

# Decision Notice

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**Decision 232/2016: Mr Mark McLaughlin and the Chief Constable of the Police Service of Scotland**

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**Revenue budget overspend**

Reference No: 201600015

Decision Date: 31 October 2016



Scottish Information  
Commissioner

## Summary

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On 29 October 2015 Police Scotland were asked for information about the forecast overspend in the Police Scotland revenue budget. Police Scotland withheld the information, because they considered disclosure would prejudice the effective conduct of public affairs substantially.

The Commissioner found that although Police Scotland had correctly withheld some of the information, it had incorrectly withheld other information and had failed to identify all of the information it held, covered by the request. In reaching this conclusion, the Commissioner accepted Police Scotland's approach to the interpretation of the request but expressed concerns about the way in which it was applied and how information covered by it was identified.

The Commissioner required Police Scotland to disclose this information.

## 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); 30(c) (Prejudice to effective conduct of public affairs)

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 29 October 2015, Mr McLaughlin made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested concerned the forecast revenue budget overspend noted in the Police Scotland Finance Report to the Scottish Police Authority (the SPA) dated 30 September 2015<sup>1</sup>. Mr McLaughlin requested all reports and correspondence between Police Scotland, the Scottish Government and the SPA about potential options for managing the overspend since 1 January 2014.
2. Police Scotland responded on 27 November 2015. Police Scotland withheld the information requested, on the basis that it was exempt from disclosure in terms of section 30(b) and (c) of FOISA.
3. On 30 November 2015, Mr McLaughlin wrote to Police Scotland, requesting a review of their decision. He disagreed that the information was exempt from disclosure and considered the public interest favoured disclosing the information.
4. Police Scotland notified Mr McLaughlin of the outcome of their review on 22 December 2015. Police Scotland upheld their original decision without modification.
5. On 26 January 2016, Mr McLaughlin wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr McLaughlin stated he was dissatisfied with the outcome of Police Scotland's review because he considered the information should be disclosed in the public interest.

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<sup>1</sup> <http://www.spa.police.uk/assets/126884/310253/310767>

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr McLaughlin made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 26 January 2016, Police Scotland were notified in writing that Mr McLaughlin had made a valid application. They were asked to send the Commissioner the information withheld from Mr McLaughlin. In response, Police Scotland provided information, indicating that this was the information they held and which fell within the scope of Mr McLaughlin's request. The case was allocated to an investigating officer.
8. At this stage, it was apparent that a considerable amount of the information provided by Police Scotland was wholly unrelated to Mr McLaughlin's request. The investigating officer asked Police Scotland to provide the withheld information which actually fell within the scope of Mr McLaughlin's request.
9. Police Scotland subsequently provided information which it considered fell within the scope of Mr McLaughlin's request.
10. 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, focusing on the exemptions applied in responding to Mr McLaughlin.
11. Police Scotland responded, providing submissions on the exemptions applied to the withheld information.
12. During the investigation, Police Scotland withdrew their reliance on the exemptions in section 30(b)(i) and (ii) of FOISA. Instead, they chose to rely on the exemption in section 30(c) of FOISA only.
13. In addition, Police Scotland were asked to clarify the searches they had undertaken in order to identify and locate all the information they held and which fell within the scope of Mr McLaughlin's request. Police Scotland were asked also to explain their interpretation of Mr McLaughlin's request to clarify why they considered the information that had now been identified (and not other parts of the relevant documents, or other documents which might be considered relevant) comprised all of the relevant information that they held.
14. Following discussions between the investigating office and Police Scotland, some further information was identified as falling within the scope of Mr McLaughlin's request.

## Commissioner's analysis and findings

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

### **Has all relevant information been identified?**

16. As in any case where an application is made to the Commissioner, she must satisfy herself that adequate steps have been taken by the authority to identify and locate all of the information it holds and which falls within the scope of the request.

17. In response to the Commissioner's initial request for the withheld information, Police Scotland provided a large volume of information, some of which clearly did not fall within the scope of the request. Police Scotland subsequently provided an updated version of the information, highlighting only information they considered actually fell within scope

*Interpretation of request*

18. Police Scotland explained that their approach to the scope of the request focused on the context of Mr McLaughlin's original request of 29 October 2015. They noted that his request quoted directly from the Police Scotland Finance Report of 30 September 2015.
19. Police Scotland stated that this section of the report concerned the joint SPA/Police Scotland revenue budget for the financial year 2015/16. The report indicated that the budget of £985.8m approved on 31 March 2015 was forecast to overspend by £25.313m. The forecast overspend had increased by around £14m from the £10.994m reported to the SPA Finance and Investment Committee six weeks earlier, and was accompanied by the statement that there had "and continues to be, full engagement with Scottish Government... to identify potential options for managing the financial position".
20. In Police Scotland's view, the significant development inferred in that part of the report appeared to have prompted Mr McLaughlin's request. They explained that their decision on what was within the scope of the request was based on their understanding of the relevant paragraph in the report and, more broadly, of their own financial arrangements and those of the SPA. That understanding was based on three principles:
  - (i) Information that pre-dated 9 October 2014 was not relevant. The financial resources allocated by the Scottish Government to the SPA/Police Scotland are ring-fenced to the relevant financial year and there is no carry-forward for any underspend. As the "financial position" referred to in the report concerned the (then) current forecasted overspend, it could only refer to the 2015/16 revenue budget. This meant that information about the 2013/14 and the 2014/15 budgets could not be relevant. As they received initial notification about the 2015/16 revenue budget on 9 October 2014, that was the earliest possible date for information covered by the request.
  - (ii) Information about other parts of the SPA/Police Scotland budget was not relevant. The statement in the report that prompted the request was drawn from the section on the revenue budget. The police reform budget and the capital budget are managed and reported separately and information about those budgets was therefore not relevant for this request. Out of scope information would include options for voluntary redundancy/early retirement, funded by the police reform budget.
  - (iii) The focus of the request was information exchanged between the three bodies about "potential options" for managing the forecast overspend in the 2015/16 revenue budget. This meant that other information about the 2015/16 revenue budget was not relevant. This would include statements on the size of the 2015/16 revenue budget or periodic estimates of the size of the budget gap, the allocation of the revenue budget between different budget holders and measures already approved that were not subject to discussion between the three bodies. Police Scotland stated that none of these types of information were "potential options" for discussion to reduce the forecast overspend.
21. During the investigation, the investigating officer asked Police Scotland to consider whether more of the information contained within specified documents previously supplied to the

Commissioner fell within the scope of the request. In response, Police Scotland stated that, in their view, they had correctly identified all the relevant information falling within the scope of Mr McLaughlin's request, providing reasons for reaching this conclusion. They accepted, however, that there might be some additional information within specified documents which was also within the scope of the request. (This is considered further in what follows.)

#### *Searches*

22. Police Scotland explained that information for this request was sought from the Police Scotland SPA Liaison Unit, based in the Force Executive. This is the central unit responsible for the formal exchange of information between Police Scotland and the SPA, to support the SPA's scrutiny function. This unit also deals with the exchange of information with the Scottish Government and Parliament.
23. Police Scotland stated that the terms of the request were sent to their SPA Liaison Unit, along with an instruction to search for correspondence and reports relating to the 2015/16 revenue budget. The request was also referred to Police Scotland's Finance Department in order to obtain information not held by the Force Executive.

#### *The Commissioner's view*

24. The Commissioner has considered carefully Police Scotland's interpretation of Mr McLaughlin's request. She has also considered their explanation of the searches undertaken and why these searches would have been likely to locate and retrieve any relevant information.
25. In general, the Commissioner accepts that Police Scotland's interpretation of Mr McLaughlin's request (including the date parameters they applied) was reasonable in the circumstances. She accepts that Police Scotland undertook reasonable, proportionate enquiries and searches in order to establish what information it held. However, she is concerned that applying this interpretation restrictively has deprived the information of some necessary context.
26. In the Commissioner's view, some additional information contained within the documents originally supplied by Police Scotland did fall within the scope of Mr McLaughlin's request. In failing to identify all of this as falling within the scope of the request, she finds that Police Scotland failed to comply fully with section 1(1) of FOISA.
27. The Commissioner has considered whether Police Scotland were entitled to withhold this additional information from Mr McLaughlin (along with the information Police Scotland already judged to fall within the scope of the request) in her findings on the section 30(c) exemption below.

#### **Section 30(c) of FOISA – prejudice to effective conduct of public affairs**

28. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

29. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).
30. Police Scotland submitted that the disclosure of information which formed discussions surrounding possible options, which had not yet been fully decided upon or ratified as policy, risked misleading conclusions being drawn by the public (including Police Scotland and SPA staff). In their view, it would be unfair for staff to be informed about internal matters through the route of FOI disclosure and this would be likely to have a negative impact on the individuals involved and, in turn, their impression of and engagement with their employer.
31. Police Scotland stated that the options being considered concerned cost savings for addressing the 2015/16 budget shortfall. The options covered included issues of an operational or financial nature. In Police Scotland's view, it was necessary to discuss the options fully and within the appropriate forums, so the resulting decisions were the most appropriate both for the organisation and its staff, but also in terms of providing an effective police service for Scotland. They considered this could only occur if open, informed and productive discussions could be undertaken between all stakeholders. In their view, these valuable relationships would be damaged should the information be disclosed.
32. Police Scotland submitted that disclosure of the information would expose the proposed options, some or all of which might never come to fruition, to public discussion. In their view, there was a significant risk that in doing so the public, and particularly employees of Police Scotland, would misinterpret or misconstrue options as agreed published policy that was destined to be implemented. They considered this would negatively impact on staff morale and damage the employee/employer relationship at a time when the organisation continued to face a significant period of change and uncertainty.
33. Police Scotland stated that 23% (almost a quarter) of respondents to a staff survey<sup>2</sup> stated they obtained their information about Police Scotland from the media. In Police Scotland's view, it could therefore be expected that any discussion about the proposed options would become known to them through this route. Police Scotland submitted that it could not be said to be in the public interest for FOISA to circumvent the appropriate communications channels, through which staff would be informed of decisions that had been made and have the reasons for those decisions accurately articulated.
34. Mr McLaughlin referred to his review request to Police Scotland. In his view, disclosure of the information would not provide inaccurate information, but rather it would be an accurate disclosure of the options under consideration. He submitted that disclosure would not harm police staff and considered they had a right to know the options under consideration: it was important, in his view, to have an informed workforce.

*The Commissioner's view on section 30(c)*

35. The Commissioner has considered the nature and content of the relevant information, along with both Mr McLaughlin's and Police Scotland's submissions.

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<sup>2</sup> <http://www.scotland.police.uk/assets/pdf/138327/307421/spa-police-scotland-opinion-survey-2015?view+standard>

36. The Commissioner acknowledges that much of the information comprises frank discussions regarding circumstances surrounding the revenue budget. This includes suggestions for current and future action, ongoing monitoring requirements and projections based on various scenarios.
37. For the most part, therefore, the Commissioner recognises that the information under consideration reflects early discussions concerning potential options for managing the budget shortfall and the development of strategies for achieving these aims. She accepts that some (or all) of the options which were suggested might not be adopted in practice.
38. The Commissioner accepts that disclosure of such information would be likely to cause substantial prejudice to the effective conduct of public affairs. In her view, disclosure of such information would curtail the ability of the various contributors to put forward suggestions and options freely. She acknowledges that disclosure would be likely to make such suggestions and options the subject of public discussion and speculation, before they had been adopted as policy, which would unnecessarily divert Police Scotland's and the SPA's resources in responding to such speculation.
39. The Commissioner recognises that the test to be considered in relation to section 30(c) is high, but she accepts in this instance that Police Scotland were correct to apply the exemption in section 30(c) to the majority of the information withheld. The Commissioner accepts this where the information comprises discussions on specific options, appraisals and projections surrounding the revenue budget.
40. However, some of the information withheld by Police Scotland is factual in nature and, in some instances at least, relatively innocuous. Given the nature of such information, the Commissioner does not accept that its disclosure would, or would be likely to, cause the prejudice claimed.
41. In all the circumstances, the Commissioner cannot accept that disclosure of these parts of the withheld information would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all of the relevant submissions, the Commissioner does not accept that Police Scotland were correct to withhold this information (i.e. the information to which the exemption was not properly applied) under the exemption in section 30(c) of FOISA. The Commissioner now requires Police Scotland to disclose this information to Mr McLaughlin.
42. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. For the information she has accepted as exempt, the Commissioner must, therefore, go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

#### *The public interest*

43. Police Scotland submitted that it was imperative, in the current situation, that they explore all options for cost savings while maintaining the confidence of their staff and the public. In their view, if the information on mere suggestions that might never come to fruition was to be made public, this could cause unnecessary upset and undermine confidence in the service. The options considered within the withheld information included all possible routes to save money: this did not mean that all such routes would be progressed (indeed, none might be progressed).
44. Police Scotland acknowledged that the public had a right to see that public funds were being properly managed. They accepted that this exemption would be unlikely to apply in

perpetuity and, in due course, it would be appropriate for the public to be made aware of the cost saving options. They did not consider it appropriate to disclose the information during ongoing deliberations.

45. In Police Scotland's view, the greater public interest lay in allowing them, in partnership with the SPA, a forum within which to communicate and discuss potential options so that final, fully informed, decisions could be made. Police Scotland believed they owed a duty of care to ensure that their staff were the first to learn of any decisions and could be advised of the reasons for them. In their view, public disclosure via FOISA would be contrary to this. Finally, Police Scotland submitted that it could not be said to be in the greater public interest to damage their working relationship with either partners such as the SPA or their own workforce.
46. Mr McLaughlin also referred to the Police Scotland staff survey. In his view, disclosure of the information would allow staff to contribute to the debate and provide an opportunity for meaningful staff engagement and communication. He also argued that debating the distribution of public funds in private weakened community engagement.
47. Mr McLaughlin referred to a report undertaken by Her Majesty's Inspectorate for Constabulary in Scotland, published in November 2015<sup>3</sup>. He noted that the report contained criticisms of the scrutiny of major change projects. These included:
  - the recording of decision making;
  - the lack of information provided to staff (creating the risk that staff fill in the gaps with rumour and speculation);
  - the lack of meaningful communications and engagement throughout the process of change; and
  - underestimating the need for engagement with staff.
48. Mr McLaughlin also noted that the report recommended engagement with communities and stakeholders on future plans.

*The Commissioner's conclusion on the public interest*

49. The Commissioner accepts there is a general public interest in transparency and accountability. In this case, she accepts that the matters under consideration are of significant interest to the public and of particular importance to staff and stakeholders of Police Scotland.
50. The Commissioner also acknowledges the risk of substantial prejudice to the effective conduct of public affairs in this case. She accepts that the matters under consideration here, whilst of significant importance, related to the early consideration of potential options for managing the revenue budget. At the time of the request, these had been neither accepted nor rejected by Police Scotland.
51. The Commissioner considers there is a strong public interest in allowing public authorities the opportunity, in confidence, to consider policy options which are at an early stage of development. In her view, disclosure of the information in this case risks jeopardising the

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<http://www.hmics.org/sites/default/files/publications/HMICS%20Independent%20Assurance%20Review%20Police%20Scotland%20-%20Call%20Handling%20Final%20Report.pdf>



ability of Police Scotland and the SPA to obtain the candid views of relevant staff and to discuss and appraise these views fully: that would not be in the public interest.

52. On balance, having taken account of all the submissions before her, the Commissioner considers the public interest in maintaining the exemption in relation to this specific information outweighs that in disclosing it.
53. The Commissioner therefore finds that Police Scotland were entitled to withhold this information under section 30(c) of FOISA.
54. With this decision, the Commissioner will provide Police Scotland with a marked up copy of the information which she considers falls within the scope of Mr McLaughlin's request. This will indicate the information to be disclosed.

## Decision

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

The Commissioner finds that Police Scotland:

- (i) complied with Part 1 by correctly withholding some information under section 30(c) of FOISA.
- (ii) were not entitled to withhold some information under the exemption in section 30(c). By doing so, Police Scotland failed to comply with section 1(1) of FOISA.
- (iii) failed to comply with section 1(1) by failing initially to identify all relevant information falling within the scope of Mr McLaughlin's request.

The Commissioner therefore requires Police Scotland to disclose to Mr McLaughlin the information incorrectly withheld under section 30(c) of FOISA. The Commissioner requires Police Scotland to disclose this information by **15 December 2016**.

## **Appeal**

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Should either Mr McLaughlin 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.

## **Enforcement**

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If the Chief Constable of the Police Service of Scotland (Police Scotland) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland have failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

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

**31 October 2016**

### 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.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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