonald.

I find that the Ministers were justified in citing section 17(1) in relation to the information requested.

However, I find that the Ministers failed to comply with sections 10(1) and 21(1) in dealing with Dr Macdonald’s request. On this occasion I do not require the Ministers to take any steps in relation to this matter.





## **Appeal**

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Should either Dr Macdonald or the Scottish Ministers 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**25 September 2007**



## Appendix

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### 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.

##### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

##### 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.