



Scottish Information  
Commissioner

**Decision 189/2007 Mr Steven Bell of the Evening Telegraph and the  
Scottish Prison Service**

*Information relating to prisoners absconding from Castle Huntly and Noranside  
open prisons*

**Applicant: Steven Bell of the Evening Telegraph  
Authority: The Scottish Prison Service  
Case No: 200700341  
Decision Date: 18 October 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 189/2007 Mr Steven Bell and the Scottish Prison Service

***Request for information regarding the number of prisoners who absconded from Castle Huntly and Noranside open prisons over a specific time period – SPS released a large amount of information but relied on section 38(1)(b) of FOISA to withhold the names of the prisoners – Commissioner upheld SPS’s reliance on section 38(1)(b)***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2(1) and (2)(b)(e)(ii) (Effect of exemptions); 38(1)(b) and (2) (Personal information)

Data Protection Act 1998 sections 1(1) (Basic interpretative provisions) (definition of “personal data”); 2(g) and (h) (Sensitive personal data); Schedule 1 Part 1 (the first data protection principle); Schedule 2 (condition 6) and Schedule 3 (condition 3)

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

### Facts

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Mr Bell requested certain information from the Scottish Prison Service (SPS) relating to prisoners who have absconded from Castle Huntly and Noranside open prisons under the Freedom of Information (Scotland) Act 2002.

The SPS provided some information to Mr Bell, but withheld other information from him. During the investigation, the SPS released some of the information it had withheld to Mr Bell.

Following an investigation, the Commissioner found the SPS had dealt with Mr Bell’s request for information in accordance with Part 1 of FOISA. He found, in particular, that the release of the names of the prisoners would breach the data protection principles contained in the Data Protection Act 1998 (DPA) and was therefore exempt from release under section 38(1)(b) of FOISA.



## Background

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1. On 16 January 2007, Mr Bell wrote to the SPS requesting the following information:
  - How many people absconded from the open estate, in total and broken down by the two open prisons in Tayside (i.e. from Castle Huntley and HMP Noranside), during 2006?
  - What are the equivalent figures for each of the previous two years?
  - In each case of absconding during 2006, the name and age of the prisoner, the date the prisoner went missing, the prison they went missing from and, where the prisoner has been traced, the date that they were returned to prison. In each case please also state the nature of their original conviction and the length of the sentence.
  - How many prisoners are, at the date of reply, missing from the open estate, and broken down by each prison?
  - In each case where a prisoner has been missing for more than a year, the name and age of the prisoner, the date they absconded, the nature of their original conviction and length of sentence.
  - All internal and external SPS correspondence, including emails, letters, reports and minutes of meetings, regarding the level of absconding at the two prisons and possible measures to reduce it.
2. The SPS replied to Mr Bell on 26 January 2007. In its response, the SPS released information to him as to the number of prisoners who had absconded from Castle Huntly and Noranside open prisons in 2004, 2005 and 2006. The SPS also provided Mr Bell with information as to how many of those prisoners who had absconded were still at large in relation to both open prisons. However, the SPS refused to release information to Mr Bell which would address his requests as to the more detailed information that he was seeking concerning the individual prisoners. The SPS indicated that it considered this information to be personal information of the prisoners and as such was exempt under section 38(1)(b) of FOISA.
3. Furthermore, the SPS relied on section 12 of FOISA (excessive costs) for refusing to provide Mr Bell with the information that he had requested concerning the internal and external SPS correspondence and asserted that, in any event, the correspondence would be exempt under section 35(1)(f) of FOISA.



4. On 1 February 2007, Mr Bell wrote to the SPS requesting a review of its decision. In particular, Mr Bell asked that the SPS review its reliance on the exemption in section 38(1)(b) of FOISA for withholding information about the prisoners from him. Mr Bell also set out why he considers that the public interest lies in releasing this information and asked the SPS to consider the argument that the public interest lies in release. Mr Bell did not question the refusal to provide copies of correspondence on cost grounds. Accordingly, this did not form part of my investigation.
5. On 5 February 2007, the SPS notified Mr Bell that it had carried out a review and had decided to uphold its original decision.
6. On 8 March 2007, Mr Bell wrote to my Office, stating that he was dissatisfied with the outcome of the SPS's review and applying to me for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Bell had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
8. On 16 March 2007, the Scottish Government's Freedom of Information Unit (the FOI Unit), of which the SPS is an agency, was notified in writing that an application had been received from Mr Bell and was asked to provide my Office with specified items of information required for the purposes of the investigation. A response was received on behalf of the SPS and the case was then allocated to an investigating officer.

## The Investigation

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9. The investigating officer subsequently contacted the FOI Unit, asking it to provide comments on the application and to respond to specific questions on the application, on behalf of the SPS.
10. A full response was received on 4 May 2007. In this response, the SPS advised that it had given further consideration to all of the relevant issues and the application of section 38(1)(b), and was willing to release additional information to Mr Bell in an effort to resolve this case informally.



11. The SPS explained that it was now willing to release information to Mr Bell as to the age of the prisoner, date of absconding, date of return, length of sentence and the nature of the prisoner's conviction in the case of each of the prisoners who had absconded in 2006. The SPS was not, however, willing to release any other information as it considered that the release of the additional information would identify the prisoners in question and that release of the information was exempt under section 38(1)(b) of FOISA in that it would breach the data protection principles contained in the DPA.
12. In light of the SPS's offer to release further information to Mr Bell, the investigating officer contacted Mr Bell to advise him of the offer which had been made and to ask whether, as a result, he would be willing to resolve this case informally.
13. Mr Bell responded to the investigating officer to say that he did not consider that the offer from the SPS amounted to a satisfactory settlement, and as a result he was not prepared to withdraw his application to me for a decision.
14. The SPS was informed by the investigating officer that Mr Bell was unwilling to resolve this case informally, and further submissions on the case were sought from it.
15. A full response was received on 26 June 2007.
16. During the course of the investigation the SPS voluntarily released the information referred to in paragraph 11 to Mr Bell.

## **The Commissioner's Analysis and Findings**

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17. In coming to a decision on this matter, I have considered all of the submissions and other information that have been presented by both Mr Bell and the SPS, and I am satisfied that no matter of relevance has been overlooked.
18. Given that the SPS released additional information to Mr Bell during the investigation, this decision notice will focus only on the remaining information which Mr Bell requested which the SPS has not indicated that it will release to him, i.e. the names of the prisoners.



## **Section 38(1)(b) – Personal information**

19. The exemption in section 38(1)(b) (read in conjunction with section 38(2)(a)(i) or (b)) of FOISA exempts personal data from release if its disclosure to a member of the public would contravene any of the data protection principles. This particular exemption is an absolute exemption in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. Therefore, a public authority is not required to consider the public interest in whether or not the information should be disclosed if it considers that the information falls within the scope of this exemption.
20. In order to rely on this exemption, the SPS would have to show that the information which has been requested by Mr Bell is personal data for the purposes of the DPA and that release of the information to a member of the public would contravene any of the data protection principles (which are found in Schedule 1 to the DPA).
21. In this case, the SPS has argued that the names of the prisoners is the personal data of the prisoners and that to release this information would breach the first data protection principle. The first data protection principle states that the processing of data must be fair and lawful and, in particular, that information shall not be processed unless at least one of the conditions in schedule 2 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in schedule 3 of the DPA is met.
22. In considering the application of the exemption, I first have to establish whether the information which has been withheld from Mr Bell is personal data.
23. In terms of section 1(1) of the DPA, the term “personal data” means data relating to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or likely to come into the possession of the data controller (here, the data controller is the SPS).
24. Having considered the information which has been withheld from Mr Bell, I am satisfied that the prisoners can be identified from this information (i.e. names), either on its own or together with other information which is in the possession of the SPS. I am also satisfied that the information relates to the prisoners: it is clearly biographical and has the prisoners as its focus. Accordingly, I am satisfied that the information constitutes the personal data of the prisoners.
25. I have also considered the definition of sensitive personal data contained in section 2(g) and (h) of the DPA (both of which relate to offences – see the full definition in the Appendix) and am satisfied that, in this case, the information constitutes sensitive personal data.



26. As a society we recognise that information relating to offences can be worthy of additional protection, which is why section 2(g) and (h) appear in the DPA. Protection is also given in other legislation, for example the Rehabilitation of Offenders Act 1974, which allows people who have been convicted of an offence to “wipe the slate clean” and to allow them not to declare previous (spent) convictions for employment purposes after a specified rehabilitation period (although there are some exceptions to this).

***Would release of the information breach the first data protection principle?***

27. As I am satisfied that the information which has been withheld from Mr Bell constitutes personal data for the purposes of section 1(1) of DPA (and is in fact sensitive personal data as defined in section 2 of the DPA) I am now required to go on to consider whether any of the data protection principles would be breached if this information were to be disclosed.
28. As mentioned already, the SPS has argued that if this information were to be released to Mr Bell then this would breach the first data protection principle on the basis that it would amount to unfair processing.
29. In their submissions to me, the SPS advised that it has a duty to individual prisoners to protect their personal data, and that the prisoners would have no expectation that their personal data would be released and made publicly available. It is also the view of the SPS that it would be contrary to the first data protection principle to release this information without the explicit consent of the prisoners. The SPS has also argued that if the names of the prisoners were to be released, this could lead to the creation of unjustified concern in communities and the targeting of those individuals or their families by the media, general public or the local community. The SPS also considered, in looking at the conditions in Schedule 2 to the DPA, that while only condition 6 could be relevant in this instance, the tests within this condition would not be fulfilled by the release of this information.
30. The SPS has also noted that there are some occasions in which the names of absconded prisoners are released into the public domain. The SPS has explained that that this only takes place following consultation with the Police. The SPS submit that the automatic release of the names of the prisoners would in fact have the effect of impeding an investigation following a prisoner absconding.
31. I will first of all address the question of condition 6 of Schedule 2 of the DPA. I agree with the view taken by the SPS that in the circumstances this is the only condition which might apply in Schedule 2.



32. Condition 6(1) allows personal information to be processed (in this case, disclosed) 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 (Mr Bell and the public in general), 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 prisoners).
33. I must therefore apply a number of tests to establish whether condition 6 supports disclosure of the names of the prisoners in this case. The first test is whether it can be established that the third party or third parties to whom the data would be disclosed have a legitimate interest in the processing of the personal data to which the request relates. The second is whether the processing is necessary for the purposes of the legitimate interests. The third is whether the processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced.
34. In considering the first test, I accept that Mr Bell (and the public in general) has a legitimate interest in gaining access to information as to the absconding from open prisons in the Tayside area, in order to understand the nature and frequency of prisoners absconding. I consider that Mr Bell (and, again, the public in general) has a legitimate interest in this information due to concerns that criminals are illegally at large in the local community, and that by releasing the names of the prisoners the local communities may be able to assist in tracing the prisoner and having them returned to the open prison. This clearly reflects the legitimate interest in ensuring that prisoners serve their sentences and are not released prior to being fully rehabilitated.
35. There may well be a legitimate interest in the release of individual's names in certain circumstances while they are still at large (and the authorities have reason to believe that identifying them would assist either in protecting the public or securing their recapture). However, I am satisfied, from submissions from the SPS, that names will be disclosed where doing so would protect the public. I am not so satisfied that there is a legitimate interest in the release of the names of all of the prisoners who have absconded in the circumstances where the prisoner has since been returned to prison, or if where the prisoner is still at large that such a disclosure may have the effect of making the recapture of the prisoner more difficult.





36. With regard to whether disclosure of the information as to the names of the prisoners is necessary for the purposes of the legitimate interests identified above, I have considered whether the interests might be met equally effectively by any alternative means. In all the circumstances, I am satisfied that the information which the SPS has already disclosed to Mr Bell, in terms of the age of the prisoner, the date of absconding, date of return, length of sentence and the nature of the prisoner's conviction is sufficient to satisfy Mr Bell's legitimate interest in this information. I do not consider that release of the individual's names would add anything more to what has already been released to Mr Bell in terms of his legitimate interests.
37. In considering the legitimate interests of the data subjects (the prisoners), it is generally accepted in society that information about a person's criminal record should be given some protection in order to allow him/her to re-enter society after they have served their prison sentence and have undergone a period of rehabilitation. I have already referred to the fact that information about a person's offences is considered to be sensitive personal information and have referred to the Rehabilitation of Offenders Act 1974. I also accept that release of the names of the prisoners could lead to the targeting of the prisoners (once they have served their sentences) or their families and create unjustified concern in local communities.
38. Furthermore, as I have already concluded that Mr Bell's (and the public's) legitimate interests have been fulfilled by disclosure of the information which the SPS has already released, I am not persuaded in this case that the disclosure of the names of the prisoners is necessary for the purposes of Mr Bell's (and the public's) legitimate interests in terms of condition 6 of Schedule 2.
39. I am therefore satisfied that there are no conditions in Schedule 2 which would permit the names of the prisoners to be disclosed to Mr Bell.
40. I have also considered the conditions in Schedule 3 to the DPA. In the absence of evidence that the disclosure of the names of the prisoners is necessary in order to protect the vital interests of the public, I am not satisfied that any of the conditions in Schedule 3 can be satisfied in order to allow the SPS to release the information to Mr Bell.
41. As there are no conditions in either Schedules 2 and 3 which would permit the processing of this data, I am satisfied that disclosure of the names of the prisoners to Mr Bell by the SPS would breach the first data protection principle and, accordingly, that the information is exempt in terms of section 38(1)(b) of FOISA.



## **Decision**

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I find that the Scottish Prison Service acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Bell.

## **Appeal**

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Should either Mr Bell or the Scottish Prison Service 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**  
**18 October 2007**



## 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.

##### 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 ... 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
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
  - (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 require –

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

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

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



## **2 Sensitive personal data**

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

(...)

- (g) the commission or alleged commission by [the data subject] 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.

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

- 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.



**Schedule 3 Conditions relevant for purposes of first data protection principle:  
processing of sensitive personal data**

3. The processing is necessary -
- (a) to protect the vital interests of the data subject or another person, in a case where –
    - (i) consent cannot be given by or on behalf of the data subject; or
    - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
  - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.