

# Decision Notice



Decision 063/2012 Mr Drew Cochrane of the Largs and Millport News and the Chief Constable of Strathclyde Police

Name of a deceased person

Reference No: 201200104  
Decision Date: 2 April 2012

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**Margaret Keyse**

Acting Scottish Information Commissioner

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## Summary

Mr Drew Cochrane requested from the Chief Constable of Strathclyde Police (Strathclyde Police) the name of an individual who had died in an accident. Strathclyde Police withheld the name on the basis that it was exempt from disclosure under section 39(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), which applies when disclosure would be likely to endanger the physical or mental health or safety of any person. Following a review, Strathclyde Police upheld its decision to apply the exemption in section 39(1), and also applied that in section 38(1)(b) of FOISA, on the basis that the information was third party personal information and its disclosure would breach the first data protection principle. Mr Cochrane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Mr Cochrane's request for information in accordance with Part 1 of FOISA, by correctly withholding the information under section 38(1)(b) of FOISA. She did not require Strathclyde Police to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

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

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



## Background

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1. On 5 October 2011, Mr Cochrane emailed Strathclyde Police requesting the name of an individual who had died in a diving accident. Mr Cochrane also made another information request which is not under consideration in this decision.
2. Strathclyde Police responded on 2 November 2011, refusing to disclose the name on the basis that it was exempt from disclosure under 39(1) of FOISA. This exemption applies to information where its disclosure would be likely to endanger the physical or mental health, or the safety of an individual. They indicated that disclosure would be likely to cause extreme distress to the deceased's next of kin, and the family had specifically requested that details about the individual should not be disclosed. Having considering the public interest test, Strathclyde Police concluded that the public interest in maintaining the exemption outweighed that in disclosure of the information.
3. On 23 November 2011, Mr Cochrane emailed Strathclyde Police requesting a review of their decision to withhold the name of the deceased individual. In particular, Mr Cochrane asked why Strathclyde Police's practice was that the names of individuals who die as a result of murder, fire, industrial accidents and road crashes are disclosed by its media officers, while they would not disclose the name of someone who died by drowning. Mr Cochrane argued that it was not a logical position to adopt. Mr Cochrane did not consider that the exemption section 39(1) applied and he disputed Strathclyde's Police's conclusions on the public interest test.
4. Strathclyde Police notified Mr Cochrane of the outcome of their review on 21 December 2011. Strathclyde Police upheld their reliance on the exemption in section 39(1) of FOISA, and concluded that the exemption in section 38(1)(b) of FOISA was applicable also, on the basis that the name was personal data (relating to the deceased person's family members), and disclosure would breach the first data protection principle of the DPA.
5. On 22 December 2011, Mr Cochrane emailed the Commissioner, stating that he was dissatisfied with the outcome of Strathclyde Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Cochrane 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. The case was then allocated to an investigating officer.



## Investigation

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7. On 31 January 2012, Strathclyde Police were notified in writing that an application had been received from Mr Cochrane and were invited to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. In particular, Strathclyde Police were asked to provide detailed submissions to support their reasons for withholding the requested information.
8. Strathclyde Police responded on 22 February 2012, providing submissions to support their reliance on sections 38(1)(b) and 39(1) of FOISA to withhold the requested information.
9. The investigating officer requested and received Mr Cochrane's views and comments regarding his legitimate interests associated with section 38(1)(b) of FOISA and his public interest submissions associated with section 39(1) of FOISA in accessing the withheld information under consideration.
10. The relevant submissions received from both Strathclyde Police and Mr Cochrane will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered the withheld information and the submissions made to him by both Mr Cochrane and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

### Section 38(1)(b) of FOISA

12. Strathclyde Police took the view that the name of the individual who had died in an accident was personal data relating to their spouse and family. They maintained that disclosure of this information would contravene the first data protection principle in the DPA, and that the information was therefore exempt from disclosure under section 38(1)(b) of FOISA.
13. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data as defined by the DPA and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA. This particular exemption is an absolute exemption, so is not subject to the public interest test laid down by section 2(1)(b) of FOISA.



*Is the information personal data?*

14. Personal data is defined in section 1(1) of the DPA as 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 the Appendix).
15. In their submissions, Strathclyde Police commented that the test here is whether disclosure of the information would lead to the identification of an individual and in this instance they considered that the name of the deceased relates to their spouse. They stated that it was apparent to them that the deceased's name through partnership is inextricably linked to their spouse.
16. Strathclyde Police went on to explain that, if they disclosed the name of the deceased person, there was information in the public domain providing relevant details about the deceased person's area of residence. Since a check of the electoral roll had confirmed that there was only one person with the same name in the area in which they resided, disclosure would allow the identification of their spouse and family.
17. Having considered Strathclyde Police's submissions on this point, the Commissioner is satisfied that the name of the deceased person is personal data of their spouse.
18. Given the close association created through marriage, she accepts that, in the specific context of the Mr Cochrane's information request, the name of the deceased individual is information relating to their spouse (revealing that they recently lost a loved one in the diving accident concerned), and which, when considered in conjunction with other information available in the public domain, identifies their spouse.
19. Having reached this conclusion, the Commissioner must now go on to consider whether disclosure of that personal data would breach any of the data protection principles contained in Schedule 1 to the DPA. In their submissions Strathclyde Police argued that disclosure would breach the first data protection principle.

*Would disclosure breach the first data protection principle?*

20. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure into the public domain in response to Mr Cochrane's information request.
21. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case does not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this case.



22. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
23. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

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

24. Condition 1 of Schedule 2 permits data to be processed (in this case, disclosed to Mr Cochrane) if consent to such processing is granted by the data subject.
25. Strathclyde Police explained that, from their initial contact with the family of the deceased person, and at all points thereafter, the family had requested that they did not disclose details confirming the identity of the deceased person.
26. They explained that they did not consider it would have been reasonable, expected or justified, given the circumstances in this case and the family's wishes for privacy, that contact was made to request consent for disclosure, either to a journalist or to anyone else who was not involved in the police or criminal justice process.
27. Since no consent had been granted by the spouse, the Commissioner concludes that Condition 1 of Schedule 2 does not apply.
28. In all the circumstances of this case, the only condition in Schedule 2 which would permit disclosure to Mr Cochrane is Condition 6. This allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual to whom the data relate).
29. There are a number of different tests which must be satisfied before condition 6 can be met. These are:
  - Does Mr Cochrane have a legitimate interest in obtaining the personal data?
  - If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?



- Even if the processing is necessary for Mr Cochrane's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Cochrane must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that Strathclyde Police was correct to refuse to disclose the personal data to Mr Cochrane.

*Does the Mr Cochrane have a legitimate interest?*

30. Mr Cochrane has submitted that he has a legitimate interest in accessing the withheld information. He notes that Strathclyde Police discloses the names of individuals who have died in other circumstances (such as murder, fire, industrial accidents and road crashes), so in this particular situation it should be no different and Strathclyde Police should disclose the name of this individual who died in an accident. Mr Cochrane commented that, putting emotional issues to one side, the media would contend that it is in the public interest to know basic details, i.e., identity of a person killed accidentally, whether it be through road fatality, fire, drowning or murder as, in all cases, it involves the intense use of public services and therefore public funds.
31. Strathclyde Police did not consider that Mr Cochrane had a legitimate interest in seeking the name of the deceased. They considered that in interpreting Mr Cochrane's 'legitimate interest' it was in relation to the accountability for public funds, not the identification of victims; if Mr Cochrane had sought the amount of money spent by the police in attending this incident, then if the information was held, there would have been no issue of disclosure.
32. Notwithstanding Strathclyde Police's comments, the Commissioner is satisfied that Mr Cochrane has a legitimate interest as a journalist in seeking official confirmation of the facts surrounding an accidental death in order to accurately report the news.

*Is disclosure of the personal data necessary for Mr Cochrane's legitimate interests?*

33. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so he must consider whether these interests might reasonably be met by any alternative means, or which would interfere less with the privacy of the spouse.
34. The Commissioner is aware that the name of the deceased person has been reported in the press, but these details have not been confirmed by Strathclyde Police, and Mr Cochrane is seeking official confirmation of the identity of the deceased via his request for information.
35. In these circumstances, the Commissioner cannot identify any other viable means of meeting Mr Cochrane's legitimate interest in receiving official confirmation of the identity of the deceased, which would interfere less with the privacy of the data subject than by obtaining the information withheld in response to his information request. Therefore, she is satisfied that disclosure of the information is necessary for the purposes of the legitimate interest identified by Mr Cochrane.



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

36. The Commissioner must now consider whether disclosure of the withheld information would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject. As noted above, this involves a balancing exercise between the legitimate interests of Mr Cochrane and those of the data subject. Only if the legitimate interests of Mr Cochrane outweigh those of the data subject can the information be disclosed without breaching the first data protection principle.
37. The Commissioner's guidance on the exemptions in section 38 identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
  - whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
  - the potential harm or distress that may be caused by the disclosure;
  - whether the individual has objected to the disclosure;
  - the reasonable expectations of the individual as to whether the information would be disclosed.
38. In their submissions, Strathclyde Police explained that only in certain cases will they disclose the name of deceased persons, and then invariably with the consent of the next of kin and/or on the instruction of the Procurator Fiscal. They noted that, although the vast majority of fatalities will eventually become public record, in line with their Media Services Practice Guide for Media Relations Officers (September 2008), the force currently will only disclose the names of murder victims, fatal fire victims, industrial accident victims and fatal road crash victims where this will serve the interests of justice.
39. Strathclyde Police explained that in each of the cases where the name of an individual is disclosed there is a presumption that the police will be appealing for witnesses with possible criminal proceedings being brought against those responsible or culpable. Notwithstanding this, where there is an absence of any pressing need to release the name of a deceased there will still be significant consideration of the feelings and wishes of the next of kin. Invariably, however, such circumstances are completely different from those involved in tragic accidents where the question of culpability is not an issue.
40. Strathclyde Police commented that, other than the deceased's family and closest friends, no other persons would be concerned to know the name of the deceased. Local residents in the accident area may have been mildly curious, but it was certainly not in the public interest (in its correct FOI sense) that the individual be identified.





41. Strathclyde Police commented that, in addition to the spouse and immediate family's request that the name of the deceased was not disclosed, they considered that the deceased's family was undergoing an intense period of grief and mourning and had the right to do so without unjustified interference. Strathclyde Police considered that there was absolutely no justification to disclose the information with the possibility that the privacy of the family would be invaded, especially given that, at the time of the request, the individual had only recently died.
42. Mr Cochrane did not provide extensive submissions to explain why he considered his legitimate interests outweighed that of the data subject. However, he argued that the police should have a common approach to the disclosure of names of individuals who have died in any circumstance and that in this particular instance extensive public services were used and, as a consequence, vast public funds were spent.
43. Having considered all of the submissions made by Mr Cochrane and Strathclyde Police, the Commissioner finds Strathclyde Police's arguments compelling. The family of the deceased has made clear their wishes and in those circumstances disclosure would be an intrusion into their private and family life (which is protected under Article 8 of the European Convention on Human Rights).
44. While the Commissioner recognises Mr Cochrane's legitimate interests and concerns, she must consider each case individually; so she cannot require disclosure of an individual's name simply because another individual was named in different circumstances. While she acknowledges that various public services were involved in events prompted by the relevant accident, Strathclyde Police or other relevant bodies could account for their actions and expenditure without reference to the identity of the individual concerned (if other formal processes – such as a Fatal Accident Inquiry – do not prompt public disclosure).
45. On balance, the Commissioner considers that Mr Cochrane's legitimate interests in this particular case are limited when weighed against the intrusion into the privacy of the spouse and family who had only recently suffered a bereavement. In the circumstances of this case, she concludes that the rights, freedoms and legitimate interests of the data subject in relation to their reasonable expectations of privacy outweigh the legitimate interest Mr Cochrane has in obtaining the information.
46. Given this conclusion, the Commissioner finds that condition 6 of Schedule 2 to the DPA could not be met in relation to disclosure of the withheld information. For the same reasons, the Commissioner has concluded that disclosure would be unfair and, in breaching of the first data protection principle, would also be unlawful. The Commissioner therefore accepts that the information was properly withheld under section 38(1)(b) of FOISA.
47. As the Commissioner has upheld the withholding of the information under section 38(1)(b) of FOISA, she will not go onto consider the application of section 39(1) to the withheld information.



## **DECISION**

The Commissioner finds that the Chief Constable of Strathclyde Police complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the name of the deceased person requested by Mr Drew Cochrane under section 38(1)(b) of FOISA.

## **Appeal**

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Should either Mr Cochrane 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.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**  
**2 April 2012**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

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

...

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

##### 2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



**38 Personal information**

(1) Information is exempt information if it constitutes-

...

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

...

(2) The first condition is-

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

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...



## 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;

...

## Schedule 1 – The data protection principles

### Part I – The principles

1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed

unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

## Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

1 The data subject has given his consent to the processing.

...

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...