



Scottish Information
Commissioner
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Decision Notice 262/2024

Correspondence between Police Scotland and the Crown Office and Procurator Fiscal Service regarding alleged financial irregularities/and or fraud by the Scottish National Party (SNP)

Applicant: The Applicant

Authority: Police Service of Scotland

Case Ref: 202101182

Summary

The Applicant asked the Authority for correspondence between it and the Crown Office and Procurator Fiscal Service (COPFS) on the topic of alleged financial irregularities by the Scottish National Party. He also asked for correspondence between the two parties on the wording as to, whether an investigation into the Scottish National Party had been launched, by the Authority. The Authority withheld all of the information falling under the scope of the request under a number of exemptions.

The Commissioner investigated and upheld the Authority's application of the exemptions in relation to some of the withheld information, but found that the Authority had been wrong to withhold the remainder. The Commissioner required the Authority to disclose certain information to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); s30(b)(i), (ii) and (c) (Prejudice to the effective conduct of public affairs); s34(1)(b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); s35(1)(a) and (b) (Law enforcement); s38(1)(b), (2A), (5) (definitions of "data protection principles", "data subject", "personal data", "processing" and "UK GDPR") and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of “personal data”) (Definitions); 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), (5) and (10) (Terms relating to the processing of personal data)

Background

1. On 25 July 2021, the Applicant made a request for information to the Authority. He asked for:
 - (i) Any correspondence including emails, letters, text messages, WhatsApp messages between the Authority and the Crown Office between 1 June and 25 July 2021, on the topic of alleged financial irregularities and/or fraud by the Scottish National Party (SNP).
 - (ii) In particular, correspondence between the Authority and the Crown Office on the wording as to whether an investigation into the SNP had been launched by the Authority, including but not limited to whether it should be described as a ‘fact-finding’ exercise or an investigation. This should include, but not be limited to, any internal or cross-body discussions between the Authority and the Crown Office’s communications departments.
2. The Authority responded on 23 August 2021 withholding all of the information falling within the scope of the Applicant’s request under a number of exemptions, namely sections 38(1)(b), 30(b)(i) and (ii), 34(1)(b) and 35(1)(a) and (b).
3. On 23 August 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not consider the exemptions listed to be relevant, and that if they were, the public interest lay in disclosure due to the significant public interest in the independence of the judicial system, including the Authority, from political interference.
4. The Authority notified the Applicant of the outcome of its review on 20 September 2021 upholding its original decision. A reference was provided to [Decision 166/2020](#)¹ of the Commissioner by way of information.
5. On 20 September 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority’s review because he considered the application of the exemptions to be erroneous, and in any case were overruled by the overwhelming public interest in disclosure, which is central to accountability and transparency.
6. During the course of the investigation the Authority additionally relied on section 30(c) and section 39(1) of FOISA to withhold some of the information falling within the scope of the Applicant’s request. The Applicant was informed of this and afforded the opportunity to provide his comments on the Authority’s reliance on these exemptions.

¹ [Decision 166/2020 | Scottish Information Commissioner \(itspublicknowledge.info\)](#)

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 28 October 2021, the Authority was notified in writing that the Applicant had made a valid application. The Commissioner viewed the information withheld from the Applicant and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why it considered the exemptions applied to the information being withheld.

Withheld information

10. The Authority identified information in 30 documents falling within scope of the Applicant's request.
11. The previous Commissioner viewed the information which is the subject of this application at the Authority's premises on 5 September 2022 and 29 May 2023.
12. On 20 June 2024, the information falling within the Applicant's request was subsequently provided to the current Commissioner to allow him to form a view.

Section 1(1) – General entitlement

13. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications in section 1(6) are not applicable in this case.
14. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).
15. The Authority withheld all of the information from the Applicant in its initial response and in its review response, however, in the marked-up information provided to the Commissioner, some information was not being withheld under any of the exemptions stated to the Applicant.
16. The Commissioner has gone on to consider, in the remainder of this decision, the Authority's use of the exemptions in relation to the particular information it has indicated is being withheld under each exemption. However, he must find that the information that is not now being withheld under any exemption in FOISA was wrongly withheld at the time of the Applicant's request, and as a result the Authority failed to comply with section 1(1) of FOISA.
17. The Authority should now provide the Applicant with this information.

Commissioner's analysis and findings

18. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 30(b)(i) – Substantial inhibition to the provision of free and frank advice

19. The Authority withheld certain information in documents 3, 6, 8 – 10, 12 – 28 and 30 under the exemption in section 30(b)(i) of FOISA.

Test to be applied in the use of the exemptions

20. In order for the Authority to rely on the exemption in section 30(b)(i), it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
21. In applying this exemption, the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.
22. As with other exemptions imparting a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring.

The Authority's submissions about the exemption

23. The Authority argued that disclosure of the information would inhibit it and the Crown Office and Procurator Fiscal Service (COPFS), as information specific to the enquiry would be in the public domain (a result of disclosure under FOISA), and be accessible to subjects of that enquiry. This would, the Authority argued ultimately prejudice any investigation.
24. The Authority emphasised the need for free and frank discussions between the two organisations to enable discussions around ongoing enquiries and how investigations were to proceed to occur uninhibited. It explained that this type of discussion was needed to ensure fair and transparent investigations were conducted without inference being drawn when the full facts had not been established.
25. The Authority submitted that regular dialogue and cooperation was essential for both organisations to undertake their respective roles, therefore it was important that free and frank discussions were allowed to take place without outside scrutiny. It believed that disclosure would affect the relationship between the organisations, and individuals would be less willing to freely express their views if they thought information may be disclosed prior to the conclusion of ongoing enquiries. It also considered that investigation process could be harmed if those being investigated were made aware of information the Authority held or were interested in.
26. It argued that the process of conducting an investigation was a confidential process and that those affected by criminal activity were entitled to have their information protected. It argued that it relies on the cooperation of witnesses and other sources for information on the understanding that it will remain confidential unless there is a requirement for it to be presented in court. The Authority considered its effectiveness to perform its statutory function could be compromised if such information was released into the public domain.

The Applicant's submissions about the exemption

27. The Applicant considered that the Authority was applying a hypothetical possibility as to whether disclosure would result in the likely inhibition of free and frank advice. He did not consider the Authority could demonstrate that there would be real and demonstrable inhibition, nor that there would be any chilling effect on how the Authority and COPFS go about their business in law enforcement. He considered that as these are the two central tests for the exemption to apply, he asked that the true likelihood of these being activated by the request be assessed.

The Commissioner's view about the exemption

28. The Commissioner recognises the need for information and advice to be freely exchanged between the Authority and the COPFS in order for each to be able fulfil their professional responsibilities.
29. The Commissioner has considered the information withheld, along with the Authority's submissions.
30. Having considered the information contained in documents 6 and 9, the Commissioner is not satisfied that disclosure would result in the substantial inhibition necessary for the exemption to be engaged. The content of this information is not of a level of sensitivity or controversy that the impact envisaged and described by the Authority is likely to occur as a consequence of disclosure. The information in question is a few sentences that discuss approved lines, and the anticipation of ongoing updates. The Commissioner does not accept that disclosure of such information would affect the relationship between the Authority and COPFS, nor indeed have any inhibitory effect on potential future victims or witnesses.
31. As such, the Commissioner finds that the Authority was wrong to withhold the information in question in documents 6 and 9 under the exemption in section 30(b)(i) of FOISA.
32. With regard to the remaining information being withheld under section 30(b)(i) of FOISA, the Commissioner considers that the information was directly related to ongoing enquiries and how any investigation was to proceed, as such the information was sufficiently sensitive that disclosure may harm the ability of both the Authority and COPFS to fulfil their functions.
33. Consequently, the Commissioner is satisfied that the exemption in section 30(b)(i) applies to the information in documents 3, 8, 10, 12-28 and 30 to which the Authority has applied this exemption.
34. Having concluded that this remaining information is exempt from disclosure under section 30(b)(i), the Commissioner must go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this information. The information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in its disclosure.

The public interest test

35. The "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The authority's submissions about the public interest

36. The Authority acknowledged that there is a public interest in disclosing information where the information would contribute to a debate on a matter of apparent public interest
37. The Authority considered that the public interest would not be served by limited communication between it and COPFS, through fear of information relating to ongoing enquiries being disclosed before investigations are concluded, and the discouragement of individuals contacting the Authority for fear their information would be disclosed.
38. For the process to be effective it is important that all parties concerned are rigorous and candid in handling an investigation. Therefore, the Authority concluded that the public interest remains balanced against the disclosure of the information, and the exemption should be upheld.

The Applicant's submissions about the public interest

39. The Applicant considered that the request centred on discussions between Scotland's main prosecution body and the Authority on the topic of a police investigation into the finances of Scotland's governing party. It is the Applicant's view that the details of these discussions and the approaches taken are obviously in the public interest. He argued that disclosure would demonstrate that both bodies operate in an independent manner outside of the influence of government. He believed it would undermine the rule of law and confidence in the prosecution service and Authority if these discussions were kept secret.

The Commissioner's view on the public interest

40. The Commissioner has carefully considered the submissions from both the Applicant and the Authority as to where the public interest may lie and acknowledges that there is merit in the arguments put forward by both.
41. He agrees that there is public interest in transparency around the way in which the Authority and prosecution service work together, and their independence, particularly in cases such as this, involving the governing party of the country.
42. However, he accepts that there is a clear public interest in ensuring the Authority is able to have open and frank discussions with COPFS, which may involve information that has possibly been provided in confidence, without fear that these discussions will be disclosed into the public domain before all of the facts have been ascertained. The Commissioner recognises that such disclosure may well limit the candour in which these discussions are carried out in future and the willingness of individuals to co-operate. Which would clearly not be in the public interest.
43. On balance, the Commissioner finds that the public interest in disclosure of this information is outweighed by that in favour of maintaining the exemption in section 30(b)(i).
44. Accordingly, the Commissioner has concluded that the Authority was entitled to withhold the remaining information in terms of section 30(b)(i) of FOISA.

Section 30(b)(ii) – Substantial inhibition to the free and frank exchange of views

45. The Authority is withholding the same information in documents 3, 6, 8 – 10, 12 – 28 and 30 under the exemption in section 30(b)(ii) of FOISA.

46. Section 30(b)(ii) provides that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
47. As in the case with the exemption contained in section 30(b)(i), the chief consideration when applying the exemption in section 30(b)(ii) is not whether the information constitutes opinions or views, but whether disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Authority's submissions about the exemption

48. The Authority relied on the same submissions set out under the consideration of section 30(b)(i) above for the application of the exemption in section 30(b)(ii).

The Applicant's submissions about the exemption

49. The Applicant relied on the same comments set out under the consideration of section 30(b)(i) above for the application of the exemption in section 30(b)(ii).

The Commissioner's view on the exemption

50. As he stated above, the Commissioner recognises the need for information and advice to be freely exchanged between the Authority and the COPFS in order for each to be able fulfil their professional responsibilities.
51. The Commissioner has fully considered the submissions from the Authority and the Applicant, along with the content of the withheld information.
52. For the same reasons given when considering section 30(b)(i) with regard to the information being withheld in documents 6 and 9, the Commissioner is not satisfied that disclosure would result in the substantial inhibition necessary for the exemption to be engaged. The content of this information is not of a level of sensitivity or controversy that the impact envisaged and described by the Authority is likely to occur as a result of disclosure. The information in question is a few sentences that discuss approved lines, and the anticipation of ongoing updates. The Commissioner does not accept that disclosure of such information would affect the relationship between the Authority and COPFS, nor indeed have any inhibitory effect on potential future victims or witnesses.
53. As such, the Commissioner finds that the Authority was not entitled to withhold the information in question in documents 6 and 9 under the exemption in section 30(b)(ii) of FOISA.
54. As the Commissioner is not satisfied that certain of the information in documents 6 and 9 is exempt from disclosure under section 30(b)(ii) of FOISA he is not required to go on to the consider the application of the public interest test.
55. However, as he concluded previously in relation to his consideration of the remaining information in line with the exemption in section 30(b)(i), the Commissioner considers that the information was directly related to ongoing enquiries, and how any investigation was to proceed. As such the information was sufficiently sensitive that disclosure may harm the ability of both the Authority and COPFS to fulfil their functions.
56. Consequently, the Commissioner is satisfied that the exemption in section 30(b)(ii) is engaged with regard to the remaining information being withheld under this exemption.

57. Having concluded that this remaining information is exempt from disclosure under section 30(b)(ii), the Commissioner must go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this information. The information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in its disclosure.

The public interest test

The authority's submissions about the public interest

58. The Authority relied on the same public interest arguments as set out in the consideration of section 30(b)(i) above.

The Applicant's submissions about the public interest

59. The Applicant also relied on the same public interest arguments as set out in relation to section 30(b)(i) above.

The Commissioner's view on the public interest

60. For the same reasons given when considering section 30(b)(i) above, the Commissioner finds that the public interest in disclosure of this information is outweighed by that in favour of maintaining the exemption in section 30(b)(ii).
61. Accordingly, the Commissioner has concluded that the Authority was entitled to withhold the remaining information in terms of section 30(b)(ii) of FOISA.

Section 30(c) – prejudice to the effective conduct of public affairs

62. The Authority is relying on this exemption for withholding email addresses, and direct line telephone numbers in documents 1, 3 and 6 to 30.

Test to be applied in the use of the exemption

63. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs”.
64. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by the disclosure of the information, and how that harm would be expected to follow from disclosure.
65. There is no definition of “substantial prejudice” in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
66. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions about the exemption

67. As mentioned above, the Authority relied on this exemption to withhold email addresses, and direct telephone numbers in documents 1, 3, and 6 - 30.

68. It argued that these were used for operational purposes only and, had been removed to ensure that internal processes were protected. It considered that disclosure could adversely affect the processes that have been put in place in order to provide an appropriate level of service both internally and externally. Such disclosure could also, the Authority submitted, lead to misuse of the email addresses/ contact numbers.
69. There are, the Authority commented, already various ways in which the public can contact it or COPFS, with each having specific sections of their websites dedicated to this. To that end, the Authority considered the public interest to have been met.

The Applicant's submissions about the exemption

70. The Applicant was informed that the Authority was also relying on section 30(c) to withhold some of the information falling within the scope of his request but provided no further comments.

The Commissioner's view about the exemption

71. The Commissioner has considered the submissions from the Authority in relation to the type of information being withheld, and acknowledges that it does relate to email addresses and phone numbers which could be used to directly contact staff within the Authority or COPFS.
72. The Commissioner also recognises that they were provided to allow these personnel to contact each other to discuss the matter at hand.
73. The Commissioner accepts that, if these contact details were placed in the public domain, as a result of disclosure under FOISA, it could result in them being used by the public, or others, to contact personnel, rather than using the recognised, and publicised routes set up for that particular purpose. This in turn would undermine the Authority and COPFS from being able to work effectively and follow relevant internal and external processes.
74. For these reasons, the Commissioner accepts that disclosure of the contact details would have the effect of prejudicing substantially the Authority and COPFS from being able to protect their internal and external processes. As a consequence, the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(c) of FOISA for refusing to disclose this information.
75. As the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(c) for withholding this information, he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

The public interest test

76. As mentioned previously, the Authority explained that there were various ways in which the public could contact it and COPFS, with specific sections of their websites dedicated to this. For this reason, the Authority considered the public interest in disclosure of the information to have been met.
77. As stated above, the public interest should be considered in the context of FOISA as "something which is of serious concern and benefit to the public".
78. The Commissioner does not consider disclosure of email addresses and telephone contact details for specific personnel would enlighten the public as to the nature of any discussions between the Authority and COPFS in relation to the subject of the request.

79. Furthermore, the Commissioner can see no public interest in disclosure of information which would negatively impact the ability of the Authority and COPFS from being able to effectively discharge their functions under internal or external processes.
80. As the Authority has pointed out, both it and COPFS publish contact details for use by the public, and others, on their websites. This, in the Commissioner's view, fulfils any public interest in being able to contact it or COPFS directly.
81. Having carefully considered the circumstances, the Commissioner is satisfied that the public interest in withholding the information outweighs that in disclosing it. The Commissioner therefore concludes that Police Scotland were entitled to withhold the information under section 30(c) of FOISA.

Section 34(1)(b) – Investigations by Scottish public authorities, etc.

82. The Authority withheld some information contained within documents 1, 2 3, 4, 5, 10, 11, 14-16, and 18-26 under the exemption in section 34(1)(b) of FOISA.

Test to be applied in the use of the exemption

83. Section 34(1)(b) of FOISA provides that information is exempt from disclosure if it has at any time been held by a Scottish public authority for the purposes of 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 instigated.
84. The exemptions in section 34 are described as "class-based" exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test. The Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise consider the effect of disclosure in determining whether the exemption applies. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions about the exemption

85. The Authority confirmed that the information being withheld under this exemption was held as part of an ongoing investigation, which may lead to a decision by it to make a report to the procurator fiscal to enable a determination whether criminal proceedings should be considered.

The Applicant's submissions about the exemption

86. The Applicant submitted that although the exemption may well apply to some of the information that was being withheld from him, he wished the Commissioner to determine whether it had been correctly applied to all of the information.

The Commissioner's view about the exemption

87. Following the Commissioner's examination of the withheld information, he is satisfied that the exemption in section 34(1)(b) applies to all of the information other than, certain information in documents 1 and 3.
88. As this information concerns the media, the Commissioner does not accept that it was gathered and held for the purposes of an investigation in terms of section 34(1)(b).

89. Whilst the information refers to events that have been reported and are of interest to the media, it contains no information about any investigative activity involving the Authority.
90. As the Commissioner is not satisfied that the information in question is held for the purposes set out in section 34(1)(b) Of FOISA, he finds that the exemption does not apply.
91. For this information the Commissioner is not required to go on to consider the public interest test set out in section 2(1)(b) of FOISA.
92. For the remaining information being withheld by the Authority under section 34(1)(b), the Commissioner is satisfied that the exemption applies, and as such he will go on to consider the public interest test set out in section 2(1)(b) of FOISA.

The public interest test

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

The authority's submissions about the public interest

94. The Authority recognised that there was public interest in disclosing information to enable the public to assess whether it had handled the case appropriately.
95. However, it considered that there were more factors that favoured the maintenance of the exemption in the public interest:
 - i) It considered that disclosure would undermine its ability to perform its function with regards to the investigation of criminal activity. It considered there was no provision within the Scottish justice system whereby case materials become the subject of public scrutiny.
 - ii) The Authority emphasised the need for trust and confidence to ensure that it could police by consent, and noted that it relied wholly on public cooperation. It argued that information was its most valuable resource as was public trust that information provided to it would be handled with due regard to confidentiality and privacy.
 - iii) The Authority's view was that disclosure would convey a message that police investigations were neither private or confidential and could be revealed as a result of a campaign. It considered that a loss of public confidence that material would remain within the appropriate legal processes, could result in a loss of willingness to cooperate with police investigations, thus having a detrimental impact on the Authority's ability to fulfil its statutory functions.
96. The Authority considered that the balance lay in withholding the information to protect its investigatory role and ensure the process by which it conducts investigations and gathers information is not prejudiced.

The Applicant's submissions about the public interest

97. The Applicant highlighted that his request centres on discussions between Scotland's main prosecution body and the Authority on the topic of a police investigation into the finances of Scotland's governing party. He argued that the detail of these discussions and the approaches taken by these organisations were in the public interest.

98. He considered that disclosure of the information would improve transparency and accountability and demonstrate that both operate in an independent manner, and that keeping the discussions a secret would undermine the rule of law and confidence in the prosecution service and police force.
99. The Applicant argued that the aftermath of the trial of Alex Salmond only had to be considered to understand that there is always the opportunity for political actors to actively undermine the law enforcement system if the system is not transparent.
100. He considered that accusations of cover-ups and of political interference in the process could be prevented by disclosure, and that this was demonstrably in the public interest.

The Commissioner's view on the public interest - section 34(1)(b)

101. The Commissioner accepts the significant public interest in and importance of the subject matter of the request, as well as the public's confidence in the independence of the justice system.
102. The Commissioner acknowledged that there is a very high public interest in the proper functioning of the criminal justice process.
103. The Commissioner accepts, as a general principle, that there is an inherent public interest in protecting the process by which the Authority carries out investigations. He accepts that this process relies heavily on the free flow of information from witnesses and other sources; that people providing information to the Authority expect it to be treated confidentially; and that disclosure of such information in response to an information request may deter or inhibit the provision of information to the Authority in future.
104. The Commissioner also accepts the need for the Authority to be able to carry out its regulatory function, and the need for public confidence and cooperation to achieve this.
105. The Commissioner has considered the arguments presented by the Applicant and the Authority, and has concluded that, in all of the circumstances, the public interest in maintaining the exemption in section 34(1)(b) of FOISA would outweigh that in disclosure of the information.
106. Having accepted that the Authority was correct to withhold most of the information it was relying on the exemption in section 34(1)(b) for the Commissioner will now consider the exemption in section 35(1)(b) of FOISA.

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

107. The Authority is withholding some information in documents 1, 3 - 5, 15, 16, 25 and 26 under the exemptions in section 35(1)(a) and/or (b) of FOISA.
108. The Commissioner notes that the Authority has relied on the exemptions in sections 35(1)(a) and (b) of FOISA for withholding information that it is also relied on section 34(1)(b) for. As the Commissioner is satisfied that this information is exempt from disclosure under section 34(1)(b) he will not go on to consider the application of section 35(1)(a) and (b) to the same information.
109. This means that the only information he need consider is that which he did not consider was exempt under section 34(1)(b) in documents 1 and 3. The Authority had sought to withhold this information under section 35(1)(b).

Test to be applied in the use of the exemption in section 35(1)(b)

110. Section 35(1)(b) of FOISA exempts information if its disclosure would or would be likely to prejudice substantially the apprehension or prosecution of offenders. As the [Commissioner's guidance](#)² states, there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime".
111. He considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as information received) and strategies designed for these purposes.
112. There is no definition in FOISA of what is deemed to be 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 simply a remote possibility.
113. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions about the exemption

114. The Authority submitted that in the course of an investigation it will gather evidence from any person who is in a position to assist it. There is an acceptance that such information will not be disclosed to a third party other than in the course of criminal proceedings, and that to do so would undermine this expectation and may deter victims or witnesses from assisting the Authority in the future. This would hamper investigations and would or would be likely to prejudice substantially the prevention or detection of crime, and the apprehension and prosecution of offenders. The Authority believed this was particularly relevant when considering the circumstances around the reporting and investigation of any, and certainly serious offences.

The Applicant's submissions about the exemption

115. The Applicant acknowledged that this exemption may apply to some of the information falling within the scope of his request but argued that a blanket application of this exemption would be disproportionate.

The Commissioner's view about the exemption

116. The Commissioner notes the Applicant's concern about a blanket use of this exemption. Although it may not have been clear to the Applicant in the response and review response provided by the Authority, as he was provided with no information, the Commissioner can confirm that the exemption was applied to specific information within the documents listed in paragraph 107 (above), rather than to all of the information being withheld.
117. Having considered the content of the information being withheld under this exemption, the Commissioner is not satisfied that the exemption has been correctly applied to some of the information being withheld in documents 1 and 3 (the same information discussed in paragraph 87 above).

² [BriefingSection35LawEnforcement.pdf](#)

118. The Commissioner does not consider that the Authority has demonstrated how disclosure of this information that refers to the media would lead to the prejudice necessary for this exemption to be engaged.
119. Given that the Commissioner does not accept the application of this exemption to this information, he is not required to consider the public interest test set out in section 2(1)(b) of FOISA.

Section 38(1)(b) – Personal information

120. Section 38(1)(b) read in conjunction with section 38(2A) (a) or (b), exempts information from disclosure if it is “personal data”, as defined in section 3(2) of the DPA 2018, and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the GDPR.
121. The Authority withheld information under this exemption in documents 1, 3-5, 11, 14-17, 19, 20, 22-25 and 27.

Would the information be personal data?

122. “Personal data” is defined in section 3(2) of the DPA 2018 as “any information relating to an identified or identifiable living individual”. Section 3(3) of the DPA 2018 defines “identifiable living individual” as “a living individual who can be identified, directly or indirectly, in particular with 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.”
123. The Commissioner has examined the information being withheld under this exemption, and is satisfied that it would relate to identifiable, living individuals, and as such would be personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

124. The Authority submitted that Article 5(1) of the UK GDPR would be contravened by disclosure of the personal data. This requires personal data to be processed “lawfully, fairly and in a transparent manner in relation to the data subject”
125. The definition of processing is wide and includes (section 3(4)(d) of the DPA 2018) “disclosure by transmissions, dissemination or otherwise making available”. In the case of FOISA, personal data are processed when disclosed in relation to a request. This means that, the personal data could only be disclosed if disclosure would be both lawful (i.e. if it would meet one of the conditions of lawful processing listed in Article 6(1) of the UK GDPR) and fair.
126. In considering lawfulness, the Commissioner must consider whether any of the conditions in Article 6(1) of the UK GDPR would allow the personal data to be disclosed.
127. The Authority submitted that disclosure of the personal data could not be lawful unless one of the conditions in Article 6 was met and the only potentially applicable conditions were consent at Article 6(1)(a) and legitimate interests at Article 6(1)(f), but that, in its opinion, neither of these can be met in the circumstances of the case.

128. The Commissioner must now consider if disclosure of the personal data would be lawful (Article 5(1)(a)). 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. The Commissioner considers condition (f) in Article 6(1) to be the only one which could potentially apply in the circumstances of this case.

Condition (f) – legitimate interests

129. Condition (f) states that the processing will be lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or 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).

130. 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 (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.

131. The tests which must be met before Article 6(1)(f) can be met are as follows:

(i) Does the Applicant have a legitimate interest in obtaining the personal data?

(ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?

(iii) Even if processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

132. In his submissions, the Applicant accepted that there were issues around the disclosure of personal data, however, he highlighted that his request centred on issues of whether correct processes were followed by the Authority and COPFS, relating to an investigation involving the party of government in Scotland. He considered there was a legitimate interest in the identities of those involved in discussions, as there was a potential conflict of interest that could not otherwise be ascertained.

133. The Authority commented that, although it had not contacted the Applicant to ascertain what his interest might be, it considered that it was for publication. It conceded that disclosure of the personal data may be the only means by which certain aspects of the story could be obtained and was willing to accept that the Applicant had a legitimate interest in the personal data.

134. The Commissioner accepts that disclosure of the personal data would facilitate transparency and accountability to the Applicant and the wider public regarding the roles of individuals involved in the discussions. Consequently, the Commissioner accepts that the Applicant has a legitimate interest in disclosure of the personal data,

Is disclosure of the personal data necessary?

135. Having accepted that the Applicant has a legitimate interest in the withheld personal data, the Commissioner must consider whether disclosure of those personal data is necessary for the Applicant's legitimate interests.

136. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities must 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 could reasonably be met by means which interfered less with the privacy of the data subject.

137. The Authority submitted that, although it accepted the Applicant had a legitimate interest in the personal data, it did not consider that its disclosure was necessary. It considered that there were limited circumstances in which personal data would be disclosed outwith the realms of FOI.
138. The Commissioner's view is that, as the Applicant's interest in the personal data was to determine whether individuals involved in discussions had any possible conflict of interest, given the nature of the subject of the request, disclosure of most of the personal data would be necessary for this legitimate interest to be met.
139. The Commissioner is not satisfied however that it is necessary for certain of the information in document 11 to be disclosed. In the Commissioner's view this information does not in any way add to the matter that is the subject of the request, or provide the Applicant with an insight into who was involved in discussions and decision making.

The data subjects' interests or fundamental rights and freedoms

140. The Commissioner has concluded that disclosure of most of the personal data would be necessary to achieve the Applicant's legitimate interests. However, this must be balanced against the fundamental rights and freedoms of the data subjects. Only if the legitimate interest of the Applicant outweighed those of the data subjects could the personal data be disclosed without breaching the first data protection principle.
141. The [Commissioner's guidance on section 38 of FOISA](#)³ notes factors that should be taken into account in balancing the interests of parties. He notes that Recital (47) of the General Data Protection Regulation states that much will depend on the reasonable expectations of the data subjects. These are some of the factors public authorities should consider:
 - (i) Does the information relate to an individual's public life (their work as a public official or employee) or to their private life (their home, family, social life or finances)?
 - (ii) Would the disclosure cause harm or distress?
 - (iii) Whether the individual has objected to the disclosure.
142. The Authority submitted that the intensive public interest in the subject of the request had been apparent since its outset, not only in mainstream media, but also on social media and blogs. It highlighted that the febrile nature of this had diverted resources to deal with incessant enquiries. This led to a decision early on that the identity of those involved would not be made public in an attempt to protect those individuals from being targeted, in person or on social media, by persons who are politically or ideologically driven.
143. The Commissioner accepts that the information clearly relates to the data subjects' public life, however, he accepts that disclosure could lead to an impact on the private lives of both the data subjects and their families. Disclosure under FOISA is public disclosure.
144. After carefully balancing the legitimate interests of the Applicant against the interests and fundamental rights and freedoms of the data subject, the Commissioner finds that the legitimate interests served by the disclosure of the personal data held would be outweighed

³ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

by the prejudice to the rights and freedoms of the data subjects that would result from disclosure, and that the requirements of condition (f) cannot be met.

145. In the absence of a condition that would permit disclosure of the personal data, the Commissioner must conclude that disclosure would be unlawful.

Fairness and transparency

146. 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 whether disclosure of such personal data would be fair and transparent to the data subjects.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by relying on the exemptions in section 30(b)(i), (ii) and (c), 34(1)(b), 35(1) (b), and 38(1)(b) for withholding certain information from the Applicant, the Authority complied with Part 1.

However, by wrongly withholding some information from the Applicant under sections 30(b)(i) and (ii), 34(1) and 35(1)(b) the Authority failed to comply with Part 1.

The Commissioner therefore requires the Authority to disclose the information detailed to it in the accompanying Appendix, by **6 January 2025**.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner
18 November 2024