

# Decision Notice



Decision 067/2009 Mr A and the Chief Constable of Central Scotland Police

Documents relating to a specified incident

Reference No: 200900030  
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**Kevin Dunion**  
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## Summary

Mr A requested from the Chief Constable of Central Scotland Police (Central Scotland Police) witness statements and testimonies relating to a specified incident, along with a report investigating a complaint about how Central Scotland Police handled the incident. Central Scotland Police responded by advising Mr A that it was withholding the requested information under several exemptions contained in the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr A remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Central Scotland Police had dealt with Mr A's request for information in accordance with Part 1 of FOISA, by correctly applying the exemptions contained in section 38(1)(a) and (b) to all of the withheld information. He did not require Central Scotland Police to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e) (Effect of exemptions) and 38(1)(a), (b) and (2)(a)(i) and (b) (Personal data).

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions); Schedules 1 (The data protection principles) (the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6(1)).

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. In a letter dated 25 February 2008, Mr A wrote to the Chief Constable of Central Scotland Police (Central Scotland Police) requesting the following information:
  - a. Copies of witness statements relating to a specified incident
  - b. A copy of the report prepared by an Inspector who investigated a complaint concerning Central Scotland Police's handling of the specified incident



- c. Copies of witness testimonies relating to the same incident
2. Central Scotland Police responded on 9 April 2008. In their response, Central Scotland Police advised Mr A that they were withholding information pertaining to requests a) and c) in terms of sections 34(1)(a)(i), 35(1)(a) and (b) and 38(1)(a) and (b) of FOISA. They also confirmed that they were withholding the report sought in request b) in terms of sections 38(1)(b), 35(1)(g) and (2)(b) and 30(c) of FOISA.
  3. In a letter dated 30 May 2008, Mr A wrote to Central Scotland Police requesting a review of their decision.
  4. Central Scotland Police notified Mr A of the outcome of their review on 4 July 2008. They upheld their original decision not to provide the requested information but provided further explanation of why they considered the exemptions to apply.
  5. Mr A wrote to the Commissioner in a letter dated 12 December 2008, which was received on 5 January 2009. Mr A stated that he was dissatisfied with the outcome of Central Scotland Police's review and applied for a decision in terms of section 47(1) of FOISA.
  6. The application was validated by establishing that Mr A 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.

## Investigation

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7. On 23 January 2009, Central Scotland Police were notified in writing that an application had been received from Mr A and asked to provide the Commissioner with any information withheld from the applicant. Central Scotland Police responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Central Scotland Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, Central Scotland Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. In subsequent correspondence and communications with the investigating officer, Central Scotland Police provided detailed comments on this case and their reasons for relying upon the exemptions they had applied to the withheld information. Central Scotland also notified the investigating officer that they were no longer relying upon the exemption contained in section 30(c) of FOISA and they advised that they now also considered the report to be exempt in terms of section 38(1)(a) of FOISA.
10. The investigating officer then contacted Mr A, to seek his submissions on the issues to be considered in the case.



11. Mr A replied by letter on 2 April 2009 with his submissions. Where relevant, these are summarised and considered in the section below on the Commissioner's Analysis and Findings.

## Commissioner's analysis and findings

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12. 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 Mr A and Central Scotland Police and is satisfied that no matter of relevance has been overlooked.

### Withheld information

13. In this case, Mr A is seeking copies of witness statements and testimonies relating to a specified incident. Mr A is also seeking a copy of the report concerning a complaint regarding the way that Central Scotland Police handled the specified incident.
14. In total, Central Scotland Police are withholding six documents from Mr A.
  - a. The witness statements and testimonies comprise five separate documents
  - b. The report is a single document.

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

15. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. This exemption exists under FOISA because there is a right for individuals to make a request for their own personal information (known as a subject access request) under section 7 of the DPA. The rules under the DPA will therefore usually determine whether the person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) is not to deny individuals a right of access to information about themselves, but to ensure that right is exercised under the DPA and not under FOISA.
16. Section 38(1)(a) is an absolute exemption and is therefore not subject to the public interest. Consequently, if the Commissioner finds that section 38(1)(a) applies to the withheld information, he cannot order Central Scotland Police to disclose under FOISA the information requested by Mr A.
17. "Personal data" is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or 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 definition is set out in full in the Appendix).



18. The Commissioner has considered the withheld information, and he is satisfied that some of the information contained within each of the witness statements and testimonies is Mr A's own personal data. Each contains information which relates to Mr A and events in which he was involved. Mr A can be identified from this information alone, or from other information in the possession of the data controller.
19. For the same reasons, the Commissioner is satisfied that all of the information contained within the report is also Mr A's own personal information. Insofar as the information withheld relates to an incident involving Mr A, and a subsequent complaint about that incident, the Commissioner considers this information to be Mr A's own personal data. The Commissioner is satisfied that Central Scotland Police were correct to conclude that such information in each of the documents under consideration is exempt from disclosure in terms of section 38(1)(a) of FOISA.
20. 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.
21. The Commissioner also notes that Central Scotland Police advised Mr A of his right to access his own personal data under section 7 of the DPA in its response to his initial request. The Commissioner has not been provided with evidence as to whether Mr A has pursued this option, but he is satisfied that Central Scotland Police took steps to advise Mr A on how to access his own personal data outwith FOISA.
22. Having concluded that the report is entirely Mr A's own personal data, and so exempt in terms of section 38(1)(a), the Commissioner is satisfied that Central Scotland Police acted in accordance with Part 1 of FOISA when withholding this information. He has not considered whether any other of the exemptions cited by Central Scotland Police apply to this document.
23. Given that he has concluded that only part of the witness statements should be considered Mr A's own personal data, the Commissioner next considered whether the exemption in section 38(1)(b) applied to these documents.

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

24. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in Schedule 1 to the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
25. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and, secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.



26. Central Scotland Police argued that all of the withheld documents contain information which is the personal data of third parties; police officers and civilians who had some involvement or connection with the specified incident. Central Scotland Police maintained that the exemption in section 38(1)(b) applied to such personal information, because its disclosure would contravene the first data protection principle.
27. As noted above, the Commissioner has only considered this exemption in relation to the witness statements and testimonies.

### **Is the information personal data?**

28. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. As noted above, personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
29. In this case, the information under consideration is the statements and testimonies given by police officers and civilians who were connected to a specific incident.
30. The Commissioner is satisfied that all of the information contained in the testimonies and witness statements is the personal data of the witnesses themselves, while some of it is also Mr A's own personal data. Each witness is identified and the withheld information contains biographical information about them (including name, age and length of service of police officers). Each statement provides the witnesses' account of the incident and their involvement in it, and their personal views and observations thereon. The statements also contain information about other third parties (witnesses) who were connected to the incident.
31. By providing information with regard to the witnesses' views, actions and activities on the date in question and the statements are data which clearly relate to living individuals who could be identified from those data and other information in the possession of the data controller (Central Scotland Police).
32. The Commissioner has therefore concluded that the witness statements are all the personal data of the witnesses concerned for the purposes of section 1(1) of the DPA.

### **Would disclosure breach the first data protection principle?**

33. As noted above, Central Scotland Police have argued that release of the information in question in this case would breach the first data protection principle.
34. The first data protection principle requires that the processing of personal data (here, the disclosure of data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met.



35. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data relating to third parties (i.e. the witnesses) in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA.
36. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
37. The Commissioner must therefore consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed and whether the disclosure of this personal data would be fair and lawful.

*Can any of the conditions in Schedule 2 of the DPA be met?*

38. Central Scotland Police argued that of all the conditions in Schedule 2 of the DPA, only the sixth might permit disclosure of the personal data in this case.
39. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and shares this view. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued 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.
40. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - a. Does the applicant (Mr A) have a legitimate interest in obtaining this personal data?
  - b. If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subjects?
  - c. Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? This will involve a balancing exercise between the legitimate interests of the applicant (Mr A) and those of the data subjects (police officers and civilian witnesses). Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subjects can the personal data be disclosed.



*Does the applicant have a legitimate interest?*

41. Mr A was invited to comment on his legitimate interests, and informed the Commissioner he considers disclosure of the requested documents to be vital if he is to determine the reasoning behind the actions of Central Scotland Police in relation to their handling of the specified incident. Mr A submitted that his personal circumstances had been affected by the actions of Central Scotland Police during this incident, and that he has a personal interest in obtaining full disclosure of all documents pertaining to the incident.
42. The Commissioner has fully considered Mr A's submissions (although he cannot provide details in this Decision Notice) and he is satisfied that, given the nature of the incident in question, Mr A has a legitimate interest in obtaining access to the withheld information.

*Is disclosure of the information necessary to achieve those legitimate interests?*

43. The Commissioner must next consider whether disclosure is necessary for those legitimate interests. In this case the Commissioner, in taking account of the specific information requested by Mr A, is satisfied that disclosure is proportionate and that the aims of Mr A cannot be achieved by any other means which would interfere less with the privacy of the data subjects in question.

*Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?*

44. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the third parties (police officers and civilian witnesses) whose statements and testimonies have been requested. As noted above, this will involve a balancing exercise between the legitimate interests of Mr A and those of the third parties. Only if the legitimate interests of Mr A outweigh those of the third parties can the information be disclosed without breaching the first data protection principle.
45. In a briefing recently published by the Commissioner<sup>1</sup>, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
  - a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
  - b. the potential harm or distress that may be caused by the disclosure.
  - c. whether the individual has objected to the disclosure
  - d. the reasonable expectations of the individuals as to whether the information would be disclosed.

<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>





46. In relation to the statements provided by the police officers and civilian witnesses, Central Scotland Police has submitted that these statements were written with a view to the instigation of criminal proceedings (although it is noted that no criminal proceedings were subsequently commenced in relation to the specified incident). In *Decision 057/2007 Mrs Lilian Gordon and the Chief Constable of Grampian Police*, the Commissioner found that where a witness to an alleged criminal offence or a person accused of such an offence is asked to provide a statement there must be a reasonable expectation that the information could ultimately end up being disclosed in a court of law. In other words, there must be a reasonable expectation that the information could be revealed in open court.
47. In that Decision, the Commissioner noted that this raised the question of whether an expectation that information might be disclosed in open court is the same as an expectation that information might be supplied to any member of the public who requests it. The Commissioner concluded that it is not, and he noted that where information is revealed in the context of court proceedings there are rules and regulations to govern its release and the assumptions that can be drawn from that information. Above all, witnesses and the accused will be given the opportunity to defend that information, explain it, contradict it or attempt to correct inaccuracies. The same protection is not afforded to individuals where this information is released directly to a member of the public.
48. In the same decision, the Commissioner advised that while the individuals contributing to these investigations and subsequent reports may reasonably have expected their information to be disclosed into the controlled environment of the court, he was not satisfied that they would have expected that information to be directly released into the public domain (without it having been first the subject of a court hearing.)
49. In this case, Central Scotland Police have argued that the statements provided by the witnesses (both police officers and civilians) were provided in confidence (for a specific lawful purpose) and that disclosure of the personal data would potentially cause undue harm and distress to the witnesses.
50. Having considered the guidance referred to above, along with the substance of the information under discussion, the Commissioner has concluded that the witnesses (both police officers and civilians) in this case would have had a high expectation that the personal data contained within their statements would not be disclosed into the public domain (without it having been first the subject of a court hearing). The Commissioner acknowledges that police officers are expected to provide written statements in relation to any incident they witness as part of their working life, but he also notes that much of the officers' personal data included in the statements relates to their private life and not their working life. The Commissioner also notes that the officers would have no expectation that this personal data (nor that of any third parties mentioned in their written accounts) would be disclosed in response to a request by a member of the public.



51. The Commissioner has found that disclosure of the third party personal data contained in the witness statements and testimonies would entail an intrusion into the private lives of the witnesses and would be prejudicial to the legitimate interests of those persons. Having balanced the legitimate interests of the data subjects against the legitimate interests identified by Mr A, the Commissioner has concluded that disclosure would be unwarranted in this case.
52. In all the circumstances, the Commissioner is satisfied that Condition 6 of Schedule 2 is not met in this case and so would breach the first data protection principle.
53. Consequently, the Commissioner finds that all of the information contained in the witness statements and testimonies is exempt from disclosure under section 38(1)(b) of FOISA.
54. As the Commissioner has found all of the withheld information to be exempt from disclosure either in terms of section 38(1)(a) or (b) of FOISA, he is not required to consider the other exemptions applied by Central Scotland Police.

## DECISION

The Commissioner finds that the Chief Constable of Central Scotland Police acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr A.

## Appeal

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Should either Mr A or the Chief Constable of Central Scotland 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.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**15 June 2009**



## 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

...

- (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.

...

##### 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.

## Data Protection Act 1998

### 1 Basic interpretative provisions

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;

...

## 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.

...