

# Decision Notice

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**Decision 097/2017: Mr X and the Chief Constable of the Police Service of Scotland**

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**Reporting of allegation by Rangers Football Club**

Reference No: 201700345

Decision Date: 20 June 2017



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for information about the reporting of a criminal allegation. Police Scotland refused to confirm or deny whether the information existed or was held by them.

The Commissioner accepted that it would not be in the public interest for Police Scotland to reveal whether the information existed or was held.

## 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 provision as respects responses to request); 35(1)(a) and (b) (Law enforcement)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA

## Background

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1. On 8 December 2016, Mr X made a request for information to Police Scotland. He asked for information showing whether any complaint was made by Rangers Football Club about a specified criminal allegation against a named individual (Mr A) in 1990.
2. Police Scotland responded on 22 January 2017. They refused to confirm or deny whether they held the information or whether it existed, applying section 18(1) of FOISA. Police Scotland informed Mr X that they were applying section 18(1) in conjunction with sections 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(a) and (b) (Law enforcement) of FOISA.
3. On 22 January 2017, Mr X wrote to Police Scotland, requesting a review of their decision as he considered disclosure was in the public interest and only required a "yes or no" answer.
4. Police Scotland notified Mr X of the outcome of their review on 21 February 2017, confirming their position that section 18(1) of FOISA applied.
5. On 21 February 2017, Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X stated he was dissatisfied with the outcome of Police Scotland's review because he believed it was in the public interest for his question to be answered. He pointed out that he had not asked for case details or names.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 3 April 2017, Police Scotland were notified in writing that Mr X had made a valid application. 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, focusing on the provisions of section 18 and the exemptions cited in that connection.
9. Police Scotland responded with submissions on 16 May 2017.

## **Commissioner's analysis and findings**

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr X and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

### **Section 18(1) of FOISA - "neither confirm nor deny"**

11. Section 18 of FOISA allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
  - (i) a request has been made to the authority for information which may or may not be held by it;
  - (ii) if the information were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
  - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
12. Where an authority has chosen to rely on section 18, the Commissioner must establish:
  - (i) whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose it because it was exempt under one of the exemptions listed in section 18(1). The authority must satisfy the Commissioner that:
    - (a) an exemption would apply and, if it did
    - (b) that the balance of the public interest would favour withholding the information,and then
  - (ii) whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
13. It is not sufficient simply to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information, if it existed and was held, would be exempt information under one or more of the listed exemptions. Where the exemption(s)

is/are subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in disclosing any relevant information it held.

14. In this case, Police Scotland submitted that, if the information existed and was held by them, it would be exempt from disclosure by virtue of the exemptions in sections 35(1)(a) and (b) and 34(1) of FOISA.
15. The Commissioner will firstly consider whether Police Scotland could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held. In this regard, she will consider the exemptions in section 35 of FOISA first.

### **Section 35(1)(a) and (b) - Law enforcement**

16. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime (section 35(1)(a)) and/or the apprehension or prosecution of offenders (section 35(1)(b)). There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
17. As the Commissioner's guidance<sup>1</sup> on the section 35(1)(a) exemption highlights, the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.
18. In relation to section 35(1)(b), the Commissioner's guidance states that there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime". She considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as the investigative processes used).
19. Police Scotland submitted that the requested information, if it existed and was held by them, would be held for the purposes of law enforcement described in section 35(1)(a) and (b). They stated that any information contained within a police report, witness statements, etc. might be exempt from disclosure, as disclosure would, or would be likely to, prejudice substantially the prevention and detection of crime and the apprehension or prosecution of offenders. In the course of a criminal investigation, Police Scotland submitted, they would interview and gather evidence from any person or persons who might be in a position to assist them. There is an acceptance, they continued, that any such information gathered would not be disclosed to a third party, other than in the course of criminal proceedings. To do so would undermine this expectation and be likely to deter victims and/or witnesses from reporting matters to the police. This would be likely to prejudice substantially the investigation and detection of crime and the apprehension or prosecution of offenders.
20. Police Scotland referred to an ongoing wider investigation which would embrace the subject matter of any complaint falling within the scope of the request. In this connection, they were

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

in the process of identifying and interviewing potential victims, who they submitted had a reasonable expectation that the events in question would be investigated thoroughly. They explained how information covered by the request, if it existed and was held, could be relevant to this process.

21. Having considered the submissions from both Mr X and Police Scotland, the Commissioner is satisfied that any information held by Police Scotland regarding the reporting of such allegations would be held for purposes relating to the prevention or detection of crime and/or the apprehension or prosecution of offenders. In all the circumstances, she is satisfied that disclosure of any relevant information held would carry with it sufficient risk of substantial prejudice for the exemptions to apply.
22. The Commissioner accepts, therefore, that (assuming the information requested by Mr X existed and was held by them) Police Scotland would have been entitled to respond to Mr X's request by applying either or both of the exemptions in section 35(1)(a) and (b) of FOISA.

#### *The public interest*

23. Mr X was of the view that if the information was held, there would be a public interest in its disclosure. He felt that it could potentially encourage other potential victims to come forward. He also believed Rangers FC had a legal and moral duty to report any crimes they had been made aware of.
24. Police Scotland acknowledged that there was an element of high profile or national interest in the subject matter of the request, and that there were arguments relating to accountability which favoured disclosure. They presented arguments as to why they believed ongoing investigative work would be prejudiced by disclosure, should the information exist and be held, focusing on the deterrent effect described above. On balance, she concluded that the public interest in disclosure of any information held would be outweighed by that in maintaining the exemption.
25. The Commissioner has considered carefully all of the arguments presented by Mr X and Police Scotland. She accepts that there is a clear public interest in maintaining the flow of evidence in this area, as in other areas where serious crime is being investigated. She is less convinced by the public interest arguments in support of disclosure.
26. There may be a degree of public interest in knowing whether Rangers Football Club made such a report, but the Commissioner cannot regard this as compelling. Disclosure might have the encouraging effect put forward by Mr X, but the Commissioner is satisfied that it would be more likely to have the opposite effect, as described by Police Scotland.
27. Given the harm she has already acknowledged, and taking into account the less persuasive arguments for disclosure in the public interest, the Commissioner accepts that Police Scotland could have given a refusal notice under section 16(1) of FOISA in this case, on the basis that the information requested by Mr X (if it existed and was held) would have been exempt from disclosure under section 35(1)(a) and (b).
28. She is not required, therefore, to go on to consider whether the information would also be exempt from disclosure under section 34(1) of FOISA. She must still consider whether revealing whether the information existed and was held would have been contrary to the public interest.

#### **Section 18(1) - public interest**

29. Mr X's arguments on the public interest are as set out above. Police Scotland's are integrally connected with those advanced on the application of the section 35 exemptions. In addition, naturally, there are aspects of the relevant submissions the Commissioner cannot disclose without tending to reveal whether information was indeed held, or whether it existed.
30. Disclosing (into the public domain, not solely to Mr X) whether or not Police Scotland held the requested information would cast light on matters under active investigation, to the extent that the Commissioner is satisfied that there would be the required risk of substantial prejudice to these processes. In these circumstances, bearing in mind the importance of the matters under investigation, the Commissioner is also satisfied that such disclosure would not be in the public interest. Police Scotland were therefore entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr X, or whether that information existed.
31. The Commissioner notes that Mr X also expressed concern in his application to her that Police Scotland had not responded to his original request within the required 20 working days. However, Mr X did not raise this with Police Scotland in seeking a review, with the result that the Commissioner can note this apparent failure but is unable to make a formal finding on it.

## 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 X.

## Appeal

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Should either Mr X 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**  
**Acting Scottish Information Commissioner**

**20 June 2017**

### 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, 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.

...

#### 35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

(a) the prevention or detection of crime;

(b) the apprehension or prosecution of offenders;

...

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