



Scottish Information
Commissioner

**Decision 222/2006 – Mr Murdo MacLeod, Scotland
on Sunday and the Chief Constable of Northern
Constabulary**

*Statistical information about registered sex offenders of no fixed
abode*

**Applicant: Mr Murdo MacLeod, Scotland on Sunday
Authority: The Chief Constable of Northern Constabulary
Case No: 200502972
Decision Date: 4 December 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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St Andrews
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Decision 222/2006 – Mr Murdo MacLeod, Scotland on Sunday and the Chief Constable of Northern Constabulary

Request for statistical information about registered sex offenders of no fixed abode in the Force area – information withheld under sections 38(1)(b) – personal information – section 35(1)(a), (b) and (c) – law enforcement – section 39(1) – health and safety.

Facts

Mr MacLeod asked the Chief Constable of Northern Constabulary (referred to in this decision as the Police) for the number of registered sex offenders in the force area whose address was listed as “no fixed abode”. He also asked what proportion this represented of the total number of registered sex offenders, and how many of the offenders with “no fixed abode” were regarded as being at high risk of reoffending.

The Police refused to provide the information under the exemptions in section 35(1)(a), (b) and (c), section 38(1)(b) and section 39(1) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Outcome

The Commissioner found that the Police had not complied with Part 1 of FOISA in dealing with Mr MacLeod’s information request and that the information should be supplied to him.

Appeal

Should either Mr MacLeod or the Police wish to appeal against the Commissioner’s 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 of receipt of this notice.



Background

1. On 26 October 2005 Mr Murdo MacLeod sent the Police an email requesting statistical information about registered sex offenders in the force area. He asked for three pieces of information:
 - a) the number of registered sex offenders whose address was listed as “no fixed abode”;
 - b) what proportion this represented of the total number of registered sex offenders in the force area; and
 - c) how many of the offenders with “no fixed abode” were regarded as being at high risk of reoffending.
2. The Police replied the next day (27 October 2005) stating that they were not obliged to answer Mr MacLeod’s questions because the information was exempt under section 35(1)(a), (b) and (c), section 38(1)(b) and section 39(1) of FOISA. The Police considered that disclosure could harm the individuals concerned by leading to attacks on persons or their properties; that disclosure may fuel public disorder; and that registered sex offenders have a right to privacy under the Human Rights Act 1998.
3. Mr MacLeod asked for a review of this decision on the same day, questioning the suggestion that disclosure of the information requested might lead to attacks on offenders and their properties. He stated that nothing in his request implied that any offender would be named and questioned the statement that revealing the information might lead to attacks on offenders’ properties, given that they were of no fixed abode.
4. The Police replied on 2 November 2005, upholding the decision to withhold the information requested under the exemptions cited. They explained that the use of the word “properties” in their previous reply had been intended to refer to “something of value” rather than just accommodation.
5. Mr MacLeod applied to me for a decision on the same day, 2 November 2005. The case was allocated to an investigating officer.



The Investigation

6. Mr MacLeod's application was validated by establishing that he had made a written request for recorded information to a Scottish public authority and had appealed to me only after asking the authority to review its response to his request.
7. The investigating officer contacted the Police to inform them that an investigation had begun and to seek their comments on the matter in terms of section 49(3) of FOISA. The Police were asked to supply a detailed description of the information withheld from Mr MacLeod, or to provide copies. They were also asked for detailed reasons to support the application of the exemptions cited in their response to Mr MacLeod's request.
8. The Police replied on 22 February 2006. They gave details of the information withheld from Mr MacLeod and stated that their response had been in line with a policy agreed nationally by ACPO (Association of Chief Police Officers) and ACPOS (Association of Chief Police Officers in Scotland), that numbers of sex offenders will only be released on a force wide basis.
9. The Police also provided further explanation of their reasons for applying the exemptions in sections 38(1), 39(1) and 35(1)(a), (b) and (c). These reasons are fully considered in the next section of this Decision Notice.
10. During the investigation, further clarification was sought and received from the Police on several points.
11. Mr MacLeod was twice invited to provide the investigating officer with evidence to support the statement made by him in his application that other police forces had provided him with similar information to that requested from the Police. However, no information on that point was received from Mr MacLeod. Two police forces confirmed to the investigating officer that they had received Mr MacLeod's request and had supplied him with the information he asked for.



The Commissioner's Analysis and Findings

Section 38(1) – Personal information

12. Some of the information withheld from Mr MacLeod was considered by the Police to be personal information exempt from disclosure under section 38(1)(b) of FOISA. Northern Constabulary confirmed this view in its letter of 22 February 2006, but did not expand further upon its reasons for applying this exemption.
13. I first considered whether the information withheld constitutes “personal information” as defined by the Data Protection Act 1998 (the DPA).
14. Section 1(1) of the DPA defines “personal data” as data relating 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. In this case, the information withheld is statistical data about individuals living in the large geographical area covered by Northern Constabulary, which includes the Highland Council region and the island authorities of Orkney, Shetland and Western Isles.
15. It is clear that the applicant is not requesting information which directly identifies an individual or a number of individuals. However there is the possibility that the release of a statistic could readily lead to the identification of an individual. The question for me therefore is whether that identification will or will be likely to come about in the circumstances of this case
16. Although I accept that there might be speculation about the identities of the individuals concerned, the relevant test required by the DPA is whether the information would make identification of any living individual possible. It seems to me that the release of statistical information about the numbers of registered sex offenders of no fixed abode but living somewhere in this large area could not lead to the identification of any one individual. I therefore do not accept that any of the information withheld from Mr MacLeod could be considered “personal data” in terms of the DPA, and I have concluded that Northern Constabulary wrongly applied this exemption to the information in question.



Other Exemptions

17. My conclusion on the possibility of identification of an individual is central to this decision, as it has a bearing upon the consideration of the other exemptions cited. The arguments as to the application of these other exemptions depends largely upon whether or not the release of a statistic makes it possible to identify an individual or for an individual to fear that they are at significant risk of being identified. In general the lower the risk then the less likely is the occurrence of the harm envisaged by the police when arguing for the application of other exemptions. In this case I have come to the view that identification is not possible from the release of the information requested.

Section 35(1) – Law Enforcement.

18. Section 35 exempts information if its disclosure under FOISA would, or would be likely to, prejudice substantially the prevention or detection of crime (section 35(1)(a)), the apprehension or prosecution of offenders (section 35(1)(b)), or the administration of justice (section 35(1)(c)). The exemptions in section 35 are subject to the public interest test contained in section 2(1)(b) of FOISA, which means that even if the information is exempt in terms of section 35, the public authority must release the information if, in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
19. The Police explained that information had been withheld under section 35(1)(a) because the police are best able to manage sex offenders by knowing their whereabouts and keeping in contact with them. If sex offenders' identities were not protected, it would be highly probable that they would go to ground, remain undetected for a time and possibly commit other offences.
20. The Police also argued that if it was confirmed that sex offenders of no fixed abode were at large in the force area, certain people might be encouraged to take the law into their own hands and target any person suspected to fall into this category. The Police provided details of incidents in England and Wales in which serious vigilante action had been taken against individuals rightly or wrongly suspected of being sex offenders.
21. The arguments used by the Police in relation to the exemptions in section 35(1)(a), (b) and (c) assume that disclosure of the statistical information requested would lead to the identification or misidentification of any individuals represented by the statistics, and that this would have harmful consequences.



22. I take very seriously the concerns expressed by the Police that where suspicions have been roused that a sex offender is living locally, individuals (who may be entirely innocent) have sometimes been subject to harassment or attack through vigilante action. However in this case I have already found that, on its own, the information is not sufficient to positively identify an individual offender. I have also examined the likelihood that the statistical information requested could come to be associated with any particular person.
23. In presenting its case to me, the Police originally seemed to imply that the phrase “of no fixed abode” should be interpreted as sleeping rough. However, in its letter to my Office of 6 June 2006, the Police acknowledged that a wider definition applies: a person “of no fixed abode” is essentially homeless, but although they have no temporary or permanent address at which they reside, they may reside in refuges, or lead a nomadic life in caravans, as well as sleeping rough anywhere that shelter may be found.
24. I accept that it is possible that the phrase “of no fixed abode” might be assumed to refer only to rough sleepers: this seems to be how the Police envisage the phrase being interpreted, as they have argued in terms of “seeing a homeless person”, implying that homeless people are visually identifiable. Highland Council has confirmed that there are very few rough sleepers in the Highlands and Islands, and that they tend to congregate in Inverness. On the other hand, around 400 households in Highland Region reported recent experience of sleeping rough in the 2005 report “Final Evaluation of the Rough Sleepers Initiative”¹.
25. However, I do not consider that simply because Mr MacLeod’s request is capable of misinterpretation in this way, this should determine whether or not he is provided with the information he asked for. In a previous decision (065/2005 Camillo Fracassini and the Common Services Agency for the National Health Service) I discussed an authority’s concerns about information being used out of context and with the intention or unavoidable effect of being misleading or harmful. I noted that there is nothing to prevent public authorities from setting the information in context when releasing it, by providing additional explanatory information or statements.

¹ Suzanne Fitzpatrick, Nicholas Pleace and Mark Bevan, The Centre for Housing Policy at the University of York. [Final Evaluation of the Rough Sleepers Initiative](#). March 2005. ISBN 07559 3948 4



26. For instance, I have found that there were some 800 applications made to local authorities in the Northern Constabulary force area under the Homeless Persons legislation during the period April to September 2005. While not all of these people would be obviously and visibly homeless, I do not accept that homeless persons are such a rarity in this large geographical area to make it probable that any homeless person would be assumed to be a registered sex offender, if disclosure of the statistics revealed that there were registered sex offenders of no fixed abode somewhere in the Northern Constabulary force area and it was made clear that “no fixed abode” has a wider definition than “rough sleepers”.
27. It is also relevant to point out that Mr MacLeod made his request in October 2005, asking for the current statistics. The information he asked for represents the situation as it was at that particular time. Disclosure of that information cannot now be held to represent the current situation regarding registered sex offenders of no fixed abode.
28. I am aware that my decision on this matter may well attract media publicity and by doing so may raise general awareness that registered sex offenders of no fixed abode may be living somewhere in the Northern Constabulary area. However I do not accept that the raised awareness resulting from this decision notice gives rise to a reasonable concern that the subsequent course of events feared by the Police will occur. No evidence of vigilante action or threats in this area has been brought to my attention, nor has it occurred in any of the other police force areas as a consequence of statistical information being released.
29. I do not accept therefore that the argument advanced by the Police has made the case which would allow the exemption in section 35(1)(a), which exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. The prejudice must be substantial, and it must be likely. I am not persuaded that disclosure of the number of registered sex offenders of no fixed abode would, or would be likely, by itself, to lead to vigilante action or to offenders going ‘underground’ and away from police supervision. I accept that such an outcome is possible, but do not consider it to be at all likely. While I appreciate that the area covered by the Police has its own unique geographic and demographic characteristics, similar statistical information has been released by other police forces in Scotland with no immediately discernable ill-effects.



30. The Police have also argued that if the identities or other details about registered sex offenders were to be released into the public domain, identifying offenders and trying to trace them would become more difficult to achieve. When asked why this would be the case, the police explained that the relationship between the police officers who monitor registered sex offenders and the offenders themselves is a critical one, depending on mutual trust and understanding. The relationship allows police forces to assess the risk of an offender re-offending, and to take steps to prevent this from happening, for example by encouraging offenders to isolate themselves from opportunities where they are likely to re-offend. The breakdown of the relationship between the sex offender and the police force creates an environment in which proactive, preventative policing is not possible and sexual crimes are committed.
31. The Police again cited cases where disclosure of information about the location and identity of offenders has led to attacks on offenders, innocent members of the public, and those protecting them.
32. This would be a strong argument in situations where it can be shown that identification of individual sex offenders or the possibility of vigilante attacks is likely to follow the disclosure of information. However, as noted previously, although I accept that there is a possibility of such an outcome in this case, I do not consider it to be likely, especially if the information requested by Mr MacLeod is clearly defined and set in its proper context.
33. In particular I have studied the cases cited by the Police, and have found that none of the incidents in those cases stemmed directly from the disclosure of statistical information of the type requested by Mr MacLeod.
34. I therefore cannot accept this argument as justification for applying the exemption in section 35(1)(a), which requires a public authority to show that disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. The test is one of likelihood, and in this case I have concluded that disclosure of the statistical information requested is not likely to lead to individuals being targeted, although this remains a possibility.
35. Section 35(1)(b) exempts information if its disclosure under FOISA would or would be likely to prejudice substantially the apprehension or prosecution of offenders. The Police have applied this exemption on the grounds that offenders are more likely to admit to their crimes if they are afforded some degree of protection. Repeat offenders' whereabouts would already be known to the Police which would result in the public threat being dealt with expeditiously.



36. I understand the argument for protecting the identities of individual sex offenders and enabling the Police to develop a relationship with those individuals in order to monitor their behaviour, keep track of their whereabouts, and take steps to prevent re-offending or attacks on the offender. However, I do not accept that the consequences of disclosing the statistical information requested would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. I consider it unlikely that disclosure of the information would lead offenders to lose confidence in the Police's ability to protect them, or result in the sort of public disorder that would drive offenders underground.
37. Section 35(1)(c) exempts information if its disclosure under FOISA would, or would be likely to, prejudice substantially the administration of justice. The Police have explained that they have a legal obligation under the Sexual Offences Act 2003 (the 2003 Act) to maintain a register of sex offenders. If a court orders that a person should be placed on the sex offenders' register, the police have a legal requirement to place that person on the register and then to monitor that person.
38. I note that the 2003 Act does not place any obligation upon a police force to maintain a register of sex offenders; instead, it requires offenders to notify the police of certain personal details including their address or a location where they can be found. The legal obligation is laid upon the offender rather than the Police. Nor does the 2003 Act confer any responsibility upon the police regarding the assessment or monitoring of sex offenders.
39. However, I accept that the notification requirements upon sex offenders impose an implicit duty upon the Police to record their personal details. I have also noted that the Management of Offenders etc. (Scotland) Act 2005 (the 2005 Act) states that the "responsible authorities for the area of a local authority must jointly establish arrangements for the assessment and management of the risks posed in that area by any person who ... is subject to the notification requirements of the Sexual Offences Act 2003". The chief constable is one of the responsible authorities, as defined by section 10(7)(a) of the 2005 Act.
40. The arguments put forward by the Police in relation to the exemption in section 35(1)(c) are substantially the same as those cited in relation to section 35(1)(a) and (b), but the Police have also expressed their concern that if sex offenders of no fixed abode feel that they are in any way threatened by the publication of statistics, they may fail to register and disappear, preventing the police from monitoring them as legally required. This may make it easier for the offender to re-offend.



41. As noted previously, while I accept that the outcome envisaged by the Police is a possibility, I do not consider that the arguments the Police have put forward support the view that that disclosure of the statistical information requested, even if published in a newspaper, would or would be likely to, prejudice substantially the administration of justice by deterring sex offenders of no fixed abode from notifying the police of their whereabouts as legally required, or by going 'underground' and preventing the responsible authorities from managing the risks they pose. My comments in paragraphs 28 & 29 apply. I therefore do not accept that the information in question should be exempt from disclosure under section 35(1)(c) of FOISA.
42. As I have not upheld the application of the exemptions in section 35(1)(a), (b) and (c) of FOISA, I am not required to consider the public interest for or against disclosure as contained in section 2(1)(b) in relation to those exemptions.

Section 39(1) – Health and Safety

43. Section 39(1) of FOSIA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. I have previously said that I consider this exemption is sufficiently broad to cover information that may indirectly harm a person or a group of persons. It is broad enough to cover harm which could foreseeably occur in the future as well as immediate harm. This exemption is also subject to the public interest test contained in section 2(1)(b) of FOISA.
44. The Police have used arguments similar to those discussed above in paragraphs 19 & 20 and 31 to support the use of the exemption in section 39(1), stating that there would be risks to both physical well-being and mental health if the information were to be disclosed, and citing cases of vigilante violence and public disorder which have involved sex offenders.
45. The Police have also stated that the risk should be judged in terms of the impact that constant fear and intimidation has on offenders and their right to privacy and private life. Finally, the Police considered that there would be a risk to potential victims of any offender driven underground and liable to re-offend.



46. These arguments all depend on the acceptance that disclosure of the information requested would be likely to lead, directly or indirectly, to vigilante attacks on offenders or a breakdown in the relationship between registered sex offenders of no fixed abode and the police. As noted previously, although I accept that it is possible that the disclosure of the information could lead to attacks on people rightly or wrongly suspected to be registered sex offenders of no fixed abode, I do not accept that this outcome is likely, especially if the information is provided with an explanation which puts it into context.
47. I therefore do not accept that the information requested by Mr MacLeod should be exempt from disclosure under section 39(1) of FOISA. As I have not upheld Northern Constabulary's use of this exemption, I am not required to consider the public interest for or against disclosure of the information.

Decision

I find that the Chief Constable of Northern Constabulary (the Police) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by withholding information to which Mr MacLeod was entitled under section 1.

I require the Police to provide Mr MacLeod with the information within 45 days of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
4 December 2006