



Scottish Information
Commissioner
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Decision Notice 222/2026

Reports relating to alleged criminal damage

Applicant: Anonymous

Authority: Police Service of Scotland

Case Ref: 202301026

Summary

The Applicant asked the Authority for information relating to alleged criminal damage at a specified address. The Authority refused to confirm or deny whether it held the information requested. The Commissioner investigated and found that the Authority was not entitled to refuse to confirm or deny whether it held the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects responses to requests); 34(1)(b) (Investigations by Scottish public authorities); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 10 May 2023, the Applicant made a request for information to the Authority. He sought information related to a report of alleged damage caused to a specified Community Hub (the Hub) located in a village in South Lanarkshire.
2. The Authority responded on 12 June 2023. It refused to confirm or deny whether it held the information requested or whether it existed, relying on section 18(1) of FOISA, in conjunction with sections 34(1)(b), 35(1)(a) and (b), and 38(1)(b) of FOISA.

3. On 16 June 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant refuted the Authority's reasons for refusing to provide him with the information, arguing that, as part owner of the Hub, he had a right to the information requested.
4. The Authority notified the Applicant of the outcome of its review on 13 July 2023, which upheld its original response in full.
5. On 15 August 2023, 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 he considered that he had a right to the information (if it existed and were held) and the public interest favoured its disclosure.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 17 August 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

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

Section 18(1) – neither confirm nor deny

10. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by it; and
 - (ii) if the information existed and were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest
11. Where section 18(1) of FOISA is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means he is unable to comment in any detail on the Authority's reliance on any of the exemption referred to, or on other matters which could have the effect of indicating whether the information exists or is held by the Authority.
12. In this case, the Authority submitted that any information falling within the scope of the Applicant's request, if held by the Authority, would be exempt from disclosure under sections 34(1)(b), 35(1)(a) and (b), and 38(1)(b) of FOISA.

13. It is not sufficient for the public authority to simply claim that one or more of the relevant exemptions applies. Section 18(1) of FOISA makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information it held would be exempt information under one or more of the listed exemptions.
14. The Commissioner must first, therefore, consider whether the Authority could have given a refusal notice under section 16(1) of FOISA in relation to the information requested, if it existed and were held.

Section 34(1)(b) - Investigations

15. 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.
16. The exemptions in section 34(1) of FOISA are described as “class-based” exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.
17. In its submissions, the Authority explained that the decision to undertake an investigation into any criminal matter is set out under section 20 of the Police and Fire Reform (Scotland) Act 2012. The Authority argued that if the information requested by the Applicant existed and were held, it would be information held for the purposes of an investigation and would therefore be exempt from disclosure under section 34(1)(b) of FOISA.
18. It explained that any information forming part of its assessment of whether there were grounds to institute a criminal enquiry would fall within the scope of this exemption. It added that even where no grounds existed, there was the possibility that an enquiry might be instigated in the future, if new information came to light. Given this, the Authority submitted that even if an investigation was not launched at the time, any such information (if it existed and were held) would still fall within the scope of the exemption, in terms of the Authority’s duty to ascertain whether an investigation was required.
19. The Applicant argued that the Authority’s refusal to provide the information (if any existed) was “wrong” and “unjust”, and that its response was generic and inadequate.
20. Having considered the submissions made to him, and the nature of the request, the Commissioner is satisfied that the information (if it existed and were held) would be held by the Authority for the purposes of an investigation covered by section 34(1)(b) of FOISA. Consequently, he must conclude that the exemption applies.
21. Given that the Commissioner accepts that the Authority was entitled to rely on the exemption in section 34(1)(b) of FOISA for withholding all of the information requested (if it existed and were held), he is required to consider the application of the public interest test in section 2(1)(b) for that information.

Section 34(1) – the public interest

22. As noted above, the exemption in section 34(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
23. The “public interest” is not defined in FOISA but has been described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. The public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. disclosure must serve the interests of the public.

The Authority’s comments on the public interest

24. The Authority acknowledged that there was an inherent public interest in transparency regarding how police investigations were conducted; the accountability for police actions; the public understanding of how public funds were used; and the scrutiny of the Authority’s investigative functions.
25. However, the Authority submitted factors against disclosure outweighed those in favour of disclosure of the information (if it existed and were held). The authority noted that the request sought to confirm details of an incident and evidence of any report (related to that incident). It argued that public disclosure of this information (if it existed and were held) would confirm the level and nature of the Authority’s enquiries, including those involved and their investigative results, and it would serve as an indication to those who remained undetected of how and what means were dedicated to their capture.
26. The Authority stated that the process of conducting an investigation was, by necessity, a confidential process. It argued that those affected by criminal activity were entitled to have their information protected, and that the Police service relied heavily upon the co-operation of many individuals to provide evidence during such investigations.
27. The Authority stated that witnesses and other sources of information cooperated (with the Authority) on the understanding that the information provided would remain confidential unless they were required to give evidence in court. The Authority argued that there was no public interest in the release of information into the public domain that could compromise the future flow of information to the police, and consequently, its ability to effectively fulfil its statutory obligations.
28. The Authority submitted that the public interest lay in protecting its investigatory role and ensuring that the process by which it conducted investigations and gathered information was not, in any way, prejudiced. It contended that the public interest in disclosure of the information (if it existed and were held) was outweighed by the harm that would be caused by such disclosure.

The Commissioner’s view on the public interest for 34(1)(b)

29. The Commissioner has carefully considered all the arguments presented by the Authority and the Applicant.
30. The Commissioner recognises the strong public interest in ensuring that investigations are carried out effectively and that information obtained or created for investigative purposes is protected where disclosure would undermine those processes. Section 34 of FOISA exists to safeguard the ability of Scottish public authorities to investigate matters thoroughly and appropriately, and to support any proceedings arising from those investigations.

31. However, he also considers that there is a legitimate public interest in openness and transparency in how the Authority carries out its functions.
32. In a previous decision, [Decision 030/2024](#)¹ (paragraph 40) the Commissioner found, in similar circumstances, that investigative materials should only be disclosed where the public interest considerations are overwhelming. The Commissioner can (and public authorities should) never discount the possibility of the balance of the public interest favouring disclosure in any given case, but he does not consider there to be any basis for so finding in this case (assuming any information existed and were held), certainly at the time the Authority responded to the request and requirement for review..
33. In the circumstances of this case, the Commissioner accepts that disclosure would be likely to prejudice the investigative process, inhibiting the free flow of information to investigators, or otherwise undermining the authority's ability to conduct similar investigations in the future. There is a significant public interest in preserving the effectiveness and integrity of such investigations, particularly where they relate to the authority's statutory responsibilities. While the alleged incident in question is no doubt of considerable local concern, the Commissioner is not satisfied that the resulting public interest in disclosure (of any relevant information that might exist and be held) would be sufficiently strong, in all the circumstances, to outweigh that substantial public interest in maintaining the exemption.
34. The Commissioner is therefore satisfied, on balance, that the public interest in maintaining the exemption in section 34(1)(b) of FOISA outweighs the public interest in disclosure of the information requested. The Commissioner therefore concludes that the Authority was correct in its application of the exemption in section 34(1)(b) to withhold the information requested.
35. Having accepted that the Authority could give a refusal notice under 16(1) of FOISA on the basis that any relevant information (if it existed and were held) would be exempt information by virtue of section 34(1)(b), the Commissioner is required by section 18(1) to go on to consider whether the Authority was entitled to conclude that it would be contrary to the public interest to reveal whether the information requested existed or was held.
36. As the Commissioner has accepted that the Authority could give a refusal notice under 16(1) of FOISA on the basis that any relevant information (if it existed and were held) would be exempt information by virtue of section 34(1)(b), he is not required to go on to consider if the information requested would also be exempt information by virtue of sections 35(1)(a) and (b) or 38(1)(b) of FOISA.

Section 18(1) – the public interest

37. The Commissioner must now consider whether the Authority was entitled to conclude that it would be contrary to the public interest to reveal whether the information existed or was held.
38. The Applicant submitted that his position, claiming to be a part-owner of the location in question, was that he had a right to the information, and that it was in the public interest for it to be released.
39. The Authority stated that they had never publicly confirmed that the incident alleged took place, and that it was not in the public interest for a Police force to publicly confirm or disclose whether any incident occurred and whether there was evidence of any report made.

¹ [Decision 030/2024 | Scottish Information Commissioner](#)

40. The Authority argued that if it publicly confirmed that a specific crime had occurred or that a particular investigation had taken place or a person charged, it would damage the relationship between the Authority and those individuals who fulfilled a vital role in the investigative process by providing it with information and intelligence. It added that the breakdown of this relationship would be seriously detrimental to the investigative role of the police service.
41. The Commissioner is not persuaded by these arguments. He does not accept that confirming or denying the information's existence (or whether it was held) would cause the prejudice claimed by the Authority. Confirming or denying that the information exists, or is held, is simply just that – it does not extend to disclosure of the actual content or nature of any information (if it existed and were held).
42. The Commissioner has found the Authority's arguments on section 18 to be brief, generic and unconvincing, with little detail. It has claimed that the relationship between itself and the individuals who provide intelligence or information would break down if it confirmed that the information existed or was held, but it has not explained why this would occur (in the context of an incident of this nature). Given this, the Commissioner is not clear why confirmation of whether the information exists or is held in this case would damage the relationship between the police service and those who provide it with information and/or intelligence.
43. In the Commissioner's view, the Authority's arguments for section 18(1) of FOISA focus more on the harm that might occur from the actual disclosure of the information (if it existed and were held), as opposed to confirmation or otherwise of its existence and whether it was held.
44. On balance, therefore, the Commissioner concludes that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.
45. The Commissioner requires the Authority to issue the Applicant with a revised review outcome, otherwise than in terms of section 18(1) of FOISA. He requires the Authority to confirm to the Applicant whether the information requested existed and was held by it when it received the request, and to issue a fresh review outcome in terms of section 21(4)(b) of FOISA.

Decision

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

The Commissioner finds that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed.

The Commissioner therefore requires the Authority to reveal to the Applicant whether the information he requested existed and was held by it when it received his request, and to provide him with a fresh review outcome in terms of section 21(4)(b) of FOISA, by **22 October 2026**.

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

7 September 2026