



# Decision Notice 030/2024

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## Operation Sandwood Report

**Authority: Chief Constable of the Police Service of Scotland**  
**Case Ref: 202101525**

### Summary

The Applicant asked the Authority for information contained in the full Operation Sandwood report. The Authority refused to disclose this to the Applicant as it related to a criminal investigation.

Following his investigation, the Commissioner found that the Authority had been entitled to withhold the information, because it was held by a public authority for the purposes of an investigation as to whether a person should be prosecuted for an offence (and the public interest favoured maintaining the exemption).

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 47(1) and (2) (Application for decision by Commissioner)

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

1. On 5 July 2021, the Applicant made a request for information to the Authority. They asked for information contained within the full Operation Sandwood report which they understood had been published in November 2018.
2. No response was received from the Authority by the Applicant.

3. On 13 August 2021, the Applicant wrote to the Authority requesting a review of its failure to respond to their information request.
4. The Authority notified the Applicant of the outcome of its review on 20 August 2021. In doing so, the Authority explained that Operation Sandwood was a major police investigation into allegations of criminality against Police Officers, forensic investigators and legal officials involved in the Lockerbie inquiry and the subsequent trial at the Scottish Court in the Netherlands. The Authority refused to disclose the content of the report to the Applicant and relied on the exemptions in sections 34(1)(b), 35(1)(a), 35(1)(b), 38(1)(b) of FOISA for doing so. In its response to the Applicant's requirement for review, the Authority also indicated that the exemptions in sections 31(1) and 32(1)(a) could also be engaged in respect of information in individual parts of the report.
5. The Applicant submitted a second requirement for review to the Authority on 12 October 2021, in which they expressed dissatisfaction with the Authority's decision to rely on exemptions for withholding information from them.
6. On 29 November 2021, the Authority wrote to the Applicant to explain that as they had already exhausted their right to an internal review, having already requested an internal review of its failure to respond to the request within the statutory timescale (the Applicant's letter of 13 August 2023), it could not perform a second review.
7. On 14 December 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review for the following reasons:
  - The investigation into Operation Sandwood had concluded.
  - It was not an investigation into the wider Lockerbie investigation, but rather whether there had been criminality with regard the case against the original indictees.
  - It was clearly in the public interest that the people of Scotland could have full faith and confidence in the Criminal Justice System and the wider UK security services.
  - They commented that the Authority acknowledged that Operation Sandwood was a major police investigation and presumably a significant sum of taxpayer's money had been expended on it. If the investigation found criminality or other failings on the part of individuals involved in the prosecution of government agencies (whether the UK or overseas) then it was of paramount importance that this was disclosed. If nothing was found there was no need to conceal this. 33 years had elapsed since the event at Lockerbie and many of those involved, including the only person to be convicted of the bombing, were no longer here.
8. The Applicant also raised areas of concern over what they considered to be issues around the Authority's compliance with good practice with FOISA. Specifically, they commented on the failure of the Authority to respond to their request for information and then its decision to apply exemptions following review and its failure to respond. The Applicant also expressed dissatisfaction with the Authority's failure to provide them with a postal address to enable contact otherwise than online or via email.
9. In a letter dated 15 February 2022, the Applicant explained that he wanted the Commissioner to investigate whether the Authority was entitled to apply the exemptions cited.

## Investigation

10. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
11. On 28 February 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. The Authority was asked to justify its application of the exemptions (detailed in paragraph 4 above) to the information contained in the Operation Sandwood report. It was also asked to explain its consideration of the public interest test, where applicable. During the course of the investigation, comments were also sought in relation to specific matters of dissatisfaction which were raised by the Applicant in his appeal to the Commissioner.

## Commissioner's analysis and findings

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

### ***Section 34(1)(b) - Investigations by Scottish public authorities***

14. The Authority relied on the exemption in section 34(1)(b) for withholding all of the information contained in the Operation Sandwood report.
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 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.

### *The Authority's submissions about the exemption*

17. The Authority explained that Operation Sandwood was a major police investigation into allegations of criminality against police officers, forensic investigators and legal officials involved in the Lockerbie enquiry and the 2000-2001 trial at the Scottish court in the Netherlands.
18. The Authority submitted that the report itself, is a collection of information, held for the purposes of its Operation Sandwood investigation, which may, in the circumstances, have led to a decision to make a report to the Procurator Fiscal to enable it to determine whether criminal proceedings should be instituted.

### *The Applicant's submissions about the exemption*

19. In their submissions, the Applicant commented that as Operation Sandwood had found no criminality, it had no relevance to any criminal case review, unless it was a judicial review of the findings of Operation Sandwood itself.
20. The Applicant also stated that Operation Sandwood had not directly considered the Lockerbie inquiry or a review of the inquiry. They argued that as there were no findings of criminality and the operation has been closed down, there should be no problem with release of the report.

### *The Commissioner's view about the exemption*

21. The Commissioner has considered the withheld information in this case, together with the submissions presented by the Authority and the Applicant. While the Commissioner cannot publish the Authority's full submissions or his full reasoning, as to do so would require referencing the information withheld, he accepts that the withheld information has been 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.
22. Given that the Commissioner accepts that the Authority was entitled to rely on the exemption in section 34(1)(b) for withholding all of the information in the report, he is required to consider the application of the public interest test in section 2(1)(b) for that information.

### ***The public interest test - section 34(1)(b)***

23. 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.
24. 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 submissions about the public interest*

25. The Authority explained that whilst it is incomparable in terms of subject matter and scale, Operation Sandwood was a police investigation just like tens of thousands of other investigations carried out each year.
26. The Authority accepted that as a high-profile investigation, the public interest could be served by better informing the public as to the nature of the enquiry and the investigation carried out.
27. The Authority also accepted that there was an argument in terms of accountability. It recognised that as a publicly funded organisation it was appropriate that its actions were subject to appropriate scrutiny.
28. However, it took the view that investigative materials ought only to be disclosed where the public interest considerations for doing so are overwhelming. The Authority provided submissions to the Commissioner as to why it did not consider the public interest to meet that threshold in this case.
29. The Authority concluded that overwhelmingly, the public interest lay in withholding the report and the information contained within it.

*The Applicant's submissions about the public interest*

30. The Applicant provided submissions to the Commissioner as to why they considered the public interest to lie in the disclosure of the content of the Operation Sandwood report. These submissions focussed on the fact that the bombing of Pan Am 103 over Lockerbie was Scotland's worst terrorist event and worst case of mass murder, together and the significant coverage there has been, in both the media, books and legal actions in relation to the identities of those responsible and the underlying motive for the bombing.
31. The Applicant argued that it was clearly very much in the public interest that the people of Scotland could have faith and confidence in all components of their criminal justice system and the wider UK security services.
32. The Applicant recognised that the Authority had acknowledged that Operation Sandwood was a major police investigation and presumably had a significant sum of taxpayer's money expended on it. They commented that if the investigation found criminality or other failings on the part of the individuals involved with the prosecution of government agencies (whether UK or overseas) then it was of paramount importance that this was disclosed.
33. The Applicant also argued that if nothing was found, there was no reason to conceal this. They noted that 33 years had elapsed since the event at Lockerbie.
34. The Applicant provided the Commissioner with a copy of a press release issued by the Scottish Criminal Cases Review Commission (SCCRC) which made specific reference to the Operation Sandwood Report. The Applicant highlighted specific parts of the press release which they considered to be pertinent in demonstrating the reasons why there was worldwide public interest in disclosure of the report.
35. In providing evidence to support their view that the public interest lay in disclosure of the withheld information, the Applicant also referred to guidance provided by the UK Information Commissioner's office on consideration of the public interest test.

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

36. The Commissioner has carefully considered all of the arguments presented by the Authority and the Applicant, noting that he is not able to summarise all of these in this decision.
37. The Commissioner recognises and accepts the considerable public interest that exists in the relation to the bombing of Pan Am flight 103 over Lockerbie and the subsequent investigations and trial that have taken place.
38. He also recognises, the need, as the Applicant points out, for the public to have full faith and confidence in all components of the criminal justice system and the wider UK security services.
39. That said, the Commissioner considers that this public interest has been served by the fact that an investigation was carried out into the allegations made, a report prepared and the conclusion from this shared publicly. The Commissioner's finding is further supported by the fact that information already available to the Applicant, and also widely reported in the media at the time, provides details of the outcome following the conclusion of the Operation Sandwood inquiry.

40. Furthermore, the Commissioner agrees with the argument from the Authority that investigative materials should only be disclosed where the public interest considerations are overwhelming. The Commissioner does not consider this to be the case, in this instance.
41. In all the circumstance of the case, the Commissioner is satisfied that the public interest in maintaining the exemption in section 34(1)(b) of FOISA would outweigh the public interest in disclosure of the information contained in the Operation Sandwood report. The Commissioner therefore concludes that the Authority was correct in its application of section 34(1)(b) of FOISA to withhold all of the information in the Operation Sandwood report. Having reached this conclusion, he is not required to consider the application of the other exemptions identified by the Authority.

### ***Handling of request***

42. 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](#)"<sup>1</sup>), sections 10(1) and 21(1) of FOISA requires all public authorities to respond "promptly" to a request or a requirement for review (and, in any case, within a statutory 20 working day timescale).
43. 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.
44. In their application, the Applicant expressed dissatisfaction with what they considered to be a pattern of behaviour on the part of the Authority to fail to disclose information in accordance with FOISA, by failing to respond to initial requests, then applying exemptions following review and failure to respond.
45. In its submissions, the Authority explained that there were a number of factors which delayed its response to the Applicant's request. In particular, the sensitivity of the information covered by the request meant that particular arrangements had to be put in place with the FOI Team around sharing the information.
46. The Authority commented that only a tiny proportion of FOI requests it receives generate "Failure to respond" reviews and it endeavours to meet the statutory deadlines with all requests and the ultimate decision on whether to disclose information is based on the merits of the individual case.
47. In cases of "Failure to respond", the Authority recognised that it does not get a second opportunity to review a decision prior to it potentially being escalated to the Scottish Information Commissioner. As a result, it is conscious of that during the decision-making process. Any suggestion that a delay in responding is a delaying tactic is, the Authority submitted, completely untrue.
48. Having considered the submissions from the Authority, the Commissioner acknowledges that the delays in responding to the Applicant's information request were not the result of an intention to delay disclosure of information. However, having said that, it is a matter of fact that the Authority did not respond to the Applicant's information request within 20 working days. Therefore, the Commissioner finds that it failed to comply with section 10(1) of FOISA.

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<sup>1</sup> [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

49. The Applicant also expressed dissatisfaction because the Authority did not provide them with a postal address to use for correspondence, and given their circumstances they were unable to contact the Authority via email or other electronic means.
50. The Authority commented that it would usually issue a brief covering letter with its postal responses, which would include a postal address for the organisation. The Authority apologised if this had not been included on this occasion.
51. The Commissioner notes the Authority's apology but would stress that it is important that authorities consider the circumstances of the applicant when providing contact details. Taking this step would ensure that applicants are not unfairly disadvantaged because they do not have access to email.

## **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 correctly withholding some information under section 34(1)(b) of FOISA, the Authority complied with Part 1.

However, by failing to respond to the Applicant's information request within 20 working days, the Commissioner finds that the Authority failed to comply with section 10(1).

The Commissioner does not require the Authority to take any action in respect of this failure to respond timeously, in response to the Applicant's application.

## **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.

**David Hamilton**  
**Scottish Information Commissioner**

**13 March 2024**

## **Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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.
- ...

#### **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.
- ...

#### **34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
  - ...
  - (b) 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; or



...

## **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
    - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).