

# Decision Notice 074/2021

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## Investigation report and police logs: death of Robin Cook MP

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**Applicant: The Applicant**

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

**Case Ref: 202001397**



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for the police report and police logs into the investigation of the death of Robin Cook. Police Scotland refused to disclose the information as it had been gathered for the purpose of making a report to the procurator fiscal respecting the cause of a death.

Following investigation, the Commissioner accepted Police Scotland were entitled to withhold the information requested.

## 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); 34(2)(b)(ii) (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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 2 September 2020, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information request was for copies of:
  - a) the police report concerning the death of Robert Finlayson Cook (Robin Cook) MP, who was pronounced dead on 6 August 2005 at Raigmore Hospital, Inverness;
  - b) the original police press release/statement, and
  - c) the police logs.
2. Police Scotland responded on 30 September 2020. They told the Applicant that the original press releases were no longer held and advised that the information that they did hold was exempt from disclosure in terms of sections 34(2)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations), 38(1)(b) (Personal information) and 39(1) (Health, safety and the environment) of FOISA. Police Scotland further advised that they considered the public interest favoured withholding the information held.
3. Police Scotland provided a summary of the information that was held, however, outlining the circumstances.
4. On 1 October 2020, the Applicant wrote to Police Scotland requesting a review of their decision regarding part a) and c) of his request, as he disagreed with the application of the exemptions claimed. He advised Police Scotland that he believed redacting the names contained in the report would alleviate any public interest and privacy concerns Police Scotland might have.
5. Police Scotland notified the Applicant of the outcome of their review on 23 October 2020. Police Scotland upheld their original response, stating that they considered the exemption in section 34(2) of FOISA to be the most relevant. They advised that investigative information would only be released by Police Scotland by exception and only where there was an

overwhelming public interest in disclosure, which Police Scotland stated did not apply in this case.

6. On 20 November 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 believed it would be in the public interest for the information to be disclosed, with the redaction of individual names where necessary.

## **Investigation**

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7. 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.
8. On 1 December 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.
9. 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, focusing on their application of the exemptions claimed in responding to the Applicant.
10. Police Scotland provided submissions to the Commissioner, maintaining that the information was exempt from disclosure in terms of sections 34(2)(b)(ii), 38(1)(b) and 39(1) of FOISA.

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

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11. 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.
12. The Commissioner will first of all consider the exemption contained in section 34(2)(b)(ii) of FOISA, going on to consider the exemptions in sections 38(1)(b) and 39(1) only if he is not satisfied that the first exemption is engaged in this case.

### **Section 34(2)(b)(ii) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations**

13. Police Scotland withheld the information they held and which fell within the scope of the Applicant's request under the exemption in section 34(2)(b)(ii) of FOISA, which provides that information is exempt from disclosure if it is held at any time by a Scottish public authority for the purposes of an investigation being carried out for the purpose of making a report to the procurator fiscal as respects the cause of death of a person.
14. The exemptions in sections 34 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: 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 contained in section 2(1)(b) of FOISA.

15. In this case, having reviewed the information withheld and the submissions presented by Police Scotland, the Commissioner is satisfied that the withheld information has been held by Police Scotland for the purposes of an investigation covered by section 34(2)(b)(ii) of FOISA.
16. The Commissioner therefore accepts that the exemption in section 34(2)(b)(ii) of FOISA applies to the withheld information. As noted above, however, this exemption is subject to the public interest test in section 2(1)(b) of FOISA. Consequently, unless the Commissioner is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed.

#### *Public Interest test*

17. As stated in previous decisions, 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.

#### Submission from the Applicant

18. In his correspondence with Police Scotland and the Commissioner, the Applicant submitted that he believed it was in the public interest that the information be disclosed. He commented that hillwalkers and mountaineers continue to die in high numbers in Scotland, and that search and rescue organisations, such as Scottish Mountain Rescue, would benefit from having access to a report (with personal information redacted) detailing the events that led to a hillwalker's death and might be able to use the information to improve their own operations and potentially save lives. He further commented that, as Mr Cook was a high-profile figure (a former Secretary of State), it was in the legitimate public interest for academics (such as historians) to have access to official (redacted) accounts, reports or logs, because press reports at the time contained conflicting information about the details of the events.
19. He further commented that the Crown Office and Procurator Fiscal Service (COPFS) had advised that it held no information on the subject matter and that this was a further reason why the public interest favoured disclosure of the information held by Police Scotland.

#### Submission from Police Scotland

20. Police Scotland recognised a public interest in increasing the public awareness as to the handling of sudden death investigations generally and in the specific case in question. Disclosure would also enhance accountability regarding the actions of the service and officers and the use of public funds.
21. In their initial response to the Applicant, Police Scotland acknowledged that limited information regarding the death of an individual may be disclosed as part of an investigative strategy, and decisions to disclose this information are taken by the Senior Investigating Officer in consultation with COPFS. They stated that any such releases are undertaken with due care and consideration and are mindful to the potentially detrimental effects any associated media attention would bring to the family of the recently deceased.

22. In this case, Police Scotland submitted that disclosure of the information withheld would hamper their ability to conduct such inquiries in the future, as it would be known exactly what type of enquiries would be made.
23. Police Scotland submitted that the information was gathered for the purposes of an investigation and, as the interests of third parties would be affected by disclosure, the public interest test favoured withholding the information requested. They stated that those who engage with the Police do so with an expectation that their information will remain confidential, and would not expect that details of incidents would be disclosed to anybody not directly connected with the case – and certainly not to be publicly disclosed, during their lifetime or on their death. Police Scotland further submitted that the fact the deceased was a public figure did not negate the deeply personal nature of a sudden death investigation.
24. Should such information be disclosed, Police Scotland submitted that it would affect the flow of information, with it being highly likely that individuals would be less willing to engage with the Police in the knowledge that such information would enter the public domain. They stated there was no public interest in releasing information that would result in any reduction in the willingness of the public to engage with Police Scotland. They further submitted that the breakdown of this relationship would be seriously detrimental to the ability of Police Scotland to gain the trust of individuals, which they considered to be of critical importance.
25. Police Scotland provided submissions to the effect that, even if personal details were redacted, it would still be evident who the information related to.
26. Police Scotland also submitted that it was the role of COPFS to investigate deaths, not the public, and that it could not be in the public interest for the police service to simply publish investigative materials, irrespective of the passage of time, to let the public “have a go”.
27. They submitted that there are well established, appropriate procedures in place to investigate such matters and public disclosure of case materials, outwith those procedures, not only undermines them, but also causes untold damage to the individuals involved, who then find themselves and their late loved ones subject to discussion/speculation.
28. Police Scotland concluded that, while the Applicant might have a genuine interest in the information requested, this must be balanced with the wider public interest considerations of protecting the statutory role of the Police service and preserving the relationship between the Police service and the public.

#### The Commissioner's view

29. The Commissioner recognises the public interest in disclosure of information which would show how Police Scotland conduct and report on investigations. Disclosure would contribute to a fuller understanding of how Police Scotland investigate such matters and, in particular, how they investigated the death in question. However, in considering disclosure under FOISA, the Commissioner must address the question of whether the information withheld by Police Scotland should be made available to the public at large, not just to those who may have a specific interest in the matter.
30. 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".

31. In relation to information provided by witnesses, the Commissioner's view is set out clearly in *Decision 197/2007*<sup>1</sup>, in which it is recognised that the inclusion of section 34 in FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring the ongoing willingness of members of the public to cooperate with the various investigatory processes making up the justice system, and the system for dealing with sudden deaths and fatal accidents.
32. The Commissioner acknowledges that there can be a strong argument for maintaining the exemptions contained in section 34 where they relate to such investigations, even where the information concerned no longer relates to ongoing investigations or proceedings.
33. The Commissioner has considered whether disclosure of the information in question would contribute to the administration of justice and enforcement of the law, reveal any malpractice, enable correction of misleading claims or contribute to a debate on a matter of public interest. Considering the content of the information that has been withheld, the Commissioner does not find disclosure to be necessary for any of these purposes. He also considers the summary provided by Police Scotland, in responding to the applicant on 30 September 2020, goes some way to addressing the public interest in disclosure of the information.
34. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is significant enough to outweigh that in withholding the information in question. The Commissioner therefore concludes that Police Scotland were entitled to withhold the information under section 34(2)(b)(ii) of FOISA.
35. Given that the Commissioner has concluded that all of the information withheld by Police Scotland was correctly withheld in terms of section 34(2)(b)(ii) of FOISA, he is not required (and does not intend) to consider the exemptions in sections 38(1)(b) or 39(1).

## 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 the Applicant.

## Appeal

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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.

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

**12 May 2021**

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<sup>1</sup> <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600889.aspx>

## Appendix 1: Relevant statutory provisions

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### 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.

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- (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.

...

#### 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-

...

- (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

...

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