

# Decision Notice

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## **Decision 213/2016: Mr Y and the Chief Constable of the Police Service of Scotland**

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### **Details of a police vehicle**

Reference No: 201601072

Decision Date: 5 October 2016



## Summary

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On 19 January 2016, Mr Y asked the Chief Constable of the Police Service of Scotland (Police Scotland) for details of a police vehicle involved in an incident, and related information. Police Scotland refused to confirm or deny whether they held the information requested.

During the investigation, Police Scotland informed Mr Y that they did not hold some of the information he had requested. They also confirmed they held other information which he had requested, and supplied that information to him.

The Commissioner finds that Police Scotland were not entitled to refuse to confirm or deny whether they held the information requested by Mr Y. She accepts that Police Scotland have now properly responded to Mr Y's request, and does not require them to take any further action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held); 18(1) (Further provisions as respects responses to request)

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 19 January 2016, Mr Y made a request for information to Police Scotland in respect of a police incident. He requested:
  - The registration number and make of the police vehicle involved (part 1)
  - Whether the vehicle was carrying firearms (part 2)
  - Did the vehicle have camera recording equipment fitted and was the incident recorded (part 3)
  - Whether such a vehicle can be left unattended while it contains firearms (part 4)
  - What the principal duties of the officers were on that day (part 5)
2. Police Scotland responded on 18 February 2016. They stated that Mr Y's request appeared to be for personal data and advised him how to make a subject access request (SAR) in terms of the Data Protection Act 1998 (DPA). Police Scotland also stated that, in terms of section 18(1) of FOISA, they were entitled to refuse to reveal whether they held information which, if it exists and is held, would be covered by the exemptions in section 38(1)(a) and (b) of FOISA (Personal information).
3. On 11 March 2016, Mr Y wrote to Police Scotland requesting a review of their decision. He could not understand why section 18(1) would apply to information that would have been made public if the matter had gone to trial.

4. Police Scotland notified Mr Y of the outcome of their review on 4 April 2016, upholding their decision without modification. Again, Police Scotland referred to the right to obtain personal data under the DPA.
5. On 7 June 2016, Mr Y applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of Police Scotland's review and believed that the information would have been disclosed during the course of a criminal trial.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Y 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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland was invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
8. During the Commissioner's investigation, Police Scotland reconsidered their position and, on 10 August 2016, disclosed some information and answered Mr Y's questions (parts 2, 4 and 5 of the request). Police Scotland also gave notice that they did not hold other requested information (parts 1 and 3).
9. Mr Y accepted some of Police Scotland's response, but required the Commissioner to issue a decision on Police Scotland's compliance with Part 1 of FOISA. He also questioned whether Police Scotland was correct to state that it did not hold some of the information he had requested.

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

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

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

11. Section 18 allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) in the following limited circumstances:
  - a request has been made to the authority for information which may or may not be held by the authority;
  - if the information were held by the authority (and it need not be), the authority 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;
  - the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
12. As mentioned above, in their response to the Commissioner, Police Scotland stated that they had reconsidered their reliance upon section 18(1) of FOISA and that they had provided Mr Y with an alternative response. In the circumstances, the Commissioner must conclude that

Police Scotland do not consider themselves to have been entitled to rely upon section 18 in their earlier responses to Mr Y. In the absence of any submissions from Police Scotland to the contrary, the Commissioner concludes that Police Scotland were not entitled to rely on section 18(1) of FOISA.

13. As a result, the Commissioner finds that Police Scotland failed to comply with section 1(1) of FOISA in responding to Mr Y in terms of section 18. Given that Police Scotland have now responded to Mr Y otherwise than in terms of section 18 of FOISA, the Commissioner does not require Police Scotland to take any further action.

### **Information held by Police Scotland**

14. In relation to the new response from Police Scotland (10 August 2016), Mr Y has questioned whether Police Scotland were correct to state that they do not hold information covered by parts 1 and 3 of his request.
15. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.

#### *Part 1 of Mr Y's request*

16. Police Scotland's response of 10 August 2016 stated that they no longer held the registration number and make of the police vehicle in question. The vehicles that were in operation at the time were no longer in service and the records that are still held about the incident do not provide this level of detail.
17. Mr Y understood that hard copy vehicle journey records were maintained and completed by officers at start and end of journeys, and retained for more than two years. He suggested that these records would contain vehicle registration number, operational call sign and fleet number. He also suggested that the officers' notebooks would contain these details and the call sign of the vehicle.
18. Mr Y's comments were put to Police Scotland, who confirmed that hard copy vehicle journey records are completed by officers. However, these are retained for "current year +1" in accordance with the Police Scotland's records retention schedule. As a result, the records for the time period in question were no longer held.
19. Police Scotland confirmed that the notebooks belonging to the officers who attended the incident in question had also been checked. All the officers had noted was the vehicle call sign; there were no other details in relation to fleet number, vehicle make, or registration number. Police Scotland's Fleet Management were also contacted but confirmed they no longer hold details of the vehicle. As such, Police Scotland maintained that they were correct to give notice (in terms of section 17 of FOISA) that they do not hold information covered by Part 1 of Mr Y's request.
20. The Commissioner has considered all of the above carefully. She is satisfied that Police Scotland have taken reasonable and proportionate steps to identify and locate the information covered by Part 1 of the request. She accepts Police Scotland's explanations and finds that it is reasonable to conclude that they do not hold any information falling within the scope of Part 1 of the request.

21. Given that Police Scotland's original response and review response failed to notify Mr Y that they did not hold any information covered by Part 1 of his request, the Commissioner finds that they failed to comply with section 17(1) of FOISA.

*Part 3 of Mr Y's request*

22. Police Scotland's response of 10 August 2016 stated that the vehicle did not have camera recording equipment fitted and therefore no recordings could be taken during its involvement in the incident. Mr Y asked, quite reasonably, how Police Scotland could say there was no camera recording equipment in the vehicle when they had also stated that no information is held about the vehicle.
23. Police Scotland replied to this concern on 2 September 2016. They said that Mr Y was already aware that no camera recording equipment was in the vehicle, as he was informed of this in relation to a complaint he had made. Police Scotland provided evidence that this question had been raised by Mr Y and answered during a phone call relating to his complaint. Confirmation that the vehicle did not contain recording equipment was therefore contained within the paperwork relating to the complaint process.
24. The Commissioner has considered all of the above. In the circumstances, the Commissioner is satisfied that Police Scotland took reasonable and proportionate steps to identify and locate the information covered by part 3 of Mr Y's request.
25. The Commissioner accepts that it is reasonable for Police Scotland to conclude that they did not hold any recorded information falling within the scope of that part of the request, other than a record of a conversation with Mr Y in which he had been given verbal assurance that the vehicle did not contain recording equipment. However, this was information which was held at the time of Mr Y's request, and Police Scotland should have supplied this information to him, or explained why, in terms of Part 1 of FOISA, they were not required to do so. Consequently, Police Scotland failed to comply completely with section 1(1) of FOISA when responding to part 3 of Mr Y's request.
26. As it is clear that Mr Y was already aware of this information, the Commissioner does not require Police Scotland to provide it to him now.

## **Decision**

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The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) failed to comply with Part 1 (and in particular sections 1(1)) and 17(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Y. The Commissioner finds that Police Scotland were not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the information requested by Mr Y existed or was held by them.

For the reasons set out above, the Commissioner does not require Police Scotland to take any action in respect of these failures.

## **Appeal**

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Should either Mr Y 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**

**5 October 2016**

### 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.

...

#### 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.

...

#### 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.

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**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)**