

Our Ref: IM-FOI-2022
Date: 28 February 2022



FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I refer to your recent request for information which has been handled in accordance with the Freedom of Information (Scotland) Act 2002.

For ease of reference, your request is replicated below together with the response.

I am requesting any internal or external correspondence relating to Operation KENOVA sent or received by Police Scotland from October 2021 to date.

To first provide some context, Operation Kenova is a complex and wide-ranging investigation which was launched to investigate allegations of murder, kidnap and torture dating back to the 1970s, with the overriding priority to discover the circumstances of how and why people died.

Chief Constable Iain Livingstone is a member of the Independent Steering Group and a non-executive member of the Governance Board.

The Independent Steering Group is a voluntary group commissioned to provide additional expertise to all of the Operation Kenova investigations, to deliver the best possible investigative response.

The role of the Governance Board is to oversee the stewardship, accountability and leadership of Operation Kenova, providing clear-sighted counsel on the strategic direction, policies and independence of Kenova, ensuring alignment to the Kenova strategy and vision to achieve Article 2 European Convention of Human Rights (ECHR) compliance.

The full terms of reference and further information about the abovementioned operation can be found via the website link at: <https://www.kenova.co.uk/>.

Turning to your request for information and subsequent clarification I can confirm that all of the Police Scotland correspondence relating to Operation Kenova has now been reviewed.

i) I must first advise you that in terms of one item, namely *Neutral Citation No: [2021] NIQB 81 HOR11584*, please be advised that this information is publicly available.

As such, in terms of Section 16 of the Freedom of Information (Scotland) Act 2002, I am refusing to provide you with the information sought. Section 16 requires Police Scotland when refusing to provide such information because it is exempt, to provide you with a notice which:

(a) states that it holds the information,

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- (b) states that it is claiming an exemption,
- (c) specifies the exemption in question and
- (d) states, if that would not be otherwise apparent, why the exemption applies.

I can confirm that Police Scotland holds the information that you have requested and the exemption that I consider to be applicable is set out at Section 25(1) of the Act - information otherwise accessible: "Information which the applicant can reasonably obtain other than by requesting it under Section 1(1) is exempt information".

I can confirm that the information requested is available via the link below:

<https://www.judiciaryni.uk/judicial-decisions/summary-judgment-matters-frederick-scappaticci>

For clarity, the summary table below details all of the information held and reviewed by Police Scotland for your request, with the document referenced above highlighted in blue.

	Document Type	Date	Refers to
1	E-mail / Diary Link	29/11/2021	ISG Meeting 14 Dec 2021
2	E-mail / Diary Link	26/11/2021	ISG Meeting 14 Dec 2021
3	Agenda	26/11/2021	ISG Meeting 14 Dec 2021
4	E-mail	04/11/2021	Operational Update
5	E-mail	18/10/2021	Availability
6	Citation (copy)	01/09/2021	Document in the public domain
7	Board papers (13 sets)	08/11/2021	Gov Board meeting on 17 Nov 2021
8	Travel Itinerary	17/11/2021	Meeting arrangements
9	Gov Board Minutes	22/12/2021	Meeting Minutes from 17 Nov 2021
10	E-mail	18/10/2021	Confirms meeting date 14 Dec 2021
11	E-mail	13/10/2021	Travel arrangements
12	E-mail	19/10/2021	Travel times
13	E-mail	20/10/2021	Gov Board meeting - 17th Nov
14	E-mail	20/10/2021	Confirms travel arrangement
15	E-mail	25/10/2021	Requests confirmation of travel
16	E-mail	15/12/2021	Rescheduled dates for March
17	E-mail	16/12/2021	Thanks & update re Protocol doc
18	E-mail	26/01/2022	PRG meeting dates
19	E-mail	26/01/2022	Meeting dates
20	E-mail	26/01/2022	Meeting dates
21	E-mail	04/02/2022	Teams meeting
22	E-mail	09/02/2022	ISG / PRG Meeting dates
23	E-mail	10/02/2021	ISG Meeting arrangements
24	E-mail	04/10/2021	General update
25	Memo	23/11/2021	Legal Advice
26	E-mail	10/02/2022	Report
27	E-mail	10/02/2022	Draft statement
28	E-mail	25/10/2021	Report

It is important to remember that any disclosure under the Act is not only available to an individual, but is essentially a disclosure to the world.

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Initial redactions have confirmed that there is (virtually) no content remaining within the e-mail correspondence in particular. The remaining documents (e.g. board papers, updates etc.) are considered as not suitable for disclosure in their entirety and therefore in terms of Section 16 of the Freedom of Information (Scotland) Act 2002, I am refusing to provide you with the information sought.

The exemptions that I consider to be applicable to the information requested are;

Section 38(1) (b) - Personal Data.

Personal data is defined in Article 4 of the General Data Protection Regulation (GDPR) as:

'Information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'

Section 38(2A) of the Act provides that personal data is exempt from disclosure where disclosure would contravene any of the data protection principles set out at Article 5(1) of the General Data Protection Regulation (GDPR), which states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'

Article 6 of the GDPR goes on to state that processing shall be lawful only if certain conditions are met.

The only potentially applicable condition is set out at Article 6(1)(f) which states:

'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'

Whilst I accept that you may have a legitimate interest with regards the disclosure of this information and that disclosure may well be necessary for that purpose, I am nonetheless of the view that those interests are overridden by the interests or fundamental rights and freedoms of the data subject.

In addition the following exemptions are applied:

Section 30 (c) - Prejudice to the Effective Conduct of Public Affairs.

Where necessary some internal names / telephone numbers and email addresses have been redacted. To release these details publicly through FOI legislation could negatively impact on the operational effectiveness of various departments and external partner agencies, notwithstanding that some individuals may no longer be with the organisation.

While it is acknowledged that the disclosure of this information would support transparency and better inform the public as to how the Service conducts its business, there are already established routes for the public to make contact with the police and the disclosure of these

additional details would not support the effective conduct of public affairs. As a result, Section 30(c) of the Freedom of Information (Scotland) Act 2002 is engaged.

Section 34 (1) (b) – Investigations. This provides an absolute exemption from disclosure in that information is exempt information if it has at any time been held by Police Scotland for the purposes of an investigation which may lead to a decision to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.

Section 35 (1) (a) & (b) - Law enforcement. Information is exempt information if its disclosure under this Act would, or would be likely to prejudice substantially the prevention or detection of crime and the apprehension or prosecution of offenders. Disclosure would enable interested individuals to identify the focus of the evidence and to release this information would be contrary to the purpose and terms of reference of the operation.

Section 39 (1) - Health, safety and the environment. Police Scotland has a duty of care to its staff and in particular to those officers who specifically work within the areas concerned. Public disclosure of the information would also endanger the safety of those specific individuals as well as members of the wider public.

Section 30 (b) – Free and frank provision of advice or exchange of views. Some references are to opinion, decisions and documents in draft form. Releasing associated information into the public domain is likely to inhibit the manner in which those issues are debated, effectively undermining the ability to ensure that there is sufficient opportunity to ensure all potential concerns and viewpoints are accurately identified and addressed.

Public Interest Test (1)

Although there is generally an acceptance that public accountability may favour disclosure, and that disclosure of the information would inform the public debate on the issue in question. Nevertheless, any disclosure under FOI legislation is a disclosure to the world at large and you will appreciate that the sensitive nature of this operation cannot be overstated. It is crucial that any information released into the public domain is done so in a responsible manner which does not undermine or impede its progress.

Furthermore the public safety considerations involved in this instance clearly favour non-disclosure of the information requested and on balance I believe this is significantly in the public interest. I cannot identify any corresponding viewpoint in disclosing the requested information and therefore the exemptions are upheld.

Finally, in relation to legal advice captured by the scope of the request (i.e. contained within correspondence) the following exemption is applicable:

Section 36 (1) – Confidentiality. Any claim to confidentiality of communications relating to legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.

As you may be aware, for the exemption to apply to this particular type of communication, certain conditions must be fulfilled; namely,

- (i) The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
- (ii) The legal adviser must be acting in their professional capacity; and
- (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.

On that basis I consider the withheld information was subject to legal advice privilege.

The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.

Public Interest Test (2)

As the Information Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB). Generally, the High Court's reasoning will be relevant to the application of section 36(1) of FOISA in this instance.

There is a strong public interest in maintaining legal professional privilege and ensuring the confidentiality of communications between legal advisers and their clients. I would argue that it is important that lawyers can provide free and frank legal advice which considers and discusses all issues and options without fear that such advice might be disclosed and, as a result, potentially taken out of context. Further, if there was an expectation that such legal advice would be disclosed in the future, this would inevitably lead to similar advice being much more circumspect and therefore less effective.

I accept that there is a general public interest in disclosure of the information under consideration, to allow scrutiny of the actions of the Service and contribute to transparency and public accountability. Nonetheless, the Commissioner acknowledges that the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds.

On that basis, the public interest in disclosing the information is outweighed by that in maintaining the exemptions.

If you require further assistance or are dissatisfied with the way in which Police Scotland has dealt with your request, you are entitled, in the first instance, to request a review of our actions and decisions.

Your request must specify the matter which gives rise to your dissatisfaction and it must be submitted within 40 working days of receiving this response - either by email to foi@scotland.pnn.police.uk or by post to Information Management (Disclosure), Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH.

If you remain dissatisfied following the outcome of that review, you are thereafter entitled to apply to the Office of the Scottish Information Commissioner within six months for a decision.

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You can apply [online](#), by email to enquiries@itspublicknowledge.info or by post to Office of the Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS.

Should you wish to appeal against the Office of the Scottish Information Commissioner's decision, there is an appeal to the Court of Session on a point of law only.

As part of our commitment to demonstrate openness and transparency in respect of the information we hold, an anonymised version of this response will be posted to the Police Scotland Freedom of Information [Disclosure Log](#) in seven days' time.