

# Decision Notice

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**Decision 068/2017: Mr Alastair Tibbitt and Police Scotland**

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## **Purchases from Cellxion Ltd**

Reference No: 201700074  
Decision Date: 5 May 2018



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for information about purchases from a company called Cellxion Ltd. Police Scotland refused to confirm or deny whether the information existed or was held by them.

The Commissioner accepted that it would not be in the public interest for Police Scotland to reveal whether the information existed or was held.

## 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); 18(1) (Further provision as respects responses to request); 35(1)(a) and (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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA

## Background

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1. On 10 October 2016, Mr Tibbitt made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland), asking:  
  
"Could you confirm whether Police Scotland has ever purchased services or hardware from a firm called Cellxion Ltd in the last five years? I believe this is their website:  
<https://www.cellxion.net/>  
  
If so, please provide me with itemised details of what each purchase was for, and how much Police Scotland spent.
2. Police Scotland responded 3 November 2016. 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 Tibbitt that they were applying section 18(1) in conjunction with sections 31(1) (National security and defence), 34(1) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 35(1)(a) and (b) (Law enforcement) of FOISA.
3. On 3 November 2016, Mr Tibbitt wrote to Police Scotland requesting a review of their decision. Mr Tibbitt did not believe it was appropriate for public bodies to make assumptions about the purpose or motivation of the requester when assessing whether information is released. He asked Police Scotland to reconsider the "applied exemptions."
4. Police Scotland notified Mr Tibbitt of the outcome of their review on 1 December 2016, confirming their position that section 18(1) of FOISA applied. They denied that they had made any assumption as to Mr Tibbitt's purpose or motivation in responding to him.

5. On 13 January 2017, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Tibbitt stated he was dissatisfied with the outcome of Police Scotland's review. He believed Police Scotland was withholding the information he requested and did not accept their reasons for doing so.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 7 February 2017, Police Scotland were notified in writing that Mr Tibbitt had made a valid application. They were asked to send the Commissioner the information withheld from Mr Tibbitt. Police Scotland provided the information and the case was allocated to an investigating officer.
8. On 20 February 2017, the investigating officer asked Mr Tibbitt for more detailed explanations of his reasons for dissatisfaction. Mr Tibbitt responded on 7 March 2017.
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 Mr Tibbitt's more detailed comments of 7 March 2017, and answer specific questions focusing on the provisions of section 18 and the exemptions cited in that connection.
10. Police Scotland responded with submissions on 6 April 2017.

## Commissioner's analysis and findings

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

### **Section 18(1) of FOISA – “neither confirm nor deny”**

12. Section 18 of FOISA allows Scottish public authorities to refuse to reveal whether they hold information (or whether it exists) 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 were 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.
13. Where an authority has chosen to rely on section 18, the Commissioner must establish:
  - (i) whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose it because it was exempt under one of the exemptions listed in section 18(1). The authority must satisfy the Commissioner that:

- (a) an exemption would apply and, if it did
  - (b) that the balance of the public interest would favour withholding the information, and then
- (ii) whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest.
14. It is not sufficient simply 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 was held, would be exempt information under one or more of the listed exemptions. Where the exemption(s) is/are subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption(s) outweighs any public interest there would be in disclosing any relevant information it held.
15. In this case, Police Scotland submitted that, if the information existed and was held by them, it would be exempt from disclosure by virtue of the exemptions in sections 31(1) and 35(1)(a) and (b). (It ceased to rely upon the exemptions in section 34(1) of FOISA)
16. The Commissioner will firstly consider whether Police Scotland could have given a refusal notice under section 16(1) of FOISA in relation to the information in question, if it existed and was held. In this regard, she will consider the exemptions in section 35 of FOISA first.

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

17. In order for an exemption under section 35(1)(a) and/or (b) to apply, the Commissioner has to be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime (section 35(1)(a)) and/or the apprehension or prosecution of offenders (section 35(1)(b)). There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
18. As the Commissioner's guidance<sup>1</sup> on the section 35(1)(a) exemption highlights, the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.
19. In relation to section 35(1)(b), the Commissioner's guidance states that 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". She considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as the investigative processes used).
20. In his review request to Police Scotland, Mr Tibbitt did not believe that the exemptions cited by Police Scotland could apply to the information he sought, if it were held. He also

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

maintained his view that assumptions about his purpose and motivation had been made by Police Scotland when assessing whether to disclose information to him.

21. Police Scotland submitted that information of this nature, if it existed and was held by them, would be held for the purposes of law enforcement described in section 35(1)(a) and (b). They emphasised Cellxion's status as a market leader in relation to a limited field of communications products, arguing that any relevant information they held would provide a valuable insight into their tactical abilities in this area.
22. Having considered the submissions from both Mr Tibbitt and Police Scotland, the Commissioner is satisfied that any information held by Police Scotland regarding the purchase of goods or services from Cellxion would be held for purposes relating to the prevention or detection of crime or the apprehension or prosecution of offenders. This is not necessarily a conclusion she would reach in relation to any supplier, but here she must bear in mind that Cellxion does not appear to offer a wide range of products. Those it does offer appear to be designed for a limited range of purposes, in the communications sphere.
23. In the circumstances, the Commissioner accepts that (assuming the information requested by Mr Tibbitt existed and was held by them) Police Scotland would have been entitled to respond to Mr Tibbitt's request by applying either or both of the exemptions in section 35(1)(a) and (b) of FOISA. By its nature, any information of this kind held by Police Scotland would provide the valuable insight into tactical capacity claimed by Police Scotland, which would be substantially prejudicial to the prevention or detection of crime or the apprehension or prosecution of offenders.
24. As these exemptions are subject to the public interest test, the Commissioner is required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the requested information (if it existed and was held by Police Scotland) would be outweighed by that in maintaining the exemptions.

#### *The public interest*

25. Mr Tibbitt submitted that if the information is held, there is a great detail of public interest in understanding more about Police Scotland spending and finances. He also submitted that the "neither confirm nor deny" (NCND) response was not the correct one here and he was critical of what he believed to be its over-use by Police Scotland. He suggested this might derive from a desire to avoid disclosing information which was potentially embarrassing to the force, regardless of the public interest in the issue. Mr Tibbitt also re-iterated his contention that Police Scotland should not make assumptions about a requesters' motivation when deciding the most appropriate way to respond.
26. Police Scotland acknowledged the strength of public interest in transparency and accountability, particularly in relation to expenditure of public funds. In addition, disclosing information about their tactical capabilities would lead to the public being better informed about their effectiveness.
27. On the other hand, Police Scotland raised concerns about valuable intelligence being lost to criminals/terrorists regarding their technological capabilities, commenting that the force's efficiency and effectiveness required every possible tactical advantage. Loss of these would impact negatively on the safety of police officers and the public. If any relevant equipment were being used, Police Scotland continued, there were adequate statutory arrangements (both internally under the Police Act 1997 and externally through scrutiny by the Office of the Surveillance Commissioner) for regulating that use.

### *The Commissioner's view*

28. The Commissioner has considered carefully all of the arguments presented by Mr Tibbitt and Police Scotland. She notes Mr Tibbitt's general concern about the wider use of section 18 by Police Scotland, but here she can only consider its use in relation to his request of 10 October 2016.
29. Given the harm she has already acknowledged and the relatively generic arguments for disclosure in the public interest, and bearing in mind the existing scrutiny arrangements highlighted by Police Scotland, the Commissioner accepts that Police Scotland could have given a refusal notice under section 16(1) of FOISA in this case, on the basis that the information requested by Mr Tibbitt, if it existed and was held, would have been exempt from disclosure under section 35(1)(a) and (b). She is not required, therefore, to go on to consider whether the information would also be exempt from disclosure under section 31(1) of FOISA. She must still consider whether revealing whether the information existed and was held would have been contrary to the public interest.

### **Section 18(1) – public interest**

30. Mr Tibbitt's arguments on the public interest are as set out above. Police Scotland's are essentially intertwined with those on the application of the section 35 exemptions. In addition, naturally, there are aspects of these submissions the Commissioner cannot disclose without tending to reveal whether the information was indeed held, or whether it existed.
31. Police Scotland emphasised that disclosure of any relevant information (if held) would be to the public at large and not just to Mr Tibbitt. The effects of disclosure had to be examined in that context. They emphasised that consideration of these wider effects was crucial to their conclusions, rather than any assessment of the applicant's motivation.
32. Police Scotland also emphasised the negative impact of confirming whether the information existed or was held on their effectiveness and efficiency, for the reasons set out above,
33. Having considered all relevant submissions, the Commissioner is satisfied, in all the circumstances of this case, that it would have been contrary to the public interest for Police Scotland to reveal whether the information requested by Mr Tibbitt existed or was held by them.
34. As a result, the Commissioner is satisfied that Police Scotland were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr Tibbitt, or whether that information existed.
35. This is not a conclusion the Commissioner has reached lightly and it is specific to the circumstances of this request. The nature of Cellxion's business must be relevant here. There may be relatively little, if any, harm in revealing that a Scottish public authority has purchased goods and/or services from a supplier with a broad range of products, or where knowing that products of a particular nature are supplied would have little, if any, detrimental impact on the authority's operational effectiveness in key areas of public service provision. That, however, is not the case here.
36. The Commissioner also acknowledges Police Scotland's point that disclosure under FOISA is not simply disclosure to the person requesting the information, but rather is a public disclosure. This must always be borne in mind when considering the effects of disclosure: a disclosure of this kind to one individual cannot, therefore, be considered in isolation. This, in

the Commissioner's view, has guided Police Scotland's conclusions in this particular case, rather than any particular concern with the purpose or motivation of this particular applicant.

## **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 Mr Tibbitt.

## **Appeal**

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Should either Mr Tibbitt 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**  
**Acting Scottish Information Commissioner**  
**5 May 2017**

### 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.

...

#### 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.

...

#### 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;

...

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