

# Decision Notice

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## **Decision 166/2015: The Applicant and the Chief Constable of the Police Service of Scotland**

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### **Involvement of Kenny MacAskill in police inquiry into the death of Barry Wallace**

Reference No: 201402888

Decision Date: 5 November 2015



Scottish Information  
Commissioner

## Summary

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On 14 October 2014, the Applicant asked the Chief Constable of the Police Service of Scotland (Police Scotland) for all and any information held by Police Scotland about the potential involvement of Mr Kenneth MacAskill MSP in the police inquiry into the death of Barry Wallace.

Police Scotland applied section 18 of FOISA. They refused to confirm or deny whether they held any information stating that if it existed and was held, it would be exempt from disclosure under FOISA. Following a review, the Applicant remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that Police Scotland partially failed to respond to the Applicant's request for information in accordance with Part 1 of FOISA.

She accepted that some information covered by the request, if it existed and was held by Police Scotland, would be exempt from disclosure under section 34(1) and so Police Scotland were entitled to refuse to confirm or deny whether they held the information, in terms of section 18(1).

The Commissioner did not accept that other information covered by the Applicant's request, if it existed and was held by Police Scotland, would be exempt from disclosure under section 34(1) or section 38(1)(b) of FOISA, and so Police Scotland were not entitled to refuse to confirm or deny whether they held the information, in terms of section 18(1). The Commissioner required Police Scotland to reveal whether it held such information, and if it did so to either disclose it or serve notice under FOISA withholding it.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e) (Effect of exemptions); 16(1) and (2) (Refusal of request); 18 (Further provision as respects responses to requests); 21(1), (4), (5) and (10) (Review by Scottish public authority); 34(1)(a) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

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 14 October 2014, the Applicant made an information request to Police Scotland. He asked for:

“All and any information held by Police Scotland ...in relation to any potential involvement of or by Mr Kenneth MacAskill in the police inquiry into the death of Mr Barry Wallace (December 1999) and the criminal investigation arising therefrom, such information having been gathered or collated at any point during the police investigation or subsequently.”

2. To assist Police Scotland in dealing with his request, the Applicant provided what he described as “observations” relative to the police inquiry in question, setting out why he had reasons for believing that Mr MacAskill’s assistance or co-operation may have been sought by the police, and listing certain information he expected to be held by Police Scotland that would fall within the terms of his request.
3. Some of these “observations”, together with other background to the Applicant’s request, might assist in the understanding of this case.
4. Barry Wallace was murdered in 1999. Mr William Beggs was found guilty of the murder of Mr Wallace in October 2001. According to the Applicant, for a number of years from 1994 onwards, Mr MacAskill, then a partner in a law firm, acted for Mr William Beggs and for a relative of his who resided with him.
5. The Commissioner was told that other solicitors who had acted for Mr William Beggs were approached by the Police during the investigation into Mr Wallace’s murder and were asked to answer questions and make a statement because their business cards and their correspondence with Mr William Beggs were found in his home.
6. The Applicant believes that, correspondence pertaining to Mr MacAskill was likely to have been found by the Police during their search of Mr William Beggs’ home in connection with Mr Wallace’s murder. However, according to the Applicant, there is no record within the HOLMES (Home Office Major Enquiry System) list disclosed during the recovery process associated with Mr William Beggs’ criminal appeal of any statement having been provided by Mr MacAskill.
7. Mr MacAskill was elected as an MSP for the Lothians in 1999, the year of Mr Wallace’s murder. In 2004, three years after Mr William Beggs was found guilty of the murder, Mr MacAskill was appointed as Shadow Minister for Justice. He became Cabinet Secretary for Justice in 2007. According to The Applicant, Mr MacAskill, as Cabinet Secretary for Justice, corresponded with a member of the Legislative Assembly of Northern Ireland about this case (Mr William Beggs is originally from Northern Ireland). The Applicant argues that Mr MacAskill’s potential involvement in this “high profile police inquiry” and his co-operation (or non-co-operation) with the Police is a matter of public interest and importance.
8. Police Scotland responded to the request (see paragraph 1) on 11 November 2014. They applied section 18 of FOISA and served notice that they were unable to confirm or deny whether they held any information falling within the scope of the request. Police Scotland stated that if they held any such information it would be exempt from disclosure under section 34 (Investigations by Scottish public authorities and proceedings arising out of such investigations) and sections 38(1)(a) and (b) (Personal information) of FOISA.
9. On 20 November 2014, the Applicant wrote to Police Scotland requesting a review of their decision. He commented that Police Scotland had not explained why they considered that revealing whether the information existed would be contrary to the public interest, and argued that Police Scotland had failed to justify their reliance on the exemptions in sections 34 and 38.

10. The Applicant explained why he believed the public interest favoured disclosure of any information held by Police Scotland, or confirmation that information was held by Police Scotland. The Applicant referred to Mr MacAskill as occupying a high profile position as Cabinet Justice Secretary and to Mr MacAskill's previous position as a partner in an Edinburgh Law firm involved with what the Applicant described as "prisoners' rights cases."
11. Police Scotland notified the Applicant of the outcome of their review on 10 December 2014. Police Scotland upheld their initial decision and continued to rely on section 18 of FOISA, on the grounds that the information, if it existed and was held, would be exempt from disclosure under sections 34 and 38 of FOISA. They stated that, had their refusal been in terms of section 16 of FOISA, they would have been required to state the reason why the public interest in maintaining the exemption outweighed that in disclosure. However, as the refusal had been in terms of section 18, Police Scotland considered that they did not need to provide reasons why the public interest in maintaining the exemptions outweighed the public interest in disclosure.
12. On 23 December 2014, the Applicant wrote to the Commissioner applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland's review because they had failed to substantiate their reliance on section 18 of FOISA. He believed it was clearly in the public interest for Police Scotland to confirm whether they held the information he had requested and the extent of any such information they held.
13. The Applicant was also dissatisfied that Police Scotland had not informed him of his appeal rights to the Court of Session on a point of law.

## **Investigation**

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14. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
15. 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 including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
16. The Applicant referred the Commissioner to the arguments and submissions he had presented to Police Scotland when making his request and when seeking a review.

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

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

### *Explanatory note*

18. There are a number of steps to consider when applying section 18 of FOISA in this decision. It is important to understand these steps and their order to be able to follow the decision. They are summarised here for ease and as general guidance only: this is not a detailed technical explanation of the application of FOISA.

19. If the information existed and was held:
- (i) Would it be exempt under section 34 of FOISA?
    - (a) if no, section 18 could not be applied
    - (b) if yes, would the balance of the public interest favour withholding or disclosure?
      - if it favoured disclosure, section 18 could not apply
      - if it favoured withholding, section 18 could be applied
    - (c) where section 18 could be applied, would revealing whether it exists or is held be contrary to the public interest?
  - (ii) Would the information be exempt under section 38 of FOISA?
    - (a) if no, section 18 could not be applied
    - (b) if yes, section 18 could be applied
    - (c) where section 18 could be applied, would revealing whether it exists or is held be contrary to the public interest?

**Section 18(1) of FOISA - "neither confirm nor deny"**

20. Police Scotland refused to confirm or deny whether they held any information falling within the scope of The Applicant' request.
21. 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.
22. 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. She 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.
23. 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 exists and is 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 releasing any relevant information, if it exists and is held.

24. In this case, Police Scotland submitted that if they held any information falling within the scope of the Applicant's request, it would be exempt from disclosure under sections 34(1)(a)(i) and (ii) and section 38(1)(b) of FOISA.
25. The Commissioner must 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 Police Scotland held it; in other words, whether Police Scotland could have refused to provide the information on the grounds that it was exempt from disclosure under either section 38(1)(b) or section 34(1)(a)(i) and (ii) of FOISA, if it existed and they held it.
26. In any case where section 18(1) is under consideration, the Commissioner must ensure that her 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 she is unable to comment in any detail on the reliance by the public authority 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 by the authority.

### **The scope of The Applicant' request**

27. The Applicant first asked for "all and any information held by [Police Scotland] relative to any potential involvement of Mr Kenny MacAskill in the police inquiry into Mr Wallace's death, *at any point during that inquiry*" (emphasis added). This would, by definition, exclude any information about Mr MacAskill that did not relate to Mr MacAskill's involvement with the police investigation while the investigation was ongoing.
28. However, in the schedule attached to his request, the Applicant reiterated his request under the heading "Scope of request" and asked for information relating to the involvement of Mr MacAskill "gathered or collated at any point *during the police investigation or subsequently*" (emphasis added). He observed that Mr MacAskill had corresponded with a Member of the Legislative Assembly of Northern Ireland about the case, in his capacity as Cabinet Justice Secretary. The Applicant considered that "any information held by the police relative to any contact relating to Mr MacAskill such as may have been made by him or on his behalf concerning the criminal case, at any time since his election to the Scottish Parliament" would be information coming within the scope of his request.
29. Police Scotland explained to the Commissioner that they had interpreted the request as seeking "disclosure of any information relating to the investigation into the murder of Barry Wallace that involved a named individual; in this case, Mr Kenny MacAskill".
30. The Commissioner is content that the Applicant's request should be interpreted in this way, and should not be limited to information relating only to the period of the police investigation into the murder of Barry Wallace.

### **Section 18 applied to information withheld under section 34(1)(a) - Investigations by Scottish public authorities and proceedings etc.**

31. Section 34(1)(a) of FOISA provides that information is exempt from disclosure if it has at any time been held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether:
  - (i) a person should be prosecuted for an offence; or
  - (ii) a person prosecuted for an offence is guilty of it.

32. The exemptions in sections 34(1) are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies.
33. The exemptions in section 34(1)(a) only apply to information held for the purposes of an investigation. Information which a public authority has obtained after an investigation has been concluded will not be covered by the exemptions.
34. The Applicant asked for information relating to the involvement of Mr MacAskill in the police investigation gathered or collated during the police investigation or subsequently.

*Information in relation to involvement subsequent to the investigation*

35. The Commissioner does not accept that any information, if it exists and is held, relating to the involvement of Mr MacAskill after the investigation had been concluded would fall within the exemptions in section 34(1)(a) of FOISA.
36. Information relating to the involvement of Mr MacAskill after the conclusion of an investigation would not be held for the purposes of determining whether the Applicant should be prosecuted for the murder of Mr Wallace or whether the Applicant was guilty of the murder.
37. Given that the Commissioner does not accept that all the information, if it exists and is held, *could* be covered by section 34(1)(a), she does not, therefore, accept that section 18 could be correctly applied to information relating to the period subsequent to the police investigation.
38. The Commissioner finds, therefore that Police Scotland were wrong to refuse to confirm or deny whether they held any relevant information for the period after the investigation had been concluded, in terms of section 18 of FOISA.

*Information in relation to involvement during the investigation*

39. The Commissioner accepts that any information, if it exists and is held, relating to the involvement of Mr MacAskill during the investigation would fall within the exemption in section 34(1)(a) of FOISA.
40. The Commissioner accepts that if such requested information existed and was held by Police Scotland, it would be held for the purposes of an investigation which they had a duty to conduct for the purposes specified in section 34(1)(a) of FOISA.
41. The Commissioner accepts, therefore, that such information would fall within the exemptions in section 34(1)(a)(i) and (ii) of FOISA.
42. The exemptions in section 34(1)(a) are subject to the public interest test in section 2(1)(b) of FOISA.

*Public Interest test - section 2(1)(b) as applied to section 34(1)(a)*

43. The exemptions in section 34(1)(a) are subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, even where an exemption applies, the public authority would be unable to give a refusal notice under section 16(1) of FOISA unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

44. 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 said 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.

#### Police Scotland's submissions

45. Police Scotland acknowledged there is a public interest in the Police Service as a whole, and in the officers directly involved in the investigation, being accountable. Police Scotland also acknowledged that the public interest in justice could also favour disclosure.
46. Against this, Police Scotland argued that disclosing information that related to a criminal investigation, which contained details of third parties, could adversely affect the reputation of those third parties and could deter individuals from co-operating in a criminal investigation for fear that information might be disclosed and their identity revealed to the public outwith the protection of the court. Police Scotland commented that the Lord Advocate had previously stated that the existence of exemptions such as those in section 34(1) were "essential for an effective justice system".
47. Police Scotland also commented that it was always their hope and expectation that any person approached to assist police enquiries would do so in the interests of justice. In their view, the public disclosure of that fact outwith due legal process did not promote confidentiality, candour or a spirit of cooperation, regardless of whether or not an individual has provided relevant information voluntarily or as requirement of the legislative process. The implication in this statement, as the Commissioner sees it, is that it is in the public interest that confidentiality, candour or a spirit of cooperation (in assisting police enquiries) is promoted.
48. Taking all of these factors into consideration, Police Scotland found that the balance of the public interest test would lie in maintaining the exemptions in section 34(1)(a) rather than disclosing the information, if it exists and is held. This would allow them to give The Applicant a refusal notice under section 16(1) of FOISA.

#### The Applicant's submissions

49. The Applicant's request of 14 October 2014 set out his observations on the public interest in disclosure of any information that fell within the scope of his request. He also put forward arguments relating to the public interest in his requirement for review of 20 November 2014. In that letter, the Applicant referred to Mr MacAskill as occupying a high profile position as Cabinet Justice Secretary and also referred to Mr MacAskill's previously held position as partner of an Edinburgh Law firm involved with prisoners' rights cases. The Applicant believed there was a public interest in disclosing what, if any, involvement Mr MacAskill had with the police in this case. The Applicant referred to the public interest in accountability and transparency about the interests and former interests of senior politicians and Government Ministers. He referred to Mr MacAskill's involvement with a prisoners' advocacy group as having a direct impact on the business of government and the legislative process.
50. During the investigation, the Applicant was invited to provide supplementary submissions relating to the public interest. The Applicant's submission of 10 April 2015 stated that it was "oppressive and contrary to the scheme of FOISA to require the requester to offer detailed 'public interest' arguments in relation to information which an Authority has refused to specify that it holds". The Commissioner would like to make it clear that no such requirement was



made of the Applicant: he was simply invited to provide her with any views which he wished her to take into account when assessing the balance of public interest.

51. Despite his concerns, in his letter of 10 April 2015, The Applicant referred the Commissioner to information that, to his knowledge, had come into the possession of Strathclyde Police (a legacy force of Police Scotland). He described three examples of correspondence. He submitted that some correspondence would have been privileged and, to that extent, section 34(1)(a) of FOISA could not legitimately be cited, either alone or in conjunction with section 18. The Applicant stated that “this class of information does not raise public interest issues per se”. He considered there was a public interest in disclosure of some of the correspondence he described as a direct result of Mr MacAskill having been subsequently elected to the “Shadow Cabinet” and then appointed as Cabinet Secretary for Justice in the Scottish Government.
52. The Applicant also made further submissions to the Commissioner on 26 October 2015. He referred to an article which appeared in The Times on 24 October 2015. This article referred to a piece written by Mr MacAskill for the journal Police Professional, in which Mr MacAskill expressed concerns about the reform of Police Scotland’s stop-and-search powers, including the possibility that “consensual” searches be abolished.
53. The Applicant believed that this article served to emphasise the public interest in favour of disclosure and, in particular, the role played by Mr MacAskill in this case.

#### The Commissioner's view

54. The Commissioner carefully considered all of the arguments presented by Police Scotland and by the Applicant, noting that she is not able to summarise all of these in this decision. She has concluded, in all the circumstances, that the public interest in maintaining the exemptions in section 34(1)(a) of FOISA would outweigh the public interest in disclosure of the information (relating to involvement during the Police investigation), if it exists and is held by Police Scotland.
55. The Commissioner accepts, as a general principle, that it is in the public interest for persons giving witness statements or being otherwise involved in the course of criminal investigations to do so confidentially. It is in the public interest that both the fact and content of witness statements, or involvement with a case in any other capacity, are treated in confidence. The exception to this would be where this is disclosed in the context of judicial proceedings or related processes.
56. To remove such confidentiality would generally be contrary to the public interest for participants in a criminal investigation, whatever their seniority or public role, as it would inhibit them from providing full and frank information to the Police, for fear that their involvement would be disclosed. This in turn could impact on the ability of the Police to conduct criminal investigations with its consequent impact on the criminal justice system. There would have to be very strong reasons in the specific circumstances of a case for the balance of the public interest to be in favour of disclosure.
57. In relation to the information covered by the exemption in section 34(1)(a), if any such information exists and is held by Police Scotland, the Commissioner does not find that there are sufficiently strong reasons why it would be in the public interest to disclose the information, despite the public-facing roles which Mr MacAskill has held.
58. Having accepted that Police Scotland could have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information (i.e. information held to the end of the

investigation) would be exempt information by virtue of section 34(1)(a) of FOISA, the Commissioner is required by section 18(1) to go on to consider whether the Police were entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.

*Public Interest test - section 2(1)(b) as applied to section 18(1) in respect of 34(1)(a)*

The Applicant's submissions

59. The Applicant considered that, in terms of the public interest, it was relevant that Mr MacAskill had occupied a high profile position as Cabinet Justice Secretary and was previously a partner of an Edinburgh Law firm involved with prisoners' rights cases.
60. He also referred to there being a public interest in being aware of whether or not Police Scotland had retained information, and held it at the time of the request, or whether Police Scotland had destroyed information. Similarly, the Applicant submitted that there was a public interest in knowing if the police had failed to seek Mr MacAskill's assistance (with their criminal inquiry) in the first instance.

Police Scotland's submissions

61. Police Scotland submitted that to reveal whether they held the information requested by the Applicant would not be in the public interest. They pointed out that, given the sensitive nature of any police investigation (which by definition will focus on an allegation of criminality about an individual, or will require primary evidence from other individuals whether or not additional circumstantial evidence is available), confirmation that information exists or does not exist provides a focus of attention on those individuals.
62. Police Scotland submitted that they [the Police Service] operate by public consent and the continuing cooperation and support of individuals who may be able to provide relevant information is paramount. They had huge concerns that if this relationship and trust is broken then the interests of justice will not be served. They stated that, particularly where the involvement of named individuals is requested in criminal investigations, "the focus moves from the general to the very specific and we would argue that the harm in confirmation of involvement increases dramatically".
63. Police Scotland also submitted that the fact that an individual may or may not have been involved in police inquiries does not mean such information will eventually be disclosed by Crown Office in respect of court proceedings. It was their view that to confirm by disclosure or exemption, or to deny Mr MacAskill's involvement in any aspect of their investigation, would jeopardise not only the principle of confidentiality and trust but also the personal rights of any such named individuals. Therefore, Police Scotland believed it was not in the public interest to confirm or deny that it held such information.

The Commissioner's views

64. The Commissioner considered carefully considered the arguments presented by Police Scotland and by the Applicant.
65. The Commissioner accepts that if Police Scotland had revealed whether any of the information requested by the Applicant existed or was held, this would have prejudiced their law enforcement functions and relationship with third parties, as Police Scotland submitted. The Commissioner is of the view that this would not be in the public interest.

66. The Commissioner does not accept that the points put forward by the Applicant, on balance, outweigh the public interest in confirming or denying that information exists or is held by Police Scotland. It is in the greater public interest to protect the ability of the police to investigate a case without prejudicing their law enforcement functions and relationship with third parties.
67. Having considered the submissions of both parties, the Commissioner is satisfied, in all the circumstances of this case, that it would be contrary to the public interest for Police Scotland to reveal whether the information requested by The Applicant (insofar as it relates to the investigation into the murder of Barry Wallace) existed or was held by them. 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 the Applicant, which could have been withheld under section 34(1)(a) of FOISA.
68. The Commissioner will go on to consider whether Police Scotland were justified in refusing to confirm or deny that they held information which, if it exists and is held, would be exempt from disclosure under section 38(1)(b) of FOISA.

**Section 18 applied to information withheld under section 38(1)(b) - Personal information of third parties**

69. In this part of her decision, the Commissioner is considering only information which, if it exists and is held, would not be covered by the exemption in section 34(1): in other words, information subsequent to the police investigation. She is not required to consider information which, if existed and was held, related to the involvement of Mr MacAskill during the investigation, as she has already concluded that any such information would be exempt under section 34(1)(a) and that Police Scotland were entitled to apply section 18 to it.
70. Police Scotland stated that if they held information covered by the Applicant's request, they would (and could) apply the exemption in section 38(1)(b) of FOISA to that information.
71. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b), exempts information from disclosure if it is "personal data", as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
72. In order to rely on this exemption, Police Scotland must show, firstly, that any such information would be personal data for the purposes of the DPA and, secondly, that disclosure of that data would contravene one or more of the data protection principles to be found in Schedule 1 of the DPA: in other words, that the exemption in section 38(1)(b) of FOISA would apply to the information if it exists and is held by Police Scotland.

*Would the information, if it exists and is held, be personal data?*

73. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in Appendix 1).
74. Police Scotland stated that, if they held it, the information would be the personal data of Mr MacAskill. It would be information about any potential involvement of Mr MacAskill in the investigation into the death of Barry Wallace.

75. The Commissioner accepts that such information, if it exists and is held, would be personal data. By definition, such information would relate to Mr MacAskill and would identify him, and would be his personal data.

*Would disclosure of the information, if held, contravene the first data protection principle?*

76. In their initial response of 11 November 2014, Police Scotland argued that disclosing the information, if it exists and is held, would contravene the first data protection principle.
77. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case would be the disclosure into the public domain of any personal data that might be held by Police Scotland, in response to the Applicant's information request.
78. If the Commissioner is satisfied that the disclosure of personal data, if it exists and is held, *would not* breach the first data protection principle, Police Scotland could not give a refusal notice under section 16(1) of FOISA, as any information would not be exempt from disclosure under section 38(1)(b) of FOISA. In effect, this means that Police Scotland would not be entitled to confirm or deny whether they hold the personal data in question.
79. On the other hand, if disclosure of personal data, if it exists and is held, *would* breach the first data protection principle, then Police Scotland could give a refusal notice under section 16(1) of FOISA as any data would be exempt from disclosure under section 38(1)(b) of FOISA. If this is the case, the Commissioner would go on to consider whether it would be contrary to the public interest to reveal whether the information exists.
80. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits disclosure, it is likely that disclosure will also be fair and lawful.

*Could any of the conditions in Schedule 2 be met?*

81. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which could permit disclosure of the information, if it exists and is held. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual(s) to whom the data relate).
82. There are a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is the Applicant pursuing a legitimate interest or interests?
  - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of Mr MacAskill?

(iii) Even if the processing is necessary for the Applicant' legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of Mr MacAskill?

83. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of the Applicant must outweigh the rights and freedoms or legitimate interests of Mr MacAskill before condition 6 will permit disclosure. If the two are evenly balanced, the Commissioner must find that Police Scotland would be able to refuse to disclose the requested information (if it exists and is held) to the Applicant.

*Is The Applicant pursuing a legitimate interest or interests?*

84. The Applicant's submission to the Commissioner referred to the legitimate interest in "...seeking to call to account both Police Scotland (and its predecessor) in terms of its actings in respect of Mr MacAskill over the period in question and in seeking to ensure transparency in the relationship between Government Ministers (including former Ministers) and the police".

85. The Applicant argued that Mr MacAskill's relationship with "the various police organisations concerned" could not be known.

86. Police Scotland did not make any submission on whether the Applicant was pursuing a legitimate interest.

87. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance on section 38(1)(b)<sup>1</sup>, it states:

"In some cases, the legitimate interest might be personal to the applicant, e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."

88. Having considered all relevant submissions she has received from the Applicant on this point the Commissioner accepts that the Applicant has a legitimate interest in obtaining the personal data covered by his request, if it exists and is held by Police Scotland.

*Would disclosure of the information be necessary to achieve those legitimate interests?*

89. Having concluded that the Applicant has a legitimate interest in obtaining the personal data under consideration (if it exists and is held), the Commissioner must now consider whether disclosure of the personal data would be necessary in order to satisfy his legitimate interest. In doing so, she must consider whether his legitimate interest might be reasonably met by any alternative means.

90. The Commissioner considers that it would be necessary for any withheld personal data to be disclosed to the Applicant in order to achieve his legitimate interests. The Commissioner is not aware of any other viable means of meeting the Applicant' interests which would interfere less with the privacy of Mr MacAskill than providing the withheld personal data, if it exists and

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

is held by Police Scotland. For this reason, the Commissioner is satisfied that disclosure of the information would be necessary for the purposes of the Applicant.

*Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?*

91. The Commissioner must consider whether disclosure would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of Mr MacAskill. This involves a balancing exercise between the legitimate interests of the Applicant and those of Mr MacAskill. Only if the legitimate interests of the Applicant outweigh those of Mr MacAskill could the information be disclosed without breaching the first data protection principle.
92. In the Commissioner's published guidance on section 38 of FOISA, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
  - whether the information relates the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
  - the potential harm or distress that may be caused by the disclosure;
  - whether the data subjects have objected to the disclosure; and
  - the reasonable expectations of the individual as to whether the information would be disclosed.
93. The Commissioner is of the view that any information (if it exists and is held) could pertain to both the public and private life of Mr MacAskill. The Applicant has accepted that certain information about Mr MacAskill's private life would not require to be disclosed. The example of the type of information The Applicant would expect to be disclosed given in his letter of 10 April 2015 was personal information about Mr MacAskill's movements or whereabouts on particular dates.
94. The Commissioner has considered the potential harm or distress that may be caused by the disclosure of the personal data (if it exists and was held). Given that the information would relate to Mr MacAskill's actions as Cabinet Secretary for Justice or as an MSP, she considers that any harm or distress would be limited. A person occupying such a senior position in public life will have an expectation that their actions and correspondence in that role will be subject to scrutiny. They might reasonably expect such scrutiny to cover the question of whether they had corresponded on certain matters, in their official capacity. The Commissioner considers that Mr MacAskill would have a reasonable expectation that information about his actions as Cabinet Secretary would be disclosed, if such information exists and is held by Police Scotland.
95. On balance, the Commissioner takes the view that the Applicant's legitimate interests outweigh the prejudice that would be caused by disclosure to Mr MacAskill's rights and freedoms or legitimate interests. Consequently, she finds that such prejudice would not be unwarranted. The Commissioner is therefore satisfied that condition 6 of Schedule 2 is met in relation to such personal data, if it exists and is held.
96. For the same reasons as considered above in relation to condition 6, the Commissioner is satisfied that disclosure of the information, if it exists and is held, would not be unfair.
97. The Commissioner therefore finds that disclosure of such information, if it exists and is held, would be fair and lawful and that Police Scotland would not be entitled to withhold such information under section 38(1)(b) of FOISA, if it exists and is held.

98. Having accepted that the Police could not have given a refusal notice under section 16(1) of FOISA on the basis that any relevant information of the type described by the Applicant, if it exists and is held, would be exempt information by virtue of section 38(1)(b) of FOISA, the Commissioner is not required by section 18(1) to go on to consider whether Police Scotland were entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.
99. Consequently, the Commissioner concludes that Police Scotland were not entitled to refuse to reveal whether any information of the type described by the Applicant exists or is held by them in terms of section 18(1) of FOISA. The Commissioner has set out below the steps which she requires Police Scotland to take as a result of this conclusion.

### **Handling of the Request**

100. In his application to the Commissioner, the Applicant expressed dissatisfaction that Police Scotland failed to provide appropriate information about his right of appeal to the Court of Session on a point of law, following the Commissioner's decision.
101. Police Scotland were invited to comment and they apologised for the omission. Police Scotland said an email with the instruction to include the appropriate wording in respect of this appellate right has been circulated to all Police Scotland staff for inclusion in future disclosures. Also, they explained that a further letter had been sent to the Applicant apologising for this error, and informing him of this right of appeal to the Court of Session on a point of law only.
102. Under section 21(10) of FOISA, a notice (under section 21(5)) communicating the outcome of the review carried out by a Scottish public authority must contain details of the applicant's rights of application to the Commissioner *and* of appeal to the Court of Session. Accordingly, the Commissioner finds that Police Scotland failed to comply fully with section 21(10) of FOISA in responding to The Applicant's request for review. Given that Police Scotland have taken steps to raise awareness among their staff that they are required to include this information when responding to a request for review, the Commissioner does not require Police Scotland to take any further action in respect of this failure in response to the Applicant's application.

## Decision

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

The Commissioner finds that Police Scotland:

- (i) Failed to comply with section 21(10) of FOISA by failing to notify the Applicant of his rights of appeal to the Court of Session following her decision.
- (ii) Were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether they held information which, if it exists and is held, would not be covered by the exemptions in section 34(1)(a), i.e. information relating to involvement of Mr MacAskill subsequent to the police investigation
- (iii) Were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether they held information which, if it exists and is held, would be covered by the exemption in section 38(1)(b), insofar as it relates to the personal data of Mr MacAskill in his capacity as Cabinet Justice Secretary or as an MSP.

The Commissioner therefore requires Police Scotland to reveal to the Applicant whether any such information exists or is held by them. If the information is held, she requires Police Scotland to provide that information to the Applicant, or to issue a refusal notice in line with the requirements of section 16 of FOISA, or to explain why (in terms of FOISA) they are not required to comply with his request. If the information is not held, she requires Police Scotland to give notice of this in line with the requirements of section 17 of FOISA.

She requires Police Scotland to do this by **21 December 2015**.

The Commissioner also finds that Police Scotland was entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether they held information which, if it exists and is held, would be covered by the exemptions in section 34(1)(a), i.e. information relating to involvement of Mr MacAskill during the police investigation.

## Appeal

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Should either the Applicant 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 it had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**5 November 2015**

## 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 –
  - (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –  
...
  - (e) in subsection (1) of section 38 –
    - (i) paragraphs (a), (c) and (d); and
    - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

#### 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 -
  - (a) discloses that it holds the information;
  - (b) states that it so claims;
  - (c) specifies the exemption in question; and

- (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the 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, 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.
- (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.

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

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

- (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.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

....

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

## **34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-

- (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
  - (i) should be prosecuted for an offence; or
  - (ii) prosecuted for an offence is guilty of it;

...

### **38 Personal information**

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or

...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

# Data Protection Act 1998

## 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

### Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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