

# Decision Notice



Decision 021/2011 Ms Hollie Greig and the Chief Constable of Grampian  
Police

Criminal investigation and investigation of death

Reference No: 201102014  
Decision Date: 3 February 2012

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
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St Andrews KY16 9DS  
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## Summary

Ms Greig requested from the Chief Constable of Grampian Police (Grampian Police) information relative to two specific investigations, one relating to the death of an individual and one relating to criminal allegations. Grampian Police responded by stating that it did not hold certain of the information, while withholding the remainder under various exemptions in FOISA. Following a review, Ms Greig remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Grampian Police had complied with FOISA in dealing with Ms Greig's information requests. Insofar as the requested information was held by Grampian Police, he accepted that it had been properly withheld under exemptions relating to investigation of the cause of a death (section 34(2)(b)(ii)) or personal data (section 38(1)(a) and (b)).

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e) (Effect of exemptions); 17(1) (Notice that information is not held); 34(2)(b)(ii) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(a) and (b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data") and 2(e) (Sensitive personal data); Schedules 1 (The data protection principles, Part I – the principles) (the first data protection principle); 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6) and 3 (Conditions relevant for purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

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

## Background

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1. On 30 August 2011, Ms Greig wrote to Grampian Police requesting information relative to the investigation of the death of a named individual. The request (request 1) was in the form of 12 separate questions.



2. On 31 August 2011, Ms Greig again wrote to Grampian Police requesting the following information (request 2), which was connected to a specific criminal investigation:
  - a. Who was able to access a Crime Report previously restricted to an officer no longer with the service.
  - b. In what circumstances would a retired officer be called to attend a Criminal Injuries Compensation Appeal relating to a live investigation.
  - c. The details of a named officer's long term sickness.
  - d. The rule, law or code regarding a named officer making a specified disclosure to a GP.
  - e. The copy of a section 117 warrant and the relative supporting evidence.
  - f. The names of officers who assisted a GP at a specific incident.
  - g. Records relative to a specific incident.
3. On 28 September 2011, Grampian Police responded to Ms Greig's request 1, stating that they did not hold some of the information requested. They further stated that the information they did hold was exempt from disclosure in terms of section 34(2)(b)(ii), in that it related to an investigation into a sudden death which Grampian Police had a duty to investigate and report on to the Procurator Fiscal.
4. On 28 September 2011, Grampian Police also responded to Ms Greig's request 2. Explanations were provided in response to request 2a and 2d, while Grampian Police stated that they did not hold information falling within the scope of request 2b and 2e. In relation to request 2c and 2f, Grampian Police indicated that it was withholding the information it held under section 38(1)(b) of FOISA. Information covered by request 2g was withheld under section 38(1)(a) and (b) of FOISA. Grampian Police provided Ms Greig with information relative to request 2g under section 7 of the DPA.
5. On 30 September 2011, Ms Greig wrote to Grampian Police requesting a review of their decisions.
6. On 25 October 2011, Grampian Police notified Ms Greig of the outcome of their reviews in respect of both requests. In relation to request 1, they upheld their original decision, with the exception that they now gave notice that they did not hold information relative to the first of her 12 questions. The review in respect of request 2 also upheld Grampian Police's original decision, in that case with the exception that it now gave notice that it held no information falling within the scope of request 2f.
7. On 25 October 2011, Ms Greig wrote to the Commissioner, stating that she was dissatisfied with the outcome of Grampian Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Ms Greig had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests.



## Investigation

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9. On 21 November 2011, Grampian Police was notified in writing that an application had been received from Ms Greig and asked to provide the Commissioner with any information withheld from her. Grampian Police responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted Grampian Police, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Grampian Police was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested (with specific reference to the provisions cited in its responses to the applicant) and to explain the steps it had taken to identify and locate the information Ms Greig had requested.
11. Grampian Police responded on 20 December 2011, providing submissions indicating that they were relying upon a number of exemptions in FOISA and providing their reasoning for each.
12. The relevant submissions obtained from Ms Greig and Grampian Police will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Ms Greig and Grampian Police and is satisfied that no matter of relevance has been overlooked.
14. Grampian Police variously stating that the requested information was not held, or withheld such information as they held under sections 34(2)(b)(ii), 38(1)(a) or 38(1)(b) of FOISA to withhold the information from Ms Greig. The Commissioner will first of all consider whether Grampian Police were correct to respond in terms of section 17(1) of FOISA that certain information was not held before considering the exemptions relied upon by Grampian Police.

### Section 17 – Information not held

15. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain restrictions which, by virtue of section 1(6), allow Scottish public authorities to withhold information or charge a fee for it. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.



16. Grampian Police advised that it did not hold information to answer certain of the 12 questions set out in Ms Greig's request 1, or information falling within the scope of requests at 2b, e or f of her request 2.
17. In its submissions to the Commissioner, Grampian Police explained (with details and explanations) that it had carried out specific searches and enquiries to confirm that no further relevant information was held. The Commissioner is satisfied that these were adequate in the circumstances.
18. Having considered all relevant submissions and the terms of the requests, therefore, the Commissioner accepts that Grampian Police interpreted Ms Greig's requests reasonably and took adequate steps to establish what information it held and which fell within the scope of these requests.
19. In all the circumstances, therefore, the Commissioner accepts, on the balance of probabilities, that Grampian Police does not (and did not, at the time it received the relevant requests) hold any information falling within the scope of the requests referred to in paragraph 16 above. Grampian Police was, therefore, correct in responding to these parts of Ms Greig's requests in terms of section 17(1) of FOISA.

**Section 34(2)(b)(ii) of FOISA – Investigations by Scottish public authorities and proceedings arising out of such investigations**

20. Grampian Police withheld the information they held and which fell within the scope of request 1 under the exemption in sections 34(2)(b)(ii) of FOISA, which provides that information is exempt from disclosure if it is held at any time for the purposes of an investigation being carried out for the purposes of making a report to the procurator fiscal as respects the cause of death of a person.
21. The exemptions in sections 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.
22. In this case, having reviewed the information withheld and the submissions presented by Grampian Police, the Commissioner is satisfied that the withheld information has been held by Grampian Police for the purposes of an investigation covered by section 34(2)(b)(ii) of FOISA.
23. The Commissioner therefore accepts that the exemption in section 34(2)(b)(ii) of FOISA applies to the withheld information. As noted above, however, this exemption is subject to the public interest test in section 2(1)(b) of FOISA. Consequently, unless the Commissioner is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed.



*Public Interest test*

24. As stated in previous decisions, 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. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. it must serve the interests of the public.

*Submission from Ms Greig*

25. In her submissions to the Commissioner, Ms Greig believed this information needed to be released in the interest of the public, stating there was no good reason not to release it. She stated that there had never been an inquiry into the death, drew comparison with a similar case, and stated that the next of kin had not been given full and frank disclosure in relation to the matter.

*Submission from Grampian Police*

26. Grampian Police recognised a public interest in knowing how such investigations were carried out, particularly in high profile and controversial cases, and in whether the force had carried out such inquiries thoroughly.
27. Grampian Police also submitted, however, that to disclose specific details of how an investigation had been carried out, could hamper the Force's ability to conduct such inquiries in the future, as it would be known exactly what types of enquiries would be made to establish whether any criminality was involved.
28. Grampian Police considered that if witness details were disclosed along with details of the information they had provided to the police, witnesses would be reticent to come forward with information in the future. This reduction of flow of information would prevent the police from carrying out thorough investigations, hampering both the detection of crime and the prosecution of offenders. Grampian Police also submitted that witnesses had the expectation of privacy about the way in which they and the information they provided were handled.
29. Grampian Police concluded on balance that the public interest lay in withholding the information. In coming to this conclusion, Grampian Police stated that they had taken account of the fact that the case in question had previously been reviewed both internally and externally: in their view, this diminished the public interest in disclosure to exercise public scrutiny.





*The Commissioner's view*

30. The Commissioner recognises that Ms Greig has a strong personal interest in fully understanding the circumstances of the death in question and agrees that disclosure would contribute to a fuller understanding of how Grampian Police investigate such matters and, in particular, the death in question. However, in considering this case, the Commissioner must address the question of whether the information withheld by Grampian Police should be made publicly available, and not just to those who may have a personal interest in the matter.
31. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public".
32. The Commissioner's view is set out clearly in *Decision 197/2007 Mr Alan Turner and the Chief Constable of Grampian Police*<sup>1</sup>, in which he stated that the inclusion of section 34 in FOISA reflected an inherent public interest in ensuring the proper and effective conduct of police investigations, and investigations of a similar nature. In this context, there are related public interests in ensuring the ongoing willingness of members of the public to cooperate with the various investigatory processes making up the justice system, and the system for dealing with sudden deaths and fatal accidents.
33. The Commissioner acknowledges that there is a compelling argument for maintaining the exemptions contained in section 34 where they are applied to police reports, even where the information concerned no longer relates to ongoing investigations or proceedings. It is of considerable public interest that individuals remain willing to co-operate with the criminal justice system by providing witness statements and other assistance to the police in the course of their investigations. The Commissioner is satisfied that such willingness would be diminished if, for example, witness statements were to be disclosed routinely under the terms of FOISA.
34. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is significant enough to outweigh that in withholding the information in question. The Commissioner therefore concludes that Grampian Police was correct in its application of section 34(2)(b)(ii) of FOISA to withhold the information held and which fell within the scope of Ms Greig's request 1.

**Section 38(1)(b) – Personal information**

35. Grampian Police submitted that the information requested at 2c above was personal data for the purposes of the DPA and that its disclosure would contravene the first data protection principle on fair and lawful processing. Consequently, it argued that the information was exempt under section 38(1)(b) of FOISA.

<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600889.asp>



36. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts information from disclosure where that information is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles in Schedule 1 to the DPA.
37. In considering the application of this exemption, the Commissioner must first determine whether the information in question is personal data as defined in section 1(1) of the DPA and then, if it is, whether any of it is sensitive personal data as defined in section 2 of the DPA. If he is satisfied that the information is personal data, he will go on to consider whether its disclosure would breach any of the data protection principles, considering the implications of its status as sensitive personal data as and where appropriate.
38. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

*Is the information under consideration personal data?*

39. The Commissioner has considered whether the information withheld is personal data for the purposes of section 1(1) of the DPA; that is, data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in full in the Appendix).
40. The Commissioner has considered the submissions received from Grampian Police on this point. In the circumstances, he is satisfied that any information covered by request 2c would be data relating to a living individual (i.e. the officer concerned) who could be identified from those data. He therefore accepts that the information would be that individual's personal data, as defined by section 1(1) of FOISA.

*Sensitive personal data*

41. Grampian Police submitted that the information sought was also sensitive personal data, in terms of section 2(e) of the DPA, because it related to the named officer's sickness absence and therefore clearly involved consideration of their physical and mental health.
42. Section 2 of the DPA defines sensitive personal data. This includes, at section 2(e), personal data consisting of information as to the data subject's physical or mental health or condition. The Commissioner is satisfied that the information under consideration here clearly relates these matters and is therefore sensitive personal data.
43. The Commissioner will now consider whether disclosure of the information would breach the first data protection principle as submitted by Grampian Police.





*Consideration of the first data protection principle*

44. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing in this case would be disclosure in response to Ms Greig's information request.
45. The Commissioner will first of all consider whether any of the conditions in Schedule 3 can be met, to allow the processing of the personal sensitive data. If none of these conditions can be met, there will be no requirement to go on to consider the application of the conditions in Schedule 2.

*Can any of the conditions in Schedule 3 to the DPA be met?*

46. There are 10 conditions listed in Schedule 3 to the DPA. One of these, condition 10, allows sensitive personal data to be processed in circumstances specified in an order made by the Secretary of State and the Commissioner has also considered the additional conditions for processing sensitive personal data as contained in secondary legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000.
47. The Commissioner's guidance<sup>2</sup> on the section 38 exemption concludes that in practical terms there are only two conditions in Schedule 3 which would allow sensitive personal data to be processed in the context of a request for information under FOISA, namely:  
Condition 1 – the data subject has given explicit consent to the release of the information; or,  
Condition 5 – the information contained in the personal data has been made public as a result of steps taken deliberately by the data subject.
48. In relation to the withheld information, the Commissioner accepts that the data subject has not given explicit consent to the release of the information and he would not expect Grampian Police to attempt to obtain such consent. Consequently, he is satisfied that condition 1 in Schedule 3 cannot be met.
49. Similarly, from the information available to him, the Commissioner is unable to conclude that condition 5 in Schedule 3 can be met in this case.
50. Having also considered the other conditions in Schedule 3, the Commissioner has come to the conclusion that none of these would permit disclosure of the sensitive personal data under consideration here. In the absence of a condition permitting disclosure, that disclosure would also be unlawful. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.

<sup>2</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



### Section 38(1)(a) – Personal Information

51. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
52. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA (where disclosure is generally to the world at large).
53. Ms Greig's request 2g clearly concerned matters in which she was directly involved, and related to her specifically. The Commissioner is satisfied that any information falling within the scope of this request and withheld from Ms Greig in terms of section 38(1)(a) of FOISA relates to her as an identifiable individual and is her personal data. Consequently, the correct route for Ms Greig to obtain this information is via the DPA and the Commissioner notes that Grampian police provided her with information in response to this request, under the DPA.
54. The Commissioner therefore finds that Grampian Police was correct in its application of section 38(1)(a) of FOISA to information covered by request 2g.
55. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld.

### DECISION

The Commissioner finds that the Chief Constable of Grampian Police complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Ms Greig.

Decision 021/2012  
Ms Hollie Greig  
and the Chief Constable of Grampian Police



## Appeal

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Should either Ms Greig or the Chief Constable of Grampian Police wish to appeal against this decision, there is an 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 notice.

**Margaret Keyse**  
**Head of Enforcement**  
**3 February 2012**



## Appendix

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### 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.
- ...
- (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.
- ...
- (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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- ...
- (e) in subsection (1) of section 38 –
    - (i) paragraphs (a), (c) and (d); and
    - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



**17 Notice that information is not held**

(1) Where-

- (a) a Scottish public authority receives a request which would require it either-
  - (i) to comply with section 1(1); or
  - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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

...

(2) Information is exempt information if-

...

(b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-

...

(ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

**38 Personal information**

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;



...

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...





## Data Protection Act 1998

### 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

### 2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

...

(e) his physical or mental health or condition,

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...



**Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data**

...

- 6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

**Schedule 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data**

1. The data subject has given his explicit consent to the processing of the personal data.

...

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

...