| Police Scotland logo | Freedom of Information ResponseOur reference: FOI 23-1133Responded to: 8th June 2023 |
| --- | --- |

Your recent request for information is replicated below, together with our response.

## In relation to Luke Mitchell and in reference to a previous letter issued by Police Scotland:

## 1. We would be grateful if you could provide us with a copy of the 'strict guidelines' to which you refer in the paragraph of your letter relating to the examination of medical and forensic type samples. Are there written guidelines which require to be followed, or is the position as summarised within that paragraph?

In regards to your specific request, I must advise that Police Scotland do not hold the information requested. As such, in terms of Section 17 of the Freedom of Information (Scotland) Act 2002, this represents a notice that the information requested is not held by Police Scotland.

The ‘strict guidelines’ requested are not recorded but to be of assistance the position is summarised as follows. Please note that this relates to any such request and is not specific to this case.

Forensic samples may well be a piece of evidence in future proceedings or applications to the Scottish Criminal Cases Review Commission (SCCRC) and so preserving the integrity of the samples is or paramount importance. It is not dissimilar from any other approach which is taken towards evidence in a criminal case where maintaining the chain of evidence to secure its integrity whilst in the police’s custody is crucial. The request would therefore be treated as it would be if a defence expert wished access to productions in a live criminal case. That is to say that measures require to be taken to facilitate whilst ensuring that safeguards are in place which permits access in a controlled manner with appropriate oversight.

In cases such as this, Police Scotland would liaise with the Crown Office and Procurator Fiscal Service (COPFS) to determine the scope of the examination that had been agreed.

It is important to note that a legal basis for access would also need to be provided.

## 2. We note, at the top of the second page, you indicate that Police Scotland will not provide any documentation with regard to previous examinations or results in relation to these productions. We would be grateful if you would confirm which of these productions have been examined previously. Please also confirm precisely why it is we will not be provided with any documentation in relation to previous examination or results in relation to these productions. We look forward to receiving from you a comprehensive list of the items which have previously been examined, and a comprehensive list of documentation relating to this which are in the possession of Police Scotland.

Question 2 of your request is split into two parts and I will answer each in turn.

Firstly, you have asked for “any documentation with regard to previous examinations or results in relation to these productions. We would be grateful if you would confirm which of these productions have been examined previously”.

In response to your request, I must advise that Police Scotland do not hold the information requested. This information would be held by the Scottish Police Authority. As such, in terms of Section 17 of the Freedom of Information (Scotland) Act 2002, this represents a notice that the information requested is not held by Police Scotland.

You may wish to consider making a request to the SPA and I have included a link to the relevant page on their website below:

[Freedom of Information - Scottish Police Authority (spa.police.uk)](https://www.spa.police.uk/about-us/accessing-information/)

Secondly you have asked for “Please also confirm precisely why it is we will not be provided with any documentation in relation to previous examination or results in relation to these productions”.

Notwithstanding the above and confirmation that Police Scotland do not hold the documents requested, Police Scotland does hold instructions from COPFS that this information should not be provided.

## 3. We note that Police Scotland is unwilling to provide the name of the Officer authorising disposal. Please confirm the reason for this. It would seem to us that this is an important piece of information in terms of the decision-making process. We can see no reason the individual's identity and rank should be withheld. We do not think that it is relevant, simply because they are no longer employed by Police Scotland, that this information is not to be provided. We are of the view that the information provided thus far is incomplete. We have not been provided with the master document. In particular, given that this master document has been edited to remove the name and designation of the individual who ordered destruction and disposal, we would therefore be grateful if you would provide us with a copy of the book/document which was signed when the productions were signed out of the Production Store in Edinburgh on 26 May 2021.

Question 3 of your request is split into two parts and I will answer each in turn.

Firstly, you have asked for “We note that Police Scotland is unwilling to provide the name of the Officer authorising disposal. Please confirm the reason for this.”

I can confirm that Police Scotland do not hold the rationale behind this decision as recorded information. As such, in terms of Section 17 of the Freedom of Information (Scotland) Act 2002, this represents a notice that the information requested is not held by Police Scotland.

Secondly, you have asked for “we would therefore be grateful if you would provide us with a copy of the book/document which was signed when the productions were signed out of the Production Store in Edinburgh on 26 May 2021”.

In terms of section 16 of the Freedom of Information (Scotland) Act 2002, I am refusing to provide you with the information requested.

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,

(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.

The exemptions that I consider to be applicable to the information requested by you are:

* Section 34(1)(b) – Investigations
* Section 35(1) & (b) – Law Enforcement
* Section 38(1)(b) - Personal Data
* Section 39(1) – Health, safety and the environment

## Section 34(1)(b) – Investigations

Section 34(1)(b) of the Act provides 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.

The matter you are enquiring about was previously subject to a live police enquiry.

**Public Interest Test**

I do appreciate that there is a degree of interest in the release of the information you have requested and that to do so would help inform public debate on policing in Scotland.

However it is essential that any release of information does not interfere or prejudice enquiries or risk such enquiries in the future. To do so would put the enquiries at risk and to do so would be vastly against the public interest.

The balance lies in withholding the information requested at this time.

## Section 35(1) & (b) – Law Enforcement

## Section 39(1) – Health, safety and the environment

In regards to Section 35(1)(a)(b) and 39(1), as per the above, release of this information would be likely to prejudice substantially the ability of the police to investigate and detect crime, and would have a similar detrimental impact on the apprehension or prosecution of offenders.

It would provide an insight into murder investigations and would be extremely useful for criminals and those intent on wrongdoing and would assist them in circumventing the efficient and effective provision of law enforcement by the police service, which in turn would have an adverse impact on the safety of the officers involved and the general public.

This would increase the risk to the personal safety of individuals and also the safety of the police officers responding to incidents.

These are non-absolute exemptions and requires the application of the public interest test.

**Public Interest Test**

Public awareness would favour a disclosure as it would contribute to the public debate surrounding a high profile murder investigation and the police handling of such an enquiry.

I would, however, contend that the efficient/effective conduct of the service and public safety favours retention of the information as it cannot be in the public interest to release information that would prejudice law enforcement or which is likely to have an adverse impact upon public safety.

Accordingly, at this time the public interest lies in protecting the integrity of investigative and criminal justice procedures by refusing to provide the information sought.

I appreciate that there is a public interest in relation to police investigations and in particular murder investigations. That said, it is essential that neither investigations nor the potential for proceedings to be brought against an individual are put at risk.

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

In regards to the requested name specifically, 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 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.

On that basis, it is my view that disclosure of the information sought would be unlawful.

If you require any further assistance please contact us quoting the reference above.

You can request a review of this response within the next 40 working days by email or by letter (Information Management - FOI, Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH). Requests must include the reason for your dissatisfaction.

If you remain dissatisfied following our review response, you can appeal to the Office of the Scottish Information Commissioner (OSIC) within 6 months - [online](http://www.itspublicknowledge.info/Appeal), by email or by letter (OSIC, Kinburn Castle, Doubledykes Road, St Andrews, KY16 9DS).

Following an OSIC appeal, you can appeal to the Court of Session on a point of law only.

This response will be added to our [Disclosure Log](http://www.scotland.police.uk/access-to-information/freedom-of-information/disclosure-log) in seven days' time.

Every effort has been taken to ensure our response is as accessible as possible. If you require this response to be provided in an alternative format, please let us know.