

Decision Notice

Decision 134/2019: the Applicant and the Chief Constable of the Police Service of Scotland

Cooperation with a TV production company

Reference No: 201801663

Decision Date: 23 September 2019



Scottish Information
Commissioner

Summary

Police Scotland were asked what cooperation they had given to the makers of a television programme (“The Investigator: A British Crime Story”) broadcast on STV in April 2018.

Police Scotland provided some information, but withheld other information under a number of exemptions. Following an investigation, the Commissioner found that Police Scotland had been entitled to apply the exemption in section 38(1)(b) (Personal information), but had wrongly applied other exemptions. He required Police Scotland to disclose that information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 34(1)(a) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) and (b) (Law enforcement); 38(1)(b), (2A)(a), (2)(b) and (5) (definitions of the "data protection principles", "data subject" and "personal data"); 39(1) (Health, safety and the environment)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5) and (10) (Terms relating to the processing of personal data)

General Data Protection Regulation (the GDPR) Articles 5(1)(a) (Principles relating to processing of personal data); 6(1)(a) and (f) (Lawfulness of processing)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 21 April 2018, the Applicant made the following request for information to the Chief Constable of the Police Service of Scotland (Police Scotland):

“The Investigator: A British Crime Story”
Mark Williams-Thomas / SyCo Productions

This is a written request for information concerning the cooperation provided by your authority with the producers of the above television programme broadcast on STV on the evening of Thursday 19 April 2018.

...

I request all and any information held by your authority concerning the cooperation by Police Scotland with the makers and producers of the above television programme broadcast on Thursday 19th inst. I would expect this information to include schedules of information provided, correspondence (including e-mail messages) concerning the making of the programme and the various consents obtained and given in order to facilitate disclosure.”

2. Police Scotland acknowledged the request on 24 May 2018, and apologised that it had not been able to provide the Applicant with information in the time required by FOISA.

3. On 2 June 2018, the Applicant wrote to Police Scotland requesting a review of their decision on the basis that they had failed to respond to his information request.
4. Police Scotland did not respond.
5. The Applicant applied to the Commissioner who issued a Decision Notice on 13 August 2018, requiring Police Scotland to provide the Applicant with a response to his requirement for review.
6. Police Scotland notified the Applicant of the outcome of their review on 20 September 2018. They provided him with some information, but they withheld other information under sections 30(c), 35(1)(a) and (b) and 38(1)(b) of FOISA.
7. On 27 September 2018, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland's review on the basis that they:
 - a) interpreted his request too narrowly;
 - b) failed to offer him advice and assistance;
 - c) failed to specify what information was being withheld under each exemption; and
 - d) wrongly applied exemptions to the information he had requested.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 8 October 2018, Police Scotland were notified in writing that the Applicant had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from the Applicant. Police Scotland provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were invited to comment on this application and to answer specific questions. These related to their reasons for relying on exemptions to withhold information from the Applicant.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and Police Scotland. He is satisfied that no matter of relevance has been overlooked.

Scope of the investigation

12. In his application to the Commissioner, the Applicant argued that Police Scotland had too narrowly interpreted the terms of his information request. He argued that, while his request was broadly framed and concerned the cooperation by Police Scotland with the makers and producers of a specified TV programme, Police Scotland had limited the terms of the request to consider only information that related to episode 3 of the ITV series.

The Applicant submitted that the “cooperation” in question, which was the subject of the request, was clearly not confined to the making of a particular episode of a series of programmes.

13. The Commissioner considered the specific terms of the Applicant’s information request along with the points raised by the Applicant and Police Scotland. He concluded that the scope of the investigation would only consider “cooperation” in relation to episode 3 of the TV series, but not relating specifically to episodes 1 and 2. The Commissioner also determined that his investigation would consider information which relates to the series as a whole, including episode 3.
14. This was explained to the Applicant in a letter dated 23 January 2019.

Withheld information

15. Police Scotland identified 87 documents that fell within the scope of the Applicant’s information request and, on 20 September 2018, they provided him with redacted versions of those 87 documents. However, in the redacted copies it was not clear where Police Scotland had withheld information as it was outwith the scope of the Applicant’s request and where they had withheld information as it fell under one of the exemptions they had applied.
16. During the investigation, the Commissioner asked Police Scotland to provide both him and the Applicant with a new set of marked-up documents that clearly indicated why each redaction had been made. Police Scotland did this and the Applicant commented on the exemptions being relied upon by Police Scotland, namely sections 30(c), 35(1)(a) and (b) and 38(1)(b) of FOISA.
17. Following this, Police Scotland were notified that the Commissioner considered that some of the information they had marked-up as being outwith the scope of the Applicant’s request was relevant to his request. The Commissioner asked Police Scotland to comment on this information (contained in documents 12, 18 and 49) and Police Scotland notified the Commissioner that they were withholding this information under the exemptions contained in section 34(1)(a)(i) and (ii), 35(1)(a) and 39(1) of FOISA.
18. The Commissioner will now go on to consider each of the exemptions relied on by Police Scotland.

Section 35(1)(a) - Law enforcement

19. In order for the exemption in section 35(1)(a) to apply, the Commissioner has to be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime.
20. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers an authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
21. As the Commissioner's guidance¹ on section 35(1)(a) highlights, the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of persons suspected of being

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.

22. Police Scotland have applied the exemption contained in section 35(1)(a) of FOISA to information within the following numbered documents; 12, 18, 22, 25, 26, 28, 48, 49, 52, 53, 58, 62, 63, 65, 72-76 and 86.

Police Scotland submissions

23. Police Scotland submitted that the emails contain allegations and evidence gathered through a criminal investigation and as such are exempt from disclosure as the information contained within them would, or would be likely to, prejudice substantially the prevention and detection of crime.
24. Police Scotland explained that, during the course of an investigation, the police will interview and gather evidence from any person who may be in a position to assist them. There is an acceptance that the information gathered will not be disclosed to a third party other than in the course of criminal proceedings, and that it is subject to a common law duty of confidentiality. If the information were to be disclosed, it would undermine this expectation and may deter victims or witnesses from assisting the police in future.
25. If this occurred, it would hamper police investigations and would, or would be likely to, prejudice substantially the prevention or detection of crime. Police Scotland argued that this is particularly relevant when considering the circumstances around the reporting and investigation of any serious offences, as is the case here.

The Applicant's submissions

26. The Applicant queried Police Scotland's reliance on section 35(1)(a) of FOISA, arguing that it is absurd to suggest that the disclosure of information identifying "unsolved cases" (such as communications between law enforcement officers and journalists) could meet the test of "substantial" prejudice.

Commissioner's conclusions on 35(1)(a)

27. Police Scotland have argued that the emails falling within the scope of the request contain allegations and evidence gathered through a criminal investigation. However, the Commissioner is not satisfied that this is the case. The emails being withheld from the Applicant were created as a result of an investigative journalist contacting Police Scotland to seek information on unsolved crimes. The purpose of the original contact was to obtain information that could feature in a TV broadcast. The emails contain correspondence between both parties along with some internal correspondence between various officers at Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS).
28. The arguments provided by Police Scotland are general arguments that relate to the application of the exemption contained in section 35(1)(a) of FOISA, but which do not relate to the actual information being withheld.
29. For example, Police Scotland refer to the importance of being able to interview and gather information from any relevant person during an investigation and state that such information should be treated confidentially. The Commissioner generally agrees with this, but he does not see how it applies to the information being withheld in this case. The emails do not contain witness statements, but rather they contain questions raised by a journalist along with the views and comments of Police Scotland staff in response to these questions.

30. Given this, the Commissioner cannot see why disclosure in this case would dissuade any future witnesses from confiding in Police Scotland and he cannot see why, in this case, disclosure would, or would be likely to, prejudice substantially the prevention and detection of crime.
31. 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.

Section 35(1)(b) – Law enforcement

32. Police Scotland have also applied the exemption contained in section 35(1)(b) of FOISA to information within the following numbered documents; 12, 18, 22, 25, 26, 28, 48, 49, 52, 53, 58, 62, 63, 65, 72-76 and 86.
33. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance states, there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime".
34. He considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as information received) and strategies designed for these purposes.
35. As noted above, there is no definition of "substantial prejudice" in FOISA, but the Commissioner considers authorities have to be able to establish harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
36. The exemption in section 35(1)(b) is also subject to the public interest test in section 2(1)(b) of FOISA.

Police Scotland submissions

37. Police Scotland explained that the deaths of a number of individuals mentioned in the emails are unresolved homicides. Police Scotland submitted that the investigations of these unresolved homicides are live ones and that criminal proceedings remain live against the suspect(s). Police Scotland argued that any release of the information may prejudice both the live investigations and any future proceedings.

The Applicant's submissions

38. The Applicant again queried Police Scotland's reliance on section 35(1)(b) of FOISA, arguing that it is absurd to suggest that the disclosure of information identifying "unsolved cases" could meet the test of "substantial" prejudice. He noted that Police Scotland had even sought to apply section 35(1)(a) and (b) to the subject heading of an email sent to them by the investigative journalist. The Applicant argued that there would seem to be no rational basis for applying the exemption to the mention by a journalist of a particular case.

Commissioner's conclusions on section 35(1)(b) of FOISA

39. The Commissioner acknowledges that a number of individuals mentioned in the emails were the victims of unresolved homicides and he notes that, as these cases are unresolved, they are still considered to be live or open. However, he does not see how disclosure of the

withheld information in question would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders.

40. Many of these unsolved cases have featured in newspaper articles and televised news programmes over the years. The information discussed in the emails arises from the questions put to Police Scotland by an investigative journalist. Police Scotland have not explained why the disclosure of references to these homicides and victims (much of which is easily identifiable as already being in the public domain) would result in the harm claimed.
41. In the circumstances, the Commissioner is not satisfied that Police Scotland have provided sufficient submissions to show that disclosure of the information requested would negatively impact on or prejudice substantially the apprehension or prosecution of offenders.
42. For the reasons set out above, the Commissioner does not accept that disclosure of the withheld information would have caused, or would have been likely to cause, substantial prejudice to Police Scotland's ability to prevent or detect crime or apprehend or prosecute offenders. He does not believe such a conclusion can be reached on the basis of the general arguments provided here.
43. The Commissioner does not, therefore, accept that the exemptions in section 35(1)(b) of FOISA should be upheld in this case. Given that the exemptions has not been found to apply, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Section 34(1)(a)(i) and (ii) – Investigations by Scottish public authorities and proceedings arising out of such investigation

44. Police Scotland withheld information contained in documents 12, 18 and 49 under the exemptions in sections 34(1)(a)(i) and (ii) of FOISA. These provide that information is exempt from disclosure if held at any time by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence or whether a person prosecuted for an offence is guilty of it.
45. Police Scotland did not provide separate submissions for each of the above listed exemptions, instead they provided one set of arguments for sections 34(1)(a)(i) and (ii) of FOISA. The Commissioner would note that both of these exemptions are distinct and the arguments in support of their application should be quite separate. Providing “one-size-fits-all” arguments for these exemptions leads, in the Commissioner’s view, to poorer quality submissions.
46. The exemptions in section 34 are described as "class-based" exemptions. This means that, if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test: the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions are, however, subject to the public interest test in section 2(1)(b) of FOISA.
47. Police Scotland argued that the information being withheld under section 34(1)(a)(i) and (ii) is information that is held by Police Scotland for the purposes of an investigation. They argued that the withheld information refers to cases that remain unsolved and, depending on the outcome of an investigation, could lead to a decision to report an individual(s) to the Crown. Police Scotland maintained that these are still unsolved cases in another UK jurisdiction and

as such it would be wrong for Police Scotland to release that information without recourse to the host force.

48. Police Scotland submitted that, while the perpetrators remain at large, they have a duty of care to any surviving witnesses who have come forward or may come forward in the future to fully investigate any allegations if required to do so by the host force.

Commissioner's conclusions on section 34(1)(a)(i) and (ii) of FOISA

49. The Commissioner has considered the arguments put forward by Police Scotland, but he is not satisfied that either of the exemptions can be applied to the withheld information. The arguments put forward by Police Scotland do not appear to relate to the information that is being withheld under these exemptions. The Commissioner considers that the information that has been withheld from the Applicant was not gathered and is not held for the purposes of an investigation in terms of section 34(1)(a)(i) or (ii). The information is contained in an email exchange and relates to the views of a journalist and a TV programme which was subsequently broadcast.
50. While the information refers to the victims of crime, it contains no information about the actual crimes or any investigation into the crimes themselves. Indeed, the Commissioner notes that there is more detailed information about the crimes and the victims in the public domain than is contained in the information that is being withheld.
51. As the Commissioner is not satisfied that the information in question is held for the purposes set out in section 34(1)(a)(i) or (ii), he finds that the exemptions do not apply.
52. As the Commissioner has concluded that the exemptions in section 34(1)(a)(i) and (ii) do not apply, he is not required to go on to consider the public interest test as set out in section 2(1)(b) of FOISA.

Section 39(1) – Health, safety and the environment

53. Police Scotland have applied the exemption contained in section 39(1) of FOISA to the information in documents 12, 18 and 49 that they had previously argued was outwith the scope of the request.
54. 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. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
55. As the Commissioner notes in his briefing on this exemption², section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test found in many other harm-based exemptions in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. This test is less demanding than the "substantial prejudice" test.
56. Police Scotland submitted that the withheld information concerns unsolved murder cases which include proceedings at various stages of development. This is likely to associate the details of individuals including the victim, alleged perpetrator, suspect, witnesses and related information leading to negative consequences. Police Scotland contended that disclosure of the information will indicate which cases are being investigated at this point in time.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

57. Police Scotland argued that disclosure may also cause renewed distress to the relatives of the victims and may bring unwanted attention to those trying to come to terms with the death of their loved one. They also argued that disclosure could cause distress to those families of the victims whose circumstances, for whatever reason, are not being reviewed; families may find it hard to come to terms with why this process is not being carried out at this time.

Commissioner's conclusions

58. In coming to a decision on the application of section 39(1) of FOISA, the Commissioner has taken cognisance of all of the submissions made by Police Scotland.
59. The phrase "endanger" is broad enough to apply where there is a threat, direct or indirect, to the safety of a person. Since the exemption does not specify that any threat should be imminent before it applies, the threat may be either immediate, or one which would foreseeably arise in the future. The Commissioner believes that, for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
60. In this case, Police Scotland have argued that disclosure would endanger the mental health of the families of the victims mentioned in the emails.
61. The Commissioner has established that the victims referred to in the withheld information have all been named in newspaper articles and it is relatively easy to locate information about the circumstances surrounding their death or disappearance on the Internet. This is all public information. The Commissioner understands that the family of the victims may become anxious or distressed when information about their loved ones and/or their deaths appear in the media, but he takes the view that withholding information in this case would not prevent that from happening.
62. Police Scotland have also argued that disclosure will indicate which cases are being investigated at this point in time and that this would endanger the physical or mental health of an individual. The Commissioner does not accept this argument.
63. The documents withheld from the Applicant date from March 2017 to October 2017. The Commissioner understands that relatives may be upset if they thought that Police Scotland were not prioritising the case of their loved one, but were focusing on other unresolved cases. However, in their submissions on section 35(1)(b), Police Scotland made it clear that "*the investigations of these unresolved homicides are live ones and that criminal proceedings remain live against the suspect(s)*".
64. Therefore, if there were some indications in the withheld documents that some cases were not actively being reviewed between March 2017 and October 2017, that does not mean that they were not actively reviewed prior to March 2017 nor after October 2017. It is clear that Police Scotland have not closed any of these cases and they remain open and unresolved. Any concerns relatives may have from information contained in the correspondence can no doubt be assuaged by Police Scotland, thus mitigating any harm. In any event, having reviewed all of the withheld correspondence, the Commissioner has not been able to identify any content which would be likely to cause the harm claimed by Police Scotland.
65. Having concluded that disclosure of the withheld information in this case would not, and would not be likely to, endanger the physical or mental health or safety of any person, the Commissioner finds that the exemption in section 39(1) was incorrectly applied to the withheld information by Police Scotland.

66. Given that the exemption in section 39(1) of FOISA was wrongly applied, the Commissioner is not obliged to consider the public interest test in section 2(1)(b) of FOISA.

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

67. Police Scotland have applied the exemption contained in section 30(c) of FOISA to information contained in documents 2, 5-39 and 41-86.
68. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
69. The standard to be met in applying the tests contained in section 30(c) is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

Police Scotland's submissions

70. Police Scotland stated that they were withholding Police Scotland and COPFS email addresses and telephone numbers as well as the names and contact details of Police Scotland and COPFS staff under section 30(c) of FOISA. (During the investigation, Police Scotland were asked if they were relying on section 38(1)(b) (Personal information) to withhold the names and contact details of police and COPFS staff or whether they intended to apply any other exemption(s) to the names of staff. Police Scotland confirmed that they were relying only on section 30(c) to withhold the names and contact details.)
71. Police Scotland argued that the telephone numbers and email addresses are used for operational purposes only and the information has been withheld to ensure that internal processes are protected. Police Scotland submitted that disclosure of this information would be likely to adversely affect the processes that have been put in place, in order to provide an appropriate level of service internally as well as externally.
72. Police Scotland submitted that there are already various ways in which the public can contact Police Scotland or COPFS, with a specific section of both authorities' websites dedicated to this.
73. In addition, Police Scotland argued that the disclosure of the names of police and COPFS staff members would have the potential to harass the personnel involved, particularly if the Applicant (or any third party) were to begin contacting them directly and disrupting their day to day business.

The Applicant's submissions

74. The Applicant argued that Police Scotland had not established that the exemption applies in the particular circumstances of this case. The Applicant submitted that the individuals concerned had engaged with journalists in what, in his view, could be described as a bid to

win favourable journalistic comment. The Applicant submitted that he would expect the contact details to be held in publicly accessible directories of one kind or another in any event.

Commissioner's conclusions on section 30(c)

75. The Commissioner has considered the arguments put forward by Police Scotland but he is not satisfied that the exemption applies..
76. Information can only be exempt under section 30(c) of FOISA if its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The Commissioner is not satisfied that Police Scotland have demonstrated such harm would follow disclosure. Police Scotland have argued that if the names and contact details were disclosed, third parties may use this information to directly approach Police Scotland/COPFS staff and this may interrupt their day to day work.
77. The Commissioner notes that the names of all but one of the individuals in question are already in the public domain in connection with their roles as employees of Police Scotland or of COPFS. In some cases, the direct contact details of the individuals are also in the public domain. He also notes the senior roles played by most of the individuals in question.
78. Police Scotland have not provided the Commissioner with any evidence that disclosing the names and contact details would make it more likely that individuals would directly approach the individuals, nor have they demonstrated why such contact would disrupt the officers' day to day work. The Commissioner considers that officers are likely to be contacted throughout the day by colleagues and other individuals relevant to their work, which may include members of the public. The Commissioner cannot see why contact made as a result of the disclosure of the information would be any more disruptive than the day to day contact that such staff already experience, and Police Scotland have not explained why this would be the case.
79. Police Scotland have argued that the contact details are used for internal processes and disclosure would threaten those processes. Again, Police Scotland have not provided any further explanation or evidence to indicate why this would be the case and the Commissioner is not convinced by the harm claimed.
80. For these reasons, the Commissioner finds that the information withheld under section 30(c) of FOISA does not qualify for exemption under that provision. Police Scotland have not provided evidence or arguments to persuade him that the information, if disclosed, would cause substantial prejudice to the effective conduct of public affairs.
81. Given that the exemption in section 30(c) of FOISA was wrongly applied, the Commissioner is not obliged to consider the public interest test in section 2(1)(b) of FOISA.

Section 38(1)(b) – Personal information

82. Police Scotland withheld the names and contact details of the TV company employees and information about families of the victims of crime on the basis that it was exempt from disclosure under section 38(1)(b) of FOISA.

The exemption

83. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A) exempts information from disclosure if it is "personal data" and its disclosure would contravene any of the data protection principles in the GDPR or, where appropriate, in the DPA 2018

84. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information personal data?

85. "Personal data" is defined in section 3(2) of the DPA 2018 as "any information relating to an identified or identifiable living individual". Section 3(3) of the DPA 2018 defines "identifiable living individual" as "a living individual who can be identified, directly or indirectly, in particular by reference to –

- (a) an identifier such as a name, an identification number, location data or an online identifier, or
- (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual."

86. Information will "relate to" a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.

87. The information withheld under section 38(1)(b) of FOISA comprises the names and contact details of employees of a TV production company and the names of some family members of the victims of crime.

88. In their submissions, Police Scotland argued that disclosure of the withheld information would identify living individuals.

89. The Commissioner has considered the nature of the withheld information in this case, which comprises the names and contact details of TV company employees, as well as information about the families of the victims of crime, and he is satisfied that the information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure breach one of the data protection principles?

90. Police Scotland argued that disclosure would breach the principle in Article 5(1)(a).

91. Article 5(1)(a) of the GDPR requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject." The definition of "processing" is wide and includes (section 3(4)(d) of the DPA 2018) "disclosure by transmission, dissemination or otherwise making available". In the case of FOISA, personal data are processed when disclosed in response to a request. Personal data can only be disclosed if disclosure would be both lawful (i.e. if it would meet one of the conditions of lawful processing listed in Article 6(1) of the GDPR) and fair.

Lawful processing: Article 6(1)(f) of the GDPR

92. Among other questions, therefore, the Commissioner must consider if disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the GDPR would allow the personal data to be disclosed. Police Scotland took the view that no conditions in Article 6 apply in the circumstances of this case. The Commissioner considers condition (f) of Article 6(1) of the GDPR to be the only condition which could possibly apply in this case.

Condition (f) legitimate interests

93. This condition allows personal data to be processed if the processing is "necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except

where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."

94. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
95. Police Scotland have argued that disclosure of the personal data is unwarranted, and the data subjects have a reasonable expectation of privacy.
96. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - a) Does the Applicant (or does another member of the public) have a legitimate interest in obtaining the personal data?
 - b) If so, is the disclosure of the personal data necessary to achieve that legitimate interest?
 - c) Even if the processing is necessary to achieve that legitimate interest, is that overridden by the interests or fundamental right and freedoms of the data subjects?
97. Police Scotland acknowledged that the Applicant may have a legitimate interest in obtaining the information.
98. The Applicant argued that the relationships between the police, COPFS, journalists and media organisations are a legitimate area for democratic scrutiny and public comment, and that disclosure of such information is in the public interest. The Applicant has submitted that individual journalists are conscious of their influence and those involved in the programme that is the subject of his application have actively sought publicity and plaudits for their work.
99. There is no definition in the DPA of what constitutes a "legitimate interest." The Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's guidance on section 38 of FOISA³ states:

In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.
100. The Commissioner is satisfied that the Applicant, and the wider public, has a legitimate interest in knowing which representatives of the TV production company corresponded with Police Scotland with a view to obtaining information that could be used in a broadcast TV programme.
101. However, the Commissioner does not accept that the Applicant has a legitimate interest in obtaining personal data about the families of victims of crime. These individuals have no expectation that their personal data would be disclosed in response to a request for information and the Commissioner cannot identify any legitimate interest that the Applicant may have in obtaining such information. It is clear from the Applicant's submissions, that he

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

is interested in the level of cooperation given to the TV Company by Police Scotland. There is no indication that obtaining the personal data of the family members of crime victims is relevant to him or his information request. Disclosure of this personal data will not illuminate, in any way, the nature of the cooperation given to the TV Company by Police Scotland.

102. In the circumstances, the Commissioner finds that the Applicant does not have a legitimate interest in obtaining the personal data of the families of victims of crime and he finds that this information should be withheld.

Is disclosure of the personal data necessary?

103. Having accepted that the Applicant does have a legitimate interest in obtaining the personal data of TV company employees, the Commissioner must consider whether disclosure of the personal data is necessary for that interest. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
104. The Commissioner has taken account of the decision by the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55⁴. In this case, the Supreme Court stated (at paragraph 27):

"... A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less."

105. As the Supreme Court confirmed, "necessary" means "reasonably" rather than absolutely or strictly necessary. When considering whether disclosure would be necessary, public authorities need to consider whether the disclosure is proportionate as a means and fairly balanced as to ends, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subjects.
106. The Applicant has argued that the individuals whose names are being withheld would have had no expectation of privacy. He has clearly indicated that he requires the names of those individuals.
107. Based upon the facts of this case, the Commissioner accepts that disclosure of the names of the TV company's employees is necessary in order for the Applicant to know at which level of the company the contact took place. The Commissioner can identify no viable means of meeting those interests which would interfere less with the privacy of the data subjects than disclosing the withheld information.
108. However, the Commissioner is not satisfied that disclosure of the contact details of those staff is necessary to meet the Applicant's legitimate interests, and the Applicant has not provided the Commissioner with any compelling reason as to why he is entitled to receive that information.
109. In all the circumstances, and for the reasons recounted above, the Commissioner is satisfied that disclosure of the names of the company's employees is necessary for the legitimate interests identified, but disclosure of the contact details of those employees is not necessary

⁴ <http://www.bailii.org/uk/cases/UKSC/2013/55.html>

110. The Commissioner will now consider whether the Applicant's legitimate interest in obtaining the names of the TV company employees outweighs the rights of those individuals to privacy.

The data subjects' interests or fundamental rights and freedoms

111. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOISA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure. Only if the legitimate interests in the disclosure of the information outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
112. The Applicant considered the information should be disclosed as the individuals (researchers working for a TV production company) would not expect "privacy" in relation to their journalistic work. The Applicant argued that contributions from even the junior members of a television production team are acknowledged in the credits shown at the end of the production. He therefore considered it highly likely that the names of the researchers redacted by Police Scotland have been broadcast.
113. The Applicant provided the Commissioner with a copy of a letter sent to him by a journalist who was looking for prisoners to take part in a TV documentary. The Applicant submitted that he receives similar letters quite frequently and in each case the journalist or TV company employee who contacts him provides their name.
114. The Commissioner's guidance on section 38 of FOISA sets out some factors that should be taken into account in balancing the interests of parties. The guidance makes it clear that, in line with Recital (47) of the GDPR, much will depend on the reasonable expectations of the data subjects and that these are some of the factors public authorities should consider:
- (i) Does the information relate to an individual's public life (their work as a public official or employee) or to their private life (their home, family, social life or finances)?
 - (ii) Would the disclosure cause harm or distress?
 - (iii) Whether the individual has objected to the disclosure
115. Disclosure under FOISA is public disclosure. The Commissioner's guidance on section 38(1)(b) of FOISA makes it clear that, when deciding whether disclosure would cause unwarranted prejudice to an individual, the Commissioner will consider the seniority of the person's role and whether their role is public facing.
116. The Commissioner notes that, while Police Scotland have disclosed the name of the investigative journalist who presented the TV programme, they have withheld the names of his PA and other TV company staff with roles such as archive researcher and assistant producer.
117. The Commissioner acknowledges that the withheld information relates to the individuals' public lives (as employees of the TV production company) rather than to their private lives. However, he considers that while these individuals are working in a field that relies on publicity and media attention, their job responsibilities are as part of the production team; they are not household names.

118. The TV company employees are all backroom staff and did not feature in the episode that was broadcast on TV. The Commissioner recognises that some (or all) of these individuals may have been credited at the end of the TV broadcast, but he does not consider that this means they would expect their personal data to be disclosed in response to a request under FOISA. Similarly, the fact that the Applicant receives letters from companies which, for obvious reasons will contain the name of the person writing to the Applicant, does not mean that they would expect their personal data to be disclosed into the public domain.
119. The Commissioner has taken into account the Applicant's legitimate interests. As noted above, the Applicant has argued that relationships between the police and the media are a valid area for public scrutiny, and the Commissioner gives some weight to these arguments.
120. In reaching his decision, the Commissioner has considered whether, in relation to each individual, disclosure of any or all of the information would breach the data protection principles. He has therefore considered each data subject separately, although the decision notice does not refer to each separately. After carefully balancing the legitimate interests of each data subject against those of the Applicant, the Commissioner finds that the legitimate interests served by disclosure of the withheld personal data are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the individuals in question in this case. In the circumstances of this particular case, the Commissioner concludes that condition (f) in Article 6(1) of the GDPR cannot be met in relation to the withheld personal data.
121. The Commissioner has concluded, on balance, that the legitimate interest in obtaining the information is outweighed by reason of prejudice to the TV company employees' rights and freedoms or legitimate interests. While it is appropriate that the investigative journalist has been named, this does not mean that the names of backroom production staff should be publicly disclosed.

Fairness

122. Given that the Commissioner has concluded that the processing of the personal data, if held, would be unlawful, he is not required to go on to consider separately whether disclosure of such personal data would otherwise be fair and transparent in relation to the data subjects.

Conclusion on the data protection principles

123. For the reasons set out above, the Commissioner is satisfied that disclosure of the personal data would breach the data protection principle in Article 5(1)(a) of the GDPR. Consequently, he is satisfied that the personal data are exempt from disclosure under section 38(1)(b) of FOISA.

Decision

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

The Commissioner finds that Police Scotland were entitled to withhold the names and contact details of the TV production company staff under section 38(1)(b) of FOISA.

However, by wrongly withholding information under sections 30(c), 34(1)(a)(i) and (ii), 35(1)(a) and (b) and 39(1) of FOISA, Police Scotland failed to comply fully with section 1(1) of FOISA.

The Commissioner therefore requires Police Scotland to provide the Applicant with the information they have wrongly withheld by 7 November 2019.

Appeal

Should either the Applicant or Police Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Margaret Keyse
Head of Enforcement

23 September 2019

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- ...
- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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
 - (ii) prosecuted for an offence is guilty of it;

...

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;
 - (b) the apprehension or prosecution of offenders;

...

38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
 - (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A));

...

- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -

- (a) would contravene any of the data protection principles, or

...

- (5) In this section-

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

"the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4), (10), (11) and (14) of that Act);

...

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 2018

3 Terms relating to the processing of personal data

...

- (2) "Personal data" means any information relating to an identified or identifiable living individual (subject to section 14(c)).
- (3) "Identifiable living individual" means a living individual who can be identified, directly or indirectly, in particular by reference to -
 - (a) an identifier, such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) "Processing", in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as -
 - ...
 - (d) disclosure by transmission, dissemination or otherwise making available,
 - ...
- (5) "Data subject" means the identified or identifiable living individual to whom personal data relates.
...
- (10) "The GDPR" means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

...

General Data Protection Regulation

Article 5 Principles relating to processing of personal data

- 1 Personal data shall be:
 - a. processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency")
 - ...

Article 6 Lawfulness of processing

- 1 Processing shall be lawful only if and to the extent that at least one of the following applies:
 - a. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
 - ...
 - f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.
 - ...

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