

# Decision Notice



Decision 085/2014 Mr Russell Findlay and the Police Investigations and  
Review Commissioner

Complaint investigation report

Reference No: 201302977  
Decision Date: 14 April 2014

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## Summary

On 27 November 2013, Mr Findlay asked the Police Investigations and Review Commissioner (PIRC) for information relating to the investigation of a complaint against named police officers. PIRC refused to confirm or deny whether he held any information, or whether the information existed.

Following an investigation, the Commissioner found that PIRC was entitled to neither confirm nor deny whether he held the information, or whether the information existed.

The Commissioner also found that PIRC failed to comply with the requirements of section 16(1)(c) and (d) of FOISA, by not informing Mr Findlay which of the exemptions listed in Part 2 of FOISA he considered would apply if the information existed and was held.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1)(c), (1)(d) and (3) (Refusal of request); 18 (Further provisions as respects responses to request); 35(1)(g) and (2)(b) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 27 November 2013, Mr Findlay wrote to PIRC, seeking information from a report (compiled by PIRC and submitted to the Scottish Police Authority) relating to a complaint made by a named individual about named police officers.
2. PIRC responded to Mr Findlay's request on 29 November 2013, notifying Mr Findlay (in accordance with section 18 of FOISA) that he could neither confirm nor deny whether he held the information.
3. PIRC informed Mr Findlay that, if he held the information requested, it would be exempt from disclosure in terms of section 35 of FOISA, without any further explanation.



4. On 29 November 2013, Mr Findlay wrote to PIRC, requesting a review in respect of the response he had received and providing reasons why he disagreed with the outcome.
5. PIRC responded to Mr Findlay's requirement for review on 16 December 2013, upholding the original response without modification.
6. On 19 December 2013, Mr Findlay wrote to the Commissioner, stating that he was dissatisfied with the outcome of PIRC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Findlay made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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8. On 27 January 2014, the investigating officer notified PIRC in writing that an application had been received from Mr Findlay. PIRC was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and, in particular, to justify his reliance on any provisions of FOISA he considered applicable to Mr Findlay's request.
9. PIRC responded on 4 February 2014, confirming that he was applying section 18 of FOISA to the request, on the basis that (if it existed and was held) the information could be withheld under section 35(1)(g) of FOISA, read with section 35(2)(b). He provided reasons for this position.
10. Mr Findlay also provided submissions on the public interest.

## 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 Findlay and PIRC. She is satisfied that no matter of relevant has been overlooked.

### Section 18 of FOISA – “neither confirm nor deny”

12. As mentioned above, PIRC refused to confirm or deny whether he held any information falling within the scope of Mr Findlay's request. PIRC adhered to this position in his submissions to the Commissioner.



13. 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 it;
  - 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;
  - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
14. Where an authority has chosen to rely on section 18, 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. She must also establish whether, if the information existed and was held by the authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions listed in section 18(1).
15. The Commissioner must ensure that her decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the authority's reliance on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held.
16. 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 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.
17. In this case, PIRC submitted that if he did hold any information falling within the scope of Mr Findlay's request, it could be withheld under section 35(1)(g) of FOISA, read with section 35(2)(b).

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

18. 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). PIRC argued that disclosure of any relevant information would, or would be likely to, prejudice substantially the exercise his functions of the purposes specified in section 35(2)(b), i.e. to ascertain whether a person is responsible for conduct which is improper.
19. PIRC is a Scottish public authority for the purposes of FOISA.



20. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test 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 what is deemed to be 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.
21. The Commissioner must therefore consider three separate matters to determine whether this exemption would apply to the requested information, if it existed and was held:
  - does PIRC have a function in relation to the purpose mentioned in section 35(2)(b)?
  - if he does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, PIRC's ability to exercise that 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.
22. The Commissioner is satisfied that the purpose described in section 35(2)(b) is a function of PIRC when undertaking investigations under the Police (Conduct) (Senior Officers) (Scotland) Regulations 1999 (as amended by the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013), in response to complaints against senior police officers.
23. In this case, having considered the submissions provided by PIRC, the Commissioner accepts that, if the information requested in this case existed and was held by PIRC, it would be held for the purpose mentioned in section 35(2)(b) of FOISA.
24. On the question of "substantial prejudice", the Commissioner notes the submissions from PIRC to the effect that investigations into such complaints would be hampered if witnesses considered information provided for those investigations would be subject to disclosure under FOISA. PIRC explained that such the complaint investigation process relied upon the cooperation of witnesses coming forward and providing evidence: they would expect their identities to be revealed only in the context of the investigation and any subsequent misconduct hearing. Disclosure outwith that context, PIRC submitted, would have a serious negative impact on the investigative process, inhibiting individuals who might otherwise have done so from coming forward.
25. Having considered all of the submissions made by PIRC, the Commissioner is satisfied that disclosure of the requested information (if it existed and was held) would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise of PIRC's functions for the purpose mentioned in section 35(2)(b) of FOISA. Consequently, she accepts that that PIRC would have been correct to identify the information as exempt in terms of section 35(1)(g) of FOISA, if in existence and held.



*The public interest test – section 2(1)(b)*

26. As indicated above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, even where the Commissioner accepts substantial prejudice for the purposes of section 35(1)(g), she must still order the information to be disclosed unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.
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. it must serve the interests of the public.
28. PIRC stated that he had considered the following factors in assessing the public interest, concluding that the public interest in maintaining the exemption would outweigh that in disclosure, assuming any information to exist and be held:

*Considerations supporting disclosure:*

- Public interest in scrutiny and transparency in relation to complaints against senior police officers
- Public interest in the transparency of PIRC's regulatory process
- Public interest in scrutinising the actions of public officials

*Considerations against disclosure:*

- Disclosure would be damaging to PIRC's ability to conduct investigations in a private setting, with the associated benefits for gathering evidence
  - It would not be in the public interest to disclose information where a complaint investigation had not been completed or, where completed, there were no grounds for disciplinary action
  - Disclosure causing substantial prejudice to the functions of PIRC would not be in the public interest.
29. Mr Findlay made submissions to the Commissioner in relation to the public interest in disclosure, assuming relevant information to exist and be held. He considered disclosure of the requested information to be in the public interest as the information would relate to alleged misconduct by senior police officers. More widely, he considered PIRC's findings should be transparent for the sake of public confidence.

*The Commissioner's view*

30. Having carefully considered all of the arguments presented by PIRC and by Mr Findlay (and noting that she is not able to present all of these in this decision), the Commissioner has concluded, in all the circumstances of this case, that the public interest in maintaining the exemption in section 35(1)(g) of FOISA would outweigh the public interest in disclosure of the requested information, if in existence and held.





31. Having accepted that PIRC could give a refusal notice under section 16(1) of FOISA on the basis that any relevant information would be exempt information by virtue of section 35(1)(g) of FOISA, the Commissioner must consider whether PIRC was entitled to conclude (for the purposes of section 18) that it would be contrary to the public interest to reveal whether the information existed or was held.

### **The public interest – section 18**

32. Mr Findlay's submissions on the public interest are described above.
33. PIRC provided reasons for concluding, on balance, that it would not be in the public interest to reveal whether he held the requested information, or whether it existed. These were in line with the public interest submissions considered above in relation to the exemption.
34. The Commissioner is satisfied, in all the circumstances of this case, that were PIRC to reveal whether the information requested by Mr Findlay existed or was held, that would have the prejudicial impact on his investigative and complaint-handling processes claimed by PIRC. Clearly, given the crucial role played by PIRC in dealing with complaints against senior police officers, this would not be in the public interest.
35. As a result, the Commissioner is satisfied PIRC was entitled to refuse to confirm or deny, in line with section 18 of FOISA, whether he held the information requested by Mr Findlay.

### **Refusal notice under Section 18**

36. Section 18(2) of FOISA specifies that when a request for information is refused in terms of section 18, the refusal notice does not need to include the information stipulated in section 16(1)(a) or 16(2) of FOISA. This means that a refusal under section 18 does not need to confirm whether the public authority holds the relevant information, or set out the public authority's reasons for concluding that the public interest would favour maintaining the exemption(s) that would apply, if the information existed and was held.
37. However, the requirements in sections 16(1)(b), (c) and (d) must be met within a refusal notice under section 18, although section 16(3) removes the obligation to state why the exemption would apply (under section 16(1)(d)) if doing so would itself reveal exempt information.
38. Section 16(1)(c) specifically requires that the public authority specify the exemption(s) in question. This is not qualified in any way for the purposes of section 18.
39. In this case, PIRC informed Mr Findlay that he considered the information would be exempt in terms of section 35, if it existed and was held. There are multiple exemptions in section 35, but PIRC provided no explanation of which one he considered applicable in this case.
40. PIRC submitted that he could not provide further information on the particular exemption he considered applicable, without revealing whether he held information. The Commissioner does not accept this, even if such information could be withheld under FOISA. Given the nature of the request and PIRC's functions, it appears inevitable that this would be the applicable exemption, should any relevant information exist and be held by PIRC.

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41. It also appears to the Commissioner that it would be possible to provide general reasons why the exemption would apply, without revealing whether information existed or was held.
42. In the circumstances, the Commissioner concludes that PIRC failed to comply with section 16(1)(c) and (d) of FOISA in responding to Mr Findlay. Since these matters have been addressed within this decision, the Commissioner does not require PIRC to take any action in response to this failure.

## DECISION

The Commissioner finds that the Police Investigations and Review Commissioner (PIRC) was entitled, under section 18(1) of the Freedom of Information (Scotland) Act 2002, to refuse to reveal whether the information requested by Mr Findlay existed or was held.

The Commissioner also finds that PIRC failed to comply with Part 1 (and, in particular, section 16(1)(c) and (d)) of FOISA, by not informing Mr Findlay which of the exemptions listed in section 18(1) of FOISA would apply if the information existed and was held, or why the exemption(s) would apply. As these matters are addressed in this decision, she does not require PIRC to take any action in response to this failure.

## Appeal

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Should either Mr Findlay or the Police Investigations and Review Commissioner wish to appeal against this decision, there is an 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**  
**14 April 2014**





## Appendix

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### Relevant statutory provisions

#### 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.

...

##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

...

- (c) specifies the exemption in question; and  
(d) states (if not otherwise apparent) why the exemption applies.

...

- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.



...

### 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, 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.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given 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-  
...
  - (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);  
...  
by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.
- (2) The purposes are-  
...
  - (b) to ascertain whether a person is responsible for conduct which is improper;  
...