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# Decision Notice 211/2025

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## Ongoing investigation into the bombing of Pan Am 103

Authority: Chief Constable of the Police Service of Scotland  
Case Ref: 202201247

### Summary

The Applicant asked the Authority for various pieces of information about the ongoing investigation into the bombing of Pan Am 103 on 21 December 1988, a copy of a memo described as “the Entwistle memo” and information about Operation Sandwood.

The Authority withheld the information on the basis that it related to a criminal investigation, and its disclosure would prejudice the prevention or detection of crime and the apprehension or prosecution of offenders. During the investigation, the Authority changed its position for certain information. It now considered that some information would be too costly to provide, certain information was not held, and some other information was also exempt from disclosure on the basis that it would prejudice international relations or comprised third party personal data.

The Commissioner investigated and found that, while the Authority had correctly withheld some information on the basis that its disclosure would compromise ongoing investigations, it had wrongly withheld some other information under the exemptions claimed. He also found that the Authority had failed to comply with the duty to advise and assist, and that it had failed to comply with the statutory timescale for responding to the Applicant’s request for review. For the information found to have been wrongly withheld, the Commissioner required the Authority to disclose certain of that information to the Applicant, and to issue a revised review outcome for the remainder.

## Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)<sup>1</sup> (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 32(1)(a)(i) (International relations); 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement); 38(1)(b) (Personal information); 47(1) and (2) (Application for decision by Commissioner).

## Background

1. On 25 May 2022, the Applicant made a multi-part request for information to the Authority. Only parts A2, A3, A4, B and E2 of the request are the subject of the Applicant's application to the Commissioner as follows:
  - A Please provide the following information in respect of the ongoing investigation into the bombing of Pan Am 103 on 21 December 1988, on an annual basis (either calendar or financial year, as best accommodates the data held) from 2011 to the date of response. (If financial year, please specify parameters.)  
...
    - 2) Number of lines of enquiry (a) continuing – i.e. carried forward from previous period; (b) fresh – i.e. not previously investigated; (c) reconsidered – i.e. previously investigated and (d) abandoned.
    - 3) Number of statements taken from (a) witnesses and (b) persons of interest/suspects.
    - 4) Number of contacts during year with (a) FBI (including legal attachés); (b) Department of Justice or (c) CIA.  
...
  - B Entwistle Memo dated 3 April 1990 reference D8925.  
...
  - E Please provide the following information in respect of Operation Sandwood on an annual basis (either calendar or financial as best accommodates data held) between February 2014 and November 2018.  
...
    - 2) Number of statements take from (a) witnesses and (b) persons of interest.  
...

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<sup>1</sup> <https://www.legislation.gov.uk/asp/2002/13/contents>

2. The Authority responded on 11 July 2022, apologising for the delay in responding. It confirmed it held the information requested in parts A2, A3, A4, B and E2 and refused to provide that information as it considered it to be exempt from disclosure under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA.
3. The Authority stated that the information was of potential relevance to ongoing investigations and therefore disclosure would prejudice the detection of crime and the apprehension and prosecution of offenders. In this regard, the Authority referred to a recent [statement by the Lord Advocate](#)<sup>2</sup> issued on 15 January 2021 regarding the case.
4. While the Authority accepted that the investigation was of significant interest to the public and had been for many years, it stated that investigative materials would only ever be released where there were overwhelming public interest considerations for doing so and in cases where disclosure could not be argued to be potentially prejudicial – in particular to any associated criminal justice procedures. As this remained an ongoing enquiry, the Authority concluded that, on balance, the public interest lay in maintaining the exemptions.
5. On 29 July 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision to withhold the information. For parts A2, A3, A4 and E2, he argued that withholding the information, which simply required numeric values, was irrational. In his view, providing the figures would not identify lines of enquiry, the individuals or the substance of statements from whom they were taken, or the subject of contacts with official American agencies. For part B, he contended that this memorandum was released in 2006. Given that it had been publicly disclosed and related primarily to an event nearly 33 years ago that was not the subject of a post or current police investigation, it was unreasonable to assert that the exemptions claimed applied.
6. The Authority notified the Applicant of the outcome of its review on 9 September 2022. It apologised for the delay in responding and fully upheld its original decision without modification.
7. On 4 November 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because it had failed to comply with the statutory timescales in FOISA. He further believed that the exemptions applied by the Authority to withhold the information were excessive and irrational given that parts A2, A3, A4 and E2 of his request simply required a numeric response which would be unlikely to disclose operationally sensitive information, and that part B related to a document over 32 years old, the subject of which, and most of its contents, were already in the public domain as it was released during the judicial process.

## Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

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<sup>2</sup> <https://www.copfs.gov.uk/about-copfs/news/lockerbie-appeal-statement-from-the-lord-advocate/>

9. On 15 November 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application, invited its comments and asked it for the information withheld from the Applicant. The Authority subsequently provided the information along with its initial comments.
10. The Applicant also provided comments on the public interest in disclosing the information.
11. The case was subsequently allocated to an investigating officer.
12. Following consideration of the withheld information along with the comments received, it was considered necessary to seek further submissions from the Authority, particularly as it had changed its position for some of the information requested. These focused on:
  - (i) the alleged failure, by the Authority, to comply with the response timescales set out in FOISA;
  - (ii) the Authority's position in relation to each element of the breakdowns requested in parts A2, A3, A4 and E2, whether the information held by the Authority satisfied those parts of the request, and what advice and assistance the Authority had given to the Applicant to allow him to understand that some of this information was not held, or was not held in the format requested, and
  - (iii) the Authority's justification for relying on the newly added exemptions in section 32(1)(a)(i) and section 38(1)(b) to withhold the information requested in part B.
13. In the interests of natural justice, the Applicant was also asked to provide any further submissions he wished to make on the newly added exemptions for part B.
14. Both parties provided further submissions to the Commissioner during the investigation.

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

15. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***The Authority's submissions on section 34(1)(b) and section 35(1)(a) and (b)***

#### ***Section 34(1)(b) - Investigations by Scottish public authorities and proceedings arising out of such investigations***

16. The exemption in section 34(1)(b) 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 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.
17. 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 in section 34 are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.

*The Authority's submissions on section 34(1)(b)*

18. In its initial comments to the Commissioner, the Authority put forward the following arguments in support of its decision to withhold the information requested under the exemption in section 34(1)(b) of FOISA.
19. The Authority explained that the ongoing police enquiry into the Lockerbie air disaster which occurred in 1988 was "Operation Bohawn". "Operation Sandwood" referred to a major investigation it had initiated in February 2014 in response to calls for the robust investigation into "allegations of criminality against police officers, forensic investigators and legal officials involved in the Lockerbie inquiry and the 2000/01 trial at the Scottish Court in the Netherlands", submitted by the group "Justice for Megrahi".
20. The Authority submitted that all of the information held in relation to both Operations was therefore held for the purposes of an investigation into allegations of criminality, and so section 34(1)(b) applied.

*The Authority's submissions on the public interest – section 34(1)(b)*

21. The Authority fully accepted that:
  - (i) both investigations were high profile and consequently of significant interest to the public. The bombing of Pan Am 103 remained the deadliest terrorist attack on UK soil and the largest homicide case Scotland's prosecutors had ever encountered in terms of scale and complexity;
  - (ii) disclosure of any information connected to the initial and/or subsequent related investigations would add to and inform any public debate on the matter, and
  - (iii) there was an argument in terms of accountability. As the Authority was a publicly funded organisation, it was therefore appropriate that its actions were subject to appropriate scrutiny.
22. The Authority submitted, however, that this must be balanced against the fact that investigative materials should only ever be released where there were overwhelming public interest considerations for doing so. It disagreed that disclosure of the information requested could be argued to be in the public interest simply because the case was high profile, arguing that it could not be in the public interest to disclose information that would undoubtedly be prejudicial to associated criminal justice procedures.

*Section 35(1)(a) and (b) – Law Enforcement*

23. Section 35(1)(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. The term "prevention or detection of crime" is wide ranging. It encompasses actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of people suspected of being responsible for committing a crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.
24. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. There is likely to be an overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime". Section 35(1)(b) is narrower and focusses on the process of identifying, arresting or prosecuting those suspected of being responsible for unlawful activity. Again, this term could refer to the apprehension or prosecution of

specific offenders or to more general techniques such as investigative processes used, information received, or guidance given, and strategies designed for these purposes.

25. There is no definition of "substantial prejudice" in FOISA, but the Commissioner's view is that authorities have to be able to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
26. The exemptions in section 35(1) are subject to the public interest test in section 2(1)(b) of FOISA.

*The Authority's submissions on section 35(1)(a) and (b)*

27. In its initial comments to the Commissioner, the Authority put forward the following arguments in support of its decision to withhold the information requested under the exemptions in section 35(1)(a) and (b) of FOISA.
28. The Authority submitted that all of the information requested was relevant to ongoing investigations and its disclosure at this time would be likely to substantially prejudice the prevention or detection of crime and the apprehension or prosecution of offenders.
29. The Authority referred to a [statement issued by the Lord Advocate](#)<sup>3</sup> on 12 December 2022, following the US Department of Justice taking a former Libyan intelligence officer into custody on charges including destruction of an aircraft resulting in death. It submitted that both the Authority and the Crown Office and Procurator Fiscal Service remained committed to the pursuit of justice as regards the case and, given these developments, it could in no way be regarded as a historic matter.
30. The Authority confirmed that it held all evidence relating to the case and would be supporting the US prosecution at the direction of the Lord Advocate. It stated that the Lord Advocate had also made clear that the live enquiry would continue with a view to ensuring that any other individuals involved in the conspiracy faced justice if evidential thresholds were met, and that this was in addition to the male extradited to the USA.
31. The Authority submitted that there may well be further lines of enquiry in Libya which would progress this but, due to the ongoing political and civil disorder and threat picture, it had been difficult to conduct such enquiries in Libya. It was envisaged that if, and when, conditions improved, then Scottish investigators and prosecutors would be deployed to Libya to progress further enquiries there. In the Authority's view, it could only be inherently harmful to that prosecution, and also to any further detection and apprehension of offenders, to disclose details about the investigations at this time.
32. For the statistical information requested, the Authority stated that this provided a significant insight into the pattern of investigative activity over time, and this was particularly an issue as regards the ongoing Operation Bohawn investigation. It considered such information to be of intelligence value to parties who may be seeking to evade justice, in terms of awareness of the type of policing activity taking place at any given time. This knowledge, it believed, could encourage offenders to take steps to avoid detection and apprehension, where it might appear that policing activity was ramping up over a certain period, for example, spikes in operational activity as a result of new information coming to light or new lines of enquiry. The Authority recognised that the opposite was also true and, bearing in mind that investigations

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<sup>3</sup> <https://www.copfs.gov.uk/about-copfs/news/lockerbie-bombing-statement-from-the-lord-advocate/>

may continue for many years, there would also be periods when operational activity appeared to slow.

33. For part B of the request, the Authority submitted that its concerns centred on the content of the document which detailed extremely sensitive operational discussions between law enforcement agencies. While the Authority recognised that the document itself could be regarded as historic in nature, it considered its content was clearly of relevance to the ongoing investigation and any criminal justice proceedings that could result. In the Authority's view, it would be substantially prejudicial to those processes were such information to be released into the public domain at a time when continuing international co-operation was fundamental to progressing the case. The Authority argued that it must be able to co-operate freely and frankly with other countries/agencies as regards the investigation without fear that, outwith the appropriate criminal justice proceedings, their participation would be publicly disclosed whilst investigations were ongoing.

*The Authority's submissions on the public interest – section 35(1)(a)&(b)*

34. The Authority fully accepted that:

- (i) the investigation was high profile and consequently of significant interest to the public. The bombing of Pan Am 103 remained the deadliest terrorist attack on UK soil and the largest homicide case Scotland's prosecutors had ever encountered in terms of scale and complexity;
- (ii) disclosure of any information connected to the initial and/or subsequent related investigations would add to and inform any public debate on the matter, and
- (iii) there was an argument in terms of accountability. As the Authority was a publicly funded organisation, it was therefore appropriate that its actions were subject to appropriate scrutiny.

35. The Authority submitted, however, that this must be balanced against the fact that investigative materials should only ever be released where there were overwhelming public interest considerations for doing so. It believed that, from the initial investigation into the bombing right through to the continuing live investigations, there was very little information that could be taken in isolation as of relevance to one strand of those investigations in particular.

36. The Authority stated that it had released limited information regarding the bombing and subsequent investigations where it was appropriate and safe to do so, arguing that it could not be in the public interest to disclose information that would result in prejudice to law enforcement activities and/or proceedings.

*The Applicant's submissions*

37. In his submissions to the Commissioner, the Applicant put forward the following arguments in support of the public interest in disclosure of the information requested.
- (i) The bombing of Pan Am 103 on 21 December 1988 resulted in the deaths of all 259 passengers and crew together with a further 11 people in Lockerbie where large sections of the aircraft fell. It was the United Kingdom's worst terrorist event and case of mass murder. This was clearly a matter of serious concern to the public and disclosure of the information would serve the interests of the public.

- (ii) There were significant questions and doubts regarding the conduct of the investigation, prosecution and outcome (including subsequent appeals) resulting from the bombing of Pan Am 103. These impacted upon the credibility of the Scottish criminal justice system as a whole, both domestically and internationally; upon the Authority and its predecessor forces, the Crown Office and Procurator Fiscal Service, the SCCRC [Scottish Criminal Cases Review Commission] and the judiciary; and gave cause for concern regarding possible interference in Scottish affairs from London and elsewhere.
- (iii) The families of those killed as a consequence of the PA 103 bombing had an absolute right to the true facts of the case, including:
  - (a) Who was ultimately responsible for the bombing of PA 103. and what was the underlying purpose/rationale behind the Act?
  - (b) Where, when, how and by whom was the “primary suitcase” containing the bomb that destroyed the PA 103 introduced into the baggage system?
  - (c) If it was not the sole person convicted of the bombing and/or the nation deemed responsible, why were they blamed and the public misled as to the true facts of the case?
- (iv) This right also extended to the family of the person convicted for the bombing, and all the more so if he was, in fact, unconnected with the acts he was convicted of.
- (v) The Authority averred that the investigation into the bombing of PA 103, known as “Operation Bohawn”, was active and ongoing, justifying the application of an exemption. The information requested would reasonably be expected to confirm or otherwise the veracity of that averment.
- (vi) The Authority had failed to comply with its duty to set out its methodology for applying the balancing exercise with respect to the public interest test.
- (vii) Almost 34 years had passed since the bombing of PA 103. Most of the principals involved with this matter – whether as senior politicians in the UK or elsewhere, senior investigators, lawyers and judges; the sole person convicted of the bombing and the leaders of the various groups believed to have actually been responsible – were deceased. More tragically, so were many of the relatives of those who died, some of whom spent many years searching for the truth. Accordingly, it was all the more important that the information be disclosed.

38. During the investigation, the Applicant provided the following additional comments on the public interest in disclosure of the information requested:

- (i) The Authority, and other Scottish criminal justice service agencies and bodies, had a culture of concealment and cover-up, especially in high-profile cases such as the Lockerbie bombing. Disclosure would enhance scrutiny of decision-making processes and thereby improve accountability, participation and – most importantly – public confidence that they will be treated fairly, lawfully and without discrimination should the need ever arise.
- (ii) Being treated fairly and transparently, whether as a suspect, victim or member of the public seeking information, was central to public confidence and willingness to assist with the detection and investigation of crime, including assistance with identification of



offenders. If the police were happy to cover up miscarriages of justice for political ends, what would they do to the ordinary person in the street?

- (iii) Transparency and trust were even more important on the international stage than, in some ways, domestically, at least with regard to this matter. The Authority's averment that disclosure would adversely impact relations with the US was clearly fallacious. If, as widely believed, they acted improperly/illegally then the interests of justice required that this should be open to public scrutiny. If not, further concealment and cover-up would simply lead to increased distrust and lack of confidence, leading to an increased level of political discontent.
- (iv) A large number of those who played leading roles in the investigation have subsequently died, and those who are still alive are likely to have been named in the various books, and other online and print publications about the events.

- 39. The Applicant provided the Commissioner with copies of media articles in support of the continuing public interest in this matter and referred to two major documentary tv series on the Lockerbie investigation to be broadcast during 2025.
- 40. The Applicant's submissions and supporting evidence have been taken into account by the Commissioner in his consideration of the case, in what follows.
- 41. The Commissioner will now go on to consider each part of the Applicant's request in turn, where he will set out his views for each part.

***Part A2 of request – Ongoing Lockerbie investigation – Annual numbers of lines of enquiry (a) continuing (b) fresh (c) reconsidered (d) abandoned***

- 42. In its review outcome, the Authority withheld the above information under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA.

***The Applicant's submissions – Part A2***

- 43. In his application to the Commissioner, the Applicant argued that the exemptions applied by the Authority to withhold the information requested were excessive and irrational given that this part of his request simply required numeric values which would unlikely disclose operationally sensitive information.
- 44. The Applicant's submissions on the public interest in disclosure of the information requested are set out in paragraphs 37-39 above.

***The Authority's submissions on the exemptions claimed – Part A2***

- 45. The Authority's submissions on the application of the exemptions in section 34(1)(b) and section 35(1)(a) and (b) to withhold the information requested are set out in paragraphs 18-22 and 27-36 above.

***The Authority's submissions on the information held – Part A2***

- 46. In its initial comments to the Commissioner, the Authority explained that it did not record investigative activity in terms of "lines of enquiry", however it was recognised that this was a commonly used term, and the Applicant could not reasonably be expected to know that, nor how the Authority's systems operated or how data was managed. In the Authority's view, it would have been disingenuous and not at all helpful, in terms of the duty in section 15 of FOISA to advise and assist applicants, to offer a "not held" response on the basis of terminology alone.

47. The Authority explained that data relating to the investigation was held on HOLMES [Home Office Large Major Enquiry System] which manages enquiries in terms of individual “actions”. The Authority stated that it could be the case that one line of enquiry encompassed multiple actions, or indeed one action might be relevant to a number of lines of enquiry. That said, the Authority considered that the number of actions was the data it held which was of most relevance to the Applicant’s request. It confirmed, however, that actions were not categorised as per the headings set out in part A2 of the request.
48. In its later submissions, the Authority considered that, in line with its responsibilities under section 15 of FOISA, this part of the Applicant’s request could be interpreted more broadly than the specific terminology used therein. It confirmed, however, that it did not hold recorded information on the number of “lines of enquiry” set out in that part of the request, or otherwise. What it did consider to be within scope, the Authority stated, were the HOLMES actions, however these could not be broken down in that way.
49. The Authority accepted that it may have been better to issue a section 17 “information not held” notice to this part of the request, and would not disagree with that approach, were that the Commissioner’s decision.

*The Commissioner’s views – Part A2*

50. The Commissioner has fully considered the submissions from both parties along with the withheld information itself.
51. The Commissioner has considered the explanation put forward by the Authority in relation to the nature of the information held which, it considers, falls within the scope of this part of the Applicant’s request. Having done so, the Commissioner is not satisfied that the Authority holds the information which the Applicant actually requested here. In his view, the correct approach would have been for the Authority to have informed the Applicant, in terms of section 17 of FOISA, that it did not hold the information requested, including that in the sub-categories listed, and explain to him why this was the case. The Commissioner considers it would also have been helpful for the Authority to explain to the Applicant why it considered information relating to “actions” to be most relevant to this part of the request, which might have enabled the Applicant to make a new request for the information that the Authority actually holds.
52. By informing the Applicant, at review stage, that it was withholding the information requested in part A2 of his request, this would have led the Applicant to believe that the Authority did, in fact, hold that particular information, broken down to each of the elements set out in that part of his request, when clearly it did not.
53. In light of this, the Commissioner has no option but to find that the Authority was not entitled to rely on the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA at review stage, for any of the information requested in part A2 of the request.
54. The Commissioner has also considered the Authority’s submissions in relation to its belief that, by interpreting and responding to this part of the request in the way it did, it believed it was satisfying its duty to advise and assist under section 15 of FOISA. The Commissioner does not agree. Without offering any explanation to the Applicant in its response to this part of the request, as to the nature and level of information held, which might have allowed the Applicant to reframe this part of his request, the Commissioner finds that the Authority failed to comply with the duty in section 15 of FOISA.

55. The Commissioner therefore requires the Authority to carry out a fresh review and issue the Applicant with a revised review outcome for this part of his request.

***Part A3 of request – Ongoing Lockerbie investigation – Annual numbers of statements taken from (a) witnesses (b) persons of interest/suspects***

56. In its review outcome, the Authority withheld the above information under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA.

***The Applicant's submissions – Part A3***

57. In his application to the Commissioner, the Applicant argued that the exemptions applied by the Authority to withhold the information requested were excessive and irrational given that this part of his request simply required numeric values which would unlikely disclose operationally sensitive information.
58. The Applicant's submissions on the public interest in disclosure of the information requested are set out in paragraphs 37-39 above.

***The Authority's submissions on the exemptions claimed – Part A3***

59. The Authority's submissions on the application of the exemptions in section 34(1)(b) and section 35(1)(a) and (b) to withhold the information requested are set out in paragraphs 18-22 and 27-36 above.

***The Authority's submissions on the information held – Part A3***

60. In its submissions to the Commissioner, the Authority confirmed that all of the statements held were classed as witness statements, and so it held information that satisfied element (a) of part A3 of the request (i.e. the number of Operation Bohawn statements taken from witnesses).
61. In respect of Operation Bohawn statements taken from persons of interests/suspects (element (b) of part A3), the Authority submitted that this was more complicated. It explained that, focusing solely on the information held (i.e. the number of witness statements in element (a) of part A3), none of those statements would identify the individual as a person of interest (as this was not a formal term used by the Authority), or as a suspect. Once an individual was formally treated as a suspect, they would then be interviewed under caution as opposed to being asked to give a statement. The Authority noted, however, that it was possible for someone who had previously provided a statement to be later classed as a suspect. The Authority recognised that this part of the request may benefit from additional clarity being provided to the Applicant.

***The Commissioner's views – Part A3***

62. The Commissioner has fully considered the submissions from both parties along with the withheld information itself.

***The Commissioner's views on element (a) of Part A3***

63. For element (a) of the request (annual numbers of witness statements for Operation Bohawn), the Commissioner recognises that the witness statements themselves would clearly be held for the purposes of a police investigation. He is therefore satisfied that, in being derived from information clearly held for those purposes, the exemption in section 34(1)(b) also applies to the statistical data requested (i.e. the annual numbers of witness statements for Operation Bohawn). He is therefore satisfied that the exemption in section 34(1)(b) is engaged for the information withheld.

64. As he has found that the exemption in section 34(1)(b) is engaged, the Commissioner must now go on to consider where the balance of public interest lies in relation to the information withheld.
65. Having done so, the Commissioner is not satisfied, on the basis of the submissions provided by the Authority, that the public interest is likewise inherently weighted against disclosure. He can see no justified public interest arguments for withholding the information and considers that the Authority has failed to demonstrate why the balance of public interest favours non-disclosure. On the basis of the submissions provided, he fails to see how disclosure of this historic statistical information could compromise the investigative process in future. In the Commissioner's view, the balance of public interest, in this case, lies in making the information available to the Applicant.
66. The Commissioner therefore finds that the Authority was not entitled to withhold the information requested in element (a) of part A3 of the request under section 34(1)(b) of FOISA.
67. As the Authority is also relying on the exemptions in section 35(1)(a) and (b) to withhold that same information, the Commissioner will now go on to consider the application of those exemptions.
68. The Commissioner recognises that the witness statements themselves would clearly be held for the purposes of preventing and detecting crime, and for apprehending and prosecuting offenders and is therefore satisfied that the statistical data requested (i.e. the annual numbers of witness statements for Operation Bohawn) is derived from information clearly held for those purposes.
69. In relation to section 35(1)(a) and (b), again the Commissioner is not satisfied, from the submissions provided by the Authority, that the harm claimed would manifest as a direct result of disclosure of the information requested here. He notes that the information requested covers the number of statements taken annually over a 12 year period for a high profile police investigation. While the Commissioner accepts that disclosure of the contents of the statements themselves (had they been requested) might reveal any new evidence or investigative activity being pursued, he fails to see how disclosure of the historical statistical information asked for would enable an individual to circumvent justice, would reveal a pattern of investigative activity or would give an insight into the type of policing activity taking place at any given time.
70. The Commissioner is therefore not satisfied that the exemptions in section 35(1)(a) and (b) of FOISA are engaged for the information requested in element (a) of part A3 of the request. He therefore finds that the Authority was not entitled to withhold the information requested here under the exemptions in section 35(1)(a) and (b) of FOISA.
71. Given that the Commissioner has found that the exemptions in section 35(1)(a) and (b) are not engaged, he is not required to go on to consider the public interest in disclosure of that information.
72. As the Authority is not relying on any other exemptions to withhold the information requested in element (a) of part A3 of the request, the Commissioner requires the Authority to disclose it to the Applicant.

#### *The Commissioner's views on element (b) of Part A3*

73. For element (b) of the request (annual numbers of statements taken from persons of interest/suspects for Operation Bohawn), the Commissioner has considered the explanation put forward by the Authority. Having done so, the Commissioner is not satisfied that the Authority holds the information requested here. In his view, the correct approach would have been for the Authority to have informed the Applicant, in terms of section 17 of FOISA, that it did not hold the information in the sub-categories listed in element (b), and explain to him why this was the case.
74. By informing the Applicant, at review stage, that it was withholding the information requested in element (b) of part A3 of his request, this would have led the Applicant to believe that the Authority did, in fact, hold that particular information when clearly it did not.
75. In light of this, the Commissioner has no option but to find that the Authority was not entitled to rely on the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA at review stage, for the information requested in element (b) of part A3 of the request.
76. The Commissioner therefore requires the Authority to carry out a fresh review and issue the Applicant with a revised review outcome for this part of his request (i.e. element (b) of part A3).

#### ***Part A4 of request – Ongoing Lockerbie investigation – Annual numbers of contacts with (a) FBI (b) Department of Justice (c) CIA***

77. In its review outcome, the Authority withheld the above information under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA.

#### *The Applicant's submissions – Part A4*

78. In his application to the Commissioner, the Applicant argued that the exemptions applied by the Authority to withhold the information requested were excessive and irrational given that this part of his request simply required numeric values which would unlikely disclose operationally sensitive information.
79. The Applicant's submissions on the public interest in disclosure of the information requested are set out in paragraphs 37-39 above.

#### *The Authority's submissions – Part A4*

80. In its initial comments to the Commissioner, the Authority confirmed that it had changed its position in relation to the above information. It submitted that it had proved challenging to attribute numerical values to this part of the request.
81. For information relating to the number of contacts with the FBI and the Department of Justice, the Authority confirmed that the Senior Investigating Officer (SIO) had regular contact with both the FBI and the Department of Justice. However, based on recollection alone and operational knowledge, there had been no contact with the CIA.
82. The Authority explained that contact with US colleagues took various forms – by phone, email, online and in-person meetings, with the amount of contact varying across time. While there was no specific recording system or process in place to specifically detail contact with US agencies, the Authority submitted that undoubtedly some records would be held. As such, the Authority could not confidently state that information was not held; however, in the absence of a formal recording system, it was unable to put a number on this.

83. As a minimum, the Authority explained, it would need to review the diary and hand-written notebooks of the SIO and his colleagues, along with those of previous postholders going back to 2011. The Authority assessed that even focusing on the last two years or so only, the level of research involved would be sufficiently extensive so as to invoke section 12 of FOISA.
84. The Authority stressed that the results of any such exercise could not be taken, in any way, to be a comprehensive and/or accurate reflection of all contact between the various agencies as there would undoubtedly have been contact that was not recorded as well as records (emails etc.) that had long since been deleted.
85. In light of the above, the Authority submitted that it had no alternative other than to change its position and apply section 12 of FOISA to those parts of the request relating to the number of contacts with the FBI and the Department of Justice, as it would be unable to try to answer these parts within the £600 cost limit.
86. For information relating to the number of contacts with the CIA, the Authority confirmed that it now wished to rely on section 17 of FOISA. The Authority submitted that while its position here was largely anecdotal, in terms of “reasonable searches” for the information, it held an email from the SIO confirming that there had been no contact with the CIA.

*The Commissioner’s views – Part A4*

87. The Commissioner has fully considered the submissions from both parties, including the Authority’s change of position for the information requested in part A4, in which it confirmed it was now relying on section 12(1) of FOISA for information relating to contact with the FBI and the Department of Justice, and on section 17 of FOISA for information relating to contact with the CIA.
88. Having done so, the Commissioner has no option but to find that the Authority was not entitled to withhold the information requested in part A4 under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA at review stage.
89. He therefore requires the Authority to carry out a fresh review and issue the Applicant with a revised review outcome for this part of his request.

***Part B of request – Entwistle memo***

90. In its review outcome, the Authority withheld the above information under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA. During the investigation, the Authority confirmed that it also wished to rely on the exemptions in section 32(1)(a)(i) and section 38(1)(b) to withhold that same information and provided the Commissioner with submissions on the applicability of these additional exemptions.

*The Applicant’s submissions – Part B*

91. In his application to the Commissioner, the Applicant argued that the information requested in part B related to a document that was over 32 years old, the subject of which, and most of its contents, were already in the public domain as, he stated, it was released during the judicial process.
92. The Applicant’s submissions on the public interest in disclosure of the information requested are set out in paragraphs 37-39 above.

*The Authority's submissions on section 34(1)(b) - Part B*

93. The Authority's submissions on the application of the exemption in section 34(1)(b) to withhold the information requested are set out in paragraphs 18-22 above.

*The Commissioner's views on the exemption – section 34(1)(b) – Part B*

94. The Commissioner has considered the submissions from both parties along with the withheld information itself (the document described as the "Entwistle memo").
95. Having done so, the Commissioner is satisfied that this information is held by the Authority for the purpose of an investigation which led to a report being made to the Procurator Fiscal to determine whether criminal proceedings should be brought. The Commissioner therefore concludes that the exemption in section 34(1)(b) is engaged for the information withheld for part B of the Applicant's request.

*The Commissioner's view on the public interest - section 34(1)(b) – Part B*

96. Having found that the exemption in section 34(1)(b) of FOISA is engaged for the information requested in part B, the Commissioner is now required to go on to consider where the public interest lies in disclosure of the information requested.
97. The Commissioner recognises that there exists a significant public interest in the Lockerbie air disaster, given it is "the deadliest terrorist attack on UK soil and the largest homicide case Scotland's prosecutors have ever encountered in terms of scale and complexity", as submitted by the Authority.
98. The Commissioner has also taken regard of the Applicant's claims that most, if not all, of the memo's contents have been made publicly available by various means. However, despite extensive research, where he found various references to this document, the Commissioner has been unable to locate an actual copy of the memo itself in the public domain.
99. In the Commissioner's view, the confidentiality of information held for the purposes of an ongoing investigation is an important and relevant factor here. While the actual information has to be considered in each case, he considers that generally the Authority must be able to exercise some level of control over the disclosure of any information relating to an ongoing investigation in order that it can maintain an expectation of trust and confidence in the criminal justice system, for example, where it considers public disclosure would aid obtaining information to assist an investigation, or for reasons of public interest.
100. Having considered the arguments both for and against the public interest in disclosure of the information, the Commissioner cannot see any over-riding public interest in making available the information withheld here, which is clearly held for the purposes of an investigation by the Authority into the Lockerbie air disaster, an investigation which remains ongoing.
101. The Commissioner therefore finds that the Authority was entitled to withhold the information requested in part B under the exemption in section 34(1)(b) of FOISA.
102. As the Commissioner has found that the Authority correctly withheld the information requested in part B under the exemption in section 34(1)(b) of FOISA, he is not required to go on to consider the application of any of the further exemptions which the Authority sought to rely on to withhold that same information.

***Part E2 of request – Operation Sandwood – Annual numbers of statements taken from (a) witnesses (b) persons of interest***

103. In its review outcome, the Authority withheld the above information under the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA.

***The Applicant's submissions – Part E2***

104. In his application to the Commissioner, the Applicant argued that the exemptions applied by the Authority to withhold the information requested were excessive and irrational given that this part of his request simply required numeric values which would unlikely disclose operationally sensitive information.

105. The Applicant's submissions on the public interest in disclosure of the information requested are set out in paragraphs 37-39 above.

***The Authority's submissions on section 34(1)(b) and section 35(1)(a) and (b) - Part E2***

106. The Authority's submissions on the application of the exemptions in section 34(1)(b) and section 35(1)(a) and (b) to withhold the information requested are set out in paragraphs 18-22 and 27-36 above.

***The Authority's submissions on the information held – Part E2***

107. In its initial comments to the Commissioner, the Authority confirmed that it held the annual number of statements noted/submitted in relation to Operation Sandwood between February 2014 and November 2018, together with the total number of statements obtained and reviewed by Operation Sandwood from legacy investigations.

108. In its later submissions, the Authority explained that these were all classed at witness statements, and so it held information that satisfied element (a) of part E2 of the request (i.e. the number of Operation Sandwood statements taken from witnesses).

109. The Authority subsequently changed its position regarding the statements relating to legacy investigations, recognising that these existed prior to the enquiry. Noting the actual wording of the request, the Authority now considered that it would be reasonable to interpret this part of the request as a request for new statements created over the course of the enquiry following discussions with witnesses. The Authority confirmed that it no longer considered the legacy statements to fall within the scope of this part of the request.

110. In respect of Operation Sandwood statements taken from persons of interests (element (b) of part E2), the Authority submitted that this was more complicated. It explained that, focusing solely on the information held (i.e. the number of witness statements in element (a) of part E2), none of those statements would identify the individual as a person of interest (as this was not a formal term used by the Authority), or as a suspect. Once an individual was formally treated as a suspect, they would then be interviewed under caution as opposed to being asked to give a statement. The Authority noted, however, that it was possible for someone who had previously provided a statement to be later classed as a suspect. The Authority recognised that this part of the request may benefit from additional clarity being provided to the Applicant.

***The Commissioner's views – Part E2***

111. The Commissioner has considered the submissions from both parties along with the withheld information itself.



### *The Commissioners views on the legacy statements – Part E2*

112. In respect of the legacy statements for which, during the investigation, the Authority changed its position and now considered that these did not fall within the scope of this part of the Applicant's request, the Commissioner accepts the Authority's revised position with regard to these. Given that these statements existed before the commencement of the Operation Sandwood investigation, he concurs with the Authority's revised view that these legacy statements cannot be considered to fall within the scope of this part of the request.
113. In light of this, the Commissioner has no option but to find that the Authority was not entitled to rely on the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA at review stage for the legacy statements, given that these do not fall within the scope of this part of the Applicant's request.
114. The Commissioner would stress, however, the importance of ensuring that, on receipt of a request for information, the Authority fully understands what information is covered by that request, takes steps to identify and locate all information falling within scope and does not consider information which is irrelevant.

### *The Commissioner's views on element (a) of Part E2*

115. For element (a) of the request (annual numbers of witness statements for Operation Sandwood), the Commissioner recognises that the witness statements themselves would clearly be held for the purposes of a police investigation. He is therefore satisfied that, in being derived from information clearly held for these purposes, the exemption in section 34(1)(b) also applies to the statistical data requested (i.e. the annual numbers of witness statements for Operation Sandwood). He is therefore satisfied that the exemption in section 34(1)(b) is engaged for the information withheld.
116. As he has found that the exemption in section 34(1)(b) is engaged, the Commissioner must now go on to consider where the balance of public interest lies in relation to the information withheld.
117. Having done so, the Commissioner is not satisfied, on the basis of the submissions provided by the Authority, that the public interest is likewise inherently weighted against disclosure. He can see no justified public interest arguments for withholding the information and considers that the Authority has failed to demonstrate why the balance of public interest favours non-disclosure. As with the information considered in paragraph 65 above, and considering the submissions provided, it is not apparent why disclosure of these historical figures should compromise the investigative process. In the Commissioner's view, the balance of public interest, in this case, lies in making the information available to the Applicant.
118. The Commissioner therefore finds that the Authority was not entitled to withhold the information requested in element (a) of part E2 of the request under section 34(1)(b) of FOISA.
119. As the Authority is also relying on the exemptions in section 35(1)(a) and (b) to withhold that same information, the Commissioner will now go on to consider the application of those exemptions.
120. The Commissioner recognises that the witness statements themselves would clearly be held for the purposes of preventing and detecting crime, and for apprehending and prosecuting offenders and is therefore satisfied that the statistical data requested (i.e. the annual

numbers of witness statements for Operation Sandwood) is derived from information clearly held for those purposes.

121. In relation to section 35(1)(a) and (b), again the Commissioner is not satisfied, from the submissions provided by the Authority, that the harm claimed would manifest as a direct result of disclosure of the information requested here. He notes that the information requested covers the number of statements taken annually over a 12 year period for a high profile police investigation. While the Commissioner accepts that disclosure of the contents of the statements themselves (had they been requested) might reveal any new evidence or investigative activity being pursued, he fails to see how disclosure of the historical statistical information asked for would enable an individual to circumvent justice, would reveal a pattern of investigative activity or would give an insight into the type of policing activity taking place at any given time.
122. The Commissioner is therefore not satisfied that the exemptions in section 35(1)(a) and (b) of FOISA are engaged for the information requested in element (a) of part E2 of the request. He therefore finds that the Authority was not entitled to withhold the information requested here under the exemptions in section 35(1)(a) and (b) of FOISA.
123. Given that the Commissioner has found that the exemptions in section 35(1)(a) and (b) are not engaged, he is not required to go on to consider the public interest in disclosure of that information.
124. As the Authority is not relying on any other exemptions to withhold the information requested in element (a) of part E2 of the request, the Commissioner requires the Authority to disclose it to the Applicant.

#### *The Commissioner's views on element (b) of Part E2*

125. For element (b) of the request (annual numbers of statements taken from persons of interest for Operation Sandwood), the Commissioner has considered the explanation put forward by the Authority. Having done so, the Commissioner is not satisfied that the Authority holds the information requested here. In his view, the correct approach would have been for the Authority to have informed the Applicant, in terms of section 17 of FOISA, that it did not hold the information in the sub-categories listed in element (b), and explain to him why this was the case.
126. By informing the Applicant, at review stage, that it was withholding the information requested in element (b) of part E2 of his request, this would have led the Applicant to believe that the Authority did, in fact, hold that particular information when clearly it did not.
127. In light of this, the Commissioner has no option but to find that the Authority was not entitled to rely on the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA at review stage, for the information requested in element (b) of part E2 of the request.
128. The Commissioner therefore requires the Authority to carry out a fresh review and issue the Applicant with a revised review outcome for this part of his request (i.e. element (b) of part E2).

#### ***Handling of the request for review - timescale for compliance***

129. In his application to the Commissioner, the Applicant was dissatisfied with the failure of the Authority to comply with the statutory timescale in FOISA for responding to his requirement for review.

130. As set out in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the EIRs) (the "[Section 60 Code](https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/)"<sup>4</sup>), section 21(1) of FOISA requires all public authorities to respond "promptly" to a requirement for review (and, in any case, within a statutory 20 working day timescale).
131. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
132. The provision in section 21(1) makes it clear that the 20 working day period is a long-stop and that the overriding requirement is to respond promptly.
133. In its submissions to the Commissioner, the Authority explained that the Applicant's request for review was received on 2 August 2022 and responded to on 9 September 2022. The Authority accepted that the delay in responding constituted a procedural breach, for which it had apologised to the Applicant in its review outcome, and reiterated its apology in its submissions. The Authority was unable to offer any further explanation for the delay due to the passage of time.
134. The Authority further submitted that it no longer used mail books (or anything similar) given it received so little hard copy mail. It explained that office-based staff would immediately scan any mail received and forward it to the relevant team as appropriate. The Authority provided a copy of an email evidencing, as part of the email trail, the date and time of scanning of the Applicant's request for review. This evidenced that the request for review had been sent to the FOI team on 2 August 2022.
135. It is a matter of fact that the Authority did not provide a response to the Applicant's requirement for review, received on 2 August 2022, within 20 working days, so the Commissioner finds that the Authority failed to comply with section 21(1) of FOISA in this respect.
136. The Commissioner notes that the Authority provided the Applicant with an apology for the delay in responding to his request for review.

## Decision

The Commissioner finds that the Authority partially complied 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 by withholding the information requested in part B of the Applicant's request under the exemption in section 34(1)(b) of FOISA, the Authority complied with Part 1 of FOISA.

However, he also finds that the Authority failed to comply with Part 1 of FOISA by:

- relying on the exemptions in section 34(1)(b) and section 35(1)(a) and (b) of FOISA at review stage for the information requested in parts A2, A3, A4 and E2 of the Applicant's request and, in so doing, failed to comply with section 1(1) of FOISA;

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<sup>4</sup> <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

- failing to explain to the Applicant the nature and level of information held in its response to part A2 of the request and, in so doing, failed to comply with section 15(1) of FOISA, and
- failing to comply with section 21(1) of FOISA, by failing to respond to the Applicant's requirement for review within the statutory timescale.

The Commissioner therefore requires the Authority to disclose to the Applicant the information he has found to have been wrongly withheld in element (a) of both parts A3 and E2 of the request. He also requires the Authority to carry out a fresh review for parts A2 and A4, and for element (b) of both part A3 and E2 of the request, and issue the Applicant with a revised review outcome for those parts. He requires the Authority to take these steps by **16 October 2025**.

## **Appeal**

Should either the Applicant or the Authority 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**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Euan McCulloch**  
**Head of Enforcement**

**1 September 2025**