

# Decision Notice



Decision 082/2012 Mr Peter Cherbi and Scottish Ministers

Refusal to confirm or deny that information is held

Reference No: 201200247  
Decision Date: 8 May 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

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## Summary

Mr Peter Cherbi requested from the Scottish Ministers (the Ministers) information concerning a laptop which was stolen in 2009 from a QC. The Ministers refused to confirm whether the information requested existed or was held by them, in terms of section 18(1) of FOISA. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had generally dealt with Mr Cherbi's request for information in accordance with Part 1 of FOISA. In particular, the Commissioner was satisfied that the Ministers were entitled to refuse to confirm or deny whether the information existed or was held by them.

However, the Commissioner also found that the Ministers failed to comply with the requirements of section 16(1)(c) of FOISA by not advising Mr Cherbi which of the exemptions in Part 2 of FOISA they considered would apply if the information existed or was held by them. She did not require the Ministers to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1), (2) and (3) (Refusal of request); 18 (Further provisions as respects responses to request); 35(1)(g) and 2(a) (Law enforcement)

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 24 November 2011, Mr Cherbi emailed the Ministers requesting information concerning a laptop which was stolen in 2009 from a QC who was undertaking work on behalf of the Ministers. The loss of this laptop (and personal data thereon) was reported by the (UK) Information Commissioner, who is responsible for enforcing the Data Protection Act 1998, in August 2011, after the relevant court cases were completed.



2. Mr Cherbi requested information relating to any discussions or communications held by the Scottish Government surrounding the stolen laptop, and any information on whether the Scottish Government discussed or were involved in the decision not to report the case to the Information Commissioner until the cases the QC was working on had finished.
3. The Ministers responded on 22 December 2011, issuing a notice under section 18(1) of FOISA. Section 18 gives Scottish public authorities the right to refuse to reveal whether information exists or is held by them, where they consider that to do so would be contrary to the public interest and, if it did exist and was held by the authority, the information could be withheld under any of the exemptions in sections 28 to 35, 39(1) or 41 of FOISA. In their response, the Ministers did not indicate which of the relevant exemptions they considered would apply if the requested information did exist and was held by them.
4. On 23 December 2011, Mr Cherbi emailed the Ministers requesting a review of their decision.
5. The Ministers notified Mr Cherbi of the outcome of their review on 2 February 2012. They upheld their initial decision to refuse Mr Cherbi's request in terms of section 18(1) of FOISA.
6. On the same day, Mr Cherbi emailed the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Cherbi 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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8. On 24 February 2012, the Ministers were notified in writing that an application had been received from Mr Cherbi.
9. The investigating officer contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking a number of specific questions in relation to the requirements of section 18(1). The Ministers subsequently responded in full.
10. The relevant submissions received from both the Ministers and Mr Cherbi will be considered fully in the Commissioner's analysis and findings below.



## 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 submissions made to her by both Mr Cherbi and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Section 18 of FOISA

12. Section 18 allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
- a request has been made to the authority for information which may or may not be held by it;
  - if the information were held by the authority (and it need not be), the information would be exempt under one of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and
  - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
13. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. She must also establish whether, if the information exists and is held by the public authority, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
14. Whilst doing so, the Commissioner must ensure that her decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that she is unable to comment in any depth on the reliance by the public authority on any of the exemptions listed in section 18(1), or on other matters which could have the effect of indicating whether the information existed or was held by the authority.
15. The Ministers provided the Commissioner with a full explanation as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. The Commissioner is unable to set out these submissions in this decision, but she has considered them fully.
16. In his application, Mr Cherbi challenged the Ministers' application of section 18(1) of FOISA, stating that it was important to understand the full facts of this case.
17. Although she recognises that there is some public interest in allowing understanding of the circumstances leading to the delay in the reporting of the loss of the relevant laptop to the UK Information Commissioner, the Commissioner is satisfied, in the circumstances, that it would be contrary to the public interest for the Ministers to reveal whether the information requested by Mr Cherbi exists or is held by them, for the reasons set out in the Ministers' submissions.



18. As noted above, the Ministers did not inform Mr Cherbi of which exemption(s) they considered would be applicable to the requested information if it did exist, and was held by the Ministers. During the course of the investigation the Ministers submitted that, if the information sought by Mr Cherbi existed and was held by them, it would be exempt under section 35(1)(g) of FOISA.

### **Section 35(1)(g)**

19. Section 35(1)(g) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the ability of a Scottish public authority (or of a public authority which is subject to the Freedom of Information Act 2000) to carry out its functions for any of the purposes mentioned in section 35(2). The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
20. The Ministers indicated that the relevant function was that of ascertaining whether a person has failed to comply with the law, set out in section 35(2)(a).
21. Having considered the Ministers' submissions, the Commissioner is satisfied that, if it existed and was held by the Ministers, the disclosure of the withheld information would, or would be likely to, prejudice substantially the exercise by a relevant authority of the functions in section 35(2)(a). She is therefore satisfied that, if held, the information requested by Mr Cherbi would be exempt from disclosure under section 35(1)(g) of FOISA.
22. The Commissioner is also satisfied that, if the information existed and was held, the public interest in maintaining that exemption would outweigh the public interest in the disclosure of the information.
23. In reaching this conclusion, the Commissioner has recognised the public interest identified by Mr Cherbi in understanding the facts surrounding the delayed reporting of the loss of the laptop to the Information Commissioner, but she is not persuaded that this would outweigh the public interest that would favour maintaining the exemption, if the information existed and was held.
24. On the basis of the above, the Commissioner is satisfied that the Ministers complied with Part 1 of FOISA by refusing to confirm whether the information requested by Mr Cherbi exists or is held by them.

### **Refusal notice under Section 18**

25. In their submissions, the Ministers stated that they were not required to advise Mr Cherbi which exemption (sections 28 to 35, 39(1) or 41) applied by virtue of section 18(1), arguing that sections 16(1) and (2) do not apply when relying on section 18(1). However, the Commissioner disagrees with the Ministers on this point.



26. Section 18(2) specifies that when a request for information is refused in terms of section 18(1) of FOISA, the refusal notice does not need to include the information specified under section 16(1)(a) or 16(2). This means that a refusal under section 18(1) does not need to confirm whether the public authority holds the relevant information, or set out the public authority's reasons for concluding that the public interest would favour maintaining the exemption(s) that would apply, if it were held.
27. However, the requirements in sections 16(1)(b), (c) and (d) must be met within a refusal notice under section 18(1) (although section 16(3) removes the obligation to make a statement under section 16(1)(d) if doing so would itself reveal exempt information). Section 16(1)(c) specifically requires that the public authority specify the exemption(s) in question.
28. Consequently, the Commissioner concludes that the Ministers failed to comply with section 16(1)(c) of FOISA by failing to specify the exemption(s) in sections 28 to 35, 39(1) or 41 that would apply if the information existed or was held by the Ministers. Since this omission has been rectified within this decision, the Commissioner does not require the Ministers to take any action in response to this decision.

## DECISION

The Commissioner finds that the Scottish Ministers generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Peter Cherbi.

The Commissioner was satisfied that the Ministers were entitled to rely on the provisions of section 18(1) of FOISA in responding to Mr Cherbi's request. However, the Commissioner found that the Ministers failed to comply with Part 1 and in particular the requirements of section 16(1)(c) of FOISA by not advising Mr Cherbi which of the exemptions in sections 28 to 35, 39(1) or 41 of FOISA would apply if the information existed or was held by them. She did not require the Ministers to take any action.



## Appeal

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Should either Mr Cherbi or the Ministers 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**  
**8 May 2012**



## 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.

...

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

##### 2 Effect of exemptions

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

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.





- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection 1(d) in so far as the statement would disclose information which would itself be exempt information.

...

### **18 Further provision as respects responses to request**

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

### **35 Law enforcement**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
  - ...
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - ...
- (2) The purposes are-
  - (a) to ascertain whether a person has failed to comply with the law;
  - ...