

# Decision Notice

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## Decision 202/2017: Ms Jennifer McKiernan and Transport Scotland

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### Average speed cameras on A90

Reference No: 201701359

Decision Date: 7 December 2017



Scottish Information  
Commissioner

## Summary

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Transport Scotland was asked for correspondence sent or received by the Minister for Transport regarding average speed cameras on the A90 between Aberdeen (Stonehaven) and Dundee.

Transport Scotland disclosed some information and withheld the remainder. During the investigation, Transport Scotland disclosed the remaining information.

The Commissioner found that Transport Scotland had incorrectly withheld the information which it later disclosed. It also failed to respond to the initial request within the required timescale. The Commissioner does not require Transport Scotland to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 30(b)(i) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 1 May 2017, Ms McKiernan made a request for information to Transport Scotland. She asked (amongst other requests) for copies of any documents written by or sent to Humza Yousaf's office (Minister for Transport and the Islands) referencing the possibility of introducing Average Speed Cameras (ASC) on the A90. On 3 May 2017, Transport Scotland asked Ms McKiernan to clarify her request by explaining which section of the A90 she was referring to. Ms McKiernan replied on the same day that she was interested in "the justification for putting permanent ASC between Aberdeen (Stonehaven) and Dundee".
2. Transport Scotland did not respond. On 1 June 2017, Ms McKiernan asked Transport Scotland to conduct a review of its failure to respond to her request.
3. Transport Scotland notified Ms McKiernan of the outcome of its review on 21 June 2017. It apologised for the delay in replying to her request. It disclosed some information, and withheld the remainder under section 30(b)(i) of FOISA (Prejudice to effective conduct of public affairs).
4. On 3 August 2017, Ms McKiernan applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms McKiernan considered that disclosure was in the public interest, to justify the way in which public money had been spent. She felt this was particularly important as Transport Scotland had stated that it did not hold "the evidence behind the decision".

## Investigation

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5. The application was accepted as valid. The Commissioner confirmed that Ms McKiernan made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.

6. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified on 5 September 2017 that an application had been received from Ms McKiernan and that an investigation into the matter by the Commissioner had commenced. Subsequent references in this decision to submissions sought and received from Transport Scotland are to be read as including submissions sought and received from the Ministers on behalf of Transport Scotland.
7. Transport Scotland was asked to send the Commissioner the information withheld from Ms McKiernan. Transport Scotland provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and answer specific questions including explaining the searches it had conducted and justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. On 18 October 2017, Transport Scotland disclosed further information to Ms McKiernan. It considered that this represented all the information it held which fell within scope of her request. It withdrew its reliance on section 30(b)(i) of FOISA in relation to the information it had now disclosed.
10. Transport Scotland provided submissions to the investigating officer and responded to queries regarding its submissions.

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

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11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Ms McKiernan and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

### **Section 1(1) – Information falling within scope of the request**

12. Section 1(1) of FOISA creates a general entitlement to be given information held by a Scottish public authority which is requested by an applicant, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1.
13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
14. The first question for the Commissioner was whether Transport Scotland was correct to state that all information which fell within scope of Ms McKiernan's request had been disclosed.
15. The Commissioner is satisfied that only information which falls outside the scope of Ms McKiernan's request had been redacted from the documents provided to her.
16. Following the disclosure of information to Ms McKiernan during the Commissioner's investigation, Transport Scotland confirmed that it did not hold any other information falling in scope of the request and was not withholding any information under section 30(b)(i) of FOISA.
17. The Commissioner investigated whether Transport Scotland had identified all the information it held which was covered by Ms McKiernan's request. Transport Scotland provided details

of the searches it had carried out on its electronic Record and Document Management system (eRDMS).

18. Transport Scotland was asked to check whether it held any correspondence with Mr Yousef or his office from before 16 December 2016 (the date of the document disclosed to Ms McKiernan). Transport Scotland confirmed that there was no earlier correspondence. It explained that a “comprehensive site prioritisation exercise” had concluded in autumn 2016. There was no requirement for any discussion with the Minister prior to completion of the exercise.
19. Having considered the information provided to the Commissioner and disclosed to Ms McKiernan, the terms of Ms McKiernan’s request and Transport Scotland’s submissions, the Commissioner concludes that Transport Scotland carried out adequate searches, and identified and disclosed all information falling within scope of Ms McKiernan’s request.
20. However, as Transport Scotland did not disclose all of the information when responding to Ms McKiernan’s request, the Commissioner finds that Transport Scotland failed to comply fully with section 1(1) of FOISA.

### **Section 30(b)(i) – Prejudice to effective conduct of public affairs**

21. Section 30(b)(i) of FOISA is set out in full in Appendix 1. As mentioned above, Transport Scotland withdrew its reliance upon section 30(b)(i) of FOISA and disclosed the information it had previously withheld under this exemption. It did not give reasons for this. The Commissioner must conclude that the information in question was not exempt from disclosure under section 30(b)(i) of FOISA.

### **Timescales**

22. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
23. It is a matter of fact that Transport Scotland did not provide a response to Ms McKiernan’s clarified request for information of 3 May 2017 within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA.

## Decision

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The Commissioner finds that Transport Scotland failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms McKiernan.

Transport Scotland provided some information in compliance with section 1(1) of FOISA but wrongly withheld information under section 30(b)(i) of FOISA. This information was provided during the Commissioner's investigation, but by failing to provide the information when responding to Ms Kiernan's request, Transport Scotland failed to comply fully with section 1(1) of FOISA.

Transport Scotland failed to comply with Ms McKiernan's request within the timescale required by section 10(1) of FOISA.

Given that Transport Scotland has now disclosed all the information falling in scope of the request, the Commissioner does not require Transport Scotland to take any action in respect of these failures in response to Ms McKiernan's application.

## Appeal

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Should either Ms McKiernan or Transport Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**7 December 2017**

## Appendix 1: Relevant statutory provisions

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### 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

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

Information is exempt information if its disclosure under this Act -

...

- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**