

# Decision Notice



Decision 100/2008 Mr Paul Smith and the Chief Constable of Central Scotland  
Police

Copies of reports and documentation pertaining to complaints made by  
applicant

Reference No: 200701782  
Decision Date: 26 August 2008

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Smith requested from the Chief Constable of Central Scotland Police (Central Scotland Police) copies of the entire files and two specific reports relating to complaints he had made. Central Scotland Police responded by stating that the information was exempt under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Smith remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Central Scotland Police had dealt with Mr Smith's request for information in accordance with Part 1 of FOISA by correctly withholding information under sections 34(1)(a)(i), 35(1)(g), 38(1)(a) and 38(1)(b) of FOISA. He did not require Central Scotland Police to take any action.

## Relevant statutory provisions and other sources

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 34(1)(a)(i) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(g) and (2)(b) (Law enforcement); 38(1)(a), (b) and (2)(a)(i) and (b) (Personal information).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) and 2 (Sensitive personal data); Part 1 of Schedule 1 (The data protection principles - the first data protection principle).

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.

## Background

---

1. On 24 May 2007, Mr Smith wrote to Central Scotland Police requesting the following information:
  - A copy of the entire files relating to complaints he had made
  - Copies of two reports prepared by named officers



2. Central Scotland Police responded on 27 June 2007, refusing to supply the information on the basis that it was exempt under sections 30(c), 34(1)(a)(i), 35(1)(a), (b) and (g) (the last read in conjunction with 35(2)(b)); 38(1)(a) and 38(1)(b) of FOISA. Mr Smith was also informed at this stage that he could request a copy of all the information held about him by applying under the Data Protection Act 1998 (DPA) and was supplied with a web link providing him with further instructions in this connection.
3. On 15 August 2007, Mr Smith wrote to Central Scotland Police requesting a review of their decision.
4. Central Scotland Police notified Mr Smith of the outcome of their review on 6 September 2007, upholding their original decision to withhold the information without amendment.
5. On 11 December 2007, Mr Smith wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of Central Scotland 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 Smith 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.

## Investigation

---

7. On 11 January 2008, Central Scotland Police were notified in writing that an application had been received from Mr Smith and asked to provide the Commissioner's Office with any information withheld from the applicant. Central Scotland Police responded with the information requested and the case was then allocated to an investigating officer.
8. Central Scotland Police supplied the Commissioner's Office with 103 documents which it understood to fall within the scope of Mr Smith's request. They also informed the Commissioner's Office that documents 57 and 79 represented the two reports specifically requested by Mr Smith.
9. The investigating officer subsequently contacted Central Scotland Police, providing them with an opportunity to make comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Central Scotland Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
10. During the course of the investigation, the investigating officer provided Mr Smith with further advice as to how to submit a Subject Access request under section 7 of the DPA to Central Scotland Police.



## Commissioner's analysis and findings

---

11. In coming to a decision on this matter, the Commissioner has considered all the information and the submissions that have been presented by both Mr Smith and Central Scotland Police and is satisfied that no matter of relevance has been overlooked.
12. Of the 103 documents supplied by Central Scotland Police, documents 82 to 92 inclusive, 94 and 99 to 103 inclusive could not have been held by Central Scotland Police at the time they received Mr Smith's request. They cannot, therefore, fall within the scope of that request and will not be considered further in this decision. The Commissioner would observe that they do not, in any event, relate directly to the investigation of Mr Smith's complaints.

### Section 34(1)(a)(i) – Investigations by a Scottish Public Authority

13. Central Scotland Police applied the exemption in section 34(1)(a)(i) of FOISA to documents 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 24, 26, 27, 28, 31, 35, 38, 42, 43, 44, 45, 46, 50, 51, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 79, 93, 95, 96, 97 and 98.
14. In terms of section 34(1)(a)(i) of FOISA, information is exempt information if it has at any time been held by a Scottish public authority for the purposes of an investigation the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence.
15. The scope of section 34(1)(a)(i) is potentially very broad in that it could cover any information held by the police where they consider a criminal offence might have been committed. The exemption is not time limited in that it applies to information held "at any time". Further, in order for information to fall within the scope of this exemption the police do not need to have "identified" the person that should be prosecuted. Where the police consider a criminal offence might have been committed and carry out an investigation into this, all information held for the purpose of that investigation will fall within the scope of section 34(1)(a)(i).
16. The exemption contained in section 34(1)(a)(i) is a class exemption. This means that there is no harm test (i.e. no test of substantial prejudice or similar) contained in the exemption. If the information falls within a particular class of information embraced by the exemption, then it is deemed to be exempt.
17. The Commissioner has considered the documents listed above. He is satisfied that the information contained in these documents was recorded for the purposes of investigations which Central Scotland Police had a duty to conduct, and that among the purposes of these investigation was to ascertain whether a person or persons should be prosecuted for an offence. The Commissioner is satisfied in the circumstances that the information falls within the class of information considered exempt under section 34(1)(a)(i) of FOISA.



18. However, the exemptions in section 34 are subject to the public interest test laid down by section 2(1)(b) of FOISA. This means that, although the information in these documents is exempt, it still requires to be released unless, in all the circumstances of the case, the public interest in disclosing it is outweighed by the public interest in maintaining the exemption.
19. Central Scotland Police acknowledge that there is a public interest (which would favour disclosure) in the effectiveness and thoroughness of police investigations into the possible misconduct of individual officers, as well as in accountability and justice to the individual. They also acknowledge that there might be a public interest in identifying instances of alleged misconduct found in an investigation of this kind, especially where they tend to point to individual failings rather than systemic failure and would demonstrate a thorough police investigation, allowing the public to have confidence in the investigation process.
20. However, Central Scotland Police further submit that disclosure of information gathered during such investigations would deter individuals from reporting matters or providing evidence. With this flow of information impeded, the police (it is argued) would find it difficult to investigate crime, one of their core duties. Central Scotland Police consider that in this case the information might be of interest to the applicant and others, but that there is no wider public interest to be served by disclosure.
21. Central Scotland Police submit that a high degree of confidentiality had traditionally been attached to police reports and statements, and that to disclose information such as that requested by Mr Smith would jeopardise the candour and freedom with which the police report to the Procurator Fiscal. They conclude that the public interest in disclosing the information requested is outweighed by the public interest in maintaining the exemption.
22. The Commissioner has considered carefully the public interest arguments presented by Central Scotland Police in the light of the information withheld. He accepts that there are strong arguments supporting the view that it is in the public interest to preserve the confidentiality of information held in relation to the investigation of a crime or potential crime, and that in general it will not be in the public interest to take any action which would undermine the confidence of the public in that part of the justice system or the confidence of witnesses providing information for such investigations.
23. However, there are also public interest arguments which would support the case for disclosure of the information. For instance, there is a strong argument that disclosure would promote accountability, and that accountability would promote public confidence in the processes used to deliver justice. That said, having considered all the circumstances, the Commissioner regards the primary interest in disclosure in this particular case as being that of the applicant rather than the wider public, in which context he notes the full explanations of the outcomes of the relevant investigations already given to Mr Smith.
24. Having considered the information withheld in the circumstances of this particular case, the Commissioner has decided that, on balance, the public interest in maintaining the exemption in section 34(1)(a)(i) outweighs any public interest in disclosure. He is therefore satisfied that the information listed in paragraph 13 above was properly withheld under section 34(1)(a)(i) of FOISA.



25. Central Scotland Police also applied the exemptions in section 38(1)(a) and (b) of FOISA to the information in a number of documents.

### **Section 38(1)(a) – applicant’s own personal data**

26. Section 38(1)(a) of FOISA states that information is exemption information if it constitutes personal data of which the applicant is the data subject. This is an absolute exemption under FOISA and is not subject to the public interest test.

27. “Personal data” is defined in section 1(1) of the DPA as:

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

- i. from those data, or
- ii. from those data and from other information which is in the possession 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.”

28. Central Scotland Police submit that on this definition Mr Smith’s request is clearly one which is a request for personal data of which he is the data subject, although they have not applied this exemption to all of the withheld information. Section 38(1)(a) and (b) have in fact been claimed together (without distinction) in respect of a number of specified documents.
29. While their submissions could have been clearer on this point, the Commissioner (having considered all of the information in respect of which the section 38(1) exemptions have been claimed) has determined that the following documents would be more appropriately considered under section 38(1)(a):
- Documents 1, 3, 4, 5, 15, 20, 21, 22, 23, 25, 32, 33, 34, 37, 40, 41, 56, 77, 78, 80 and 81.
- Due to the nature of document 25, it has been necessary to consider it partly under section 38(1)(a) and partly under section 38(1)(b).
30. The Commissioner is satisfied that the information in the documents listed in paragraph 29 above is all information from which Mr Smith can be identified, which has him as its focus and which is biographical about him in a significant sense. He is therefore satisfied that the information relates to Mr Smith and that he is the subject of the information. Consequently, the information is Mr Smith’s personal data as defined in section 1(1) of the DPA, and as such is exempt from disclosure under section 38(1)(a) of FOISA.
31. As section 38(1)(a) is an absolute exemption, it is not subject to the public interest test set out in section 2(1)(b) of FOISA. As the Commissioner has found that section 38(1)(a) applies to the information listed in paragraph 29 above he must therefore conclude that it was properly withheld under that exemption.



32. Central Scotland Police submits that Mr Smith was advised in a letter dated 27 June 2007 of his rights to apply for his own personal information through a Subject Access Form but have no record of him having done so. During the course of the investigation, the investigating officer provided Mr Smith with further advice and details of how to submit a subject access request under the DPA.

### **Section 38(1)(b) – personal data of other individuals**

33. The Commissioner has considered documents 25 (part – see analysis of section 38(1)(a) above), 30, 36, 39, 47, 48, 49, 52, 53 and 76 under section 38(1)(b) of FOISA. These are the documents for which Central Scotland Police claimed section 38(1)(a) and (b) and which the Commissioner has not considered under section 38(1)(a), with the exception of information he has already considered and found to be exempt under section 34(1)(a)(i) (see above).
34. 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 and 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. The first of these principles (which Central Scotland Police argue is the relevant principle in this case) states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (as it would be by disclosure), unless at least one of the conditions in Schedule 2 (to the DPA) is met. In the case of sensitive personal data, as defined in section 2 of the DPA, at least one of the conditions in Schedule 3 must also be met.
35. The information considered under this exemption, all gathered for the purposes of investigating Mr Smith's complaints, relates primarily to persons other than Mr Smith. Applying the same considerations as in paragraph 30 above, the Commissioner is satisfied that it is the personal data of those persons for the purposes of section 1(1) of the DPA. Given the nature of the information, at least some of it is sensitive personal data.
36. According to guidance from the Information Commissioner (who is responsible for promoting observance of the requirements of the DPA, including the data protection principles, across the United Kingdom) in his *Freedom of Information Act Awareness Guidance No 1 – Personal Data*, the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
37. In this particular case, the Commissioner accepts that those providing information for the purposes of these investigations did so in the belief that their contributions would be treated confidentially and would not be generally disclosed. The Commissioner accepts that this would be the normal expectation when making contributions to an investigation into allegations of criminality or of a disciplinary nature. Perhaps more importantly in this connection, he also considers that those to whom the relevant information relates (not always the same persons as those contributing to the investigation in relation to them) would have had no reasonable expectation of general disclosure of their personal information in this context. The Commissioner finds that disclosure in these circumstances would be unfair and therefore contrary to the first data protection principle.



38. Given that the Commissioner has determined that disclosure of the information would be unfair, he is not required to go on to consider whether release of the information would be unlawful or whether any of the conditions in Schedule 2 and/or 3 of the DPA could be met in relation to it. Like section 38(1)(a), this exemption is an absolute one and the Commissioner therefore finds that Central Scotland Police were correct to withhold these documents under section 38(1)(b) of FOISA.

**Section 35(1)(g), read in conjunction with section 35(2)(b) – law enforcement**

39. Central Scotland Police applied the exemption in section 35(1)(g) of FOISA, read in conjunction with section 35(2)(b), to the information in a number of documents. The Commissioner has considered the majority of these under other exemptions and accepted the relevant information as properly withheld under these exemptions (see above), and consequently only document 29 remains to be considered here.
40. Section 35(1)(g) of FOISA allows a Scottish public authority to withhold information if its disclosure would, or would be likely to, substantially prejudice the exercise (by it or another public authority) of a function for any of the purposes listed in section 35(2). Central Scotland Police believe that the disclosure of the information in document 29 would, or would be likely to, prejudice substantially their ability "to ascertain whether a person is responsible for conduct which is improper", which is the purpose listed under section 35(2)(b).
41. Investigations into allegations of misconduct by police officers below the level of Assistant Chief Constable are governed by the Police (Conduct) (Scotland) Regulations 1996 (the Conduct Regulations). It is clear from the Conduct Regulations that their application in relation to officers of Central Scotland Police is a "function" of Central Scotland Police, a required condition before the exemption in section 35(1)(g) can be applied. The purpose of an investigation and any necessary subsequent procedure under the Conduct Regulations would be to ascertain whether a particular police officer had been responsible for conduct amounting to misconduct, in other words conduct which was improper. The Commissioner is satisfied, therefore, that information derived from such an investigation would fall within the scope of section 35(1)(g), read with section 35(2)(b).
42. Central Scotland Police submit that document 29 comprises information to which this exemption applies and that officers would be likely to be less free and frank with their statements if they considered this information would be disclosed into the public domain. Central Scotland Police further argue that the investigating officer must feel able to express freely his or her views on the evidence obtained and indicate whether any misconduct has occurred, particularly where this relates to specified police officers.
43. Having considered these arguments and the content of document 29, the Commissioner accepts Central Scotland Police's argument that the release of these documents could reasonably be expected to prejudice substantially the conduct and effectiveness of future investigations, in particular by inhibiting to a significant extent the freedom and frankness with which views were expressed. For this reason, the Commissioner accepts that the information in this document would be exempt under section 35(1)(g).





44. The exemption in section 35(1)(g) is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that, even although the Commissioner is satisfied that the disclosure of the report would, or would be likely to, prejudice substantially the carrying out by Central Scotland Police of the relevant function, the Commissioner must still order the report to be disclosed unless he is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
45. Central Scotland Police argue that while justice to one particular individual (Mr Smith) might favour the release of the information requested, the fair treatment of a number of individuals (Mr Smith and the officers subject to the complaints) and the need to ensure the efficient and effective conduct of the Force (and in particular the conduct of investigations of this kind) clearly favour non-disclosure of the information requested.
46. In this case, having considered all relevant arguments, the Commissioner can identify no general public interest in disclosure of the information in document 29 which would outweigh the strong public interest arguments in ensuring that such investigations can be conducted without significant inhibition. Consequently, the Commissioner is satisfied that Central Scotland Police were justified in withholding the information under section 35(1)(g) of FOISA. Once again, he notes the extent to which Mr Smith himself has in fact been briefed as to the outcomes of the investigations.

## DECISION

The Commissioner finds that Central Scotland Police acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Smith.

## Appeal

---

Should either Mr Smith or Central Scotland 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**  
**26 August 2008**



## 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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

...

- (e) in subsection (1) of section 38 –
  - (i) paragraphs (a), (c) and (d); and
  - (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.



**34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
- (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
    - (i) should be prosecuted for an offence; or
    - ...

**35 Law enforcement**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- ...
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - ...
- (2) The purposes are-
- ...
  - (b) to ascertain whether a person is responsible for conduct which is improper;
  - ...

**38 Personal information**

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
  - (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.

## Data Protection Act 1998

### 1 Basic interpretative provisions

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-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),



- (e) his physical or mental health or condition,
- (f) his sexual life,
- (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.

## **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.
- ...