

Decision Notice 103/2021

Movements of a named person and investigation of accuracy of witness statements

Applicant:

Public authority: Chief Constable of the Police Service of Scotland

Case Ref: 201901207



Scottish Information
Commissioner

Summary

[REDACTED]

Police Scotland refused to disclose the information under sections 34 (Investigations by Scottish public authorities, etc.), 35 (Law enforcement) and 38(1)(b) (Personal information) of FOISA.

The Applicant argued that, on balance, the public interest lay in the disclosure of the information and that his legitimate interest in the disclosure of the third party personal data covered by his request meant that it should be disclosed.

Following an investigation, the Commissioner agreed that the information was exempt from disclosure under the exemptions claimed by Police Scotland.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1),(4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 16(1)(a) and (d) and (3) (Refusal of request); 17(1) (Notice that information is not held); 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement); 38(1)(b), (2A), (5) (definitions of “data protection principles”, “data subject”, “personal data”, “processing” and “UK GDPR”) and (5A) (Personal information); 47(1)(a) (Application for decision by Commissioner); 49(3)(a) (Commissioner’s decision); 57(1) and (1A) (The expression “historical record”); 58(1) and (2)(b) (Falling away of exemptions with time)

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d) (Terms relating to the processing of personal data)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. On 28 February 2018, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland), the REDACTED]. The request was for information held by Police Scotland explaining [REDACTED]. (The information request of 28 February 2018 is set out in full in Appendix 2 to this decision.)
6. Police Scotland originally notified the Applicant that his request was both vexatious and repeated in terms of section 14(1) and (2) of FOISA and that, consequently, they were not obliged to comply with the request.

7. The Applicant sought a review. Police Scotland refused to carry out a review, arguing that, under section 21(8) of FOISA, they were not required to do so. The Applicant wrote to the Commissioner on 14 May 2018, applying for a decision in terms of section 47(1) of FOISA. The Commissioner subsequently issued *Decision 204/2018* on 12 December 2018 which found that the request was neither vexatious nor repeated and that Police Scotland had not been entitled to refuse to carry out a review. He ordered Police Scotland to carry out the review.
8. Police Scotland carried out a review and notified the Applicant of the outcome on 25 January 2019. Police Scotland withheld the information requested by the Applicant under the following exemptions in Part 2 of FOISA:
 - section 34(1)(a) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations)
 - sections 35(1)(a) and (b) (Law enforcement)
 - section 38(1)(b) (Personal information)
9. On 16 July 2019, the Applicant made a further application to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant disagreed with the exemptions applied by Police Scotland, arguing that Police Scotland had given only general arguments and had failed to take account of the specific circumstances of the case.

Investigation

10. The application of 16 July 2019 was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. On 18 July 2019, Police Scotland were notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were invited to comment on this application and to answer specific questions in relation to the exemptions they had applied.
13. During the investigation, additional comments were sought from both the Applicant and Police Scotland. The Applicant also provided the Commissioner with copies of correspondence between his agents and the Crown Office and Procurator Fiscal Service (COPFS), with letters he had received from Police Scotland and with a news article. These are considered in more detail below.

Onus of proof

14. In the Applicant's view, Police Scotland had simply ignored why he was making his information request and had ignored the fact that "justice is a public good which must be seen to be done and which cannot be seen to have been done where exculpatory information has been withheld and where the state maintains the validity of a conviction whose basis is objectively challenged."
15. During the investigation, the Applicant repeated his concerns that Police Scotland had not considered the actual terms of his request or to have tested the exemptions they had applied against the actual information he had requested.

16. After being given an opportunity to comment on the arguments made by Police Scotland to the Commissioner during the investigation (as he had requested), the Applicant commented that it was for Police Scotland to justify their reliance on the exemptions and that it was emphatically not for him to anticipate or speculate on Police Scotland's view as to the public interest in relation to the disclosure of material.
17. This is not a point which Police Scotland had argued – or attempted to argue. For sake of clarity, the Commissioner agrees that the onus is on authorities to justify the use of an exemption. However, it is generally helpful, particularly with exemptions which are subject to the public interest test, or when dealing with requests for third party data (when an applicant's legitimate interests may be relevant), to give applicants an opportunity to comment.

Whether information held

18. The Applicant also commented that Police Scotland had not even indicated (in relation to this application) that it holds the information he requested. This suggests the Applicant may have believed this was the reason for its reliance on "general arguments."
19. However, the Commissioner notes that the refusal notice issued by the Police Scotland dated 25 January 2019 clearly states, in line with section 16(1)(d) of FOISA, that it holds the information.
20. In any event, the Commissioner viewed the information which is the subject of the application at Police Scotland premises on 31 July 2020 and 4 September 2020.

Commissioner's analysis and findings

21. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Historical records

22. It will be noted that the information which the Applicant has requested was, at the time of his request (28 February 2018), almost [REDACTED]. Part 5 of FOISA (Historical records) makes it clear that not all of the exemptions in Part 2 of FOISA can be applied after a certain period. For example, many exemptions (such as those in sections 28 to 29 of FOISA) cannot be applied to a historical record which is more than 15 years old (as defined in section 57(1) of FOISA).
23. In the absence of any reference to the exemptions in sections 34 and 38(1)(b) in Part 5 of FOISA, the exemptions can be applied in perpetuity and regardless of the age of the information. [REDACTED]
24. The exemptions in section 35 can be applied to information which is up to 100 years old (section 58(2)(b)).
25. Therefore, despite the age of the information covered by the Applicant's request, none of the exemptions claimed by Police Scotland have fallen away with time.

Section 34(1)(a) and (b): Investigations by Scottish public authorities, etc.

26. Police Scotland applied three exemptions in section 34 to the information requested by the Applicant.

27. Under the exemptions applied by Police Scotland, information is exempt information if it has at any time been held by a Scottish public authority for the purposes of an investigation –
- which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i))
 - which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii))
 - conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b))
28. Unlike many of the exemptions in Part 2 of FOISA, these exemptions are not subject to a harm test. (For example, the exemptions in section 35, considered below, can only be applied where disclosure would, or would be likely to, prejudice substantially a particular interest.) This means that, provided the information falls into one or more of the categories set out above, the information will be exempt from disclosure.
29. As the Commissioner's briefing¹ on the exemptions in section 34 notes, when the Freedom of Information Bill was going through the Scottish Parliament, the then Lord Advocate commented that the exemptions in section 34(1) were essential for an effective justice system. He believed that witnesses would be inhibited from co-operating in criminal investigations if there was a possibility that the information they gave could be disclosed under FOISA.
30. Nevertheless, all of the exemptions in section 34 are subject to the public interest test in section 2(1)(b) of FOISA. This means that, even if one or more of the exemptions apply, the information must still be disclosed if, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

Application of the exemption

31. Police Scotland has confirmed that the information which is the subject of the application was gathered and recorded for the purposes of an investigation which [REDACTED] had a duty to conduct, to ascertain whether a person should be prosecuted for an offence which, at the time of the enquiry, might have led to a decision by the authority to make a report to the procurator fiscal, to enable the fiscal to determine whether criminal proceedings should be instigated.
32. It is clear to the Commissioner, given the subject matter of the request, a [REDACTED], that any information held by Police Scotland must be, or have been, held by Police Scotland or by its statutory predecessor for the purposes set out in section 34(1)(a)(i) and (ii) and/or (b) of FOISA. The Applicant has not questioned this.
33. The Commissioner is therefore satisfied that the exemptions in section 34(1)(a)(i) and (ii) and (b) apply.

The public interest test

34. As noted above, the exemptions in section 34 are subject to the public interest test in section 2(1)(b) of FOISA.

¹ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section34/Section34.aspx>

Police Scotland's submissions

35. Police Scotland argued that there is a genuine and strong public interest in ensuring that the flow of information and evidence to and from the police in relation to criminal investigations is not deterred or inhibited. If it were, the police would not be in a position to fully investigate whether and by whom a crime had been committed, one of their core duties.
36. Favouring disclosure of the information, Police Scotland recognised that the Applicant is looking for the information to [REDACTED]. The public disclosure of certain information gathered from existing information databases may, in Police Scotland's view, assist in this process.
37. However, Police Scotland considered that there were many more factors favouring the maintenance of the exemptions in the public interest:
 - given the information covered by the request [REDACTED], the exemptions applied give rise to a public interest favouring non-disclosure.
 - the information contains details of statements made to the police by third parties. In Police Scotland's view, this information is generally considered to be confidential and would only be disclosed during court proceedings instigated as a result of the investigation or other due legal process.
 - disclosure may prevent the public contacting the police in future. This would be detrimental to the efficient and effective conduct of the police, as the police must be in a position to fully investigate matters reported to them.
 - similarly, individuals may be discouraged from contacting the police in future for fear that their information may be disclosed into the public domain.
 - the Applicant may receive some of this information through existing judicial disclosure procedures and via the precognition process. Police Scotland commented that, as far as they are concerned, the Applicant has not sought to do this and instead seeks to make public the information gathered during [REDACTED].
38. On balance, Police Scotland considered that, while it could be argued that consideration, such as justice to an individual, i.e. the Applicant, would favour disclosure of the information, the very nature of the criminal investigation into [REDACTED], the applicability of the exemptions in section 34, the interests of third parties, the need to ensure the fair treatment of an individual and the need to protect the flow of information to the police clearly favour maintaining the exemptions.
39. A summary of these submissions was, with the agreement of Police Scotland, shared with the Applicant.

The Applicant's submissions on the public interest test

40. The Applicant was concerned that Police Scotland did not consider the background to his request or the public interest in ensuring fair trials and in righting miscarriages of justice.
41. He commented that Police Scotland were still focussing on the generalities and not on the actual information he had asked for.
42. The Applicant considered that he had asked for a narrow range of information and commented that CCTV images appear in newspapers, on television, etc. all the time and that Police Scotland make good use of this. On 15 April 2021, the Applicant provided the

Commissioner with a letter from Police Scotland (dated 1 April 2021) regarding a complaint he had made to Police Scotland on a separate issue. In responding to his complaint, Police Scotland disclosed the position of the various parties to the complaint and the steps taken by police to investigate matters. The Applicant considered that this provided further evidence that the exemptions applied by Police Scotland in this case should not apply in the public interest.

43. The Applicant provided the Commissioner with a legal Opinion he had received in December 2018, which took the view that the undisclosed information could have a material impact on [REDACTED]. This is addressed in more detail below.
44. On 22 June 2021, the Applicant also provided the Commissioner with a letter he had received from Police Scotland notifying him that their enquiry into [REDACTED] had concluded and wishing to arrange the return of property seized in connection with that enquiry to the Applicant.
45. Although the Applicant did not comment on why this letter was relevant to his application, the Commissioner understands that the Applicant brought this letter to his attention in order to argue that the public interest in maintaining the exemptions in sections 34 and 35 was lower now that the enquiry had concluded.

[Redacted]

46. As noted above, in 2011, [REDACTED]. This decision deals with the same information and the arguments remain relevant.
47. The Commissioner bore in mind that disclosure under FOISA is not just to one person, but has the effect of making information publicly available.
48. He noted that disclosure would place into the public domain information confirming the nature and extent of certain CCTV evidence available to [REDACTED] when investigating [REDACTED], and would reveal details of the steps taken in relation to a particular line of inquiry. The information sought by the Applicant would publicly confirm the nature and extent of the police investigation in that area, and provide insights into a named individual's involvement in that investigation.
49. The Commissioner noted that the matters under consideration may have been aired in the trial and, as such, made public. However, he recognised that public awareness of such facts would fade after those events. In addition, the subject matter of the Applicant's request might not have been explored in detail at the time of the trial. As a result, the fact that the case went to trial should not be given significant weight as favouring public disclosure of information gathered for the purposes of the investigation at a later date.
50. The Commissioner acknowledged and gave some weight to the public interest identified by the Applicant in transparency in the criminal justice system. This applies both generally and in relation to the particular case to which the Applicant's information request relates. The Commissioner recognised that some public interest would be served by disclosure in this case, since it would aid understanding of the police investigation into the relevant case.
51. However, on balance, he considered there to be a stronger public interest in maintaining the exemptions in section 34 of FOISA than in disclosing the information. He considered that there was very considerable public interest in ensuring that the steps taken by the police to conduct a thorough investigation and the identities of the persons who they interviewed

should be kept confidential, except where disclosed in the context of judicial proceedings or related processes.

52. The Commissioner believed it was unquestionably and strongly in the public interest that the public remained confident in and willing to co-operate with the criminal justice system by providing witness statements and other assistance to police in the course of their investigations. He agreed with [REDACTED] that disclosure under FOISA of the information requested by the Applicant would be likely to undermine the confidentiality that is an understood part of police investigations, with the consequence that the public would be less willing to assist the police with future investigations.
53. He also considered that publicly disclosing information recorded and held by the police concerning particular CCTV evidence could provide insights into the police investigative strategies, to the detriment of future investigations. He considered it to be strongly in the public interest that the nature and content of evidence gathered by police is not made publicly available outwith the context of judicial proceedings or related processes, as doing so could undermine such investigations.
54. On balance, therefore, the Commissioner found, in 2011, that the public interest in maintaining the exemptions in sections 34(1)(a)(i) and (b) outweighed that in disclosure of the information withheld from the Applicant.

[REDACTED]

55. [REDACTED]
56. [REDACTED]
57. [REDACTED]

“Specific” public interest arguments

58. [REDACTED] The Commissioner therefore asked both the Applicant and Police Scotland for their comments on whether, in the particular circumstances of this case, there were specific reasons why the public interest in disclosing the information outweighed that in maintaining the exemption.
59. As noted above, the Applicant provided the Commissioner with a legal Opinion he had received in December 2018, which, in summary, considered that the undisclosed information could be of significance to the outcome of his Applicant’s criminal case, and that its non-disclosure was of significance in submitting that the Applicant did not have a fair trial.
60. The Applicant is therefore arguing that there is a justified public interest in the disclosure of the information in order to correct a miscarriage of justice.
61. A summary of the Opinion was, with the agreement of the Applicant, shared with Police Scotland. The Commissioner gave Police Scotland an opportunity to comment on the points raised by the Applicant. Police Scotland repeated that they could not disclose any such evidence without the authority of the Crown, as to do so may prejudice any present or future legal proceedings. Police Scotland also commented that, in their view, they had fully explained their position in relation to the Applicant’s request from a freedom of information point of view.
62. The Applicant clearly believes that the public interest in maintaining the exemptions has diminished with the passage of time.

63. Separately, he commented that [REDACTED]. He considered that this to be a further factor to be weighed in favour of disclosure of the information requested, emphasising its importance to him as an individual.
64. On 21 September 2020, the Applicant sent the Commissioner a copy of a news article which had appeared in [REDACTED]. The Applicant commented that this underlines the extent to which he remains negatively impacted by public statements by individuals associated with the prosecution of the criminal case which is the subject matter of his request. The Applicant asked the Commissioner to note that the case is still the subject of reported public comment by those involved in the investigation and suggested that this impacts on the public interest in disclosure and discourse based on evidence.

Can the Applicant obtain the information in other ways?

65. Given the comments from Police Scotland about freedom of information not being the correct process to obtain the information he wanted (Police Scotland suggested he make an application to COPFS), the Commissioner considered it appropriate to look at whether the Applicant could obtain the information in other ways, as this could be relevant to the public interest test.
66. The Commissioner therefore asked the Applicant to confirm whether he had made such an application to COPFS and what the outcome was – or what he thought the likely outcome of making such an application to the Crown Office would be.
67. The Applicant advised the Commissioner, on 22 August 2019, that there had been an extended criminal process in which the COPFS responded to his agents instructed in the appeal explicitly in terms of FOISA. He also commented that Police Scotland had not sought to rely on section 25 of FOISA (which exempt from disclosure information otherwise accessible to the person making the request), either in relation to his earlier request or this later request and that it had not previously been argued before the Inner House that FOISA did not apply to information he had requested.
68. On 23 August 2020, the Commissioner confirmed that Police Scotland had not applied the exemption in section 25(1), but that his focus was on how this would affect the public interest test (or, in relation to the exemption in section 38(1)(b), considered below, the Applicant's legitimate interests).
69. At various points during the investigation, the Applicant provided the Commissioner with a range of correspondence he or his agents had had with COPFS. This included:
 - a letter from COPFS dated 23 November 2006 to the Applicant's agents, disclosing some information (e.g. copies of police statements for the civilian witnesses who gave evidence at the trial).
 - a letter from COPFS dated 21 December 2006 enclosing a handwritten witness statement and referring to an application made to [REDACTED]. COPFS noted that this was treated as a freedom of information request and passed to the (then) Scottish Executive to deal with on the basis that it was thought appropriate for the request to be resolved before the Petition for recovery of documents, as it may satisfy their requirements in relation to the extradition process, and as it made little sense for there to be two processes to recover information going on at the same time.
 - a letter from COPFS dated 23 April 2008 relating to a petition for recovery of documents and enclosing a wide range of information, including certain witness statements

- a letter sent by COPFS to his agents on 24 July 2009. This letter made it clear that enquiries were being made with the police to obtain a list of the CCTV footage recovered in the course of its investigation. The Crown said it would provide a list to the Applicant's agents and, thereafter, any request they wished to make for copies of the footage they did not already have would be provided to them.
- a letter from the Applicant's agents to COPFS dated 24 December 2012, referring to its letter of 24 July 2009 above, asking about the outcome of their enquiries and why the information had never been disclosed to the Applicant.
- a letter sent to COPFS on 15 April 2010. Part of this letter was headed "Ongoing Non-disclosure of material evidence" and stated that the Crown Office had failed to disclose to the Applicant's agents material which they have requested on numerous occasions (e.g. CCTV "stills") and other material in their possession (e.g. [REDACTED] CCTV footage), despite an apparent undertaking to disclose the information.
- a letter from COPFS dated 21 April 2010 which appears to be a response to the letter of 15 April 2010 and which thanked the Applicant for his letter and noted the contents, but made it clear it had no further comments to make.
- [REDACTED] In the Applicant's view, this underlined that his requests to COPFS had been entirely fruitless.
- a letter from the Applicant's agents to the Commissioner (dated 20 January 2020) which advised the Commissioner that they recollected writing to COPFS to request information but that the correspondence was not responded to and COPFS did not provide the information when they requested it. The Applicant's agents said that, despite efforts being made to request the information from COPFS, there is an unwillingness on COPFS' part to provide it. It is their understanding that, while COPFS has a perpetual duty to disclose exculpatory evidence, the duty is one which it alone discharges and COPFS alone decides whether information is, or is not, exculpatory. In the Applicant's agents' view, therefore, it was highly unlikely that COPFS will supply the information.
- a letter from COPFS (dated 11 February 2021), confirming that it was satisfied that its disclosure obligations have been met and that, if the Applicant wished to proceed with a Petition for Recovery of Documents, it would consider the petition in due course
- the Commissioner has also seen documents which the Applicant lodged with the Outer House of the Court of Session in relation to judicial review proceedings, which included a legal Opinion provided to the Applicant on 28 May 2021. This notes that the Applicant has "sought rigorously" to obtain the information but has been unsuccessful.

The Commissioner's conclusions on the public interest

70. The Commissioner's role is to determine whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemptions. Given the inter-relationship between the exemptions in section 34(1)(a)(i) and (ii) and (b), he will consider the public interest test in section 2(1) at the same time.
71. In the Commissioner's view, there is a very strong public interest in protecting the ability of Police Scotland to investigate crimes. The Applicant wants information which was given to Police Scotland in confidence, or which was gathered by Police Scotland for the purposes of a criminal investigation, to be disclosed into the public domain. The Commissioner is

satisfied that such disclosure would, particularly given the high profile of the criminal investigation, be very likely to deter others from providing information to Police Scotland.

72. The Commissioner also recognises that there are a number of arguments in favour of disclosing the information:
- there is a presumption running through FOISA that openness is, in itself, to be regarded as something which is in the public interest: public confidence will be increased by openness and transparency with regard to actions taken by the police, especially important where the investigation involves a crime [REDACTED]
 - there is a public interest in revisiting a conviction which the Applicant clearly believes was unjustified
73. Having weighed the public interest in maintaining the exemptions against the public interest in disclosing the information, the Commissioner is satisfied, on balance, and in all the circumstances of the case, that the public interest lies in maintaining the exemptions.
74. As noted above, the Commissioner concluded [REDACTED] that the public interest in disclosing the information was outweighed by the public interest in maintaining the exemptions in section 34 applied by Police Scotland. Although almost [REDACTED] have passed, the Commissioner considers that these public interest arguments remain relevant.
75. He has also considered whether the information which the Applicant has requested under FOISA is in fact available to him by other means as well as the more specific public interest arguments put forward on this occasion by the Applicant.
76. It is clear that the Applicant has attempted over the years to obtain the information by means other than FOISA. It is also clear from information provided by the Applicant to the Commissioner that some of the information falling within the scope of his request has already been provided to him or his agents.
77. The Commissioner has taken account of the “specific” public interest arguments made by the Applicant, and the Opinions which suggested that the disclosure of the information could evidence a miscarriage of justice. The Commissioner’s role is not, of course, to determine whether a miscarriage of justice has occurred, but to determine whether a public authority has correctly applied the provisions in FOISA to a request, including the correct balancing, where relevant, of where the public interest lies.
78. Nevertheless, the Commissioner has carefully viewed and considered the information covered by the Applicant’s request and has had regard to that information when considering whether the public interest in disclosing the information is outweighed by that in maintaining the exemptions.
79. What the correspondence and other documents provided by the Applicant does show is that there are processes whereby the Applicant can seek information and statements without the information and statements being placed into the public domain, as is the case with any disclosure under FOISA, and without the negative effect such disclosure would have on the flow of information and evidence to and from the police in relation to criminal investigations. (The Commissioner notes the Applicant’s comments about the letter sent to him by Police Scotland on 1 April 2021, responding to a complaint he had made. He does not consider the position to be analogous to a request made under FOISA. In that letter, Police Scotland were responding to a complaint made by the Applicant and not to an information request made under FOISA. In responding to the complaint, there is no expectation that the

information is placed into the public domain, even if Police Scotland did not specifically set any restrictions on the Applicant's use of the information in their response. The Commissioner also notes the Applicant's reference to the letter from COPFS dated 21 December 2006. However, the consideration of information under FOISA in that case will necessarily be determined on the specific facts of that case. Likewise, it does not necessarily follow that information disclosed in one case will lead to other information being disclosed in another case.)

80. The Applicant also argued that the public interest in maintaining the exemption has diminished with the passage of time. However, the Commissioner notes that, [REDACTED] stated that it was not persuaded that the public interest in maintaining the exemption diminishes with the passage of time. It noted that the Scottish Parliament had made specific provision in section 58 of FOISA for the falling away of exemptions with time.
81. In the Commissioner's view, the fact that the Scottish Parliament determined that the section 34 exemptions applied by the Police Scotland should last in perpetuity certainly reduces the weight to be given to this argument. This does not mean, of course, that information which is found to be exempt under section 34 of FOISA can never be disclosed in the public interest. On each occasion, the public interest in disclosure needs to be balanced against the public interest in maintaining the exemption.
82. The fact that Police Scotland's enquiry into [REDACTED] has now "concluded" does not, in the Commissioner's view, have an impact on the balance of the public interest in this case; the closure of the case appears to be an administrative step.
83. Similarly, the Commissioner is not persuaded by the Applicant's argument that the fact that the [REDACTED] is a further factor in favour of disclosure. The Commissioner recognises that the Applicant will now be entitled to have his case considered by the Parole Board, but the Commissioner understands that it is not the function of the Parole Board to investigate possible miscarriages of justice or to raise any misgivings about the correctness of a conviction. In any event, the Commissioner is required to determine the public interest at the time Police Scotland responded to the Applicant's request for review, i.e. as at 25 January 2019. In *Scottish Ministers v Scottish Information Commissioner*,² the Court of Session stated, at paragraph [31]:

... any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of [FOISA].
84. On balance, therefore, and having considered all aspects of the public interest argued by both the Applicant and Police Scotland, the Commissioner is satisfied that the public interest in the disclosure of the information is outweighed by the public interest in maintaining the exemptions.
85. The Commissioner is therefore satisfied that the information requested by the Applicant is exempt from disclosure under sections 34(1)(a)(i) and (ii) and (b) of FOISA.

Section 35(1)(a) and (b): Law enforcement

86. Police Scotland applied two exemptions in section 35 to the information withheld from the Applicant. ([REDACTED] also applied these exemptions when the Applicant asked for this information in 2010. At that point, the Commissioner did not consider it necessary to

² <https://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

consider whether the exemptions applied in [REDACTED] as he had already concluded that the information was exempt from disclosure under section 34 of FOISA. However, for completeness, the Commissioner considers it appropriate to consider these exemptions, despite having already concluded that the information is exempt from disclosure.)

87. Under section 35 of FOISA, information is exempt information if its disclosure would, or would be likely to, prejudice substantially –
- the prevention or detection of crime (section 35(1)(a)) and
 - the apprehension or prosecution of offenders (section 35(1)(b))
88. As the Commissioner’s guidance on section 35 notes³, the term “prevention or detection of crime” is wide ranging. It encompasses actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of people suspected of being responsible for committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.
89. The Commissioner’s guidance notes that there is likely to be some overlap between information relating to “the apprehension or prosecution of offenders” and “the prevention or detection of crime.” In his view, “apprehension or prosecution of offenders” is narrower, focussing on the process of identifying, arresting or prosecuting anyone suspected of being responsible for unlawful activity. This term could refer to the apprehension and prosecution of specific offenders, or to more general techniques (such as investigative processes used, information received, or guidance given) and strategies designed for these purposes.
90. The exemptions in section 35(1)(a) and (b) can only apply where disclosure of the information in question would, or would be likely to, prejudice substantially the prevention or detection of crime or the apprehension or prosecution of offenders. FOISA does not define “substantial prejudice”, but the Commissioner considers an authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely and, therefore, more than a remote possibility. Police Scotland must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice the exemption is designed to protect.
91. As with the exemptions in section 35, these exemptions are subject to the public interest test in section 2(1)(b) of FOISA.

Application of the exemptions

92. Police Scotland argued that evidence gathered during a criminal investigation, is exempt as disclosure of the information would, or would be likely to, prejudice substantially the prevention and detection of crime and apprehension or prosecution of offenders.
93. In the course of a criminal investigation such as the one which led to the Applicant’s conviction, the police interview and gather evidence from any person who may be in a position to assist them. In Police Scotland’s view, it is accepted that the information gathered will not be disclosed to a third party other than in the course of criminal proceedings. Information obtained from third parties is therefore subject to a common law duty of confidentiality. Disclosing the information would undermine this expectation of confidentiality and may deter victims or witnesses from assisting the police in the future. In Police

³ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

Scotland's view, this would immediately hamper police investigations and would, or would be likely to, prejudice substantially the prevention and detection of crime and the apprehension or prosecution of offenders.

94. In the Applicant's view, Police Scotland had only made general arguments unrelated to the nature of the information sought. He also commented that some such information is routinely placed into the public domain by "the authorities", either in the course of conducting criminal proceedings, or in their aftermath.
95. The Commissioner is satisfied that the information held by Police Scotland and falling within the scope of the Applicant's request is held for purposes relating to the prevention or detection of crime and/or the apprehension or prosecution of offenders. What he must consider is whether disclosure would, or would be likely to, prejudice substantially these interests.
96. Each application for decision must be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances.
97. The Commissioner notes the concerns raised by the Applicant about only general arguments being used by Police Scotland in this case. However, the Commissioner has some sympathy with the position Police Scotland is in: although Police Scotland is required, by section 16(1)(d), to state (if not otherwise apparent) why an exemption applies, its explanation does not have to be so detailed that the explanation would itself disclose exempt information (section 16(3) of FOISA).
98. The Commissioner also considers it likely the disclosure of information in this case would lead to similar information requests being made to Police Scotland, again undermining police confidence in what will happen to any information they provide as part of an investigation and undermining the existing processes for obtaining such information.
99. In the course of an investigation, such as the one which is the subject of this application, the police interview and gather evidence from any person who may be in a position to assist them. In Police Scotland's view, it is accepted that the information gathered will not be disclosed to a third party other than in the course of criminal proceedings, a common law duty of confidentiality, and to do so would undermine this expectation and may deter victims or witnesses from assisting the police in the future. (Again, it is worth noting that information disclosed under FOISA is disclosed into the public domain and not just to the requester.) In Police Scotland's view, this would immediately hamper police investigations and would, or would be likely to, prejudice substantially the prevention and detection of crime and the apprehension or prosecution of offenders.
100. The Commissioner is satisfied that disclosure of the information would, or would be likely to, prejudice substantially the prevention and detection of crime and the apprehension or prosecution of offenders. He considers that the concerns raised by Police Scotland regarding the disclosure of the information are genuine and real and are at least likely to occur should the information be disclosed.
101. The Applicant is concerned that Police Scotland did not consider the actual information involved – i.e. the actual information which falls within the scope of his request and, instead, relied on "general" arguments to withhold the information. However, in cases such as this, even if the actual information itself was relatively innocuous, the Commissioner must consider the wider effects of disclosure on the prevention or detection of crime and/or the apprehension or prosecution of offenders.

102. The Applicant has commented that CCTV images appear in newspapers, on television, etc. all the time, and that Police Scotland make good use of these. The Commissioner understands this to be an argument that the disclosure of the specific CCTV footage he has requested would not cause the harm argued by Police Scotland – after all, if such footage is regularly used by Police Scotland, what harm would there be in disclosing this particular footage?
103. The Commissioner is not persuaded by this argument. The use of CCTV footage such as the footage the Applicant has requested is controlled, for example, by the General Data Protection Regulation and the Data Protection Act 2018. CCTV footage can lawfully be used by Police Scotland in specific circumstances, for example where they are satisfied that the processing is necessary to protect an individual's vital interests or to prevent and detect crime or apprehend and prosecute offenders.
104. A decision to use specific, limited CCTV footage for the purposes of an investigation is very different from the disclosure of information under FOISA, where the footage would be put into the public domain. Consequently, the Commissioner does not consider that the fact that certain CCTV footage is used by Police Scotland in specific circumstances reduces the likelihood of disclosure of this information causing harm.

The public interest test

105. As noted above, the exemptions in section 35 are subject to the public interest test in section 2(1)(b) of FOISA.

Submissions from Police Scotland

106. Again, Police Scotland recognised that the public interest in assisting the Applicant to assist his appeal, either relating to the length of his sentence or possibly to the Scottish Criminal Cases Review Commission in due course.
107. However, Police Scotland considered that there were more factors in favour of maintaining the exemptions in section 35. These can be summarised as follows:
- the information relates to CCTV footage seized, statements provided to [REDACTED] and lines of enquiry undertaken as part of a criminal investigation.
 - the applicability of the exemptions cited (here, the Commissioner understands Police Scotland is referring to the conclusion that the disclosure would, or would be likely to, cause substantial prejudice to the prevention or detection of crime and to the detection of crime and the apprehension or prosecution of offenders) gives rise to a public interest favouring non-disclosure.
 - the information contains details of statements made to the police by third parties. This information is generally considered to be confidential and would only be further disclosed during court proceedings instigated as a result of the investigation or other due legal process. Police Scotland also commented that public disclosure of information relating to this case may jeopardise the Applicant's further efforts to persuade the Supreme Court to take on his case.
 - disclosure of the information to the public may prevent the public contacting the police in the future, which would be detrimental to the efficient and effective conduct of the police, given that the police must be in a position to fully investigate matters reported to them.

- disclosure of the information may discourage individuals from contacting the police in future for fear that their information may be publicly disclosed.
- the Applicant may receive some of this information through existing judicial disclosure procedures and via the precognition process. Police Scotland again commented that, as far as they were aware, the Applicant had not sought to do this and instead seeks to make public the information gathered during [REDACTED].

108. For these reasons, Police Scotland concluded that the public interest in disclosing the information was outweighed by that in maintaining the exemptions.

Submissions from the Applicant

109. As noted elsewhere, the Applicant was concerned that Police Scotland did not consider the background to his request or the public interest in ensuring “fair trials” and in righting miscarriages of justice. He was also concerned that Police Scotland was focussing on the general arguments which did not take account of the fact that he had asked for a narrow range of information.

The Commissioner’s conclusions on the public interest

110. Again, the Commissioner’s role is to determine whether, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemptions. He will consider the exemptions in section 35(1)(a) and (b) together, as that is what Police Scotland have done.

111. In the Commissioner’s view, there are a number of arguments in favour of maintaining the exemptions:

- the very strong public interest in protection the law enforcement capabilities of Police Scotland: self-evidently, the interest in the prevention or detection of crime or the apprehension or prosecution of offenders is an important one.
- the disclosure of information provided to Police Scotland on a confidential basis would deter others from providing information to them, which would seriously hinder Police Scotland’s efforts regarding the prevention and detection of crime.
- when considering the public interest in preventing crime, it is important to take account of all the consequences that can be anticipated as realistic possibilities
- there is a risk of distress and harm to those involved and to their families
- the effect of disclosure would be likely to be very harmful to other investigations.

112. The Commissioner also recognises that there are a number of arguments in favour of disclosing the information:

- there is a presumption running through FOISA that openness is, in itself, to be regarded as something which is in the public interest: public confidence will be increased by openness and transparency with regard to actions taken by the police, especially important where the investigation involves a crime [REDACTED]
- there is a public interest in revisiting a conviction which the Applicant clearly believes was unjustified

113. Having weighed the public interest in maintaining the exemptions against the public interest in disclosing the information, the Commissioner is satisfied, on balance, and in all the circumstances of the case, that the public interest lies in maintaining the exemptions.
114. The public interest in protecting the ability of Police Scotland to prevent or detect crime and to apprehend or prosecute offenders is exceptionally high. As noted above, the Commissioner has already concluded that disclosure of the information would, or would be likely to, prejudice substantially those interests.
115. The Commissioner has taken account the Applicant's comments regarding a possible miscarriage of justice. However, as noted elsewhere, the Commissioner, having viewed the information, has considered that information in arriving at his conclusions.
116. Similarly, documents provided by the Applicant show that there are processes whereby the Applicant can seek information and statements without the information and statements being placed into the public domain, as is the case with any disclosure under FOISA and without the negative effect such disclosure would have on the flow of information and evidence to and from the police in relation to criminal investigations.
117. While the Applicant clearly has a personal interest in the information, this does not, in this case, equate to a public interest of significant weight.
118. The Commissioner has also considered the age of the information. The exemptions in section 35 last for 100 years, suggesting that the Scottish Parliament regarded that period as the appropriate level before the exemption could be relaxed. Clearly, this does not mean that information which is exempt from disclosure under section 35 can never be disclosed under FOISA on the balance of the public interest. However, it does suggest that the age of the information should be given limited weight in carrying out the public interest test.
119. The Commissioner is therefore satisfied that the information is exempt from disclosure under sections 35(1)(a) and (b) of FOISA.

Section 38(1)(b): Personal information

120. Police Scotland applied the exemption in section 38(1)(b) of FOISA to the personal data of:
 - the witnesses named in the Applicant's request [REDACTED]
 - the police officers identifiable from the information and
 - other witnesses speaking to the CCTV evidence.
121. The Commissioner notes that the information covered by the Applicant's request also includes the personal data of other individuals, but that Police Scotland have not applied the exemption in section 38(1)(b) to that data. Given his determination that that personal data is exempt from disclosure under both sections 34 and 35 of FOISA, he does not consider it necessary to consider whether that data is also exempt from disclosure under section 38(1)(b) of FOISA.
122. Police Scotland withheld the information sought by the Applicant under section 38(1)(b) as read with "the first condition", i.e. as read with section 38(2A)(a). This exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene any of the data protection principles set out in Article 5(1) of the UK GDPR or, where relevant, in the DPA 2018.

123. The exemption in section 38(1)(b), applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
124. As with the exemption in section 34(1) of FOISA, this exemption can be applied to information regardless of how old it is, subject, of course, to the need for it to relate to a living individual.

Is the information personal data?

125. The first question the Commissioner must address is whether the information withheld by Police Scotland under this exemption is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable living individual. "Identifiable living individual" is defined section 3(3) of the DPA 2018 – see Appendix 1. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR.)
126. Information will "relate to" a person if it is about them, is linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
127. The Commissioner is satisfied that the information being withheld under section 38(1)(b) is personal data: the information identifies living individuals (the information names the individuals as well as giving other information which would identify them) and clearly relates to the individuals, by disclosing information about their roles in the criminal investigation.

Would disclosure contravene one of the data protection principles?

128. Police Scotland argued that disclosure would breach the data protection principle in Article 5(1)(a) of the UK GDPR. Article 5(1) states that personal data shall be processed "lawfully, fairly and in a transparent manner in relation to the data subject."
129. "Processing" of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.
130. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
131. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

132. Condition (f) states that processing shall be lawful if it -
- is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*
133. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.

134. The three tests which must be met before Article 6(1)(f) are as follows (see paragraph 18 of *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55⁴ - although this case was decided before the GDPR (and UK GDPR) came into effect, the relevant tests are almost identical):

- does the Applicant have a legitimate interest in the personal data?
- if so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
- even if the processing would be necessary to achieve the legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects which require protection of personal data (in particular where the data subject is a child)?

Does the Applicant have a legitimate interest?

135. Police Scotland accepted that the Applicant has a legitimate interest in the personal data in question. The Commissioner agrees. The Applicant has been found guilty of [REDACTED] and wishes to obtain the information to assist him to argue that there has been a miscarriage of justice.

136. The Commissioner also considers that there is a wider interest in ensuring that those convicted of a crime are guilty of it: the Applicant has been convicted in a court of law and is attempting to have that decision overturned.

Is disclosure necessary to achieve that legitimate interest?

137. Here, “necessary” means “reasonably” rather than absolutely or strictly necessary. The Commissioner must therefore consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant’s legitimate interests can be met by means which interfere less with the privacy of the data subjects.

138. As mentioned elsewhere, if the information the Applicant has requested is disclosed in response to a FOISA request, it is, in effect, disclosed into the public domain.

139. As noted elsewhere, documents provided by the Applicant show that there are processes whereby the Applicant can seek information and statements without the information and statements being placed into the public domain, as is the case with any disclosure under FOISA. They also show that the Applicant already has some of the information covered by the request.

140. Similarly, as noted elsewhere, the Commissioner has carefully viewed and considered the information covered by the Applicant’s request.

141. Having considered all the circumstances, the Commissioner is satisfied that, although the Applicant has a legitimate interest in the personal data, disclosure is not necessary to achieve that legitimate interest.

142. The Commissioner will, nevertheless, go on to consider whether, if he had found disclosure necessary to achieve the Applicant’s legitimate interests, this would have overridden the interests or fundamental rights and freedoms of the data subjects.

⁴ <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

Interests or fundamental rights and freedom of the data subjects

143. In the Commissioner's guidance on section 38(1)(b)⁵, he notes that this involves a balancing exercise between the interest of the requester and the interests of the data subject. (Although additional care must be given where the data subject is a child, the Commissioner is satisfied, given the age of the information, that none of the data subjects in question are children.) Only if the legitimate interest of the Applicant outweighs the interests of the data subjects can the personal data be disclosed. Disclosure will also involve some intrusion of privacy. However, that intrusion will not always be unwarranted.
144. Much will depend on the reasonable expectations of the data subjects as to how their personal data will be further processed, based on their relationship with the controller. (In the case of Article 5(1)(f), the "controller" will also include the Applicant and the wider public, given that it is to the Applicant and the wider public that the information would be disclosed.)
145. In considering reasonable expectations, some of the factors to be considered are:
- whether the information relates to an individual's public life (for example their work as a public official or employee) or to their private life (for example, their home, family, social life or finances). Information about an individual's private life deserves more protection than information about their public life. The seniority of the individuals' positions, and whether they have a public facing role, will also be relevant.
 - would disclosure cause harm or distress? Disclosing information about an individual's private information or family life may cause distress and, of course, Article 8 of the European Convention on Human Rights, which states that everyone has the right to respect for his private and family life, home and correspondence, must be considered here.
 - has the data subject objected to disclosure? While this may be a factor to be considered in carrying out the balancing exercise, refusal or lack of consent does not necessarily mean that the interest of the data subject will override the interests of the Applicant.
146. Police Scotland commented that the Applicant has sought evidence collected as part of the investigation [REDACTED] for which the Applicant was found guilty. They stated that the information, CCTV footage seized and lines of enquiry undertaken as part of the criminal investigation, would have been provided by third parties (the data subjects) to [REDACTED]. This information is considered confidential and would only be disclosed during legal proceedings as a result of the investigation or any other due legal process.
147. In Police Scotland's view, the data subjects would not have any expectation that their personal data would be made public in response to a request made under FOISA.
148. Police Scotland also expressed concern that disclosing the information may prevent the public contacting the police in future. This would be detrimental to the efficient and effective conduct of Police Scotland as Police Scotland must be in a position to fully investigate matters reported to them.
149. Finally, Police Scotland commented that seeking public disclosure of the information may in fact jeopardise the Applicant's [REDACTED] should the information be made public, there

⁵ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

will be an enormous amount of negative public interest (in a newsworthy sense) that the Applicant is still trying to overturn his conviction.

Conclusion on the data protection principles

150. On balance, the Commissioner has concluded that condition 6(1)(f) cannot be met. Even if the Commissioner had found disclosure to be necessary to achieve the Applicant's legitimate interests, this would have been overridden by the interests or fundamental rights and freedoms of the data subjects.
151. The Commissioner is satisfied that the data subjects would not reasonably expect that the personal data in question would be disclosed into the public domain in response to an information request made under FOISA. In particular, disclosing the personal data of the members of the public who assisted with the criminal investigation would, even after such a long time, be likely to cause harm or distress, given the circumstances of [REDACTED].
152. While the Commissioner recognises that public servants, such as police officers, will have less of an expectation of privacy than other members of the public, the fact that the information is [REDACTED], relates to [REDACTED] and that some of the police officers involved are unlikely still to work for Police Scotland, he is also satisfied in the circumstances of this case that the officers (or former officers, as may be), would have no reasonable expectation that the information would be disclosed.
153. The Commissioner therefore concludes that there is no condition in Article 6 of the UK GDPR allowing the personal data to be disclosed, with the result that he must also conclude that disclosure would breach Article 5(1)(a) of the UK GDPR. (Given that the Commissioner has concluded that the processing of the personal data would be unlawful, he is not required to go on to consider separately whether disclosure of such personal data would be otherwise fair and transparent in relation to the data subjects.)
154. The Commissioner therefore finds that, given that disclosure would breach a data protection principle in Article 5(1) of the UK GDPR, the personal data is exempt from disclosure under section 38(1)(b) of FOISA.

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or Police Scotland 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.

Daren Fitzhenry
Scottish Information Commissioner

29 June 2021

Appendix 1: 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 –
...
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which –
 - (a) discloses that it holds the information;
...
 - (d) states (if not otherwise apparent) why the exemption applies.

...

- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.

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

- (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
 - (ii) prosecuted for an offence is guilty of it;
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or

...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;

...

38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);
- ...
- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
- (a) would contravene any of the data protection principles, or
- (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.
- ...
- (5) In this section-
- "the data protection principles" means the principles set out in –
- (a) Article 5(1) of the UK GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;
- "data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);
- “personal data” and “processing” have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);
- “the UK GDPR has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act
- (5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice given under section 21(5) or (9); or
- ...
- may make application to the Commissioner whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- ...

49 Commissioner's decision

...

- (3) In any other case, the Commissioner must -
- (a) give that authority notice in writing of the application and invite its comments; and

...

...

57 The expression "historical record"

- (1) For the purposes of this Part, a record becomes a "historical record" in accordance with subsections (1A) to (1C).

- (1A) A record becomes one at the end of the period of 15 years beginning with 1st January in the calendar year following the date on which the record is created.

...

58 Falling away of exemptions with time

- (1) Information contained in a historical record cannot be exempt information by virtue of any of sections 28 to 30, 33(1), 36, 37, 40 and 41(a).

- (2) Information cannot be exempt information by virtue of -

...

- (b) section 34(2)(b), 35 or 38(1)(c) or (d) after the end of that period of one hundred years,

which commences at the beginning of the calendar year following that in which the record containing the information is created.

General Data Protection Regulation

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

- a. processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency")

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
 - ...
 - (d) disclosure by transmission, dissemination or otherwise making available.

...

Appendix 2: Wording of information request of 28 February 2018

[REDACTED]

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info