

# Decision Notice

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**Decision 063/2019: Mr Paul Hutcheon and Chief Constable of the Police Service of Scotland**

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**Examinations under Schedule 7 to the Terrorism Act 2000**

Reference No: 201800709  
Decision Date: 15 April 2019



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for information regarding examinations under Schedule 7 to the Terrorism Act 2000. Police Scotland replied as follows:

- They refused to confirm or deny whether they held some of the information.
- They stated that some of the information was not held.
- They stated that to supply some of the information would cost in excess of £600.
- They withheld some of the information under various exemptions.

Following an investigation, the Commissioner accepted that some of the information had been correctly withheld and that other information was not held. However, the Commissioner required Police Scotland to issue a new review response for other parts of the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b)(Effect of exemptions); 12(1) (Excessive cost of compliance); 17(1) (Notice that information is not held); 18(1) (Further provision as respects responses to request); 21(4) (Review by Scottish public authority); 31(1) (National security and defence); 35(1)(a) and (b) (Law enforcement); 39(1) (Health, safety and the environment)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

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 21 October 2017, Mr Hutcheon made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was as follows:
  - (i) Broken down by every financial year from 2013/14 onwards, how many examinations have been carried out under Schedule 7 to the Terrorism Act 2000?<sup>1</sup>
  - (ii) Broken down by every financial year from 2013/14 onwards, how many individuals were detained under Schedule 7 to the Terrorism Act 2000?
  - (iii) Broken down by every financial year from 2013/14 onwards, how many
    - (a) strip searches, and
    - (b) goods examinations,were carried out under Schedule 7 to the Terrorism Act 2000?
  - (iv) Broken down by every financial year from 2013/14 onwards, how many individuals subject to an examination and/or detention under Schedule 7 to the Terrorism Act 2000 were charged with offences under the Act?

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2000/11/schedule/7>

- (v) Broken down by every financial year from 2013/14 onwards, how many individuals subject to an examination and/or detention under Schedule 7 to the Terrorism Act 2000 were reported to the fiscal over alleged offences in relation to the Act?
2. Police Scotland responded on 17 November 2017. They refused to confirm or deny whether they held the information or whether it existed, relying on section 18(1) of FOISA. Police Scotland informed Mr Hutcheon that they were applying section 18(1) in conjunction with sections 31(1) (National security and defence); 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement) and 39(1) (Health and Safety) of FOISA.
  3. On 21 November 2017, Mr Hutcheon wrote to Police Scotland, requesting a review of their decision on the basis that it was in the public interest for the information, if held, to be disclosed. He stated that Police Scotland had not provided evidence of a specific risk of harm.
  4. Police Scotland notified Mr Hutcheon of their review outcome on 21 December 2017 and upheld their application of section 18(1) of FOISA without modification.
  5. On 6 April 2018, after Mr Hutcheon had made an application to the Commissioner, Police Scotland issued him with a revised review outcome on 6 April 2018, as follows:
    - In respect of Mr Hutcheon's points (i) and (iii)(b), Police Scotland confirmed that they held this information but were applying sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA to withhold it.
    - In respect of his point (ii), they stated that they held the information, except for the year 2014/15. They applied section 17(1) (Notice that information is not held) of FOISA to the 2014/15 data and sections 31(1), 35(1)(a) and (b) and 39(1) in respect of the other years.
    - In respect of his point (iii)(a), they applied section 12(1) of FOISA, stating that it would cost in excess of the £600 cost limit to provide this information.
    - In respect of his points (iv) and (v), they upheld their application of section 18(1) of FOISA in conjunction with sections 31(1), 34(1)(b), 35(1)(a) and (b) and 39(1).
  6. On 24 April 2018, Mr Hutcheon wrote to the Commissioner's Office. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA, stating that he was dissatisfied with the outcome of Police Scotland's revised review because he considered the exemptions had been incorrectly applied and that it was in the public interest for the information to be disclosed.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Hutcheon 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 4 June 2018, Police Scotland were notified in writing that Mr Hutcheon had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Hutcheon. 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 to answer specific questions, focusing on the provisions of FOISA applied in the revised review outcome.

10. Mr Hutcheon was also asked to provide any comments he wished to make in support of his position that the information should be disclosed.
11. Submissions were obtained from both Police Scotland and Mr Hutcheon during the course of the investigation.

## Commissioner's analysis and findings

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12. 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 Mr Hutcheon and Police Scotland. He is satisfied that no matter of relevance has been overlooked.
13. The Commissioner will firstly consider Police Scotland's application of the exemption at section 31(1) of FOISA.

### Section 31(1) – National security and defence

14. Police Scotland applied this exemption to information on the number of examinations of individuals carried out (part (i) of the request), the number of individuals detained (part (ii) of the request) and the number of goods examinations carried out (part (iii)(b) of the request).
15. The Commissioner notes that, in respect of part (ii) of the request, Police Scotland stated that they held the information except for the year 2014/15. They applied section 17(1) of FOISA to the 2014/15 information. The Commissioner will consider that part of the request later in this decision.
16. Section 31(1) of FOISA provides that information is exempt information if exemption from section 1(1) (i.e. the right to request information from a Scottish public authority) is required for the purpose of safeguarding national security.
17. The expression "national security" is not defined in FOISA. The Commissioner considers the phrase covers matters such as
  - defence of the realm
  - the prosecution of war
  - the disposition of the armed forces
  - nuclear weapons
  - security and intelligence services, and
  - potential threats to the economic wellbeing of the UK, including terrorism, espionage and subversion.
18. It should be noted that section 31 (and the Commissioner's briefing on the exemption<sup>2</sup>) specifies that information is exempt from disclosure if exemption is required for the purposes of safeguarding national security, a condition which has a narrower scope than information which simply relates to national security.

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section31/Section31.aspx>

19. Police Scotland described the external security threats they were seeking to guard against in applying this exemption. They provided detailed information on the associated policing arrangements. The Commissioner does not consider it possible to set these submissions out in greater detail without disclosing information which could itself be subject to the exemption.
20. The Commissioner has carefully scrutinised Police Scotland's submissions. Having taken account of all the relevant factors, he finds their arguments persuasive and is satisfied that the information under consideration is sensitive and that exemption from section 1(1) is required for the purpose of safeguarding national security.
21. In the circumstances described by Police Scotland, the Commissioner accepts that they have demonstrated a link between disclosure of the information and direct risks to national security, sufficient to justify exemption for the purpose of safeguarding that security.
22. As the Commissioner is satisfied that the information is exempt under section 31(1), he will now go on to consider the public interest test set down in section 2(1)(b) of FOISA.

#### *The public interest test*

##### Submissions from Police Scotland

23. Police Scotland accepted that the public should be able to hold them to account in terms of financial and resourcing decisions, and that publication of the information sought would better inform the public as to the extent of Police Scotland activity in this area.
24. However, Police Scotland considered their overwhelming priority had to be safeguarding the national security of Scotland and the UK and, where they genuinely believed disclosure of information would prevent them from doing this to the best of their ability, the public interest had to lie in maintaining the exemption. While acknowledging that statistical information relating to Schedule 7 for Great Britain as a whole is available from the Home Office Statistical Bulletins<sup>3</sup>, they provided arguments explaining why the requisite harm would follow from disclosure at the level of detail sought by Mr Hutcheon.
25. Police Scotland concluded that the public interest in disclosure did not outweigh the public interest in maintaining the exemption.

##### Submissions from Mr Hutcheon

26. Mr Hutcheon stated that there was a precedent for publishing figures in relation to this part of the law on a UK-wide basis and believed that publication did not threaten national security or defence. He argued that, unless the Scottish figures were extremely low, the public interest favoured disclosing the information. He submitted that potential terrorists already knew the powers under Schedule 7 existed and their use would not be a surprise.

##### The Commissioner's conclusions

27. As noted above, the Commissioner has accepted that Police Scotland's submissions were sufficient to demonstrate a link between disclosure of the information under consideration and national security being compromised to the extent required by this exemption.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/716000/police-powers-terrorism-mar2018-hosb0918.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716000/police-powers-terrorism-mar2018-hosb0918.pdf)

28. In the circumstances he must give greater weight to the risk of harm to the public. He therefore finds, on balance, that the public interest in withholding the information (i.e. maintaining the exemption) outweighs that in disclosing it.
29. Consequently, the Commissioner accepts that Police Scotland were entitled to withhold the information to which they applied section 31(1) of FOISA. Having reached this conclusion, he is not required to consider the application of sections 35(1)(a) and (b) and 39(1) of FOISA, which Police Scotland also applied to this information.
30. The Commissioner will now go on to consider the application of section 17(1) of FOISA.

### **Section 17(1) – Notice that information is not held**

31. 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. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
32. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
33. Police Scotland applied section 17(1) to that part of Mr Hutcheon's request asking for the numbers of individuals detained for the year 2014/15. Mr Hutcheon submitted that it made little sense to him that information for some years would be held but not for others.
34. The investigating officer asked Police Scotland how they had established that they did not hold any recorded information falling within this part of Mr Hutcheon's request.
35. Police Scotland explained that they held copies of the relevant statistical returns to the Home Office for all years covered by the request, except 2014/15. They also explained that the definition of a detention changed during 2014/15, based on changes to the associated Codes of Practice.
36. In the 2013/14 return, Police Scotland continued, there was a field for a "detentions" figure. In later returns, following the change in definition, there was no such field: the current means of transmitting such information to the Home Office is for individual forces to send an email (which the force does not retain) each time a detention occurs. Although they do, from 2015/16 onwards, hold statistical information which includes the number of detentions.
37. Police Scotland submitted that it was impossible to confirm whether there was a "detentions" field in the 2014/15 return without sight of that return. However, they considered it unlikely that it would include such a field, given the timeframe in question. They confirmed the searches undertaken to ascertain whether there was any relevant information held for 2014/15.
38. Police Scotland considered whether it would be possible to generate a figure for 2014/15 by going through each of the examination records, but it was assessed that section 17 of FOISA was the more appropriate response. They noted, in any case, that it would not necessarily be possible to determine from these records whether a "detention" – for the purposes of Home Office reporting – had occurred.

### *The Commissioner's conclusions*

39. The Commissioner can only consider what recorded information is actually held by Police Scotland, not what information they might be expected to hold.
40. Having considered all the relevant submissions and the information requested, the Commissioner is satisfied with Police Scotland's explanations as to why they do not hold any relevant recorded information for the year in question.
41. The Commissioner would emphasise that public authorities are not under any obligation to create information in response to an information request. In any case, he concurs that any such newly created information could not be guaranteed to be accurate.
42. Taking all of the above into consideration, the Commissioner accepts - on the balance of probabilities - that Police Scotland do not (and did not, on receiving the request) hold any information falling within this specific part of Mr Hutcheon's request, and correctly gave notice of this to him, as required by section 17(1) of FOISA.
43. While accepting that Police Scotland did not hold the information in question, it is the Commissioner's view – having considered the equivalent information and associated arguments for the years for which information was held – that it is likely that section 31(1) of FOISA could have been applied to withhold any relevant information which had been held for 2014/15.
44. Notwithstanding the above comments, Mr Hutcheon does (of course) have the right to make a new information request for this information directly to the Home Office.
45. The Commissioner will now go on to consider the application of section 18(1) of FOISA.

### **Section 18(1) – "neither confirm nor deny"**

46. Police Scotland refused to confirm or deny under FOISA whether they held any information falling within parts (iv) and (v) of the request, i.e. number of examinees charged with an offence and number of examinees reported to the Procurator Fiscal.
47. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information 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 existed and was 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.
48. Where a public authority has chosen to rely on section 18(1), the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. He must also establish whether, if the information existed and was held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions listed in section 18(1) and cited by the authority.

49. It is not sufficient 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 were held, would be exempt information under one or more of the listed exemptions.
50. In any case where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he is unable to comment in any detail on the reliance by the public authority on any of the exemptions listed in relation to section 18(1), or on other matters which could have the effect of indicating whether the information existed.
51. In this case, Police Scotland argued that the information would be exempt by virtue of sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA (in their submissions to the Commissioner, they provided no comments in relation to section 34(1)(b), cited previously in responding to Mr Hutcheon).

*Section 31(1) – National security and defence*

52. The tests required for section 31(1) of FOISA to apply are set out at paragraphs 16 to 18.
53. Police Scotland submitted that disclosure of the information, if held, would provide a clear insight as to the extent of counter-terrorism operations and activity in Scotland and elsewhere in the UK.
54. Information regarding individuals charged and reported is published at a national level, they explained, conscious that any disclosure below that level would result in a detriment to national security due to the low numbers involved.
55. Police Scotland submitted that, in safeguarding national security and protecting the UK against the threat of terrorism, police forces must have every tactical advantage possible available to them. They argued that a key strand of the overall counter-terrorist effort was ensuring terrorists were not informed as to the extent of police activity and the results of that activity at individual police force level.

*Section 35(1)(a) and (b) – Law enforcement*

56. Section 35(1)(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. 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.
57. These are qualified exemptions, which are subject to the public interest test in section 2(1)(b) of FOISA, should they be found to apply to the withheld information.
58. As the Commissioner's guidance<sup>4</sup> on this exemption indicates, the term "prevention or detection of crime" is wide-ranging, encompassing actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and prevention.

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<sup>4</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>



59. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers that the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, more than simply a remote possibility.
60. Police Scotland submitted that, were the information held, any disclosure would provide a clear insight as to the level of policing activity in Scotland and, consequently, the remainder of the UK, which would enable those engaged in criminal activity to use this information to their advantage and plan an attack on the more vulnerable parts of the UK.
61. Disclosure of any information more detailed than that published by the Home Office (Police Scotland argued) would allow for comparison of Counter Terrorism Units across the country and enable terrorists to build a picture of the resources in place and where they were currently deployed.
62. In Police Scotland's view, such disclosure would also indicate the level of policing activity in certain areas - which would, in turn, allow individuals to exploit what might be considered as less active or resourced areas, by assessing patterns of police activity and deployments over time, ultimately to avoid detection.

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

63. Section 39(1) of FOISA states that 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.
64. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
65. As the Commissioner notes in his briefing on this exemption, section 39(1)<sup>5</sup> 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 or safety. This test is less demanding than the "substantial prejudice" test.
66. Police Scotland submitted that, were the information held, and taking into account their arguments under the previous two exemptions, it followed that their ability to keep people safe from harm would be significantly prejudiced should any such information be disclosed. Non-disclosure would therefore be a necessary measure to keep people safe from harm.

#### *The Commissioner's views on the exemptions*

67. Having considered the submissions made by Police Scotland, the Commissioner cannot accept that any of these three exemptions would apply to the information requested. He is not satisfied (in all the circumstances of this case) that Police Scotland have established robustly enough that disclosure would result in the harm that they state.
68. The Commissioner is not persuaded that disclosure of the number of individuals reported to the Procurator Fiscal, and the number charged with an offence, would cause (or, as appropriate, be likely to cause) the required degree of harm.
69. He is of the view that, without the context of the overall numbers of those who were detained/examined, the necessary links could not be made to enable hostile parties to form a

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<sup>5</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

clear insight as to the extent of counter-terrorism operations and activity in Scotland and elsewhere in the UK.

70. Nor can he accept that disclosure of such information would provide a clear insight as to the level of policing activity in Scotland. Given the lack of insight any such information would provide, he is unconvinced by the arguments put forward by Police Scotland as to any likely endangerment of health or safety that might be caused by disclosure, were the information held.
71. The Commissioner does not, therefore, accept that the exemptions in sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA could be upheld were the information to exist or be held in this case. Given that these exemptions have not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA in relation to these exemptions.

#### *Section 18(1) – Refusal to confirm or deny whether information is held*

72. The Commissioner has found that, were the information held, none of the exemptions cited by Police Scotland in conjunction with section 18(1) of FOISA would be upheld. Accordingly, he does not accept that Police Scotland could issue a refusal notice under section 16(1) of FOISA on the basis that the information, were it to exist and be held by Police Scotland, would be exempt from disclosure by virtue of any of the exemptions in sections 31(1), 35(1)(a) and (b) and 39(1) of FOISA.
73. In these circumstances, Police Scotland were not entitled to refuse to confirm or deny whether they held the information, or whether it existed. The Commissioner does not need to go on to consider whether it would be contrary to the public interest to confirm or deny whether the information existed or was held by Police Scotland.
74. The Commissioner therefore requires Police Scotland to go back and issue a new review outcome, under section 21(4)(b) of FOISA (i.e. relying on provisions other than section 18), in respect of this part of Mr Hutcheon's request.

#### **Section 12(1) – Excessive cost of compliance**

75. Police Scotland applied this provision to part (iii)(a) of Mr Hutcheon's request, which asked for the number of strip searches carried out each financial year from 2013/14 onwards.
76. Under section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed for that purpose in the Fees Regulations. This amount is currently £600 (regulation 5). Consequently, the Commissioner has no power to order a public authority to disclose information should he find that the cost of responding to a request for that information exceeds this sum.
77. The projected costs the public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, the authority reasonably estimates it is likely to incur in:
  - locating
  - retrieving, and
  - providing

the information requested in accordance with Part 1 of FOISA. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

78. The public authority may not charge for the cost of determining:

- whether it actually holds the information requested, or
- whether or not it should provide the information.

#### *Submissions from Mr Hutcheon*

79. Mr Hutcheon disputed that retrieving this information would exceed the cost limit.

#### *Submissions from Police Scotland*

80. Police Scotland submitted that there was no statistical information gathered on the use of strip searches, and so any information of relevance would be held in the records associated with each examination of an individual.
81. They stated that a strip search could only take place where an individual had been detained. While some statistical information, for some years, was held regarding the number of individuals detained, the associated records were not stored separately, nor, for at least some of the period requested, were they in any way identifiable from the other records except by way of case-by-case research.
82. Police Scotland explained that the records associated with an examination would vary significantly, depending on the circumstances, but they estimated a minimum of five minutes per case in order to read through everything and ascertain whether there was any reference to a strip search having taken place. Further to this, they explained, the records are stored locally at the various ports across Scotland and so there would be further costs related to travel. They provided an estimate of the time required.
83. Police Scotland went on to explain that the required research would have to be carried out by someone who was security vetted to the appropriate level, in other words either a police officer from the border policing team or an appropriate member of the FOI team. This would result in an hourly rate in excess of the £15 maximum and so, using the maximum as the basis for calculation, the cost of researching this question would be a figure (which it provided) well in excess of the £600 limit.
84. The investigating officer made reference to The Home Office's Code of Practice for Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000<sup>6</sup> (the Code of Practice), which states that a record of all strip searches must be maintained.
85. Police Scotland were asked whether any separate record/list of strip searches was held, as Police Scotland's position appeared to be saying that the occurrence of such a search would only be recorded in an individual's file.
86. Police Scotland responded that there was no separate record/list of strip searches held by them.
87. All paper records of examinations were stored at a local level, Police Scotland explained, and were not split between those which were detentions and those which were not. At least for some of the period requested, it would therefore be necessary to go through each set of

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417105/48256\\_Code\\_of\\_Practise\\_Schedule\\_7\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417105/48256_Code_of_Practise_Schedule_7_accessible.pdf)

paperwork for every examination (at every port) to make a determination as to, firstly, whether the subject was detained and, if so, whether there was a strip search. Police Scotland described the relevant records, confirming that none of the information could be extracted from any kind of database.

88. Police Scotland stated that, in order to comply with the Code of Practice, maintaining a record of strip searches was achieved by indicating whether or not a strip search was conducted on the notice of detention form (which was submitted to the National Counter Terrorism Policing Operations Centre). They stated that they did not record any statistical information separately at a local/ regional level.

#### *The Commissioner's conclusions*

89. Having taken account of all the circumstances and the submissions made by Police Scotland, some of which the Commissioner is unable to discuss fully for reasons of national security, the Commissioner finds that Police Scotland have justified their application of section 12(1) of FOISA in this case.
90. As a result, the Commissioner accepts that section 12(1) was correctly applied to this information.

## **Decision**

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The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Hutcheon.

The Commissioner finds that, in withholding information asked for in parts (i), (ii) and (iii)(b) of Mr Hutcheon's request, Police Scotland complied with Part 1. The Commissioner also finds that some of the information asked for in part (ii) of the request was not held by Police Scotland and so upholds the application of section 17(1) of FOISA.

Additionally, the Commissioner finds that Police Scotland were entitled to refuse to comply with part (iii)(a) of Mr Hutcheon's request on grounds of excessive cost, under section 12 of FOISA.

However, the Commissioner also finds that Police Scotland were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether the information requested in parts (iv) and (v) of Mr Hutcheon's request existed or was held by them.

In this respect, Police Scotland failed to comply fully with section 1(1) of FOISA.

The Commissioner therefore requires Police Scotland to respond to Mr Hutcheon's request by providing him with a new review outcome in terms of section 21(4)(b), responding other than in terms of section 18 (for parts (iv) and (v) of the request) of FOISA, by **30 May 2019**.

## **Appeal**

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Should either Mr Hutcheon 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**

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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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**15 April 2019**

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

#### 12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- ...

#### 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.

...

## **21 Review by Scottish public authority**

...

- (4) The authority may, as respects the request for information to which the requirement relates-
  - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
  - (b) substitute for any such decision a different decision; or
  - (c) reach a decision, where the complaint is that no decision had been reached.

...

## **31 National security and defence**

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.

...

## **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;

...

## **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.

...

## **Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004**

### **3 Projected costs**

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
  - (a) no account shall be taken of costs incurred in determining-
    - (i) whether the authority holds the information specified in the request; or
    - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
  - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

### **5 Excessive cost - prescribed amount**

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.



**Scottish Information Commissioner**

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