

# Decision Notice

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## Decision 252/2014: Ms Alison Mackenzie and Chief Constable of the Police Service of Scotland

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### Complaint correspondence

Reference No: 201402283

Decision Date: 5 December 2014



Scottish Information  
Commissioner

## **Summary**

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On 17 June 2014, Ms Mackenzie asked the Chief Constable of the Police Service of Scotland (Police Scotland) for correspondence with the Police Investigations and Review Commissioner (PIRC) relating to three complaints.

Police Scotland told Mr Mackenzie the information was exempt from disclosure, as it was her own personal data and as disclosure would, or would be likely to, substantially prejudice PIRC's ongoing investigation (and thus the exercise of its functions in relation to police conduct).

Police Scotland disclosed all of the information, subject to the redaction of personal data, during this investigation. The Commissioner found that Police Scotland had been entitled to withhold the information in responding to Ms Mackenzie's request and requirement for review.

## **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); 35(1)(g) and (2)(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.

## **Background**

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1. On 17 June 2014, Ms Mackenzie made a request for information to Police Scotland. She asked for copies of all correspondence that had occurred between Police Scotland and PIRC in relation to three complaints she had submitted to PIRC.
2. Police Scotland responded on 30 June 2014. They refused to supply the information, on the basis that it was Ms Mackenzie's personal data and therefore exempt under section 38(1)(a) of FOISA. Police Scotland also stated that the information was exempt under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(b). Police Scotland stated that as her complaints were still being reviewed by PIRC, disclosure would (or would be likely to) prejudice substantially the exercise of PIRC's function with regard to ascertaining whether a person is responsible for conduct which is improper. They concluded that the public interest favoured maintaining the exemption in section 35(1)(g).
3. Police Scotland also advised Ms Mackenzie of her rights to make a subject access request under the Data Protection Act 1998.
4. On the same day, Ms Mackenzie wrote to Police Scotland requesting a review of their decision. Noting that PIRC had disclosed information to her in response to a request she considered to be the same, Ms Mackenzie did not accept that the information should be withheld by Police Scotland.
5. Police Scotland notified Ms Mackenzie of the outcome of their review on 28 July 2014. In addition to the exemptions applied initially, Police Scotland now considered some of the information to be exempt under elements of section 34 of FOISA.

6. On 21 September 2014, Ms Mackenzie wrote to the Commissioner. Ms Mackenzie applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Mackenzie stated she was dissatisfied with the outcome of Police Scotland's review because she was not satisfied that the authority was entitled to withhold the information.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Ms Mackenzie 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.
8. On 25 September 2014, Police Scotland were notified in writing that Ms Mackenzie had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Ms Mackenzie. They 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 answer specific questions. They were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested, with particular reference to the exemptions cited in response to Ms Mackenzie.
10. On 18 November 2014, Police Scotland disclosed all of the information previously withheld, subject to the redaction of personal data. Police Scotland disclosed this information on the basis that PIRC had by then reached and communicated a determination in relation to her complaints. Ms Mackenzie remained dissatisfied that the information was originally withheld from her.

## **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 her by both Ms Mackenzie and Police Scotland. She is satisfied that no matter of relevance has been overlooked.
12. Ms Mackenzie has noted that information was disclosed to her by PIRC in response to a request she considered to be the same. While this will be considered below to the extent that the Commissioner considers it relevant to Police Scotland's decision to withhold information, this is not a comparative exercise and FOISA will never prevent a Scottish public authority from choosing to disclose information (section 66 makes this explicit). It does not necessarily follow from one authority's decision to disclose information that another authority is wrong to withhold the same or similar information at or around the same time.

## **Section 35(1)(g) – Law Enforcement**

13. Police Scotland withheld the information on the basis that section 35(1)(g), read in conjunction with section 35(2)(b), applied. At the time they considered Ms Mackenzie's request and requirement for review, Police Scotland submitted, the complaints referred to in the request were still being reviewed by PIRC. They did not believe it was appropriate to circumvent the recognised review process by releasing information in response to Ms Mackenzie's request, claiming that this would undermine the ongoing investigation and could jeopardise the outcome.

14. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any public authority (as defined by the Freedom of Information Act 2000) or Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. Police Scotland argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of PIRC's functions to ascertain whether a person is responsible for conduct which is improper (section 35(2)(b)).
15. PIRC is a Scottish public authority for the purposes of FOISA, listed in Schedule 1.
16. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of "substantial prejudice", but the Commissioner's view is that the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
17. The Commissioner must therefore consider three separate matters to determine whether this exemption applies:
  - Does PIRC have a function in relation to ascertaining whether a person is responsible for conduct which is improper?
  - If so, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, PIRC's ability to exercise this function?
  - If such prejudice would, or would be likely to, occur, whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
18. The functions and powers of PIRC in this connection are derived from the Police, Public Order and Criminal Justice (Scotland) Act 2006, specifically sections 34 and 35 which provide that PIRC may examine the manner in which particular kinds of complaint have been handled by Police Scotland.
19. In performing this function, PIRC obtains information from the police body which dealt with the complaint. This information is considered along with information provided by the person who made the complaint. An assessment is then made as to whether, in all the circumstances, the complaint was dealt with to a reasonable standard.
20. Having considered the functions of PIRC under this legislation, the Commissioner is satisfied that the information under consideration here relates to the performance of a function exercised for the purposes described in section 35(2)(b).

*Would substantial prejudice occur, or be likely to occur?*

21. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of the relevant functions of PIRC.
22. Police Scotland submitted that disclosure would undermine the ongoing investigations (by PIRC) and could jeopardise their outcomes.

23. The Commissioner notes that Ms Mackenzie sought this information at the point where, on Police Scotland's understanding of the situation, PIRC was still undertaking an investigation into the handling of these particular complaints. Police Scotland articulated a belief that disclosure at that point would undermine PIRC's investigation and could jeopardise the outcome.
24. The Commissioner considers Police Scotland's understanding of the situation to have been a reasonable one in the circumstances. She is satisfied that, at the time they responded to Ms Mackenzie's request and requirement for review, Police Scotland were not aware of the outcome of PIRC's review of these complaints. While there may be circumstances in which it would be reasonable (and indeed desirable) to consult another public authority with an interest in requested information on the question of disclosure, the Commissioner acknowledges that it would be equally reasonable for an authority in Police Scotland's position (as the subject of a review on questions of conduct) to conclude that such an approach would be inappropriate. In the interests of avoiding any perception of potential prejudice to the review, it would appear to have been reasonable in the circumstances simply to await the review's outcome, as communicated by PIRC, and in the meantime only respond to the reviewing authority as and when asked to do so.
25. In all of the circumstances of this case, the Commissioner is satisfied that Police Scotland's apprehension of substantial prejudice was a real one. Viewed objectively, she accepts that substantial prejudice to the integrity of an ongoing investigation such as that under consideration here is a genuine risk should information pertinent to that investigation be disclosed. She accepts, therefore, that it was appropriate for Police Scotland to conclude that disclosure of the information withheld under this exemption would (or would be likely to) prejudice substantially PIRC's ability to conduct its review.
26. The Commissioner must now go on to consider the application of the public interest test, as set out in section 2(1)(b) of FOISA.

*The public interest test*

27. 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.
28. Police Scotland acknowledged that there was a public interest in the transparency of PIRC's processes which favoured disclosure. However, they concluded that there was a greater public interest in allowing the official process being conducted by PIRC to proceed in the recognised way, to ensure its integrity and allow conclusions to be reached without interference. To support this statement, Police Scotland highlighted that PIRC's conclusions might include recommendations to improve practices on a wider scale within Police Scotland, which it argued was of benefit to all parties involved and the wider public.
29. The Commissioner acknowledges that there is a strong public interest in maintaining the exemption in section 35(1)(g) in this case, in order to maintain the effectiveness of PIRC's investigative processes. The only argument she has received to the contrary is that PIRC chose to disclose much the same information earlier. She can only observe that PIRC, as the independent statutory regulator charged with carrying out the review, was in a rather better position than Police Scotland to judge when disclosure could take place without prejudicing the effective exercise of its own functions. It has not been explained to the

Commissioner what public interest, if any, would have been served by parallel disclosure by Police Scotland.

30. Taking account of all the circumstances, therefore, the Commissioner is satisfied that the public interest in the exemption being maintained outweighed that in disclosure of the withheld information by Police Scotland. Consequently, she finds that Police Scotland were entitled to withhold the information under section 35(1)(g) of FOISA, read in conjunction with section 35(2)(b).
31. As stated above, Police Scotland released this information to Ms Mackenzie once PIRC had reached and communicated a determination on her complaints, subject to the redaction of third party personal data. These redactions have not been challenged by Ms Mackenzie and therefore cannot be considered by the Commissioner. Having concluded that the information withheld initially was properly withheld under section 35(1)(g) of FOISA, the Commissioner does not need to consider the application of the other exemptions cited by Police Scotland in responding to Ms Mackenzie.

## **Decision**

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The Commissioner finds that Police Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Mackenzie.

## **Appeal**

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Should either Ms Mackenzie 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 December 2014**

## **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.
- ...
- (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.
- ...

#### **35 Law enforcement**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
  - ...
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- ...
- (2) The purposes are-
  - ...
  - (b) to ascertain whether a person is responsible for conduct which is improper;
- ...

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