

# Decision Notice



Decision 052/2012 Mr X and the Scottish Prison Service

CCTV footage

Reference No: 201102073  
Decision Date: 26 March 2012

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## Summary

Mr X, a prisoner, requested CCTV footage covering a specific prison desk area between particular times. Having apparently assumed that Mr X was only seeking footage in which he appeared within the specified time period, the Scottish Prison Service (the SPS) responded by stating that the information was exempt from disclosure under the exemption at section 38(1)(a) of FOISA (in that it was his own personal information). Following a review, in which SPS upheld its decision in full, Mr X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which it was pointed out that it appeared that the specified footage was not entirely Mr X's own personal data, the SPS additionally cited the exemptions at sections 34(1)(a)(i) (Investigations by a Scottish Public Authority, etc.) and 35(1)(a), (b) and (f) (Law Enforcement).

The Commissioner found that only the part of the CCTV footage in which Mr X appeared was exempt from disclosure under section 38(1)(a) of FOISA. However, she found that the whole of the withheld CCTV footage was exempt from disclosure under section 34(1)(a)(i) of FOISA, because it was held by a public authority for the purposes of an investigation as to whether a person should be prosecuted for a crime. The Commissioner found that, on balance, the public interest lay in maintaining that exemption, and so the SPS had acted in accordance with Part 1 of FOISA when withholding the information in response to Mr X's request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(i) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 38(1)(a) and (5) (definitions of "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions) (definition of "personal data")

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



## Background

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1. On 16 June 2011, Mr X wrote to the SPS requesting the CCTV footage which covered a particular desk area in a prison, over a specified 20 minute period. He indicated that this was in connection with an ongoing complaint. The Commissioner understands that this complaint concerns an allegation of assault made by Mr X, relating to events shown on the relevant footage.
2. The SPS responded on 13 July 2011, advising Mr X that it was withholding the information under section 38(1)(a) of FOISA, on the basis that it was personal data of which Mr X was the data subject.
3. The SPS advised that the request would be dealt with as a subject access request in terms of the DPA, and that the information would be accessible to him unless it was covered by an exemption under the DPA. It asked him to fill out a form and pay a fee before processing the request further.
4. On 19 July 2011, Mr X wrote to the SPS, requesting a review of its decision. He commented that it would have been reasonable for the SPS to consider to what extent the footage could have been provided under FOISA as opposed to the DPA, for example by pixelation or by seeking the consent of third parties shown in the footage.
5. The SPS notified Mr X of the outcome of its review on 18 August 2011, which was to uphold the original decision in full. The SPS's letter referred erroneously to section 31(1)(a) of FOISA, but the wider content of that letter made it clear that the previous decision to apply the exemption section 38(1)(a) had been upheld.
6. On 1 November 2011, Mr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X submitted that the SPS should have provided the information in a pixelated form and that it had failed to found properly upon any exemption and to explain why it would not provide some of the information requested.
7. The application was validated by establishing that Mr X had made a request 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 that request. The case was then allocated to an investigating officer.



## Investigation

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8. Following allocation of this case, the investigating officer wrote to Mr X, highlighting that the exemption in section 38(1)(a) of FOISA creates an absolute exemption from disclosure relating to information that is personal data of the applicant. She noted that, to the extent that Mr X appeared in the requested CCTV footage, the Commissioner was likely to conclude that information was properly withheld under section 38(1)(a) of FOISA. Mr X was advised to consider whether he wished to withdraw his request under FOISA, and pursue it instead under the DPA. He was also asked to confirm whether he was interested in receiving only information in which he appeared, or also footage showing other events and persons.
9. Mr X responded by confirming that he wished to continue with this case, and that he was not just seeking CCTV footage in which he appeared, and he wished to all footage (including that in which he was not present) from the 20 minute period specified. He also stated that there were two cameras in the relevant location, and he wished to see the footage from both angles.
10. The SPS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing (on 28 November 2011) that an application had been received from Mr X and that an investigation into the matter had commenced. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions. Subsequent references to submissions from the SPS are references to submissions made by the Ministers' Freedom of Information Unit on behalf of the SPS.
11. The SPS was asked to provide the Commissioner with a copy of the CCTV footage, and to justify its reliance on any provisions of FOISA it considered applicable to that information. The investigating officer also noted that, given Mr X's comments, it seemed unlikely that the 20 minutes of CCTV footage sought in Mr X's request was entirely his own personal data. The SPS was asked to confirm the extent to which it considered the withheld information to be Mr X's own personal data (and so exempt in terms of section 38(1)(a)), and to confirm whether it considered any other exemptions to be applicable to the withheld footage.
12. In response, the SPS maintained that it still considered Mr X's request as one seeking the footage with regard to the incident complained of, and this was why it considered the request to be most appropriately handled as a subject access request under the DPA. However, following further consideration, the SPS also submitted that the CCTV footage was exempt from disclosure under sections 34(1)(a)(i) and 35(1)(a), (b) and (f) of FOISA.
13. The SPS was unable to provide the Commissioner with a copy of the CCTV footage due to particular software being required to view it. However, the investigating officer and another member of the Commissioner's staff visited the prison in question to view the footage on 21 February 2012. During that visit, the footage covering the period specified by Mr X, from both of the cameras of interest to him, was viewed in full.



14. Mr X was also asked by the investigating officer for his submissions on the matters raised by the case, which he provided.
15. The relevant submissions received from both the SPS and Mr X will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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16. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr X and the SPS and is satisfied that no matter of relevance has been overlooked.

### Section 38(1)(a) of FOISA – personal information

17. As noted above, the SPS initially withheld the CCTV footage sought by Mr X solely on the basis that it was exempt from disclosure under in section 38(1)(a) of FOISA.
18. 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.
19. This exemption exists within 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 information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA does not deny individuals a right of access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
20. Personal data is defined in section 1(1) of the DPA as 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 the Appendix).
21. Viewing of the footage requested by Mr X allowed the Commissioner's staff to confirm that Mr X was only present on camera for a short period within the 20 minutes covered by the withheld footage, and the events of concern to him also occurred during that same period.
22. The Commissioner finds that the parts of the withheld footage showing Mr X and the event about which he has complained constitute data which relate to Mr X, and from which he can be identified (alone or in conjunction with other information held by the SPS). She finds that those limited parts of the footage were correctly found to be Mr X's personal data, and so exempt from disclosure under section 38(1)(a) of FOISA.



23. 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 this information being released or withheld.
24. However, the Commissioner does not consider that the remaining parts of the footage, which do not show Mr X or the events involving him, relate to Mr X, or allow his identification. She therefore finds that the majority of the withheld CCTV footage does not constitute Mr X's own personal data, and so the Commissioner finds that the SPS incorrectly applied the exemption in section 38(1)(a) of FOISA to those parts.
25. Mr X has expressed unhappiness that the SPS's initial response advised him that he could make a subject access request for the information, but when he did, withheld the information, having applied an exemption within the DPA. He has suggested that in offering this advice, the SPS acted in breach of its duty to provide advice and assistance in terms of section 15(1) of FOISA.
26. The Commissioner has considered this point, but notes that the SPS's response made clear that the requested footage would only be made available in response to a subject access request if it was not covered by an exemption within the DPA. As such, it made clear that making a further request would not necessarily lead to disclosure. It is not for the Commissioner to comment on whether or not information should be disclosed in response to a subject access request made under DPA.
27. While the Commissioner has not been able to uphold the SPS's application of the exemption in section 38(1)(a) of FOISA, she finds no failing in its communication of that decision, beyond a minor typographical error, in relation to which she considers the intended content was clear from the wider content of the relevant notice. She considers that the SPS provided appropriate advice and assistance in relation to the alternative route for making a request under the DPA, in line with the SPS's duty under section 15(1) of FOISA.

### **Section 34(1) of FOISA – Investigations by a Scottish public authority**

28. Section 34(1) of FOISA provides a number of exemptions from disclosure which apply if the requested information has at any time been held by a Scottish public authority for the purposes of certain types of investigations. Relevant investigations include those which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i)).
29. It is relevant to note that, for the purposes of the exemptions in section 34(1), the public authority to which a request has been made does not have to be same public authority which has at some time held the requested information for the purposes of a relevant investigation.
30. The SPS applied the exemption in section 34(1)(a)(i) of FOISA on the basis that the information in the CCTV footage has been held for the purposes of an investigation by Central Scotland Police (the police) into a complaint made.



31. The SPS has confirmed that the police took a copy of the withheld CCTV footage for the purposes of that investigation prior to the date when it notified Mr X of the outcome of its review (the date that is relevant for the purposes of this decision).
32. Having considered the submissions from the SPS, the Commissioner is satisfied that, at the relevant time, the withheld footage was held by the police for the purposes of an investigation, which the police had a duty to conduct in order to ascertain whether an individual should be prosecuted for an offence.
33. Therefore, the Commissioner is satisfied that the exemption in section 34(1)(a)(i) of FOISA is applicable to this information.
34. However, the exemptions in section 34(1) are subject to the public interest test required by section 2(1)(b) of FOISA and the Commissioner must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

*The public interest*

35. In its submissions, the SPS stated that the information on the CCTV footage requested by Mr X involved the alleged incident and potential witnesses and the SPS considered that providing the footage to Mr X would undermine the investigation and could lead to potential witnesses being inhibited from co-operating with the investigation.
36. The SPS considered that the public interest in the police being able to conduct investigations into allegations of wrongdoing without potential witnesses facing identification and intimidation, thus inhibiting them from co-operating with the investigation, greatly outweighed the public interest in disclosure of the CCTV footage.
37. Mr X submitted that it is not in the public interest that assaults by official custodians can be carried out on those held in custody. On the contrary, he maintained that there is a clear public interest in exposing such conduct, even by making public information such as CCTV footage in cases where there is no criminal prosecution or finding of guilt. He asserted that there are examples of CCTV footage of such assaults having appeared in the media and went on to state that any unacceptable behaviour of these public employees should be exposed to public scrutiny notwithstanding that a police investigation may have taken place.
38. The Commissioner has considered carefully the arguments made by both Mr X and the SPS, along with the content of the information in the CCTV footage. He has also given consideration to the fact that disclosure under FOISA would mean that the information would be disclosed into the public domain and not just to Mr X.
39. In this case, disclosure of the footage under FOISA would place into the public domain information confirming the nature of CCTV evidence scrutinised by the police in their investigations into an alleged assault, and would make public the identities of the complainant, the alleged perpetrator and any witnesses in the vicinity at the time.



40. The Commissioner accepts that there is a public interest in scrutinising the actions of public servants and ensuring that those in positions of authority do not abuse their positions. However, she is of the view that, if an offence has occurred, the public interest would be best served by the process of reports being made to the Procurator Fiscal and any ensuing court proceedings. In order for such a process to be carried out properly, the police need to be able to carry out their initial investigations without being hampered by the prospect of witness tampering. If investigative information (including CCTV footage) is publicly disclosed, then it gives the potential for witnesses to be pressurised into changing or withdrawing any statements they have made.
41. The Commissioner cannot accept Mr X's view that in cases where an investigation has been carried out and (a) no prosecution is taken forward, or (b) no guilty verdict is arrived at, then information relating to the events and persons about which allegations have been made should be put into the public domain for people to make their own minds up as to whether a person is guilty nonetheless. It is for the Scottish justice system to reach a finding in such matters, and the alternative provides for vigilante justice leading to the potential for intimidation and public embarrassment to individuals who have not been found guilty of any offence.
42. The Commissioner has considered whether obscuring the identities of the individuals appearing on the footage (by pixelation or some other method) could limit the chances of identification, as has been suggested by Mr X, but she considers it would not. This is because the number of individuals liable to be present in the relevant part of a particular prison within the specified times would be relatively small. In the circumstances, the Commissioner considers that, even if faces were obscured, identification by other aspects of the individuals' appearance (such as height, build, skin tone or gait) would still be likely.
43. The Commissioner considers that there are strong reasons for maintaining the exemption in this case, given the timing of Mr X's information request, and the fact that a police investigation was ongoing in relation to events shown in the CCTV footage under consideration. In these circumstances, the Commissioner considers that the public interest in enabling that investigation to proceed fairly and without interference is weighty. In particular, there should be no inhibitions or deterrence to the flow of information and evidence to and from the police in relation to a criminal investigation. Were this flow of information to be impeded, the police would find it difficult to investigate crime, one of their core duties, which would in itself detract from the public interest.
44. Having considered the balance of public interest for and against disclosure in this case, the Commissioner has reached the conclusion that the public interest in maintaining the exemption in section 34(1)(a)(i) outweighs that in disclosure in this case.
45. In the light of the above findings the Commissioner will not go on to consider the application of the exemption at section 35 of FOISA.





## DECISION

The Commissioner finds that the Scottish Prison Service (SPS) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X.

Although she finds that only part of the requested CCTV footage was correctly withheld under section 38(1)(a) of FOISA (on the basis that it constitutes personal data of which Mr X is the data subject), she finds the footage was entirely exempt from disclosure under section 34(1)(a)(i) of FOISA. On balance, the public interest lay in maintaining that exemption, and so the SPS had acted in accordance with Part 1 of FOISA when refusing to supply the requested information.

## Appeal

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Should either Mr X or the Scottish Prison Service 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**  
**Acting Scottish Information Commissioner**  
**26 March 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.

...

- (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

...

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.



...

**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-
- (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
    - (i) should be prosecuted for an offence; or

...

**38 Personal information**

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;

...

- (5) In this section-

...

"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;

...