

# Decision Notice



Decision 132/2010 Mr Derek Cooney and the Scottish Ministers

Investigation of complaints

Reference No: 201000873  
Decision Date: 21 July 2010

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Cooney requested from the Scottish Ministers (the Ministers) information held relating to certain investigations undertaken by Dumfries and Galloway Constabulary and Her Majesty's Inspectorate of Constabulary for Scotland (HMICS). The Ministers responded by redirecting Mr Cooney to the HMICS for the information he had requested. Following a review, as a result of which Mr Cooney was provided with some relevant information, Mr Cooney remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Cooney's request for information in accordance with Part 1 of FOISA, by releasing a report and correctly informing Mr Cooney that any further information relative to his request was likely to be held by the HMICS.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (4) (General entitlement); 3(2) (Scottish public authorities) and 17(1) (Notice that information is not held)

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. HM Chief Inspector of Constabulary and Dumfries and Galloway Constabulary are both Scottish public authorities designated in Schedule 1 of FOISA. Mr Cooney's request was not directed to either of these authorities, however, but was instead directed to the Ministers asking them for certain information held relating to investigations carried out by these two authorities.



2. It may be helpful to explain that HMICS inspects and reports on the performance of police forces in Scotland, providing advice on policing matters to the Ministers. It also had a role until 1 April 2007 in reviewing the handling of complaints against the police. Its staff include HM Chief Inspector of Constabulary (normally a former chief constable), the Lay Inspector (with no police background), police officers on secondment from police forces and civil servants employed by the Scottish Government. Inspectors of constabulary are appointed by the Queen under the Police (Scotland) Act 1967 and are independent of police forces, police authorities and Scottish Government.
3. On 4 December 2009, Mr Cooney wrote to the Ministers requesting copies of all the reports, paper work etc., concerning investigations of certain complaints conducted by HMICS and Dumfries and Galloway Constabulary.
4. The Ministers responded on 9 December 2009, indicating that Mr Cooney should contact a different Scottish public authority, this being HMICS, with a view to obtaining the information he was seeking. In so responding, the Ministers did not specifically confirm whether they held the information or not.
5. On 14 December 2009, Mr Cooney wrote to the Ministers requesting a review of their decision. Mr Cooney stated that he considered the Ministers' response to be a refusal to supply the information requested.
6. Mr Cooney did not receive a response to his request for review and, on 25 January 2010, he wrote to the Commissioner, stating that he was dissatisfied with the Ministers' failure to respond to his request for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. Following *Decision 034/2010 Mr D Cooney and the Scottish Ministers*, on 19 April 2010, the Ministers notified Mr Cooney of the outcome of their review by releasing information held in a report by HMICS dated April 2002. They advised that this was the only information they held which related to his request and redirected him to HMICS for any further information.
8. On 26 April 2010, Mr Cooney wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Cooney 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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10. On 12 May 2010 the Ministers were notified in writing that an application had been received from Mr Cooney, given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the Ministers were asked to explain the steps they had taken to establish whether they held any information falling within the scope of Mr Cooney's request.
11. During the investigation, clarification was sought from the Ministers as to how they came to hold the HMICS report described above and to explain their role in relation to information of this kind.
12. The Ministers explained that as a result of a previous request for information, on 29 July 2009 HMICS provided the Ministers (by way of background information) with a copy of the report released to Mr Cooney. During the investigation of this case, the Ministers provided the investigating officer with evidence of this.
13. The Ministers further explained in their submissions that having undertaken searches of their Record and Document Management system to determine if any information was held relative to Mr Cooney's request of 4 December 2009, the only information identified was the report from HMICS as described above. They also provided some background information on the relationship between themselves and HMICS.
14. The submissions made by both the Ministers and Mr Cooney, insofar as relevant, will be discussed further in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Cooney and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Whether information was held by the Scottish Ministers

16. Section 1(1) of FOISA states that a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority. Section 1(4) states that the information to be given by the authority is that held by it at the time the request is received (see full text in Appendix). However, if a public authority does not hold the information requested, it is not obliged by FOISA to obtain the information from a third party in order to fulfil the request.



17. The word “held” has a specific meaning in section 3(2) of FOISA that is not simply determined by the presence of information within the premises or information systems of a public authority. When information is present within a public authority’s premises and systems only because it is held on behalf of another person, that information is not held by the public authority for the purposes of FOISA. Specifically, section 3(2)(a)(i) makes it clear that if the authority holds the information on behalf of another person, then the information is not considered to be held by the authority for the purposes of FOISA.
18. During the investigation, Mr Cooney commented on correspondence he had had with civil servants in the Scottish Government, referring to staff in the Police Division and also the Director-General for Justice and Communities. He asserted that there had to be more information held, noting the Ministers’ initial failure to locate the HMICS report and questioning how they could have reached certain conclusions on the investigations in question without further information. The question here is whether the Ministers held any further relevant information for the purposes of FOISA.
19. The Ministers were also asked during the investigation to clarify whether information held by HMICS could in any way be considered to be held by them in terms of FOISA, given HMICS’s staffing arrangements, physical location and information systems. The Ministers asserted that any information held for the purposes of the functions of HMICS was held on behalf of HM Chief Inspector of Constabulary and therefore that section 3(2)(a)(i) of FOISA was engaged. Consequently, such information (if held) would not be held by the Ministers for the purposes of FOISA.
20. On the basis of the definition in section 3(2)(a)(i) of FOISA, and given the legislative status of HMICS and the Chief Inspector as outlined above (in particular in relation to the functions under consideration here), the Commissioner is satisfied that the Ministers could not be expected to hold any further information to which Mr Cooney’s request pertains. He does not accept Mr Cooney’s assertion that such an expectation follows reasonably from his previous correspondence with the Ministers on this matter.
21. The Commissioner notes the email dated 29 July 2009 which the Ministers provided supporting the contention that the HMICS report came to be in the possession of the Ministers as a result of an FOI request and not for any other reason.
22. Given the submissions from both the Ministers and Mr Cooney, the Commissioner is satisfied that the Ministers only held a copy of HMICS report provided to Mr Cooney because it had been supplied by HMICS. In all the circumstances, he is also satisfied that it was appropriate for the Ministers to advise Mr Cooney that HMICS would be likely to hold any further information he was seeking.
23. For the reasons set out above, therefore, the Commissioner has concluded that the Ministers were correct to give Mr Cooney notice in terms of section 17(1) of FOISA that they held no further information falling within the scope of his request.



## **DECISION**

The Commissioner finds that the Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Cooney.

## **Appeal**

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Should either Mr Cooney 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 decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**21 July 2010**



## 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.  
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.  
...

##### 3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
  - (a) by the authority otherwise than-
    - (i) on behalf of another person; or
    - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
  - (b) by a person other than the authority, on behalf of the authority.
- ...

##### 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.

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