

# Decision Notice

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**Decision 167/2016: Mr T and the Chief Constable of the Police Service of Scotland.**

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## **Fingerprint evidence**

Reference No: 201600946

Decision Date: 21 July 2016



Scottish Information  
Commissioner

## Summary

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On 17 February 2016, Mr T wrote to the Chief Constable of the Police Service of Scotland (Police Scotland) and asked for information in relation to the identification of fingerprint evidence he believed Police Scotland had recovered from a specific crime scene. Police Scotland refused to confirm or deny whether they held the information, or whether the information existed.

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

## 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); 16 (1), (2) and (3) (Refusal of request); 18 (Further provision as respects responses to request); 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 17 February 2016, Mr T made a request for information to Police Scotland. In relation to fingerprint evidence he believed Police Scotland had recovered from a specific crime scene, Mr T asked for all and any information held relating to the identification of the fingerprint evidence, including the identities of those concerned, the date on which each print was identified and any other information disclosed to a named person or his agent since a specified date.
2. Police Scotland responded on 11 March 2016, notifying Mr T (in accordance with section 18 of FOISA) that they could neither confirm nor deny whether they held the information, as to do so would be contrary to the public interest.
3. Police Scotland further explained that, if held, the information would be exempt from disclosure in terms of sections 34, 35, 38 and 39(1) of FOISA.
4. In responding to Mr T, Police Scotland stated that there is no requirement on a public authority, when issuing a refusal notice in terms of section 18, to state why the public interest in maintaining an exemption outweighs that in disclosure of the information. They further stated that there was no requirement to state why an exemption applies in so far as that statement would disclose information which would in itself be exempt.
5. Police Scotland explained that, in general terms, there is a statutory mechanism for disclosure in criminal cases and that any further correspondence on such matters may be directed, via his solicitor, to the Crown.
6. On 25 March 2016, Mr T wrote to Police Scotland requiring a review of their decision. He stated he had concerns that the information was held and had been disclosed to another. He did not believe Police Scotland had properly considered the terms and effects of section 18 of FOISA, submitting that section 18 could not be applied in relation to the "personal

information” exemption (section 38). He also submitted that section 18 did not automatically apply to the other exemptions claimed, and that he did not believe confirming the information was held would be contrary to the public interest.

7. Police Scotland notified Mr T of the outcome of their review on 27 April 2016. They upheld the original decision without modification.
8. On 16 May 2016, Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T argued that it would not be contrary to the public interest to disclose the information, particularly where he believed the information had been disclosed to another. He submitted that the public interest in righting what he considered to be a “miscarriage of justice” clearly outweighed that of maintaining any of the exemptions claimed by Police Scotland.

## **Investigation**

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9. The application was accepted as valid. The Commissioner confirmed that Mr T 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.
10. On 9 June 2016, Police Scotland were notified in writing that Mr T had made a valid application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 17 June 2016, Police Scotland were invited to comment on this application and answer specific questions, with particular reference to their application of section 18 of FOISA.
12. Police Scotland responded on 1 July 2016, confirming that they were applying section 18, on the basis that (if it existed and was held) the information could be withheld under sections 34(1)(a) and (b) of FOISA. They provided arguments in support of this position.
13. Mr T was given the opportunity to provide further submissions as to why it would not be contrary to the public interest to confirm whether the information existed or was held, but did not do so.
14. Mr T also sought clarification from the Commissioner as to whether a public authority could apply section 18 of FOISA in conjunction with section 38 (Personal information). It was explained to Mr T that section 2 of Freedom of Information (Amendment) (Scotland) Act 2013 had added section 38 to the list of exemptions which could be applied in conjunction with section 18.

## **Commissioner’s analysis and findings**

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15. 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 T and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

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

16. As mentioned above, Police Scotland refused to confirm or deny whether they held any information falling within the scope of Mr T’ request, or whether such information existed. Police Scotland adhered to this position in their submissions to the Commissioner.

17. Section 18 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;
  - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
18. 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) and relied upon by the public authority.
19. 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.
20. 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.
21. In this case, Police Scotland submitted that if they did hold any information falling within the scope of Mr T' request, it could be withheld under section 34(1)(a) and (b) of FOISA.

*Section 34(1)(a) and (b) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations*

22. Section 34(1)(a) and (b) of FOISA provide that information is exempt from disclosure if it is held for the purposes of:
- (i) an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
  - (ii) an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii)); or
  - (iii) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b)).

23. The exemptions in section 34 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. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
24. The Commissioner accepts that if the requested information existed and was held by Police Scotland, it would be held for the purposes of an investigation they had a duty to conduct for the purposes specified above. It is clear that any such information would relate to a specific crime scene, which was the subject of an investigation by the Police. The Commissioner accepts, therefore, that such information would fall within the exemptions in section 34(1)(a) and (b) of FOISA
25. 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 if it was held by Police Scotland) would be outweighed by that in maintaining the exemptions.

#### Public interest – section 34

26. Police Scotland acknowledged that there was some public interest in disclosure of the information sought by Mr T, if it existed and was held, in relation to informing the public how investigations were carried out. It would also meet the public interest in accountability in relation to expenditure from public funds. However, Police Scotland considered any benefit in relation to the public interest would be outweighed by prejudice to other individuals and also to the investigation and prosecution of crime generally.
27. In presenting their arguments, Police Scotland submitted that disclosure of the information sought by Mr T, if it existed and was held, could cause significant harm to both individuals and to law enforcement. They explained that disclosure would risk undermining the human rights of any suspect to a fair trial and, more importantly, the rights of the victim. In addition, such disclosures would adversely affect the wider public interest of protecting Police Scotland's enforcement capabilities.
28. Police Scotland also submitted that individuals involved in such investigations would not expect such information to be placed in the public domain, which would result in the reduction in the willingness of the public to engage with the Police conducting such investigations. This, they submitted, would compromise their law-enforcement role, which was not in the public interest.
29. Police Scotland concluded that, if the information existed and was held, the wider public interest of protecting the law enforcement role of the Police Service and preserving the relationship between the Police Service and the public (who fulfil a vital role in providing information and intelligence) would strongly favour maintaining the exemptions.
30. In his application to the Commissioner Mr T stated that he disagreed with the application of section 34 of FOISA. As mentioned above, Mr T did not provide any further submissions to the Commissioner (although he was given the opportunity to do so).
31. Having carefully considered all of the arguments presented by Police Scotland and by Mr T (noting that she is not able to summarise all of these in this decision), the Commissioner has concluded that, in all the circumstances, the public interest in maintaining the exemptions in

section 34(1)(a) and (b) of FOISA would outweigh the public interest in the disclosure of the information, if the information existed and was held.

32. In coming to this decision, the Commissioner has also borne in mind the legal processes that are in place whereby relevant information can be obtained by the defence from the Crown in criminal cases.
33. Having accepted that Police Scotland 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 34(1)(a) and (b) of FOISA, the Commissioner must consider whether Police Scotland were 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.

### **Public interest – section 18**

34. Police Scotland provided reasons for concluding, on balance, that it would not be in the public interest to reveal whether they held the requested information, or whether it existed. These were in line with the public interest submissions considered above in relation to the exemptions.
35. Police Scotland argued that their ability to conduct investigations thoroughly and the integrity of any subsequent court proceedings were compelling factors, stating that it was not in the public interest to confirm or deny whether information is held where that could jeopardise either the impartial integrity of the police report to the Crown or the force's ongoing efforts against criminality. They concluded that a public admission as to whether this information might be held would not be in the public interest, as it would take away the impartiality of the court process and might lead to "trial by the media".
36. In his requirement for review to Police Scotland and in his application to the Commissioner, Mr T submitted the public interest in righting what he considered to be a "miscarriage of justice" clearly outweighed that in maintaining any of the exemptions claimed by Police Scotland.
37. The Commissioner is satisfied, in all the circumstances of this case that, were Police Scotland to reveal whether the information requested by Mr T existed or was held, that would have the prejudicial impact on investigations claimed by Police Scotland. This would not be in the public interest.
38. As a result, the Commissioner is satisfied Police Scotland were entitled to refuse to confirm or deny, in line with section 18 of FOISA, whether they held the information requested by Mr T, or whether that information existed.

### **Content of notices (responses) under FOISA**

39. The Commissioner notes that in issuing their response to Mr T, Police Scotland informed him that there was no requirement to state why an exemption applied, if to do so would disclose information which would itself be exempt information.
40. Section 18(2) of FOISA, states that neither section 16(1)(a) (confirmation that information is held) nor 16(2) (the public interest in maintaining the exemption) shall apply to a response in terms of section 18(1).
41. An authority which issues a response in terms of section 18(1) of FOISA is, therefore, obliged to comply with the remainder of section 16(1) of FOISA. This includes section

16(1)(d), which requires the authority to state (if not otherwise apparent) why the exemption applies.

42. Section 16(3) of FOISA states that an authority is not obliged to make a statement under section 16(1)(d) in so far as the statement would disclose information which would itself be exempt information. This applies whether or not section 18(1) is being applied, which appears to be contrary to the impression created by Police Scotland in responding to Mr T. Given the nature of section 18(1), it would appear to be somewhat redundant (if not counter-productive) to refer to section 16(3) (or its effect) specifically when explaining why a particular exemption would apply.
43. The point has been brought to the attention of Police Scotland, in line with the Commissioner's intervention process.

## **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 T.

## **Appeal**

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Should either Mr T or the Chief Constable of the Police Service of Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**21 July 2016**

## 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.

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- (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-

- (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.

- (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, 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.

## **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;
  - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...

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