

# Decision Notice



Decision 120/2013 Mr J Donnelly and the Chief Constable of the Police  
Service of Scotland

Refusal to confirm or deny that information exists or is held

Reference No: 201300505  
Decision Date: 26 June 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

On 27 December 2012, Mr Donnelly asked Strathclyde Police (the Police) for information relating to a specified matter. The Police responded in terms of section 18(1) of FOISA, refusing to confirm or deny whether the information existed or was held. Following a review, Mr Donnelly remained dissatisfied and applied to the Commissioner for a decision.

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

## 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); 18(1) (Further provisions as respects responses to request); 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 the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. Mr Donnelly's information request was made to Strathclyde Police, which, until 1 April 2013, was a Scottish public authority covered by FOISA. The Chief Constable of the Police Service of Scotland (Police Scotland) is the statutory successor to the Chief Constable of Strathclyde Police under the Police and Fire Reform (Scotland) Act 2012.
2. On 27 December 2012, Mr Donnelly asked the Police for specified information relating to a particular matter.
3. The Police responded on 17 January 2013, citing section 18(1) of FOISA and refusing to reveal whether they held the information requested by Mr Donnelly. They indicated that, were any of the information to be held, it would be considered exempt under sections 34 and 35 of FOISA.
4. On 22 January 2013, Mr Donnelly requested a review of this decision.



5. The Police notified Mr Donnelly of the outcome of their review on 11 February 2013, explaining why they were upholding the initial response without amendment.
6. On 20 February 2013, Mr Donnelly wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Donnelly 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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8. The investigating officer contacted the Police on 21 March 2013, 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) of FOISA. The Police provided submissions on 23 April 2013 and 15 May 2013.

## 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 her by both Mr Donnelly and the Police. She 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, 38<sup>1</sup>, 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.

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<sup>1</sup> From 31 May 2013, Scottish public authorities may also rely on section 38 of FOISA in conjunction with section 18(1) of FOISA (Freedom of Information (Amendment) (Scotland) Act 2013)



11. Where a public authority has chosen to rely on section 18(1), the Commissioner must ensure that her 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 she is unable to comment in any depth on the public authority's reliance 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. The 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 covered by Mr Donnelly's request could be harmful to the interests of individuals and to the investigative role of the police.
13. Mr Donnelly submitted that he was seeking to confirm whether the requested information was held and, if so, to obtain a copy to enable him to resolve matters of concern to himself. Mr Donnelly did not consider these matters of concern to be secret. Accordingly, he believed that there was a public interest in the Police disclosing the information he had requested to enable him to put an end to the matter.
14. The Commissioner is unable to summarise or reproduce all of the comments made to her in this case, as to do so could reveal whether the information requested by Mr Donnelly exists or is held by the Police. However, she has considered them fully. Having considered the submissions of both parties, she is satisfied that, in the circumstances of this case, it would not be in the public interest for the Police to reveal whether the information requested by Mr Donnelly existed or was held by them.
15. The Commissioner has gone on to consider the exemptions put forward by the Police in conjunction with their use of section 18(1). The Police submitted that, if the information sought by Mr Donnelly existed and was held by them, it could be withheld under the exemptions in sections 34(1)(a)(i), and 35(1)(a) and (b) of FOISA. The Commissioner first considered the arguments put forward in relation to section 34(1)(a)(i) of FOISA.

### **Section 34 of FOISA**

16. 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.
17. The Commissioner accepts that, if the requested information in this case existed and was held by the Police, it would be held for the purposes of an investigation which they had a duty to conduct for the purpose specified above. The Commissioner accepts, therefore, that such information would fall within the exemption in section 34(1)(a)(i) of FOISA.
18. 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 the Police) would be outweighed by that in maintaining the exemption under section 34(1)(a)(i).



19. In their submissions, the Police argued that the disclosure of such information, if it existed and was held, would have the potential to prejudice investigations, the efficient and effective conduct of the force, the flow of information to the force, fair treatment of an individual, public safety and the rights of individuals as enforced by the Human Rights Act 1998. Further information was provided in support of these contentions.
20. Strathclyde Police acknowledged in their submissions that disclosure of the information requested, if held, might facilitate the resolution of Mr Donnelly's questions. On balance, however, Strathclyde Police did not consider these arguments to outweigh the public interest in protecting the interests highlighted in the previous paragraph.
21. Mr Donnelly also provided detailed reasons why he considered disclosure of the requested information would be in the public interest.
22. The Commissioner accepts that Mr Donnelly has strong personal reasons for requiring the information he requested from the Police. However, having carefully considered all of the arguments presented by the Police and by Mr Donnelly (and again noting that she 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 by the Police.
23. Accordingly, the Commissioner is satisfied that the Police were entitled, under section 18(1) of FOISA, to refuse to reveal whether the information requested by Mr Donnelly existed or was held.

## DECISION

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 Donnelly.

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the Chief Constable of the Police Service of Scotland



## Appeal

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Should either Mr Donnelly or the Chief Constable of the Police Service of Scotland 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.

**Margaret Keyse**  
**Head of Enforcement**  
**26 June 2013**



## 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.

...

- (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, 38, 38, 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-
    - (i) should be prosecuted for an offence; or

...