

# Decision Notice

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**Decision 009/2016: Mr Andrew Picken and the Scottish Police Authority**

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**Inquiry Report into Armed Police Policy**

Reference No: 201500831

Decision Date: 19 January 2016



Scottish Information  
Commissioner

## Summary

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On 31 January 2015, Mr Picken asked the Scottish Police Authority (SPA) for any version of the Inquiry Report into Armed Police Policy (Inquiry Report) that was sent to Police Scotland, and correspondence about the report.

The SPA refused to disclose the information, on the basis that disclosure would substantially prejudice the effective conduct of public affairs and so the information was exempt under section 30(c) of FOISA.

The Commissioner investigated and found that the SPA partially failed to respond to Mr Picken's request for information in accordance with Part 1 of FOISA by wrongly withholding some information. She required the SPA to disclose the information listed in Appendix 2 of this decision.

The Commissioner was also critical of the SPA's practice in relation to searching for and locating information, as it failed to locate the information it held when responding to the original request and at review.

## 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); 30(c) (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. Appendices 1 and 2 (Schedule of documents) form part of this decision.

## Background

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1. The SPA was established under the Police and Fire Reform (Scotland) Act 2012 to maintain policing, promote policing principles and continuous improvement of policing, and to hold the Chief Constable of the Scottish Police Service to account.
2. On 31 January 2015, Mr Picken made a request for information to the SPA. He asked for:
  - any versions of the Inquiry Report into Police Scotland's decision to authorise its trained Armed Response Vehicle officers to operate under a Firearms Standing Authority (Armed Police Policy) which were sent to Police Scotland prior to the report's publication.
  - any forms of recorded communication between the SPA and Police Scotland which relate to the content of the final published version of the Inquiry Report.
3. The SPA responded on 6 March 2015. The SPA withheld the information under section 30(c) of FOISA.
4. On 10 March 2015, Mr Picken emailed the SPA requesting a review of its decision on the basis that other public bodies had disclosed similar information to him previously, and he felt there was a clear public interest in its disclosure.
5. The SPA notified Mr Picken of the outcome of its review on 8 April 2015. The SPA upheld its decision without amendment.

6. On 5 May 2015, Mr Picken emailed the Commissioner. Mr Picken applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Picken stated that he was dissatisfied with the outcome of the SPA's review because he considered that there was a clear public interest in the information being disclosed.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Picken made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 22 May 2015, the SPA was notified in writing that Mr Picken had made a valid application. The SPA was asked to send the Commissioner the information withheld from him. The SPA provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPA was invited to comment on this application and answer specific questions, including providing details of the searches it had conducted in identifying the information falling in scope and justifying its reliance on any provisions of FOISA it considered applicable to the information requested. The SPA responded on 22 June 2015.
10. Mr Picken was invited to provide any additional comments as to why the withheld information should be disclosed. He did not provide any comments.
11. The SPA was asked for additional submissions to substantiate its position that the requested information should be withheld under section 30(c) of FOISA. The SPA provided these on 20 July 2015.
12. On 4 August 2015, the SPA was asked to conduct further searches of its electronic and paper records. Following this additional search, the SPA identified further information falling within scope of the request. The SPA was also asked to provide further comments on the drafting process and to explain why certain documents were considered exempt from disclosure. It did so on 21 August 2015.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Picken and the SPA. She is satisfied that no matter of relevance has been overlooked.

### **Was all relevant information identified by the SPA?**

14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold information or further information.
15. The Commissioner's decision can only consider the SPA's response in relation to the information that was held at the date it received the initial request (31 January 2015). Any information created after this date would not fall within the scope of the request.

### *The SPA's submissions*

16. The SPA provided details of the electronic records and network folders that were searched. It explained that the main focus of its searches was the information held by the Lead Director of the project, who was copied in on all correspondence.
17. The SPA explained that the first draft of the Inquiry Report was issued to external parties on 9 December 2014, so searches covered the period from this date until the Inquiry Report was published at the end of January 2015.
18. During the investigation, the SPA was asked to conduct searches of the electronic and paper records held by all staff, not just the Lead Director. In completing this search, the SPA reviewed 10,000 records and found an additional 11 emails (with attachments) some of which fell within the scope of the request. This search also encompassed records of staff that had left the SPA.
19. The SPA located 10 documents (two of these documents include attachments) containing information within the scope of Mr Picken's request. These are listed in Appendix 2.

### *Commissioner's finding*

20. The Commissioner accepts that, by the end of the investigation, the SPA had taken adequate, proportionate steps to establish what information it held falling within scope of the request but is critical of its practice in that these searches were not carried out properly in the first place. This resulted in extra, avoidable, work for both itself and the Commissioner's office.

### **Section 30(c) of FOISA – prejudice to the effective conduct of public affairs**

21. The SPA applied sections 30(c) to all of the withheld information. The withheld information comprises:
  - (i) Draft versions of the Inquiry Report.
  - (ii) Emails asking Police Scotland for comments on the draft Inquiry Report and responses.
22. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
23. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice in question must be substantial and of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

### *The SPA's submissions*

24. In its submission of 21 August 2015, the SPA provided background information regarding the preparation of the Inquiry Report for review by external parties.
25. The SPA Scrutiny Inquiry process ran from September 2014 to late January 2015. The process of conducting the Scrutiny Inquiry involved the establishment of a panel of SPA members. At the outset, the SPA made the commitment that the report of the Scrutiny Inquiry would be delivered to the SPA public board meeting on 17 December 2014.
26. The gathering of evidence to support the Armed Policing Inquiry conclusions involved an invitation to the public and stakeholders to provide written views in response to a series of questions which were accessible through the SPA website. The final element of the evidence gathered as part of the Inquiry process was a public attitudes survey of over 1,000 members of the public.
27. The challenge for the Inquiry secretariat was to synthesise this substantial body of evidence and draft a report where agreed conclusions and recommendations were underpinned by appropriate evidence, within a challenging timescale. The evidence-gathering activity did not conclude until late November 2014 and it became questionable whether the delivery target of the public meeting on 17 December 2014 could be met.
28. A draft report was circulated on 9 December 2014 for comment from Police Scotland, the Scottish Government and Her Majesty's Inspectorate of Constabulary in Scotland (HMICS). Further review took place and on 12 December 2014 a revised draft report was issued for comment.
29. The decision was taken on 15 December 2014 to withdraw the draft report from the December SPA board meeting, to consider the evidence further, and bring the report forward by the end of January 2015. The SPA considered that the 12 December 2014 draft should not have been presented to partners as the formal SPA position, and that more time should have been allowed to establish a consensus within the SPA before seeking external feedback and views.
30. Over the Christmas (2014/15) period, the Inquiry Report was redrafted, incorporating "stylistic track changes material" from Inquiry members. The Lead Officer liaised with the SPA Chair and Chief Executive as well as HMICS on bringing the content to a position where it represented a consensus view which complemented and built on the HMICS report into the deployment of Armed Police<sup>1</sup>.
31. The SPA noted that the crystallisation of the Armed Policing Policy report was necessarily an iterative process which entailed engagement between the SPA, the Scottish Government, HMICS and Police Scotland. There were free and frank exchanges of views which saw the development and improvement of the final report through various drafts. The SPA explained that any paper considered by its members in public would first be developed in private through a series of drafts. Early drafts would be overtaken in the development process and the final version is what is considered and discussed in public. The SPA argued that it was normal practice in policy development for a draft report to change over time.

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<sup>1</sup> <http://www.hmics.org/sites/default/files/publications/HMICS%20-%20Review%20of%20Standing%20Firearms%20Authority%20for%20Armed%20Response%20Vehicle%20Crews%20within%20Police%20Scotland.pdf>

32. In relation to the harm that would result from disclosure of the withheld information, the SPA outlined its working relationships with the Scottish Government and Police Scotland, and argued that the success of these working partnerships required it to protect iterative and private exchanges in the development of a final report.
33. The SPA considered that disclosure of early draft materials, originally shared privately between parties, would significantly damage its ability to fulfil its policy and strategy development roles and to deliver robust scrutiny materials. It considered that disclosure would lead to it being unable to develop materials for public presentation or to effectively test the factual and policy implications of papers, which would lead to less comprehensive and quality assured information entering the public domain, and more papers being taken in private.
34. The SPA also argued that it was likely to suffer reputational damage, if the information was disclosed. It made reference to its previous experience when it had disclosed information on its scrutiny of the Review of Stop and Search practices. It commented that the way in which this information had been used by the media had caused substantial prejudice to the effective operation and credibility of the SPA, and gave examples of how (in its view) the information had been misrepresented, undermining the credibility of the report and the SPA itself. The SPA considered that the same would be likely to occur in this case, as (in its view) the very fact that the request had included early draft materials pointed to a desire to present information out of context of the final published version of the Report.

#### *Mr Picken's submissions*

35. In his request for review Mr Picken noted that another authority had disclosed a draft version of one of its reports. He could see no reason for the SPA to withhold draft information in this instance.

#### *The Commissioner's view*

36. Both the SPA and Mr Picken have referred to the precedent set in previous cases or in responses from other authorities, in relation to similar information requests. The Commissioner is clear that each request must be considered individually, in its own context and circumstances. The decision to disclose or withhold information in one case may inform thinking, but it will not always follow that similar information will be disclosed or withheld in another case.

#### Draft versions of Inquiry Reports – documents 2, 6, 12, 29 and 40a

37. The SPA withheld information from the draft reports and associated email correspondence under section 30(c) of FOISA. Section 30(c) of FOISA exempts information from disclosure which would “otherwise” cause (or be likely to cause) substantial prejudice to the effective conduct of public affairs. The exemption in section 30(c) of FOISA cannot be used where the harm anticipated to follow disclosure relates to future inhibition in exchanging views for deliberation (there is a separate exemption for this, section 30(b)(ii)).
38. The SPA's submissions made it clear that it did not consider the exemption in section 30(b)(ii) of FOISA to apply. This being the case, the Commissioner cannot accept its argument that “the privacy of the drafting process should be maintained to protect the free and frank exchange of views that emerge through the iterative process of finalising draft material”.

39. The Commissioner notes that the SPA is wary of disclosing early drafts of a finalised report in case changes between the versions of the draft report are publicly scrutinised in a way not envisaged by the authors of the report. While the Commissioner notes this point and the SPA's past experience, the issue she must consider is whether the exemption claimed was applied correctly, in terms of FOISA.
40. The SPA provided a detailed explanation of the drafting process for the Inquiry Report, including the key events and milestones in that process. This gave the Commissioner a clear insight into the development of the report, and the differences between versions of the draft report.
41. It is clear from the SPA submissions that there was some pressure to meet the commitment to deliver the Inquiry Report to the public SPA Board meeting on 17 December 2014.
42. Inquiry members had primary responsibility for preparing the report, but it was agreed that the SPA Chair and Chief Executive should have input during the drafting stage and agree the report prior to its publication. By 9 December 2014, a draft report was circulated for comment to Police Scotland, the Scottish Government and HMICS, but discussions on drafting and tone were still ongoing between Inquiry members. Around 15 December 2014, the decision was taken to withdraw the report from the December board meeting agenda to allow the SPA to further consider the evidence it had received during the Inquiry and to establish an SPA consensus before seeking feedback and views from partners.
43. The revised report was issued for review by external partners in January 2015, and it was published on 29 January 2015. Mr Picken made his information request two days later, on 31 January 2015.
44. The Commissioner understands that the Inquiry Report was the product of an intense iterative drafting process, in which it was necessary for the SPA Inquiry members to reach a consensus and then consider comments from external partners.
45. The Commissioner is aware that, if the draft reports are disclosed, there is likely to be some analysis and commentary in the media about the changes made during the re-drafting process. She is also aware that the report concerns a matter of some public controversy and, accordingly, in this case, it was reasonable for the SPA to expect draft versions of the report to be closely scrutinised and publicly discussed, if disclosed. While there is a danger of over-estimating the effect of such scrutiny on the reputation and effective operation of the SPA, the Commissioner accepts that disclosure of the draft reports would be likely to undermine the credibility and authority of the final *report* (which represents the settled view of the SPA, unlike some of the earlier drafts).
46. The Commissioner recognises the benefits, in terms of the effective conduct of public affairs, in granting a period of time for public authorities to discuss and agree their position with other authorities. This ensures that all options and views can be explored, without concern that this process may be exposed to public discussion. This is especially important in the period before a public authority reaches a settled view and makes its view known as a matter of published policy. In some cases, the Commissioner accepts that the need for this "private space" extends beyond the point at which the public authority has made known its final view.
47. The Commissioner does not accept that the effective conduct of public affairs will always be substantially prejudiced if draft information is disclosed. Each case must be assessed on its own circumstances.

48. Mr Picken's request was made very soon after the drafting process was completed and the report was published. This is relevant in assessing the ongoing sensitivity of the information in the draft reports, and the likely effect of its disclosure in response to Mr Picken's request.
49. In this case, the Commissioner accepts that disclosure of draft versions of the Inquiry Report, so soon after its publication and so soon after the drafting process was completed, would be likely to affect the SPA's ability to produce other reports on sensitive or controversial matters through the iterative and collaborative drafting process described above.
50. The Commissioner therefore accepts that the exemption in section 30(c) of FOISA applies to the information in the draft reports. In paragraph 58 she goes on to consider whether the public interest in disclosure of these documents outweighs the public interest in maintaining the exemption and withholding the information.

Emails related to the drafting process - documents 19, 20 and 34a

51. The SPA withheld information from emails relating to the drafting process, for the same reasons as those considered above in relation to the draft reports.
52. The SPA withheld information from the emails under section 30(c) of FOISA. This being the case, the Commissioner cannot accept the SPA's arguments that disclosure would be likely to harm the free and frank exchange of views for the purpose of deliberation. Section 30(c) does not exempt such information from disclosure. The issue for the Commissioner to consider is whether the effect of disclosure would otherwise (or would otherwise be likely to) prejudice substantially the effective conduct of public affairs.
53. The question of whether substantial prejudice would, or would be likely to, follow from disclosure must be answered in relation to the specific content of the information under consideration. In this case, the Commissioner has been given no explanation, and cannot see any reason, why the SPA should anticipate that reporting the content of the emails in the media would be so negative, or so inaccurately represent the practice of the SPA, as to cause or be likely to cause such prejudice. While the Commissioner accepts that the emails form part of the iterative process by which the report was drafted and re-drafted, she does not accept that, for the most part, disclosure of the information in the emails would cause the same level of harm as disclosure of the draft reports.
54. Having considered all of the (limited) arguments put forward by the SPA, the Commissioner does not accept that the exemption in section 30(c) of FOISA applies to all of the information in the withheld emails.
55. As the Commissioner is not satisfied that all of the information in the emails was withheld correctly under section 30(c) of FOISA, she is not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to that information. She requires the SPA to disclose this information to Mr Picken.
56. However, based on the content of the information and its relationship to the draft reports, the Commissioner has concluded that the SPA was correct to conclude that some information from the email attachments is exempt under section 30(c) for the reasons set out in paragraphs 46 to 50 above. This information is contained in documents 19, 20 and 34a.
57. As the Commissioner has found that information is exempt under section 30(c) of FOISA, she will go on to consider whether the public interest in its disclosure, outweighs the public interest in maintaining the exemption and withholding it.



## **The public interest test associated with section 30(c) of FOISA**

58. The Commissioner has concluded that the drafts of the Inquiry Reports and the emails referred to in paragraphs 50 and 56 are exempt from disclosure under section 30(c) of FOISA. The exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure. This means that the Commissioner must go on to consider whether, in all the circumstances, the public interest in disclosing the information outweighs that in maintaining the exemption. If it is, she must order the SPA to disclose the information.

### *The SPA's submissions*

59. The SPA considered that it is in the public interest that "the statutory policing principles are upheld and fulfilled". It argued that this relies on the maintenance of the SPA's relationship with third parties, which would be fundamentally jeopardised by the disclosure of the withheld information, thus jeopardising the fulfilment of the policing principles and actively damaging the public interest.

60. The SPA acknowledged that it may be of interest to the public to see, via the media, early draft materials and compare them with the final published versions to have a supposed inside view into the drafting process. However, the SPA considered that the balance of public interest lies in enabling the SPA to reach conclusions on Armed Policing practice through mutually confidential engagement with other interested parties, and in protecting the privacy of this process.

61. The SPA considered that this case could be considered analogous to the development of policy generally, given that the SPA's views were informed through engagement with third parties. The SPA considered it was reasonable to assume that the conclusions reached would inform and adjust operational policing policy.

62. The SPA concluded that it would fundamentally undermine the successful operation of the SPA as a public authority concerned with police policy, performance and strategy if materials were shared publicly which were produced in the development stage and had been overtaken. Each subsequent draft of any document supersedes the previous draft until a final version is agreed and published.

63. The SPA believed that preserving the principle of working effectively with others on draft materials in private, in order to arrive at the most appropriate conclusions, should take precedence over enabling external parties to speculate upon out-of-date and out-of-context information. Practical experience had led the SPA to consider this a likely potential outcome if early drafts and exchanges were disclosed.

### *Mr Picken's submissions*

64. Mr Picken argued that there was a clear public interest in disclosing the information he had asked for, given the high profile nature of the issue and the public clashes between the SPA and Police Scotland. He pointed out that other public authorities had disclosed draft copies of reports. Mr Picken did not provide any further comments in addition to the point he made his request for review that there is a clear public interest in the information being disclosed which would not do anything to undermine the effective conduct of public affairs.

### *The Commissioner's conclusions*

65. The Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making. The Commissioner considers that this must be balanced against any detriment to the public interest as a consequence of disclosure. Exempt information can only be disclosed under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding the information).
66. The Commissioner accepts that there is a public interest in understanding the changes that were made to the Inquiry Report during the drafting process. The policy of deploying armed police is controversial, and there would be some public interest in understanding fully how the SPA's position developed during the drafting process. Access to the draft reports and associated emails would give members of the public insight that may help them to better assess whether the SPA's review process was appropriate and thorough. This would be in the public interest, given the importance of public trust in policing in Scotland.
67. In relation to the SPA's arguments, the Commissioner accepts that, in general, it is in the public interest for public authorities to be able to prepare and discuss draft documents in a manner which allows them to explore fully the issues in question, without concern that issues or discussions which may not feature in a final draft will be disclosed or taken out of context. However, she does not accept, as a general principle, that it is *always* in the public interest to protect the privacy of policy development or to withhold information from draft reports: each case must be assessed individually.
68. In this case, the Commissioner considers the public interest in the disclosure of the information must be balanced against the public interest in enabling the SPA to engage in an intense, iterative drafting process without concern that each comment or action would be scrutinised and possibly made the subject of detrimental media attention, so soon after the publication of the final report. The Commissioner accepts that the drafting process employed by the SPA was necessary in terms of the quality and thoroughness of its review, and that it is in the public interest for such reports to be the result of careful consideration.
69. The Commissioner considers that the public interest arguments in favour of disclosure are strong, given that the matter under consideration in the Inquiry Report was of serious concern, but, in relation to the specific information under consideration at this point, the Commissioner considers that there is a stronger public interest in maintaining the exemption to avoid harm to the effectiveness of the SPA's review and drafting process, and to its relationships with third parties.
70. Having accepted that disclosure in this case would be likely to cause difficulties for the SPA in its role, the Commissioner also finds that there is substantial weight to the argument that, in this case, the over-riding public interest lies in maintaining the exemption and withholding the information.
71. The Commissioner therefore finds that the SPA was entitled to withhold the information sought by Mr Picken (as outlined in the schedule in Appendix 2) under the exemption in section 30(c).

## Decision

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The Commissioner finds that the Scottish Police Authority (SPA) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Picken.

The Commissioner finds that the SPA was entitled to withhold some information under section 30(c) of FOISA, but wrongly applied the same exemption to the remaining information.

The Commissioner requires the SPA to disclose the documents identified in Appendix 2 of this decision, by **Friday, 4 March 2016**.

## Appeal

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Should either Mr Picken or the Scottish Police Authority (SPA) 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.

## Enforcement

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If the SPA fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SPA has failed to comply. The Court has the right to inquire into the matter and may deal with the SPA as if it had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**19 January 2016**

### 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.

...

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

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

## Appendix 2: Schedule of documents

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The documents listed in this schedule are a subset of a larger set of documents which are covered by this and another application relating to the Inquiry Report. Only the documents relevant to this application are listed here.

Document Number	Document Type	Disclose/Partial Disclosure/Withhold/Exclude	Comments
2	Document	Withhold	
6	Document	Withhold	
12	Document	Withhold	
19	Email	Partial Disclosure	Withhold comments in email dated 15 December 2014 @ 18:15. Disclose remainder.
20	Document	Withhold	
25	Email	Exclude	Exclude - falls within document 28.
28	Email	Disclose	
29	Document	Withhold	
34	Email	Exclude	Exclude - repeat of document 19.
34a	Document	Exclude	Exclude - repeat of document 20.
40	Email	Exclude	Exclude - repeat of document 28.
40a	Document	Withhold	

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