

# Decision Notice



Decision 117/2009 Mr Derek Cooney and the Police Complaints  
Commissioner for Scotland

Number of complaints

Reference No: 200900609  
Decision Date: 14 October 2009

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr Cooney requested from the Police Complaints Commissioner for Scotland (the PCCS) information relating to the number of complaints that the PCCS had received regarding police forces and police authorities in Scotland and how those complaints had been dealt with. The PCCS provided some information to Mr Cooney, advised him that some information was not held by it and withheld the remainder under section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Cooney remained dissatisfied and applied to the Commissioner for a decision.

During the investigation the PCCS released the remainder of the information which had been withheld, but Mr Cooney remained dissatisfied with the PCCS's handling of his request and asked the Commissioner to issue a decision.

The Commissioner accepted that the PCCS had provided Mr Cooney with all relevant information. However, he concluded that it had breached Part 1 of FOISA by wrongly withholding the requested information until the investigation commenced. The PCCS did not provide any arguments in support of its decision, and so the Commissioner could only conclude that the exemption had been wrongly applied. Since the information had been disclosed, he did not require the PCCS to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6) (General entitlement); section 2(1) and (2)(a) (Effect of exemptions) and section 25(1) (Information otherwise accessible)

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

## Background

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1. On 27 August 2008, Mr Cooney wrote to the PCCS requesting the following information:
  - a. How many complaints have you received for each of the eight police forces in Scotland?
  - b. How many complaints have you refused to investigate because it was not within your powers for each force?
  - c. How many complaints have you refused to uphold for each force?



- d. How many complaints have you upheld for each force?
  - e. Has there been any force that you have not received a complaint about?
  - f. Have you received a complaint against any of the eight police authorities?
  - g. Have you received a complaint against the Scottish Crime and Drug Enforcement Agency?
  - h. Have you received a complaint against the Scottish Police Services Authority?
2. The PCCS responded on 25 September 2008 and released information which it considered fulfilled the terms of parts a, e, f, g and h of Mr Cooney's request. It also advised Mr Cooney that it considered some of the information he had requested in part b and all of the information requested in part c of his request to be exempt from disclosure in terms of section 25(1) of FOISA on the basis that it was available to him on the PCCS website. Additionally, the PCCS advised Mr Cooney that it did not hold some of the information he had requested in part b of his request. The PCCS did not provide a response to part d of the request.
  3. On 2 October 2008, Mr Cooney wrote to the PCCS requesting a review of its decision. In particular, Mr Cooney drew the PCCS's attention to the fact that it had not provided him with a response to part d of his request and that other information to which it had applied section 25(1) of FOISA was not, in fact, available to him via the PCCS website.
  4. The PCCS notified Mr Cooney of the outcome of its review on 27 November 2008. The PCCS advised Mr Cooney that the information it held in relation to part d of his request was otherwise accessible to him via the PCCS website, and was therefore exempt from disclosure in terms of section 25(1) of FOISA. The PCCS upheld the remainder of its original decision without amendment.
  5. On 27 March 2009, Mr Cooney wrote to the Commissioner, stating that he was dissatisfied with the outcome of the PCCS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
  6. The application was validated by establishing that Mr Cooney had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. On 15 April 2009, the PCCS was notified in writing that an application had been received from Mr Cooney and that an investigation into the matter had commenced. The PCCS was also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, the PCCS was asked to provide details of the searches undertaken to locate any information falling within the scope of Mr Cooney's requests, how information is recorded and justification of its reliance on any provisions of FOISA it considered applicable to the information requested.



8. The PCCS responded on 7 May 2009 and provided detailed submissions in response to the investigating officer's questions. This led to additional correspondence between the investigating officer and the PCCS clarifying how the PCCS records information in its databases and publishes information on its website.
9. On 14 May 2009, the PCCS contacted the investigating officer indicating it wished to provide Mr Cooney with detailed responses to the parts of his request that had previously been exempted under section 25(1) of FOISA. In ongoing correspondence with Mr Cooney, the PCCS provided a detailed response to each part of Mr Cooney's request and on 17 June 2009 the PCCS released the last piece of information that fell within the scope of Mr Cooney's original request.
10. In the light of the above developments, Mr Cooney was asked whether he wished to continue with his application to the Commissioner. He confirmed that he had received all the available information he had requested, but he wished to proceed to a formal decision on the grounds that the PCCS did not release the requested information in response to his initial request and that the PCCS website did not reflect the information it held (and which had been released to him during the investigation).

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the correspondence with both Mr Cooney and the PCCS and is satisfied that no matter of relevance has been overlooked.
12. The Commissioner notes that he is obliged to issue a decision in response to an application to him, except in very limited circumstances. The Commissioner is satisfied that none of these circumstances apply in this case. He must therefore consider (as he is required to do in any decision) the application of the exemption in section 25(1) to the information as at the time when the PCCS notified Mr Cooney of the outcome of its review, and disregarding any developments since that time (including the subsequent disclosure of the withheld information to Mr Cooney).

### Consideration of section 25(1) of FOISA

13. The Commissioner must consider whether the PCCS was correct to withhold the information in terms of section 25(1) of FOISA.
14. Section 25(1) of FOISA allows Scottish public authorities to exempt information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA. In this instance the PCCS advised Mr Cooney that the information he sought was available on its website.

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15. The PCCS was invited to provide submissions on its reasons for relying on section 25(1) of FOISA. In response, the PCCS accepted that the section 25(1) exemption did not apply to the information withheld from Mr Cooney and no submissions were provided to justify its earlier position.
16. The Commissioner understands that, during the investigation, it became apparent to the PCCS that the withheld information was recorded in its databases but not available on the PCCS website and therefore it was no longer able to withhold the information in terms of section 25(1) of FOISA. The Commissioner would remind the PCCS that a public authority in receipt of an information request should take reasonable steps to identify whether or not it actually holds the information sought and, if directing an applicant to information available on a website, that the requested information is actually available on that website.
17. In the absence of any submissions to support the application of the exemption contained in section 25(1) of FOISA, the Commissioner can only conclude that the PCCS wrongly applied the exemption at the time of its review of Mr Cooney's information request. As a result, the Commissioner concludes that the PCCS failed to comply with Part 1 and section 1(1) of FOISA in withholding information that was subsequently disclosed to Mr Cooney during the investigation.

## DECISION

The Commissioner finds that the Police Complaints Commissioner for Scotland (the PCCS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cooney. By withholding the information under consideration on the grounds that it was exempt in terms of section 25(1) of FOISA, the Commissioner finds that the PCCS did not comply with section 1(1) of FOISA.

Given that the PCCS disclosed the information under consideration during the investigation, the Commissioner does not require it to take any action in response to this failure.



## Appeal

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Should either Mr Cooney or the Police Complaints Commissioner for Scotland wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**14 October 2009**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

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- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...



**25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-
  - (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if-
    - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,  
members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.