

# Decision Notice 056/2021

---

## Suspected drug death figures for 2019

---

**Applicant: The Applicant**

**Public authority: Chief Constable of the Police Service of Scotland**

**Case Ref: 202000293**



Scottish Information  
Commissioner

## Summary

---

Police Scotland were asked for the number of suspected drug deaths recorded in 2019, broken down by both month and division.

Police Scotland disclosed the number of confirmed drug deaths in 2019, but argued that the number of suspected deaths was exempt from disclosure.

The Commissioner investigated and found that the information was not exempt from disclosure. He ordered Police Scotland to disclose the information.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 34(2)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 39(1) (Health, safety and the environment)

## Background

---

1. On 27 December 2019, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was the number of suspected drug deaths recorded by Police Scotland divisions in 2019, broken down by both month and division where recorded.
2. Police Scotland responded on 27 January 2020. They confirmed they held the information requested, but issued a section 16 refusal notice, explaining they were withholding the information under sections 30(c), 34(2)(b) and 39(1) of FOISA. Police Scotland provided the Applicant with an explanation of why they could not disclose the “suspected” number of drug deaths but provided him with the number of “confirmed” drug related deaths for 2019, broken down by division.
3. On 28 January 2020, the Applicant wrote to Police Scotland, requesting a review of their decision on the basis that he had been given the information on a previous occasion (for a different timeframe) and he believed there was a strong public interest in disclosure.
4. Police Scotland notified the Applicant of the outcome of their review on 25 February 2020, upholding their original response without modification. They confirmed numbers for suspected drugs death had been disclosed on one previous occasion, but that the usual response to this kind of request was to provide information regarding confirmed drugs deaths only.
5. On 25 February 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland’s review because he considered it to be in the public interest to disclose the information. He had previously received details of suspected drugs deaths and believed some of the information might already be in the public domain, having been released to some local authorities and then published.

## Investigation

---

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 March 2020, Police Scotland were notified in writing that the Applicant had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from the Applicant. 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 to answer specific questions. These related to their reasons for withholding the information under exemptions in sections 30(c), 34(2)(b) and 39(1) of FOISA.

## Commissioner's analysis and findings

---

9. 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 the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

### **Section 30(c) - Prejudice to the effective conduct of public affairs**

10. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
11. In order for the exemption in section 30(c) to be upheld, the prejudice caused by disclosure must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances.

### *The Applicant's submissions*

12. The Applicant contended that it was the job of journalists and the media to hold governments and public bodies to account and that the information would be treated responsibly. He considered disclosure of the information was necessary to monitor progress of the Scottish Government, National Health Service and associated care bodies along with Police Scotland. He did not consider it was up to Police Scotland to decide what information the people of Scotland were exposed to.
13. The Applicant also pointed out that the information being withheld had previously been disclosed to him for a different time period. He believed local authorities were also privy to

the information, and in some cases published it. He argued that this undermined the assertion that disclosure of the information would be inherently harmful.

#### *Police Scotland's submissions*

14. Police Scotland, in its submissions, distinguished between the figures for suspected and confirmed drug deaths. They confirmed that they disclosed information regarding confirmed drug deaths, as they recognised the public interest in a matter of public concern. Police Scotland emphasised the clear difference it saw between releasing factually accurate information into the public domain as regards drug related deaths and releasing figures that might be subject to significant change following medical assessment as to the cause of death.
15. Police Scotland explained that it can take some time for the full circumstances of a death to be established and that, as such, the figures are subject to change. In its submissions, Police Scotland stressed the role of National Records of Scotland (NRS) in publishing the official statistics on drug related deaths in Scotland annually. These are usually published around the summertime, for the previous year. The schedule for publication of the 2019 report was altered due to outstanding test results delaying finalising the cause of death in some cases. Police Scotland highlighted concerns raised by NRS about the inevitable differences in data when different organisations collect information for different purposes, using different definitions and methodologies.
16. Police Scotland's view was that the publication of suspected drugs death data would be prejudicial to the effective conduct of public affairs, in terms of the lead agency role taken by NRS and also the work of the Scottish Drug Task Force and wider communication on this subject. They considered disclosure of suspected drug death data would negatively misrepresent the situation in Scotland and, consequently, the work of the Drugs Task Force and other agencies involved would be disrupted. They submitted that discussions around the extent of drugs deaths in Scotland should be based on factual information, preferably the NRS published data but in the meantime Police Scotland confirmed drug death data.
17. Police Scotland confirmed that suspected drug death data had been disclosed in error to two applicants on a previous occasion, but stressed that the general approach taken over a number of years had been to disclose confirmed drug death data only.
18. Police Scotland stated that it engages with and provides relevant information to partner agencies and that there are therefore occasions when suspected drug death data is shared on either a local or national basis, for the purposes of harm prevention and intervention opportunities and/or for appropriate transparency and scrutiny. They emphasised that, when shared, it is to specified/limited distribution list and subject to several caveats about the data limitations. At other times, trends are shared as opposed to specific numbers.

#### *The Commissioner's view on section 30(c)*

19. The Commissioner accepts that there is a clear and established route for confirmed drug death data to be published via NRS or obtained on request from Police Scotland, but this is not what the Applicant requested.
20. Police Scotland has argued that the suspected drug death data is misleading and that as such its disclosure would cause harm to the work of NRS, the Drugs Task Force and partner organisations. The Commissioner considers that it is not uncommon or unexpected for the work that public bodies do to be misunderstood or misinterpreted (or for public authorities to be concerned that their work may be misunderstood or misinterpreted). However, it is not,

by itself, a reason for withholding information under FOISA, it always being open for public authorities to provide context to address any scope for this happening. In this case, it is not clear how the supposedly misleading nature of the “suspected” figures (which, presumably, would be presented as simply suspected in any case) would disrupt the work in this field that either Police Scotland or NRS do. Police Scotland have not explained how this might happen, and the Commissioner is not convinced of the harm claimed.

21. For this reason, the Commissioner finds that the information withheld under section 30(c) does not qualify for exemption under that provision. Police Scotland have not provided evidence or arguments to persuade him that the information, if disclosed, would cause substantial prejudice to the effective conduct of public affairs.
22. Given that the Commissioner finds the exemption in section 30(c) was wrongly applied, the Commissioner is not obliged to consider the public interest test in section 2(1)(b) of FOISA.

### **Section 34(2)(b) Investigation by Scottish public authorities**

23. Section 34(2)(b) of FOISA exempts information that has at any time been held by a Scottish public authority for the purposes of an investigation being carried out by virtue of a duty to ascertain the cause of death of a person (section 34(2)(b)(i)) and/or making a report to the Procurator Fiscal as respects the cause of death of a person (section 34(2)(b)(ii)).
24. The exemptions in section 34 of FOISA 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, so 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. Such exemptions are, however, subject to the public interest test required by section 2(1)(b) of FOISA.
25. In its submissions, Police Scotland provided a copy of their “Investigation of Death Standard Operating Procedure” which details the role of Police Scotland in the investigation of (drug) deaths. Police Scotland confirmed that the information regarding drug deaths investigations is held by them for the purposes of reporting such deaths to the Crown Office and Procurator Fiscal Service.
26. The Commissioner accepts that the primary reason the information is held by Police Scotland is to fulfil its role in investigating and reporting deaths. This brings the information within the scope of the section 34(2) exemptions, without the need to consider harm. The Commissioner will now go on to consider the public interest arguments.

#### *Public interest*

27. 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”, i.e. disclosure must serve the interests of the public.

#### *Submissions from the Applicant*

28. The Applicant submitted that disclosure of the information was in the public interest. He argued that it is the job of the media to hold public bodies to account and that the information is necessary to monitor the progress of the Scottish Government, the National Health Service and associated care bodies along with the Police.

### *Submissions from Police Scotland*

29. Police Scotland recognised that the prevalence of drugs generally, and the incidence of drug deaths in Scotland, are matters of significant public debate and that disclosure of the withheld information could help to better inform this debate.
30. Police Scotland acknowledged that, as part of the Scottish Drug Deaths Task Force, the incidence of drug deaths could be an indicator of the effectiveness of Police Scotland and others in tackling the problem and so disclosure could demonstrate accountability.
31. However, Police Scotland also submitted that it held the information for investigative purposes and that this type of information is rarely released. They argued that disclosure would amount to investigation-specific disclosure in some cases, because of the time period and divisional breakdown requested. They considered the investigative role of Police Scotland in such investigations had to be protected, along with the general presumption of confidentiality afforded to individuals involved in police investigations.
32. Police Scotland understood the public appetite for information on this subject, but believed this was catered for in accurate information disclosed (referring to the confirmed drugs death data). Police Scotland did not consider it in the public interest to facilitate public speculation as to the cause of death of an individual, whilst an investigation remained ongoing. It argued that, as well as toxicology results and depending on the circumstances, other investigative lines of enquiry might be being followed. Police Scotland's view was that to disclose the suspected cause of death almost immediately following that death could potentially jeopardise further enquiries, which could not be in the public interest.

### *The Commissioner's view on the public interest*

33. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public". The Applicant has argued that the withheld information falls within this category. The Commissioner agrees that the number of drug-related deaths is of significant concern to the public, as is the ability to hold public bodies to account in this area.
34. Police Scotland's argument against disclosure centres on the possibility of specific investigations being identifiable from the withheld information. While this may be a matter of some public concern, the Commissioner is not satisfied that Police Scotland have substantiated the risk of identification. In the absence of that risk, it is difficult (from the submissions offered) to identify any risk to Police Scotland's investigative functions.
35. Having carefully considered the circumstances of this case, the Commissioner is not satisfied that the public interest in withholding the information outweighs that in disclosing the it. The Commissioner therefore concludes that Police Scotland were not entitled to withhold the information under section 34(2)(b) of FOISA.

### **Section 39(1) Health, safety and environment**

36. Section 39(1) of FOISA states that the information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and so is subject to the public interest test required by section 2(1)(b) of FOISA.

37. As the Commissioner notes in his briefing on this exemption<sup>1</sup>, section 39(1) does not contain the usual harm test. Instead of the “substantial prejudice” test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the “endangerment” of health and safety. The briefing also notes that the test of “endangerment” is less demanding than the “substantial prejudice” test applied in other exemptions.
38. The Commissioner's view is that the term "endanger" is broad enough to apply where there is a (direct or indirect) threat to the safety of a person which would foreseeably arise in the future, as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner believes that for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could reasonably be regarded as a distinct possibility.

#### *Police Scotland's submissions*

39. Police Scotland claimed that the mental health of two groups of individuals would be endangered by disclosure of the withheld information. Firstly, it argued that providing the wider public with inaccurate data misrepresenting the position jeopardised trust and confidence in the police service and led to increased public fear and anxiety.
40. Police Scotland also submitted that friends and family of the deceased individuals to whom the data related could be affected, if individual cases were identifiable from the withheld information and their situation then became the subject of speculation and, potentially, media interest and intrusion. Police Scotland referred to their endeavours to treat next of kin and others involved with dignity and respect throughout the investigation. They stated that officers are advised to only share accurate and appropriate information surrounding the circumstances of a death. Police Scotland argued that contributing to speculation as to the cause of death of loved one would contradict this approach.
41. Police Scotland argued that disclosure of real-time statistics at less than national levels meant that, in certain areas, there might be a chance that individuals would recognise when the death of a loved one appeared within a matter of days for their area. It acknowledged that the same could be said, to some extent, for confirmed drug related death statistics, but argued that the passage of time between the death and any increase in the figures made identification far more difficult and considers there was a significant difference in terms of potential impact.
42. Police Scotland recognised that every death in Scotland ultimately becomes a statistic in NRS publications, but argued that the appropriate time for the recently bereaved to recognise their loved one as the individuals behind a particular statistic is when the cause of death is proven.
43. Police Scotland argued that the days and weeks following a death are difficult for the bereaved, while awaiting toxicology, etc. to confirm the cause of death, and considered it inappropriate at that point that they may be subjected to immediate headlines identifying an additional suspected drug death for their area in the last week.

---

<sup>1</sup> <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>



44. Police Scotland highlighted that families are not always aware that their loved ones took drugs, and to face speculation surrounding the cause of death of your loved one in such a public way can only add to their grief and suffering.

*The Commissioner's view on section 39(1)*

45. The Commissioner has to be satisfied that Police Scotland has evidenced endangerment to the health or safety of individuals, as a direct result of the disclosure of the withheld information.
46. In this case, Police Scotland have argued that disclosure would endanger the mental health of the family and/or friends of victims of suspected drug related deaths included in the figures in the withheld information. This endangerment is based upon the identification of individuals from the withheld information.
47. As discussed above, the Commissioner is not satisfied that Police Scotland have evidenced that individuals could be identified from the withheld information.
48. Police Scotland also submitted that disclosure could lead to fear, anxiety and a loss of trust and confidence in the Police amongst the public. The Commissioner is not satisfied that Police Scotland have provided enough evidence to support this position: from the submissions provided, the concerns appear to arise purely from the potential for the data to mislead, which (even if established) the Commissioner cannot accept by itself as inherently linked to the required level of danger.
49. The Commissioner must also consider the threshold of harm: endangerment is generally considered to be more than the possibility of distress. It will undoubtedly be upsetting to be reminded that a loved one is suspected of dying from drug-related causes, but the Commissioner is not persuaded, from the evidence provided, that this would be at a level of endangerment to health.
50. Having concluded that there is not sufficient evidence to show that individuals could be identified and that, if they were, disclosure of the information in this case would not, and would not be likely to, endanger the physical or mental health or safety of any person, the Commissioner finds that the exemption in section 39(1) was incorrectly applied to the withheld information by Police Scotland.
51. Given that the exemption in section 39(1) of FOISA was wrongly applied, the Commissioner is not obliged to consider the public interest test in section 2(1)(b) of FOISA.

## **Decision**

---

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner therefore requires Police Scotland to provide the Applicant with the withheld information, by **15 June 2021**.

## **Appeal**

---

Should either the Applicant 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.



## **Enforcement**

---

If Police Scotland fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland has failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**28 April 2021**

## Appendix 1: 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.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

#### 34 Investigations by Scottish public authorities and proceedings arising out of such investigations

...

- (2) Information is exempt information if-

...

- (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-
- (i) by virtue of a duty to ascertain; or
  - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

...

### **39 Health, safety and the environment**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**