

Decision Notice



Decision 014/2009 Dunbritton Housing Association, Craigdale Housing Association and Blochairn Housing Co-operative and the Chief Constable of Strathclyde Police

Numbers of Registered Sex Offenders in specified postcode sectors

Reference No: 200701167; 200701168; 200701532
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Decision 014/2009
Craigdale Housing Association, Dunbritton Housing
Association and Blochairn Housing Co-operative and the
Chief Constable of Strathclyde Police



Summary

This decision replaces *Decision 014/2009 Dunbritton Housing Association, Craigdale Housing Association and Blochairn Housing Co-operative and the Chief Constable of Strathclyde Police* issued by the Commissioner on 16 February 2009.

Craigdale Housing Association, Dunbritton Housing Association and Blochairn Housing Co-operative (the Housing Associations) each made separate requests to the Chief Constable of Strathclyde Police (Strathclyde Police) for statistical information about Registered Sex Offenders (RSOs) living in certain postcode sector areas. Strathclyde Police withheld the information under a number of exemptions contained in the Freedom of Information (Scotland) Act 2002 (FOISA). The Housing Associations each sought a review of the response to their request. After receiving a notice advising them of the outcome of the review, each of the Housing Associations remained dissatisfied and applied to the Commissioner for a decision.

Because the requests and responses were so similar, the cases were considered together in a single investigation by the Commissioner.

Following investigation, the Commissioner found that Strathclyde Police had been entitled to withhold the statistics under section 38(1)(b) of FOISA, on the basis that disclosure could lead to the identification of RSOs and that such disclosure would breach the first data protection principle.

The Housing Associations appealed the Commissioner's decision to the Court of Session. The Court upheld one of their grounds of appeal, i.e. that the Commissioner had not intelligibly explained the reasons for his decision, and remitted the decision to the Commissioner to consider of new his reasons for concluding that the statistics in question are personal data and to consider, in so far as necessary, the other exemptions referred to in paragraph 72 of the original decision (i.e. the other exemptions cited by Strathclyde Police which had not been considered in the decision, these being the exemptions in section 35(1)(a) and section 39(1) of FOISA).

Following further investigation, the Commissioner came to the conclusion that there was insufficient evidence to determine that disclosure of the statistics would identify individuals. As such, he concluded that the statistics were not personal data and could not, as a result, be exempt under section 38(1)(b) of FOISA.

However, the Commissioner found that some of the information which had been requested by the Housing Associations (i.e. the numbers of RSOs in each of four risk categories) was exempt from disclosure under both section 39(1) and section 35(1)(a) of FOISA, but that the total numbers of RSOs in each of the relevant postcode areas had been wrongly withheld under these exemptions. The Commissioner therefore ordered Strathclyde Police to disclose the number of RSOs in each of the postcode areas covered by the Housing Associations' requests, but not broken down by risk category.



Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6); 2(1)(b) (Effect of exemptions); 35(1)(a) (Law enforcement); 38(1)(b), (2)(a)(i) and (b) and (5) (definition of “data protection principles”, “data subject” and “personal data”) (Personal information) and 39(1) (Health, safety and the environment)

Data Protection Act 1998 (DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data) and 2(g) and (h) (Sensitive personal data)

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Recital 26

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

Common Services Agency v Scottish Information Commissioner [2007] 1 WLR 1550

Craigdale Housing Association and others v The Scottish Information Commissioner [2010] CSIH 43

Department of Health v Information Commissioner [2011] EWHC 1430 (Admin)

Background

1. This decision replaces Decision 014/2009 Dunbritton Housing Association, Craigdale Housing Association and Blochairn Housing Co-operative and the Chief Constable of Strathclyde Police, issued by the Commissioner on 16 February 2009.
2. During the period July to September 2007, each of the Housing Associations made separate information requests to Strathclyde Police for statistical information about Registered Sex Offenders (RSOs) in certain specified postcode sectors.

Request 1: Craigdale Housing Association

3. On 27 April 2007, Craigdale Housing Association asked Strathclyde Police for the number of RSOs in postcode sectors G45-9 and G44-5, in each of four risk categories, i.e. low, medium, high and very high. The request made it clear that the request was for information to the fourth postcode digit. It explained that discussions about guidance recently circulated on re-housing sex offenders had led to concerns that areas such as Castlemilk may be carrying a greater burden of offenders than more affluent areas. The information it requested would allow it to quantify this problem.

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4. Craigdale Housing Association acknowledged that the Police had concerns about the potential for public disorder, but did not believe that any individual offender could be identified from the statistical data it had asked for, given the number of residents in both postcode sectors.
5. On 1 June 2007, Strathclyde Police wrote to inform Craigdale Housing Association that the information requested was exempt from disclosure under FOISA. Strathclyde Police cited the exemptions in sections 35(1)(a), 39(1) and 36(2) of FOISA. In summary, the Police argued that registration of sex offenders enables the police and other relevant authorities to supervise and monitor those individuals, with the aim of protecting the wider community from any risk they pose and preventing them from committing similar offences. In the experience of police services throughout the UK, even speculation about the number of RSOs within a relatively large geographic area leads to attempts to identify the individual offenders. This would have two consequences:
 - the RSO fearing identification and reprisal attack would be likely to flee from the area, breaching the terms of their registration. Without appropriate supervision and assessment, there would be a greater risk of these individuals re-offending.
 - it was likely that a minority of individuals may attempt to physically harm the RSO, or individuals wrongly suspected of being the RSO, or hound them from the area.
6. Strathclyde Police commented that Craigdale Housing Association is classed as a “relevant partner agency” under the Multi Agency Public Protection Arrangements (MAPPA) which had come into force on 2 April 2007. They advised that if they held information about RSOs residing in Craigdale Housing Association accommodation who might pose a risk to people in the area or to other Craigdale Housing Association staff, then MAPPA was in place to ensure that the relevant information could be shared with Craigdale Housing Association. (MAPPA is a framework for bringing together agencies which assess, monitor and manage offenders, including “responsible authorities” in terms of the Management of Offenders etc. (Scotland) Act 2005, such as the police and other agencies (such as housing providers) which have a duty to co-operate in as far as their responsibilities relate to MAPPA offenders. The fundamental purpose of MAPPA is public safety and the reduction of serious harm.) Strathclyde Police considered that MAPPA was a more appropriate means for disclosure of information about offenders, rather than FOISA (unlike information disclosed under FOISA, a disclosure under MAPPA would not have the effect of putting the information into the public domain).
7. On 24 July 2007, Craigdale Housing Association wrote to Strathclyde Police requesting a review of their decision and challenging some of the reasons the police had given for withholding the information. Craigdale Housing Association commented that, although it understood the strategy described by the police, it could not accept some of the points made in their response.



8. Firstly, Craigdale Housing Association addressed the point made by the police that previous experience had shown that even speculation about the number of RSOs within an area had led to attempts to identify the individuals concerned. It noted that the police had made public statements to the effect that there are sex offenders living in every community; that the police are more concerned about those not on the Register because they are not being monitored; and that the police cannot monitor sex offenders on a 24 hour basis. Craigdale Housing Association pointed out that there is regular media coverage of sex offenders. It did not accept that the public statements by the police and other professionals, and the widespread media coverage about sex offenders, had resulted in widespread vigilante action. It referred to the murder of the schoolboy Mark Cummings in Royston, and stated that in that area there had been no vigilante action, although it was common knowledge that sex offenders were living locally.
9. Secondly, Craigdale Housing Association turned to the statement that the RSO fearing identification and reprisal would be likely to flee. It argued that such action would be a criminal offence and dealt with as such by the police. It argued that there had been a major shift in thinking on this issue, as evidenced by the introduction of measures such as the Child Exploitation and Online Protection (CEOP) website, which provides details of sex offenders who abscond. Craigdale Housing Association also pointed to a high-profile case where a sex offender missing from the register for a year had been located within 48 hours after his picture was posted in connection with a murder investigation.
10. Craigdale Housing Association commented that it had no reason to believe that MAPPA and the National Accommodation Strategy for Sex Offenders (NASSO) addressed its concerns about poorer communities carrying an unacceptable and disproportionate burden in terms of housing provision for RSOs. It argued that the Cosgrove Report (a report published in 2001 by the Expert Panel on Sex Offending) stated that it is dangerous to locate high numbers of sex offenders in any one area (the Commissioner notes that this comment was made in relation to RSOs living in the same building), and that it was a matter of serious concern that neither the police nor any other authority was monitoring this. It believed it was clearly in the public interest to establish whether high numbers of sex offenders are living in any one location.
11. On 22 August 2007, Strathclyde Police notified Craigdale Housing Association of the outcome of its review. Strathclyde Police upheld the decision to withhold the information for the reasons they had previously given in relation to sections 35(1)(a) and 39(1) of FOISA; however, Strathclyde Police withdrew their reliance on section 36(2). Strathclyde Police did not comment on any of the points raised by Craigdale Housing Association in its request for review.
12. On 28 August 2007, Craigdale Housing Association wrote to the Commissioner, stating that it was dissatisfied with the way in which Strathclyde Police had dealt with its information request of 27 April 2007. It believed that Strathclyde Police had incorrectly applied the exemptions cited, for the reasons set out in its request for review of 24 July 2007. It applied to the Commissioner for a decision in terms of section 47(1) of FOISA.



13. The application was validated by establishing that Craigdale Housing Association had made a valid request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Request 2: Dunbritton Housing Association

14. On 10 May 2007, Dunbritton Housing Association wrote to Strathclyde Police to ask for the number of RSOs in areas where the Housing Association had properties. Strathclyde Police were asked to provide the number of RSOs (again, in categories of low, medium, high and very high risk) in the following postcode sectors (as with the request by Craigdale, the request was to the fourth postcode digit):
 - a) G82-1; G82-2; G82-3; G82-4; G82-5 (Dumbarton)
 - b) G83-0; G83-7; G83-8; G83-9 (Alexandria)
 - c) G84-0; G84-7; G84-8; G84-9 (Helensburgh/Lomond)
15. On 12 June 2007, Strathclyde Police provided their response, which was identical to the response sent to Craigdale Housing Association in terms of the exemptions cited and the consideration of the public interest test. Again, Strathclyde Police advised that the information sharing arrangements under MAPPA were a more appropriate route for the disclosure of information about sex offenders to the Housing Association, than disclosure under FOISA.
16. Dunbritton Housing Association asked for a review of this response on 27 July 2007. In relation to the exemption in section 35(1)(a) of FOISA, it stated that, in its view, the information requested was of a non-specific nature and disclosure would be unlikely to prejudice substantially the prevention or detection of crime. Dunbritton Housing Association also considered that Strathclyde Police had failed to properly consider and apply the public interest test, particularly in terms of keeping the public adequately informed of any danger to public health or safety, and argued that disclosure of the information would assist in keeping the public adequately informed of any danger to public health or safety posed by registered sex offenders.
17. In relation to the exemption in section 39(1) of FOISA, Dunbritton Housing Association considered that there was only a remote likelihood that disclosure of the information would endanger the physical or mental health or the safety of RSOs. Although the Police had referred to two incidents where violent attacks had followed disclosure of information, the Association did not regard this as evidence of widespread reaction to disclosure. The Association cited the restraint shown by the Royston community following the murder of Mark Cummings in June 2004. The Association also considered that Strathclyde Police had failed to apply the public interest test correctly, for similar reasons to those stated in relation to section 35(1)(a) of FOISA.
18. Dunbritton Housing Association did not consider the information sharing arrangements under MAPPA to be relevant to its information request under FOISA.



19. Dunbritton Housing Association provided several examples of how the information requested would be used when the Association was considering future requests to re-house RSOs. Finally, it commented that the introduction of the CEOP Website in November 2006 suggested a major shift in Strathclyde Police's stance on disclosing information. Given that such detailed information is now disclosed, it questioned why non-specific statistical information could not also be released.
20. On 22 August 2007, Strathclyde Police notified Dunbritton Housing Association of the outcome of its review. Strathclyde Police upheld the decision to withhold the information for the reasons previously stated in relation to sections 35(1)(a) and 39(1) of FOISA; however, Strathclyde Police withdrew their reliance on section 36(2). Strathclyde Police did not comment on any of the specific points raised on behalf of Dunbritton Housing Association.
21. On 27 August 2007, Dunbritton Housing Association wrote to the Commissioner. It stated that the Association was dissatisfied with the way in which Strathclyde Police had dealt with its information request of 10 May 2007, believing that Strathclyde Police had incorrectly applied the exemptions cited, for the reasons set out in the Association's request for review of 27 July 2007. It applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
22. The application was validated by establishing that Dunbritton Housing Association had made a valid request for information to a Scottish public authority, and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
23. Strathclyde Police were notified that the Commissioner had received applications from both Dunbritton and Craigdale Housing Associations, and were asked to supply him with copies of the information withheld. The information was provided on 14 September 2007.

Request 3: Blochairn Housing Co-operative

24. On 13 September 2007, Blochairn Housing Co-operative wrote to Strathclyde Police to ask for the numbers of RSOs in the postcode sectors G21-2 and G11-7, in the four risk categories. As with both Craigdale and Dunbritton, the request was for information to the fourth postcode digit.
25. In its letter, Blochairn Housing Co-operative stressed that it did not want information that would lead to the identification of any individual, but wanted information that would allow the organisation to compare two postcode sectors containing several thousand people in each, in order to test the theory that poorer communities carry a disproportionate burden in terms of the management of offenders. It provided population figures for the postcode sectors in question, and pointed out that poorer communities have significantly higher numbers of children and single parent households: for example, G21-2 had 45.1% of residents under 16 years of age compared to 18.4% in the more affluent G11-7. Blochairn Housing Co-operative believed this to be relevant to the debate on the management of sex offenders in communities.



26. Strathclyde Police responded on 12 October 2007, in terms virtually identical to those employed in the responses to Craigdale and Dunbritton Housing Associations, referred to previously in this decision. The exemptions cited were sections 35(1)(a), 39(1), and 36(2) of FOISA.
27. On 19 October 2007, Blochairn Housing Co-operative asked for a review of the decision to withhold the information requested. Its request for review included arguments already put forward by Craigdale Housing Association, as outlined above. In relation to section 39(1) of FOISA, it argued that the suggestion that the community would try to identify sex offenders required further substantiation, given the size of the area and population in question, and given that public statements by the police support what is common knowledge, that sex offenders live within every community.
28. On 14 November 2007, Strathclyde Police notified Blochairn Housing Co-operative of the outcome of its review. Strathclyde Police upheld the decision to withhold the information for the reasons previously stated in relation to sections 35(1)(a) and 39(1) of FOISA. However, Strathclyde Police withdrew their reliance on section 36(2). Strathclyde Police did not comment on any specific points raised by Blochairn Housing Co-operative.
29. On 15 November 2007, Blochairn Housing Co-operative wrote to the Commissioner. It stated that the Co-operative was unhappy with the refusal to release the information requested, and applied to him for a decision in terms of section 47(1) of FOISA.
30. The application was validated by establishing that Blochairn Housing Co-operative had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
31. Strathclyde Police were notified that an application for a decision had been received, and were asked to supply the Commissioner with the statistics in question. These were provided on 10 December 2007.
32. As all three requests to Strathclyde Police were for the same type of information, and as the reasons for refusing the requests were virtually identical in each case, it was decided to conjoin the three applications and issue one decision.

Investigation

Initial investigation

33. The investigating officer contacted Strathclyde Police, providing them with an opportunity to provide comments on the three applications (as required by section 49(3)(a) of FOISA).
34. Strathclyde Police were given an opportunity to provide any further comments or submissions which they wished the Commissioner to consider in reaching his decision.



35. Strathclyde Police responded on 25 February 2008 with some further information and comments which they wished the Commissioner to consider.
36. The Housing Associations were invited to provide their views on the public interest in disclosure of the information, and did so.
37. Following the House of Lords' ruling in the case of *Common Services Agency v Scottish Information Commissioner*, Strathclyde Police were asked whether, in their view, the information withheld should be considered as personal data (as defined in the Data Protection Act 1998) and, if so, whether disclosure would contravene any of the data protection principles. On 18 August 2008, Strathclyde Police provided a submission which confirmed that the statistical information withheld was considered by them to be personal data, and which set out their reasons for believing that disclosure would contravene the first data protection principle. Strathclyde Police advised that they wished to cite the exemption in section 38(1)(b) of FOISA, in conjunction with section 38(2)(a)(i).

Additional investigation

38. As discussed elsewhere in this decision, the Commissioner's *Decision 014/2009 Dunbritton Housing Association, Craigdale Housing Association and Blochairn Housing Co-operative and the Chief Constable of Strathclyde Police*, issued on 16 February 2009, was appealed to the Court of Session by the Housing Associations, in terms of section 56(b)(i) of FOISA. The Court delivered its judgement in May 2010, and upheld the Housing Associations' ground of appeal that the Commissioner had not intelligibly explained the reasons for his decision¹. The Court remitted the decision to the Commissioner to reconsider his reasons for upholding the exemption in section 38(1)(b) of FOISA and to consider, in so far as necessary, the other exemptions cited by Strathclyde Police.
39. The Commissioner subsequently carried out further investigation and reconsidered the matter afresh.
40. Strathclyde Police were invited, on 17 June 2010, to provide any additional submissions which they wished the Commissioner to consider. Strathclyde Police were asked if they could explain further how the statistical information requested by the Housing Associations could lead to the identification of individual RSOs, and were invited to provide more examples of the ways in which disclosure could, or would, affect the management or protection of RSOs.
41. Strathclyde Police responded on 30 July 2010. However, the Commissioner was of the view that these submissions were insufficiently detailed for his purposes and, on 4 February 2011, the Commissioner gave Strathclyde Police a notice under section 50(1)(a) of FOISA, requiring Strathclyde Police to provide him with information (whether in recorded or unrecorded form), describing the route by which the disclosure of the statistics, together with some other information which is already in the public domain, or as a result of action which is likely reasonably to be taken by a determined person to identify individuals, could lead to identification.

¹ <http://www.scotcourts.gov.uk/opinions/2010CSIH43.html>



42. Strathclyde Police responded on 25 March 2011. This, and their earlier, submission is considered in the next part of this decision.
43. Following the Court of Session judgement, the Housing Associations were also invited to make an additional submission in relation to the exemptions cited by Strathclyde Police, and to provide information about their community's experience of having sex offenders housed locally.
44. Responses were received from all three Housing Associations, and have been taken into account by the Commissioner in reaching his decision.
45. Since the Housing Associations first made their information request in 2007, more information has been published about the management arrangements for RSOs living in the community (for example, Community Justice Authorities' annual reports on MAPPA and an evaluation of the Sex Offender Community Disclosure pilot in Tayside, which allowed members of the public to request information about individuals who have regular, unsupervised access to their children and who are perceived to pose a risk to the children). The Commissioner is aware of such developments, but his role, as set down by section 47(1) of FOISA, is to consider whether Strathclyde Police dealt with the Housing Associations' requests in line with Part 1 of FOISA at the time it issued its review responses (22 August 2007 for requests 1 and 2; 14 November 2007 for request 3).
46. As noted above, Strathclyde Police advised the Housing Associations that they considered that the information sharing arrangements under MAPPA were a more appropriate route for the disclosure of information about sex offenders than disclosure under FOISA. However, Strathclyde Police also advised the Commissioner that, under MAPPA, the Housing Associations are not entitled to receive the information they have asked for under FOISA. In any event, the Commissioner's role is to consider whether the information should be disclosed into the public domain (such is the effect of a disclosure under FOISA), rather than under MAPPA (which would restrict the use of the information provided to the Housing Associations).

Commissioner's analysis and findings

47. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by each of the Housing Associations and by Strathclyde Police and is satisfied that no matter of relevance has been overlooked. Although the three applications have been the subject of the same investigation, he has taken account of the differing circumstances in each of the cases. As noted above, Strathclyde Police cited a number of different exemptions in relation to the information. However, given that the question of identifiability is important to the question of all the exemptions cited by the Police, not just the personal data exemption, the Commissioner considered first the question as to whether disclosure of the statistics could identify living individuals.



Section 38(1)(b) – Personal information

48. As noted above, Strathclyde Police have, during the course of the Commissioner's investigation of the applications for a decision by the Housing Associations, withheld the information requested by the Housing Associations under section 38(1)(b) of FOISA. Section 38(1)(b), read in conjunction with section 38(2)(a)(i), exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA and if disclosure of the information would contravene one or more of the data protection principles set out in Schedule 1 to the DPA. In this case, Strathclyde Police have indicated that they are satisfied that the statistics amount to personal data and that disclosure would breach the first data protection principle.

Are the statistics personal data?

49. The Commissioner has considered whether the information withheld is personal data for the purposes of section 1(1) of the DPA; that is, data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in full in the Appendix). It should be noted that the DPA gives effect to Directive 95/46/EC of October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data ("the Directive") and so this has a bearing on how the DPA should be interpreted.
50. The Commissioner has taken into account the opinions delivered in *Common Services Agency v Scottish Information Commissioner* [2007] 1 WLR 1550 and has also noted the opinion delivered by the High Court of England and Wales in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin)..
51. The Housing Associations have consistently stated that they do not wish to know the identities of the RSOs represented by the statistics, and seek only "anonymous statistical information".
52. In the *Common Services Agency* case, the House of Lords considered a request for information relating to childhood leukaemia statistics in the Dumfries and Galloway postal area. In that case, the Lords concluded that the definition of "personal data" in the DPA must, in terms of recital 26 of EU Directive 95/46/EC (Recital 26 is set out in full in the Appendix) be taken to permit the disclosure of information which had been rendered fully anonymous in such a way that individuals were no longer identifiable from it, without having to apply the data protection principles. Therefore, if individuals cannot be identified from the actual information requested, then the information is not personal data and it cannot be exempt under section 38(1)(b) of FOISA. (The decision addresses this point in more detail below.).
53. The Commissioner considered whether the statistics requested by the Housing Associations were truly anonymous information or whether it might be possible to identify living individuals represented within the statistics.



54. According to guidance entitled “Determining what is personal data” which has been issued by the UK Information Commissioner (who is responsible for enforcing the DPA throughout the UK)², in considering whether a person can be identified, it should be assumed that it is not just the means reasonably likely to be used by the ordinary man in the street to identify a person, but also the means which are reasonably likely to be used by a determined person with a particular reason to want to identify the individual.
55. The Commissioner has therefore considered not only the Housing Associations’ reasons for seeking the information (already detailed in this decision), but how other people might use the information along with other information which is already in the public domain to identify the RSOs. The Commissioner has had regard to Recital 26 to EU Directive 95/46/EC, which states that, in determining whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person.
56. Strathclyde Police provided the Commissioner with examples of determined efforts being made by members of the public to identify RSOs living in some of the areas covered by the Housing Association requests.
57. The police also provided examples relating to the wider Strathclyde Police area and other parts of the UK. There are examples of identification of individuals leading to assault and, in one case, of a murder of someone who was mistakenly identified as an RSO.
58. The information which would be provided by disclosure of the statistics consists of two elements: the postcode sector defining the geographical area covered by the request and the number of RSOs living within that area. If this information is viewed in isolation, it appears to be truly anonymous, in that it does not permit identification of any individual RSO represented by the statistics. However, the Commissioner must examine whether there are other factors or information which, considered alongside the statistics, would “unlock” the figures and permit identification of any of the individuals represented in the statistical cohorts in these cases.
59. The Commissioner notes the Housing Associations’ comment that the police have consistently warned the public that there are RSOs in every community. If this is the case, the Housing Associations have argued, why would disclosure of the statistics mean that the individuals in question would be more identifiable than they are currently?

²http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf



60. The Commissioner has considered the question of identifiability from several angles. He has also considered guidance adopted by other organisations for the “safe” (i.e. truly anonymous) disclosure of statistics relating to personal data and has considered that guidance in the light of the case before him. He has looked at the range of information potentially available to the public about the individuals represented by the statistics. He has also looked at the information Strathclyde Police have provided about local circumstances for some of the areas covered by the Housing Associations’ requests, and considered whether any of this information was relevant in assessing whether disclosure of the RSO statistics would lead to identification of individuals.
61. The Commissioner has considered whether the population and geographical size of the postcode areas in question would make identification a real possibility (generally speaking, the smaller the population and geographical size, the higher the likelihood that identification will occur). He has also considered whether there is any other information already in the public domain which, combined with the statistics (if disclosed), could lead to identification of the RSOs involved.
62. The Commissioner initially considered guidance issued by the Office for National Statistics on preserving confidentiality in relation to the dissemination of health statistics³; and guidance from the United Kingdom Association of Cancer Registries on the disclosure of potentially identifiable information⁴. However, as the Court of Session distinguished the circumstances where this guidance would be useful from the actual circumstances of this case, the Commissioner, in reconsidering the position, has not relied upon this guidance in reaching the revised conclusions set out in this decision. Instead, he has focused on the circumstances of this case and, in particular, the question of whether identification of individual RSOs would be possible if the requested statistics were disclosed.
63. As noted above, the Court found that the Commissioner had not intelligibly explained his reasons for accepting that disclosure of the statistics would, in conjunction with other available information, permit identification of individual RSOs. The Court commented: “*His conclusion [that the data in question are personal data] is a secondary finding of fact which must intelligibly follow from the primary material.*”. The Court remitted the decision to the Commissioner “*to consider of new his reasons for concluding that the statistics in question are personal data...*”⁵.

³ Review of the Dissemination of Health Statistics: Confidentiality Guidance. Office for National Statistics, 2006.

⁴ UKACR guidelines on release of: a) individual level anonymised information and b) tabular information based on small populations or small cell counts (potentially identifiable information).
<http://82.110.76.19/confidentiality/potentiallyidpolicy.asp>

⁵ <http://www.scotcourts.gov.uk/opinions/2010CSIH43.html>



64. The Commissioner understands from this that the Court requires him to demonstrate why, as a matter of fact, the statistics withheld in these cases would (either on their own or in conjunction with other information or factors) permit identification of one or more individual RSOs represented in these particular statistical cohorts, and thus fall within the definition of personal data in the DPA. In other words, the Commissioner is required to present factual reasons why, as a consequence of disclosure, identification would become possible, even where (as the Commissioner acknowledges), it is not possible for him to be certain that he is aware of all factors which may come into play should a determined individual seek to identify any of the RSOs concerned.
65. As stated previously, the Commissioner accepts that the requested information appears to be anonymous, and that identification of any of the individuals represented in the cohort would require additional information or other factors to serve as the key to unlock the statistics. The Commissioner has therefore sought to establish whether it could be demonstrated, as a matter of fact, that any such information is available in the public domain.
66. Following the Court decision, the Commissioner asked Strathclyde Police if they could provide further explanation of how disclosure of the statistics could lead to identification of individual RSOs, as argued in their submission of 18 August 2008. Strathclyde Police replied (30 July 2010) that their position was as previously outlined to the Commissioner: disclosure of the information requested together with the information already in the public domain such as cases reported in the media, court results, local incidents, local knowledge and the residential status and accommodation type for many RSOs would lead to identification of individuals.
67. The Commissioner is aware that media reports of the trial or release of RSOs may indicate the individual offender's home area, and in some cases may provide the home town or even the home address of the RSO. Photographs of the offender are sometimes published. However, this type of information, on its own, is likely to be sufficient to allow identification of an individual RSO; disclosure of the statistics would not be required for identification to take place in such circumstances.
68. The Commissioner is also aware that information about RSOs or suspected RSOs may circulate within a community in more informal ways. As noted above, Strathclyde Police have provided the Commissioner with evidence that, in some of the communities covered by the requests, residents have made active attempts to discover the identity of sex offenders living in their midst or have taken the opportunity presented by a public meeting to voice strong opposition to sex offenders being housed in the local area.
69. It is not evident to the Commissioner how disclosure of the actual statistical information withheld by Strathclyde Police would make identification certain in circumstances where the identity of an RSO was already suspected.



70. In reconsidering this case, the Commissioner came to the conclusion that he did not have sufficient information to allow him to determine that disclosure of the statistics in the districts in question could lead to the identification of the individuals. The submissions which he had previously received from Strathclyde Police had focused mainly on the potential consequence of identification, rather than on the possibility of identification as a result of the disclosure of the numbers.
71. The Commissioner therefore issued an information notice, under section 50(1)(a) of FOISA, requiring Strathclyde Police to provide him with information (whether in recorded or unrecorded form), which described the route by which the disclosure of the statistics, together with some other information which is already in the public domain or as a result of action which is likely reasonably to be taken by a determined person to identify individuals, could lead to identification. He asked Strathclyde Police to explain how any or all of the RSO statistics in combination with other information could identify any RSO. He set out his view that if identification is possible from that other information alone (e.g. press reports of a conviction), then disclosure of the statistic could not be said to lead to identification; he therefore required Strathclyde Police to provide him with the information they held in relation to this point.
72. In their response (25 March 2011), Strathclyde Police reiterated the argument that disclosure of the information requested together with information already in the public domain, such as reported media cases, court results, local incidents, local knowledge, residential status and accommodation type for many RSOs, would lead to the identification of relevant individuals. As an example of the information available in the public domain, it referred to a website⁶ where the public can search by name or by area to retrieve reports about convicted sex offenders.
73. While the response from Strathclyde Police highlights the range of information already publicly available about individuals who are RSOs, it does not show how disclosure of the statistics requested by the Housing Associations would enable identification of an individual RSO not previously identifiable; in other words, it does not show why disclosure of the statistical information would result in the figures being “unlocked” and permit identification of any of the individuals represented in the statistical cohorts in these cases.
74. The Commissioner has concluded that it not possible for him to ascertain all potential sources of information which might be available to a person determined to identify the individual offender(s) in a given postcode sector, or whether, as a matter of fact, any information exists which could serve as the key to unlock the statistics and permit identification.
75. However, having considered all the information provided to him by Strathclyde Police, he does not have sufficient evidence to support the argument that other information is available which could lead to identification of individual RSOs, should the statistics withheld under section 38(1)(b) of FOISA be disclosed.

⁶ <http://www.chris-uk.org>



76. The Commissioner accepts that, where a person already knows that an individual is an RSO, disclosure of the statistics in question would permit that person to identify the individual RSO as one of the statistical cohort. However, this in itself does not make the statistical information personal data; it is not the disclosure of the statistics which would identify the individual. The Commissioner is unable to demonstrate that disclosure of the statistics would lead to the identification of one or more RSOs, or what other information when taken together with these statistics would enable identification. As such, the Commissioner must conclude that the disclosure of the statistics would not identify individual RSOs and that the statistics are not, therefore, personal data, as defined by section 1(1)(a) of the DPA.
77. Having come to this conclusion, the Commissioner finds that the exemption in section 38(1)(b) of FOISA cannot apply to the withheld information. The Commissioner will, however, go on to consider the other exemptions cited by Strathclyde Police.

Section 35(1)(a)

78. Section 35(1)(a) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the prevention or detection of crime. If satisfied that this exemption applies, the public authority must go on to consider the public interest test in section 2(1)(b) of FOISA.

Submission from Strathclyde Police

79. When responding to each of the information requests, Strathclyde Police put forward two reasons for applying the exemption in section 35(1)(a) to the information withheld. These were:
- The RSO fearing identification and some form of reprisal attack would be likely to flee from the area in fear and in breach of the terms of their registration, hiding from both the police and those seeking to identify them. Without the appropriate supervision and assessment, there would be a greater risk of these individuals re-offending. Thus, the disclosure of the information requested would, or would be likely to, prejudice substantially the prevention or detection of crime.
 - It is likely that disorder would ensue within the community as a minority of individuals attempt to either hound the RSO from that area or physically harm them. Again, this would, or would be likely to, prejudice substantially the prevention or detection of crime.



80. Strathclyde Police explained that the registration of sex offenders enables the police and other relevant authorities to supervise and monitor them, with a view to assessing the risk of their re-offending. The process of risk assessment aims to quantify the risk of the individual re-offending and, where such a risk is identified, a number of strategies can be deployed, such as increased supervision. The strategy of supervision and monitoring is aimed at preventing the RSO from committing a similar offence, while protecting the wider community from any risk they pose. This strategy relies on the compliance of the RSO in order to enable adequate monitoring and assessment. According to Strathclyde Police, it is the experience of the police throughout the UK that speculation about the number of RSOs within even a relatively large geographic area leads to attempts by members of that community to identify them. In turn, this leads to the harmful consequences outlined in the previous paragraph.
81. Strathclyde Police took the view (letter of 30 July 2010) that disclosure of the information requested would cause harm in the public environment. While the number of RSOs in the areas in question had until now been the subject of speculation and rumour, confirmation of the numbers would turn rumour and speculation into fact. They believed that this would fuel increased speculation - not "how many?", but "who?" – and lead to the very situations which the MAPPA process was intended to prevent or manage.
82. Strathclyde Police also anticipated that disclosure of the information would be seized upon by the local press "and others who will be intent on inflaming the situation, impacting on the current management process to the detriment of that process". The police would have to dedicate more time and resources in reassuring the community and dealing with incidents arising as a consequence of disclosure.
83. Strathclyde Police provided examples from some of the areas covered by the information requests, and from other parts of the country, of incidents where individuals known or suspected to be RSOs had been targeted by vigilantes. In some cases this had disrupted the supervision arrangements for the RSO in question.
84. Strathclyde Police also provided comments on the disclosure of the number of RSOs by risk category, advising the Commissioner that this is information which they do not proactively disclose. They considered that disclosure by category would be "inflammatory" and would increase the risk of vigilante action. This would be the case particularly where the RSOs were high risk offenders. However, according to Strathclyde Police, even defining an RSO's risk category as low risk would not be without its problems, as the very fact of defining an RSO's risk category could lead to a change in public perception .
85. For these reasons, Strathclyde Police argued that the disclosure of the requested information would, or would be likely to, prejudice substantially the prevention or detection of crime.



Submission from the Housing Associations

86. The Housing Associations did not accept the arguments put forward by Strathclyde Police in relation to section 35(1)(a). In their requests for review (24 July 2007 and 19 October 2007, respectively) Craigdale and Blochairn noted that police officers have previously made public statements to the effect that sex offenders are likely to live in every community and that there is regular media coverage of sex offenders, but this has not resulted in widespread vigilante action. Dunbritton's request for review (27 July 2007) argued that Strathclyde Police had failed to demonstrate that the harm caused by disclosure would be at the level of substantial prejudice. This view was reiterated on behalf of all three Housing Associations in October 2010, at which time the Housing Associations also provided information about the way in which their communities had coped with or reacted to the presence of sex offenders housed locally, where this was known or suspected in the community.

The Commissioner's analysis

87. The Commissioner acknowledges the importance of the work carried out by the police in monitoring and supervising RSOs living in the community, both in terms of crime prevention and maintaining public order. The question for the Commissioner, in relation to the exemption in section 35(1)(a), is the extent to which this work would be disrupted if the statistics were to be disclosed. The test required by the exemption is one of "substantial prejudice", and the Commissioner must be satisfied that disclosure would, or would be likely to, cause harm at this level before he can accept that the exemption applies.
88. Strathclyde Police argued that disclosure of the statistical information would lead people to speculate about the identity of the individuals concerned. The Commissioner accepts that this may be a consequence of disclosure, particularly if media reporting were to heighten public anxiety on the matter, and that it is not necessary for an individual's status as an RSO to be established beyond doubt for them to become the target of vigilante action. The fact that the information withheld does not permit identification of the individual RSOs does not guarantee that action may not be taken against someone assumed to be an RSO. Strathclyde Police have given the Commissioner details of a number of incidents in which a person rightly or wrongly suspected to be an RSO has been subjected to abuse or violence from people objecting to their presence in the community.
89. In order for the exemption in section 35(1)(a) of FOISA to apply, the harm that disclosure would cause in terms of crime prevention must be, at least, *likely* (as well as substantial), and must be a consequence of the disclosure of the information. The question which arises is whether the harmful consequences feared by Strathclyde Police are likely to come about simply if the total number of RSOs in all of the postcode areas is made known, or whether they are more likely to result from the disclosure of the numbers in each of the risk categories, which might cause the focus of public reaction to be narrowed to areas where those categorised as being of very high risk or high risk are located, and where the attempt at identification or expressions of public anger might cause such high risk offenders to avoid monitoring by the authorities and so put the public at risk from re-offending activities.



90. In coming to a view on these issues, the Commissioner found that it was necessary to consider separately whether the exemption in section 35(1)(a) of FOISA could be applied, on the one hand, to the information about the total number of RSOs in each postcode sector and, on the other hand, to the information about the risk categories assigned to those RSOs.

Information about the total number of RSOs in each postcode sector

91. It is a matter of fact that information about the total number of RSOs in given areas has been the subject of disclosure in Scotland as well as elsewhere in the UK. Over time, the disclosures have been made for progressively smaller geographical areas or levels of population. The Commissioner is aware of instances where disclosure of statistical information about the total number of RSOs in a given area was made under FOISA or the Freedom of Information Act 2000. These include cases where the Commissioner has previously ordered disclosure of RSO statistics for certain geographical areas contrary to the views of the police. The Commissioner has not been made aware of (and has not been able to identify) any vigilante incidents or other significant adverse consequences linked to the disclosure of the information in these cases.
92. In these previous cases, disclosure has generally been at a higher geographical or population level than that requested in this case (the requests are for information to the fourth postcode digit). When assessing the likely consequences of disclosure of the information withheld in this case, the experience gained from previous cases is not directly comparable. However, in November 2007, Grampian Police disclosed the numbers of RSOs living in six towns with population sizes of between 10,000 and 20,000. Grampian Police advised the Commissioner in November 2008 that it had no knowledge of any direct consequences experienced by RSOs following disclosure. The Commissioner is aware that Grampian Police considered a number of factors specific to the local communities before reaching the decision to disclose the information, and he does not consider it set a binding precedent for similar requests. He also notes that the Grampian request did not include information about the risk categories of the RSOs. However, as the Grampian case demonstrates, it is at least possible for information to be disclosed about the number of RSOs in individual communities without subsequent evidence of the type of harmful consequences anticipated by Strathclyde Police.
93. The population in each of the postcode areas in respect of the Housing Associations' information request is, for the most part, significantly smaller than the population in previous cases where information has been disclosed. (The populations of the postcode areas (at the time Strathclyde Police were dealing with the request, in 2007) varied from 983 (G83 7) to 10,542 (G44 5). The average population of each of the postcode areas under consideration was just over 6,000.)⁷ Nevertheless the Commissioner does not find that Strathclyde Police have been able to show that vigilante action or other adverse consequences would, or would be likely to, occur as a result of disclosure of the total number of RSOs in each postcode sector requested by the Housing Associations.

⁷ Statistics provided by Strathclyde Police from GIS mapping, August 2007



94. The Commissioner has considered whether conclusions could be drawn about the way in which the affected communities might react to disclosure of statistics about RSOs living locally. Firstly, the very fact that sex offenders lived in their communities would not come as a surprise. As the Housing Associations have commented, public statements have previously been made to the effect that sex offenders are likely to live in every community⁸. The indicative number of sex offenders might be guessed at by members of the public, given the previous disclosures and also publicly available statistics and analysis. It is now known, for example, that the number of RSOs managed under MAPPA in Scotland as at 31 March 2008 was 3,131, that is, around 58 offenders per 100,000 population.⁹ The number living in Glasgow at that date was 430, equating to around 74 per 100,000 population.¹⁰ The number of registered sex offenders in the community is further broken down by Strathclyde Police to show, for example, that in June 2011, there were 96 RSOs in Glasgow Central and West, 179 in Glasgow North East and East Dunbartonshire and 199 in Glasgow South and East Renfrewshire.¹¹
95. Although these particular figures would not have been available at the time the requests were made by the Housing Associations to Strathclyde Police, the fact that this type of data is published and made widely available (some within 12 months of the reviews being carried out in these cases and whilst the Housing Associations' application was still being considered by the Commissioner) strongly indicates that it is accepted that it is safe to put such increasingly detailed information into the public domain. However, the numbers of RSOs in postcode areas falling within the scope of the Housing Associations' requests are considerably smaller and so the Commissioner has considered whether knowing that there are, for example, five or 10 RSOs (or some other figure) in a postcode sector, rather than simply knowing that some RSOs are likely to be present in the community, would be more likely to spark vigilante action or cause those RSOs to cease to cooperate with the authorities.
96. He has already concluded that such disclosure could not lead to the identification of any of the RSOs. The statistics may show that some postcode areas have more offenders than others, but not such that the difference in the figures would, in the Commissioner's view, generate the kind of adverse response feared by the Strathclyde Police. In the absence of a further breakdown by risk categories, it would not be likely to lead to efforts to identify any individual type of offender or focus attention on a particular small geographical area.

⁸ For example, Fife and Forth Valley Community Justice Authority MAPPA annual report 2009/10, at <http://www.scotland.gov.uk/Publications/2010/11/10111818/6>

⁹ Scottish Centre for Crime and Justice Research Briefing No. 01/2010
<http://www.scotland.gov.uk/Publications/2008/10/17115958/2>

¹⁰ Scottish Government Glasgow MAPPA Annual Report 2008
<http://www.scotland.gov.uk/Publications/2008/10/17115958/2>

¹¹ Strathclyde Police Number of Registered Sex Offenders in Strathclyde – June 2011
<http://www.strathclyde.police.uk/index.asp?docID=6498>



97. The Commissioner has also taken into account examples from the Housing Associations' submissions which show that information or suspicions about an individual's status as a sex offender may circulate within a community without any vigilante action occurring. Where an individual is a known RSO, then the disclosure of the total number of offenders in the postcode area where they live does no more than to indicate that that person is one of, say, five or 10 (or some other number) of RSOs in the area. Where an individual is simply suspected of being an RSO, then the disclosure does nothing to confirm whether they are indeed an RSO.
98. Vigilante action may occur where enough is already known or thought to be known about a particular individual for it to be assumed that the individual is an RSO, without the disclosure of the requested statistics. In these circumstances, the disclosure of the statistical information becomes incidental: the individual has already been "identified" (even where, in fact, misidentification has occurred) and the motive for vigilante action presumably already exists in the minds of those who would carry out such an attack. Disclosure of the statistics may provide a focus for renewed speculation about an individual who is already suspected of being an RSO, but would provide potential vigilantes with no further evidence of the identity of the RSOs in the area.. So, while he accepts that disclosure could serve as a catalyst for renewed speculation, which might lead to vigilante action, the Commissioner does not find that Strathclyde Police have shown this to be a likely consequence.
99. The second argument put forward by Strathclyde Police in relation to section 35(1)(a) concerned a negative reaction by offenders to the information requested being disclosed. Fear of identification, or alarm at attempts at identification, appear to the likeliest causes of an adverse response from offenders. Offenders may become aware that they are one of the small cohort figure disclosed, but the Commissioner is not persuaded that this would be sufficient to cause such an adverse response as to jeopardise the monitoring and other management arrangements in place in the manner suggested by Strathclyde Police, e.g. leaving their accommodation without the knowledge of the police and potentially then going on to re-offend.
100. Obviously, neither the Commissioner nor Strathclyde Police can be certain what the thoughts and feelings of individual RSOs might be, should disclosure of these particular figures take place. But, even if it is accepted that potentially some RSOs might be sufficiently alarmed by disclosure to seek relocation or go underground, the Commissioner must consider whether this is *likely*, in order to reach a conclusion on whether disclosure is likely to have a significant adverse effect on crime prevention or detection.



101. The Commissioner is not persuaded by the argument that disclosure of the apparently anonymous statistical information on its own, without any additional identifying data, is likely to increase RSOs' fear of identification to such an extent that they would feel it necessary to move on. The Commissioner accepts the possibility that disclosure of the withheld information may act as a tipping point for RSOs fearing identification, but he questions whether this is likely, given the obvious difficulties in identifying an individual offender from statistical information. He notes that, in many cases, RSOs are already likely to be vulnerable to identification through information available from media reports, local incidents or information shared by people who know their history; the RSOs are likely to be aware that this is the case, and to live with this knowledge. In this context, he does not accept that disclosure of information which does not relate in an obvious way to identifiable individuals would be likely to produce the consequences anticipated by Strathclyde Police.
102. For these reasons, the Commissioner has found that the exemption in section 35(1)(a) of FOISA should not be upheld in relation to information about the total numbers of RSOs in each postcode sector. Because the exemption has not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1) of FOISA in relation to this information. However, Strathclyde Police have also argued that these statistics are exempt from disclosure under section 39(1) of FOISA and he will consider whether this exemption applies later in this decision.

Information about the risk categories of the RSOs

103. As noted previously, the Commissioner believes it is necessary to consider separately whether disclosure of the information about risk category of the RSOs in each postcode sector would, or would be likely to, prejudice substantially the prevention or detection of crime, and whether this information is exempt from disclosure under section 35(1)(a) of FOISA.
104. RSOs are assessed in relation to the risk they pose to public safety. The Risk Matrix 2000 assessment tool places offenders into one of four risk categories (Low/Medium/High/Very High), based on characteristics that have been shown, through research, to be linked to rates of reconviction.¹² The categories are defined as follows:
- Low Risk: The offender has the potential to re-offend but is very unlikely to do so unless there is a major change in circumstances, for example, relationship breakdown, loss of accommodation.
 - Medium Risk: The offender has the potential to re-offend and cause harm but is unlikely to do so unless there is a major change in circumstances, for example, relationship breakdown, loss of accommodation.
 - High Risk: There are indicators of risk of serious harm. The potential event could happen at any time and the impact could be serious.

¹² MAPPA Offender Management SOP (available on www.strathclyde.police.uk)



- Very High Risk: There is an imminent risk of serious harm. The potential event is more likely than not to happen and the impact would be serious.
105. The Commissioner accepts that if disclosure revealed the presence of high risk or very high risk offenders in the statistical cohort for a particular postcode sector, this might well cause more alarm in the community than simply disclosing that a certain number of RSOs live in the area.
 106. The number of RSOs considered to be of high risk or very high risk is considerably lower than those who are categorised as low or medium risk. An indication of this is evident from the MAPPA annual reports where offenders are categorised as Level 1, 2 or 3, with Level 3 being reserved for offenders who present as high or very high risk. As at 31 March 2009, 38% of offenders were categorised as Level 2 and only 2% as Level 3. These figures are not directly comparable to the distribution of risk categories in the statistics at issue here, but serve to illustrate the point that higher risk offenders are a small proportion of the overall total.
 107. As noted above, public statements have been made to the effect that there are sex offenders living in every community. The Commissioner takes the view that most communities live with the knowledge that this is likely to be the case, being aware that the term “sex offender” can apply to a range of sex offences. However, it is not the case that it can be said that there are high or very high risk offenders living in every community, especially when the level of “community” in this case is broken down to the population level of a postcode sector.
 108. Disclosure of the number of offenders by risk category would focus attention on a small number of postcode areas where high or very risk offenders were present. As Strathclyde Police have indicated, the issue would move from being one of establishing “how many” offenders, to seeking to identify “who” is the offender. Although the Commissioner has already found that the disclosure of such a figure would not, of itself, lead to identification, the fact that it relates to one person or a small number of individuals in a confined area encourages at least the attempt to do so. The motivation to do so would come from the presumed nature of the offence(s) committed by the offenders and perceived risk to the community which they represent by virtue of their categorisation.
 109. The effect of a public campaign seeking to identify an offender presents the possibility of someone who is already aware of that person’s identity disclosing it, and for that to become public knowledge. It also presents the possibility of misidentification. For example, even if, as is accepted, some RSOs are already known to some members of the public, their categorisation may not be known, and they may be mistakenly targeted as being the very high risk offender, even though they are categorised as low risk.



110. The very attempt at identification in these circumstances, whether it is successful or not, is much more likely to lead to the outcome put forward by Strathclyde Police in relation to section 35(1)(a), which is that those particular RSOs fearing that they would be identified and targeted would leave their accommodation, with or without the knowledge of the police. This could disrupt arrangements for their supervision and monitoring and even lead to some RSOs “going underground” in breach of their registration requirements. Without the appropriate supervision and assessment, there would be a greater risk of these individuals re-offending. These are precisely the individuals who are at most risk of re-offending and may pose the greatest risk to the public.
111. Strathclyde Police provided examples of RSOs requiring to be re-housed, sometimes repeatedly, either because information about them was circulating in the community or because the offender feared that this was about to happen. Again, it should be noted that this evidence may be of limited value to the Commissioner in deciding whether such consequences would be likely following disclosure of the statistical information requested in this case as the information withheld would not lead to the identification of individual offenders, but it does indicate that fear of identification rather than actual identification can motivate an adverse reaction..
112. The Commissioner therefore believes it is likely that disclosure of the risk category information would lead to the consequences anticipated by Strathclyde Police. For this reason, he accepts that disclosure of the risk category information would, or would be likely to, prejudice substantially the prevention of crime.
113. The Commissioner therefore finds that while the exemption in section 35(1)(a) of FOISA does not apply to the information about the numbers of RSOs in each postcode sector, it does apply to the information about the risk category of the offenders represented in the cohort.
114. The exemption in section 35(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in disclosing the risk category information to which the exemption in section 35(1)(a) applies is outweighed by the public interest in maintaining the exemption.
115. The submissions on the public interest test put forward by Strathclyde Police relate to the withheld information as a whole; they did not offer public interest arguments relating specifically to the risk category information. They argued that while public debate and public awareness could favour disclosure, it could not be in the public interest to release information which would increase the likelihood of an RSO re-offending, or compromise the law enforcement role of the police. They referred once more to the public interest in maintaining monitoring and supervision arrangements for RSOs, in ensuring public safety and in preventing further offending.



116. In their submission of 21 October 2010, Strathclyde Police also argued that it could not be in the public interest to release information which was sensitive personal data (if the information was personal data, it would, in line with section 2(g) and/or (h) of the DPA, be sensitive personal data); this would contravene the DPA and could increase the likelihood of an RSO being physically or mentally harmed, an individual being mistakenly identified as an RSO, or could obstruct the police in relation to the assessment and supervision of RSOs. The issue of whether the information is or is not personal data in terms of the DPA has already been discussed in this decision notice; because of the conclusions reached in relation to the exemption in section 38(1)(b) of FOISA, the Commissioner has not found it relevant to consider the argument in so far as it relates to the DPA, although he will consider matters such as possible misidentification in what follows below.
117. The Housing Associations did not put forward any public interest arguments relating solely to the risk category information but their views are implicit in the arguments that they have made in support of their requests, which were for statistics broken down by risk category. Jointly, they argued that publication of the sex offender statistics would help to establish whether the process for placing RSOs in communities leads to disproportionately high numbers being housed in poorer communities where there may also be a disproportionately high number of potential victims, in terms of young children and single parent households. The Housing Associations submitted that this was not something which the Police or any other authority were monitoring, and that it was a matter of serious concern; it was therefore in the public interest to disclose information which would encourage debate on the management of sex offenders in communities, and would help to support and protect children in the communities where RSOs are housed. Dunbritton Housing Association had also argued that there was a public interest in keeping the public adequately informed of any danger to public health and safety and that disclosure of the information would assist in doing this.
118. The Commissioner has considered both sets of arguments carefully, but, on balance, finds that the public interest in maintaining the exemption in section 35(1)(a) outweighs the public interest in disclosure of the risk category information. There is, of course, merit in the Housing Associations' view that there is a public interest in establishing whether the process for placing RSOs in communities leads to disproportionately higher numbers being placed in poorer communities and that there is a public interest in encouraging debate on the management of RSOs. Such public interest would be met in part (but the Commissioner accepts not wholly) by the disclosure of the RSO data at postcode level, which would provide more detail on distribution than is currently publicly available.
119. However, there is also a clear public benefit in ensuring that the role conducted by the police and other relevant authorities in assessing, monitoring and managing offenders should not be disrupted as a result of determined public efforts to identify and target certain offenders or to conduct vigilante action, with the possibility of public disorder, jeopardising the measures already in place to minimise, so far as possible, the risk to the public from such offenders. The presumed public interest in disclosure as a means of alerting vulnerable groups in certain areas may be negated by such disclosures, if the very type of offenders which the public would want the police and authorities to be effectively monitoring and managing went 'underground', posing an even greater risk to the public.



120. In all the circumstances of the case, therefore, the Commissioner finds that the public interest in disclosing the information is outweighed by that in maintaining the exemption.
121. The Commissioner therefore finds that Strathclyde Police were correct to withhold the risk category information under section 35(1)(a) of FOISA.

Section 39(1)

122. Section 39(1) of FOISA 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. Strathclyde Police applied this exemption to all information covered by the Housing Associations' requests; that is, the numbers of RSO in each postcode sector and information about the risk category relating to each of the RSOs in the cohort.
123. Having found that the risk category information is exempt from disclosure under section 35(1)(a) of FOISA, the Commissioner is not required to consider whether it is also exempt under section 39(1). For completeness, he has done so later in this decision. However, the Commissioner first considered whether information about the numbers of RSOs in each postcode sector listed in the Housing Associations' requests is exempt from disclosure under section 39(1) of FOISA.
124. For the section 39(1) exemption to be upheld, the Commissioner requires some realistic prospect or likelihood of danger to the health and safety of one or more individuals, based on evidence or convincing arguments to that effect. It is important to note that, for the exemption to apply, it must be shown that the disclosure of the information which has been withheld would, or would be likely to, lead to "endangerment." The Commissioner takes the view that there is an existing, ever-present threat of harm to RSOs living anonymously in the community, but who may at any time be identified, or to individuals who are not RSOs, but who may be misidentified as such. For the exemption to apply, it must be evident that disclosure of the withheld information would, or would be likely to, contribute to the endangerment.
125. The term "endanger" is not defined in FOISA, but the Commissioner's view is that the term is broad enough to apply where a threat to the health or safety of a person can be foreseen, as well as where harm will immediately follow disclosure, since the exemption does not specify that any threat should be imminent before it applies. There must, however, be some well-founded apprehension of danger.
126. Generally, there is little difference between endangerment to someone's "physical or mental health" or to their "safety". However, the separate terms do have slightly different definitions. "Safety" refers to a person's wellbeing or to their security. It suggests a state of being free from danger, as well as protection from, or not being exposed to, the risk of harm or injury.



127. Where there is a real possibility that disclosure of information would, or would be likely to, endanger the physical or mental health or the safety of an individual, the Commissioner would clearly wish to safeguard against that eventuality. However, he will require the public authority to provide him with evidence not just that such an eventuality is within the bounds of possibility, but that such an eventuality has some realistic prospect or degree of likelihood of occurring.
128. The meaning of the word "likely" is open to interpretation. Chadwick LJ (in *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210) said that "likely" does not carry any necessary connotation of "more probable than not". It is a word which takes its meaning from the context. In other judgements "likely" has been taken to mean "may well", or it has been held that "likely" implies a substantial rather than a merely speculative possibility, a possibility that cannot sensibly be ignored.
129. Strathclyde Police took the view that disclosure of the information requested would, or would be likely to, endanger the physical health or the safety of RSOs or individuals wrongly identified as RSOs, through physical attack; the mental health of RSOs would also be endangered by causing them to fear such attack.
130. The arguments submitted by Strathclyde Police in relation to section 39(1) of FOISA were similar to those supplied in relation to section 35(1)(a). They stated that, in their experience, and the experience of the police service in the UK, even speculation about the number of RSOs within a relatively large geographic area has caused members of that community to attempt to identify them. This has led to attempts to seriously harm RSOs and those wrongly suspected of being RSOs by way of revenge attacks, albeit by a minority within the community. Previous disclosures concerning the location and identity of offenders have led to violent attacks on innocent members of the public, offenders, and those protecting them.
131. In reaching a conclusion on the exemption in section 39(1), the Commissioner first considered the argument that disclosure would be likely to lead to vigilante attacks and so endanger the physical health or safety of an individual. He considers that the reasoning set out in relation to section 35(1)(a) is equally relevant here. While the Commissioner accepts that there is a history of vigilante action against RSOs or those wrongly suspected to be RSOs, he questions why disclosure of the statistical information in this case is likely to be a catalyst for similar incidents. Neither Strathclyde Police nor any other police force has made the Commissioner aware of any vigilante action which can be directly attributed to previous disclosures of statistical information about RSOs (although the Commissioner accepts that, in most cases, disclosure has taken place at a higher level in terms of population and geographical area). It has not been shown how, on its own, the statistical information in question would allow a member of the public to identify (or to wrongly believe that they had identified) an RSO.



132. The Commissioner then considered the argument that disclosure would, or would be likely to, endanger the mental health of RSOs living in the postcode sectors covered by the Housing Associations' request. Again, the reasoning set out in relation to section 35(1)(a) above is relevant to the arguments submitted in relation to section 39(1). As noted previously, the Commissioner is not persuaded by the argument that disclosure of anonymous statistical information on its own, without any additional identifying data, is likely to increase RSOs' fear of identification to such an extent that they would feel it necessary to move on. It is likely that many RSOs already live with the knowledge that their status is known or suspected by their neighbours, and Strathclyde Police has not demonstrated why it would be likely that RSOs' fear of being "outed" would increase greatly following disclosure of statistical information which does not lend itself to the identification of any individual offender.
133. For these reasons, the Commissioner has found that the exemption in section 39(1) of FOISA should not be upheld in relation to information about the number of RSOs in each postcode sector. Because the exemption has not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1) of FOISA in relation to this information. As none of the other exemptions cited in relation to this information have been upheld, the Commissioner requires Strathclyde Police to provide each of the Housing Associations with the number of RSOs in the postcode sectors covered by their requests.

Information about the risk categories of the RSOs

134. As noted previously, the information about the risk categories of the RSOs in each postcode sector has already been found to be exempt from disclosure under section 35(1)(a) of FOISA. For the sake of completeness, the Commissioner considered whether this information was also exempt under section 39(1) of FOISA.
135. As set out when considering the exemption in section 35(1)(a) above, the Commissioner accepts that disclosure of the risk category information would result in determined public efforts to identify and target certain offenders or to conduct vigilante action against higher risk RSOs (or those assumed to be so). Furthermore, the safety of individual members of the public would be endangered if such offenders were to go underground, thereby avoiding monitoring and management by the authorities. He therefore accepts that the exemption in section 39(1) of FOISA applies to this information.
136. The exemption in section 39(1) is subject to the public interest test in section 2(1) of FOISA. The arguments relating to the public interest test from both parties have already been set out above, and the Commissioner has reached a similar conclusion to that reported in paragraph 118 to 120: he finds that the public interest in maintaining the exemption (in this instance, section 39(1) of FOISA) outweighs the public interest identified in disclosure of the risk category information.
137. The Commissioner therefore finds that while the exemption in section 39(1) of FOISA was wrongly applied to the information about numbers of RSOs in each postcode sector, it was correctly applied to the information about the risk category of the offenders represented in the cohort.



DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) failed to comply in full with Part 1 (and in particular failed to comply in full with section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Craigdale Housing Association, Dunbritton Housing Association and Blochairn Housing Co-operative. While Strathclyde Police were correct to withhold risk category information under both section 35(1)(a) and section 39(1) of FOISA, the Commissioner concluded that these exemptions do not apply to the numbers of RSOs in each of the postcode sectors specified in the individual requests. The Commissioner also found that the exemption in section 38(1) did not apply to any of the information which had been withheld from the Housing Associations.

The Commissioner therefore requires Strathclyde Police to provide Craigdale Housing Association, Dunbritton Housing Association and Blochairn Housing Co-operative with the numbers of RSOs in each of the postcode sectors specified in their requests by 3 September 2011. The numbers to be provided are those which were held by Strathclyde Police as at the date of receipt of each request.

Appeal

Should either Craigdale Housing Association, Dunbritton Housing Association or Blochairn Housing Co-operative (in relation to the application made by it) or the Chief Constable of Strathclyde Police wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
12 July 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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;

...

38 Personal information

- (1) Information is exempt information if it constitutes-

(...)

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;



(...)

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles;

...

39 Health, safety and the environment

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

...

(g) the commission or alleged commission by him of any offence, or



- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Recital 26

Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;