

# Decision Notice 178/2019

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## Communications re NHS Ayrshire and Arran

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**Applicant: The Applicant**

**Public authority: The Chief Constable of the Police Service of Scotland**

**Case Ref: 201901902**



Scottish Information  
Commissioner



## Summary

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Police Scotland were asked for instructions received from the Lord Advocate, his office, or COPFS regarding specific allegations against NHS Ayrshire and Arran. Police Scotland responded that no information was held.

Following investigation, the Commissioner accepted this.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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

## Background

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1. On 4 December 2018, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). In his request, he described allegations he had made to Police Scotland on 30 April 2013, involving NHS Ayrshire and Arran. The Applicant asked for the following information:

*Have Police Scotland received any instructions from the Lord Advocate, his office, or COPFS [Crown Office and Procurator Fiscal Service] in relation to this case? (Part 1)*

*Under FOISA, can you please provide me with all the information Police Scotland holds (emails, letters, correspondence, telephone calls) relating to all communications between the Lord Advocate, his office, COPFS and Police Scotland between the dates of 25th October 2017 and 19th October 2018. (Part 2)*

2. Police Scotland responded on 7 January 2019, stating that no information was held and giving notice in terms of section 17 of FOISA.
3. On 7 January 2019, the Applicant wrote to Police Scotland, requesting a review of their decision. He refused to accept that there was no information held for the period in question, given his understanding of the Police Investigations and Review Commissioner's scrutiny of a complaint regarding Police Scotland's handling of this case.
4. Police Scotland notified the Applicant of the outcome of their review on 4 February 2019, upholding their original decision that no information meeting the terms of the request was held.
5. On 21 February 2019, the Applicant wrote to the Commissioner's office. He applied 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 he did not accept that they held no information capable of addressing his request.
6. On 5 August 2019, the Commissioner issued *Decision Notice 114/2019: Mr N (the Applicant) and the Chief Constable of the Police Service of Scotland*. In this, the Commissioner found that in responding to Part 1 of the Applicant's request (which had no restriction in time),

Police Scotland had restricted the scope of the request to the dates specified in Part 2 of that request.

7. In relation to Part 1 of the Applicant's request, the Commissioner required Police Scotland to carry out a further review, including searches unrestricted by any timescale, and to notify the Applicant of the outcome, all in terms of section 21 of FOISA.
8. On 7 October 2019, Police Scotland provided the Applicant with a further response to his requirement for review in compliance with *Decision 114/2019*. Police Scotland advised the Applicant, in terms of section 17(1) of FOISA, that it did not hold any information falling within the scope of Part 1 of his request.
9. On 16 October 2019, the Applicant wrote to the Commissioner's office. The Applicant applied 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 he believed they should hold the information falling within Part 1 of his request.

## **Investigation**

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10. 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 its response to that request before applying to him for a decision.
11. On 23 October 2019, Police Scotland were notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
12. 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 answer specific questions, with specific reference to the steps they had taken to identify and locate the information requested.
13. Police Scotland responded, maintaining they did not hold the information requested by the Applicant, explaining the searches carried out.

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

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

### **Information held by Police Scotland**

15. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
16. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

17. The Commissioner notes the submissions provided by the Applicant, in which he provides reasons why he considers Police Scotland should hold the requested information.
18. In their submissions to the Commissioner, Police Scotland confirmed the position that they held no record of information requested by the Applicant.
19. Police Scotland confirmed the searches and enquiries they undertook to ascertain whether they held any information falling within the scope of Part 1 of the Applicant's request, with details. These included searches of relevant electronic and paper records, and consultation with relevant staff. Police Scotland provided supporting evidence confirming the outcomes of their searches. The conclusion of the searches and enquiries was that no information was held falling within the scope of the request under consideration.
20. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
21. Having considered all relevant submissions and the terms of the request which is the subject of the application, the Commissioner accepts that Police Scotland interpreted the Applicant's request reasonably and took adequate, proportionate steps in the circumstances to establish what information they held. Given the explanations and other submissions provided, he is satisfied that Police Scotland did not hold the information under consideration here and were correct to give him notice, in terms of section 17(1) of FOISA, that they held no information falling within Part 1 of his request.

## 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 the Applicant.

## 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.

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

**10 December 2019**

### 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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- (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.

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#### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or  
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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