

Decision Notice

Decision 242/2016: Mr Marc Ellison and the Chief Constable of Police Service of Scotland

Stop and search survey data

Reference No: 201600592

Decision Date: 9 November 2016



Scottish Information
Commissioner

Summary

Police Scotland were asked for the raw data from a Stop and Search officer confidence survey.

Police Scotland disclosed some information and withheld the remainder under the exemptions relating to the harm to public affairs and personal information. The Commissioner found that Police Scotland were entitled to withhold this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of “data protection principles”, “data subject” and “personal information”) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provision) (definition of personal data); Schedule 1 (The data protection principles, Part 1 – the principles) (the first data protection principle); Schedule 2 (Conditions relevant for the purposes of the first principle: processing of any personal data) (condition 6)

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 4 February 2016, Mr Ellison made a request for information to the Chief Constable of Police Scotland (Police Scotland). He referred to a briefing¹ on a stop and search public confidence plan, which had mentioned an online confidence survey. Mr Ellison asked for all the raw data / responses from the 851 officers who took that survey. He also asked for the original questions to be included.
2. Police Scotland responded on 3 March 2016. They provided Mr Ellison with some of the information from the survey and a summary of the responses received (which was also published online²). The remainder was withheld under sections 30(b) and (c) and 38(1)(b) of FOISA (respectively, exemptions relating to prejudice to effective conduct of public affairs, and personal information).
3. On 7 March 2016, Mr Ellison emailed Police Scotland requesting a review of their decision. He did not consider that they had justified the decision to withhold the information covered by his request.
4. Police Scotland notified Mr Ellison of the outcome of their review on 4 April 2016. They issued a modified decision, withdrawing their reliance on section 30(c) of FOISA to withhold the requested information, but maintaining their reliance on the other exemptions. Police Scotland responded to Mr Ellison’s questions, and disclosed a table specifying the number of survey respondents by rank, division and role.

¹ <http://www.spa.police.uk/assets/126884/174772/326712/item7>

² <http://www.scotland.police.uk/about-us/police-scotland/stop-and-search/stop-and-search-officer-confidence>

5. On 4 April 2016, Mr Ellison applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the reasons provided by Police Scotland for withholding the requested information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Ellison made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 14 April 2016, Police Scotland were notified in writing that Mr Ellison had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Ellison. Police Scotland provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 8 June 2016, Police Scotland were invited to comment on Mr Ellison's application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
9. Police Scotland provided submissions to the investigating officer. Clarification on some points was sought, and obtained, during the investigation.
10. Mr Ellison was invited to provide his comments as to why the information should be disclosed, and did so.
11. During the investigation, Police Scotland withdrew their reliance on section 38(1)(b) of FOISA to withhold the IP addresses obtained during the survey and relied upon section 35(1)(a) and (b) of FOISA (Law enforcement) to withhold this information instead. Mr Ellison was informed about this change in exemption. He was content for the IP addresses to be excluded from consideration in this decision.

Commissioner's analysis and findings

12. 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 her by both Mr Ellison and Police Scotland. She is satisfied that no matter of relevance has been overlooked.
13. In his application, Mr Ellison acknowledged that disclosing information which showed that a respondent was a high-ranking police officer could risk identifying the individual, as there are lower numbers of high-ranking officers. He asked if Police Scotland could provide a partial breakdown by rank and still give him the breakdown by division and role: in his view, this would not risk identification of an individual to the same extent as it could be someone of any rank. Mr Ellison also asked if an officer's comments could be paraphrased, to overcome the concern about quoting their views as expressed.
14. The Commissioner's remit is to assess and decide whether Police Scotland complied with FOISA in responding to Mr Ellison's request. The Commissioner does not have the power to require an authority to provide information in response to a different request. Mr Ellison is entitled to submit a new request to Police Scotland.

Information being withheld

15. The stop and search survey results data are held in a single excel spreadsheet by Police Scotland. A copy of this spreadsheet was provided to the Commissioner during the investigation. Police Scotland disclosed a redacted version of the spreadsheet to Mr Ellison in their initial response. The following information was disclosed:
 - RespondentID
 - CollectorID
 - StartDate
 - EndDate
 - Multiple choice answers to questions (from a range of the following responses: Strongly Disagree / Disagree / Neutral / Agree / Strongly Agree or no response at all)
16. Police Scotland confirmed that the following information was withheld from the spreadsheet:
 - Division, Rank and Department (under section 38(1)(b) of FOISA)
 - Free text comments (under section 30(b) of FOISA)

Section 30(b)(i) and (ii) – Prejudice to effective conduct of public affairs

17. Police Scotland applied these exemptions to the free text comments provided by police officers in their survey responses.
18. In order for Police Scotland to rely on these exemptions, they must show that disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
19. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
20. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring. Each request must, of course, be considered individually.

Factors to consider

21. The Commissioner's guidance³ states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another,

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.

- (ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
- (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken. The degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance.

Police Scotland's submissions on section 30(b)

- 22. Police Scotland submitted that individuals expect a certain amount of privacy when detailing their personal views. Disclosure could result in individuals being unwilling to contribute their opinions on recommendations or proposals in the future, if they anticipated their views would be publicly disclosed.
- 23. Police Scotland explained that surveys and other engagements tools are used by the organisation as a method of obtaining employees' views and suggestions, the aim being to use this knowledge to improve and develop ways of working that best serve the organisation and the communities it serves. In this case, Police Scotland explained that they intend to act upon the views obtained in the stop and search survey with improvements to the processes. In addition, Police Scotland explained that they intend to repeat the survey at a later date, when they will seek the views of the staff members once again.
- 24. Police Scotland contended that the Stop and Search Improvement Plan relies on the mutual trust and cooperation of all those who have an involvement in the use of the stop and search tactic. They argued that there is a significant risk that, if such information was disclosed, it would substantially inhibit these individuals, and others, from offering opinions in the future. This would impact on all business areas throughout Police Scotland.
- 25. Police Scotland provided evidence to show that participants were told the survey results would remain confidential. In their view, this assurance ensured a level of frankness and openness which would not have otherwise have been given and "assured a product fully reflective of participant's views".
- 26. Police Scotland submitted that their ability to provide a professional judgement in relation to any policing issues would be inhibited, if their employees or other individuals were unable to exchange advice and notable concerns freely and frankly.
- 27. In identifying the harm that would, or would be likely to follow disclosure, Police Scotland explained that they are trying to build better relationships with their officers, gaining their trust and involving them in the re-design of the Stop and Search practice. By involving them in the design, they hope the officers will have a better understanding of the issues, trust that they are being listened to, and more likely to accept the changes in practice. Police Scotland argued that disclosure of personal comments would damage that relationship. They feared

that officers could disengage with the process (including other parts of the process, such as confidential workshops).

The Commissioner's view

28. The Commissioner has considered the withheld information, along with Police Scotland's submissions.
29. The Commissioner accepts that the exemptions in section 30(b)(i) and (ii) of FOISA are engaged. She is satisfied that the police officers who completed the survey were given assurances that their comments would remain confidential, and therefore felt free to express themselves freely. These individuals had no expectation that their comments might be published, following an information request.
30. The Commissioner is satisfied that disclosure of this information would be likely to result in police officers' comments in future surveys being more guarded and less candid. She accepts that this would reduce the value of future surveys, by making them less likely to obtain and represent the true opinions of police officers, where these views were liable to be controversial for any reason. The Commissioner agrees with Police Scotland that disclosure of the information in this case would inhibit any surveys carried out in future, to a significant extent.
31. As discussed in detail below, the Commissioner has concluded that information showing the Division, Rank and Department of the officers who completed the survey was correctly withheld under section 38(1)(b) of FOISA. Given this conclusion, it is relevant to consider whether the sensitivity of the free-text comments would be lessened, if the Division, Rank and Department information was withheld.
32. As relatively few officers completed the survey, the Commissioner has concluded that it is likely or at least possible that some of those officers could be identified from the information provided in their free text comments, even after redaction of information showing their Division, Rank and Department. Given this possibility, the Commissioner accepts that substantial inhibition would result from disclosure of the free-text comments, as officers were informed that the survey responses would remain confidential and that there is another survey planned.
33. In all the circumstances of this case, the Commissioner accepts that disclosure of the information withheld under section 30(b)(i) and (ii) of FOISA would be likely to result in substantial inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, as argued by Police Scotland. As a result, she is satisfied that Police Scotland correctly applied these exemptions to the free text comments provided by police officers.
34. Having concluded that this information is exempt from disclosure under section 30(b)(i) and (ii), the Commissioner must go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this information. The information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in its disclosure.

The public interest test

Police Scotland's submissions

35. Police Scotland acknowledged that there is currently public interest in Police Scotland and the policy decisions that affect its operational decisions: accordingly, they believed the

considerations favouring disclosure would centre on accountability, public debate and research.

36. Police Scotland argued that, in this instance, the public interest is better served by withholding the requested information. Their reasons focussed on the arguments discussed already in this decision: they submitted that individuals would be unwilling to contribute to such deliberations or put forward proposals in the future if they feared their initial views would be publicly attributable. This led them to conclude that the public interest in the disclosure of the information was outweighed by the harm that could be created by revealing this information.

Mr Ellison's submissions

37. Mr Ellison believed it would be in the public interest for the withheld information from the free-text comments to be disclosed, given the controversy over the practice of stop and search. He argued that disclosure of the comments was "very much in the public interest to see how well the rank and file think Police Scotland is doing in dealing with the controversial practice of stop/search".

The Commissioner's finding

38. The Commissioner recognises that there is always a public interest in transparency and accountability and in scrutinising the decisions and decision making processes followed by public authorities. The matters under consideration in this case are clearly of public importance. Disclosure would allow the public an insight into the approach taken by Police Scotland in relation to stop and search, and show the extent to which it is accepted or questioned by police officers. Given the public debate over the practice of stop and search, it is arguable that this would be in the public interest.
39. The Commissioner also recognises that there is a public interest in participants in such a survey being able to share candid opinions and views. The Commissioner has already concluded that disclosure of the information would be likely to substantially inhibit individuals from expressing their opinions and views in similar situations, such as the follow-up survey already planned. She considers that, in general terms, this inhibition would hamper future policy and decision making within Police Scotland, which would be contrary to the public interest.
40. Having weighed up the public interest for and against disclosure, the Commissioner finds that, in all the circumstances of this case, the public interest in disclosure of the information is outweighed by that in favour of maintaining the exemptions in section 30(b)(i) and (ii) of FOISA.
41. Accordingly, the Commissioner has concluded that Police Scotland were entitled to withhold the free text comments from the survey returns in terms of section 30(b)(i) and (ii) of FOISA.

Section 38(1)(b) – Personal information

42. Police Scotland applied the exemption in section 38(1)(b) to the personal data of police officers, specifically information showing their Division, Rank and Department. As noted above, Police Scotland disclosed a redacted version of the spreadsheet to Mr Ellison with their initial response.
43. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b), exempts information from disclosure if it is "personal data" (as defined in

section 1(1) of the DPA) and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

44. 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.
45. In order to rely on this exemption, Police Scotland must show that the information being withheld is personal data for the purposes of the DPA and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA. Police Scotland considered disclosure of the information would breach the first data protection principle.

Is the information under consideration personal data?

46. The Commissioner will firstly consider whether the information withheld is personal data. “Personal data” are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. (The full definition is set out in Appendix 1.)
47. The DPA gives effect to Directive 95/46/EC⁴ on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (the Directive) and so the DPA should, if possible, be interpreted in a manner which is consistent with the Directive.
48. In considering the definition of “personal data”, the Commissioner has taken account of the opinions delivered by the House of Lords in *Common Services Agency v Scottish Information Commissioner (2008) UKHL 47*⁵, by the High Court of England and Wales in *Department of Health v Information Commissioner (2011) EWHC 1430 (Admin)*⁶ and by the Court of Session in *Craigdale Housing Association and others v Scottish Information Commissioner (2010) CSIH 43*⁷.
49. In the Common Services Agency case, Lord Hope’s view (which attracted majority support) was that the definition of personal data under section 1(1) of the DPA provides for two means of identification: identification will either be from the data itself or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
50. In deciding whether the disclosure of apparently anonymous information could identify an individual, the Commissioner has also noted the approach taken by the Court of Session in the Craigdale Housing Association case. The Court of Session referred to Recital 26 of the Directive, which states that, when determining whether a person is identifiable, account should be taken of all the means likely reasonably to be used to identify the data subject. As noted by the Court, the test is therefore whether disclosure of the information would lead to the identification of an individual or whether there is other information in the public domain which, when taken with the information, would reasonably allow for such identification.

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN>

⁵ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

⁶ <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1430.html>

⁷ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=9a5f86a6-8980-69d2-b500-ff0000d74aa7>

51. Guidance entitled “Determining what is personal data⁸” has been produced by the (UK) Information Commissioner (who is responsible for enforcing the DPA throughout the UK). This states:

“When considering identifiability, it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.”

52. The Commissioner understands that Mr Ellison (who is a journalist) is not interested in the identities of the individual officers, but is seeking a more detailed understanding of police officers’ attitudes towards the stop and search procedures. However, given that disclosure of information under FOISA is disclosure into the public domain, she accepts that it is necessary to consider whether the information about Division, Rank and Department of each respondent would permit identification by a determined person, either on its own or together with other information in the public domain.
53. Police Scotland did not provide a separate submission, to explain how police officers could be identified solely from the Division, Rank and Department information if the free-text comments were withheld. However, they explained that a low number of police officers had responded to the survey, and argued that this could lead to an officer being identified.
54. As noted above, Police Scotland have already disclosed some information from the spreadsheet to Mr Ellison and a summary of the results has been published. Of particular relevance to the question of identifiability is that the survey was completed by a low number of officers (relative to the number of officers in Police Scotland). The Commissioner notes that in the majority of the police Divisions, 10% or fewer completed the survey, and in one instance only four officers completed the survey out of a cohort of 946 officers.
55. If the information on Division, Rank and Department is viewed in isolation, it appears to be anonymous and unlikely to permit identification of any individual data subject. However, when the information is considered together with the information which has already been disclosed, the Commissioner considers that the identification of individual officers is a real possibility, particularly given the low numbers of participants from some Divisions. She considers that a “determined person” could identify an individual officer in some cases at least.
56. The Commissioner is therefore satisfied that the information (Division, Rank and Department) that is being considered here relates to individuals who can be identified, and that it comprises personal data as defined in section 1(1) of the DPA.

Would disclosure contravene the first data protection principle?

57. Police Scotland submitted that making this information available would breach the first data protection principle. This states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. The processing in this case would be making the information publicly available in response to Mr Ellison’s request.

⁸ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

58. In the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner is satisfied that the personal data in question are not sensitive personal data for the purposes of section 2 of the DPA, so it is not necessary for her to consider the conditions in Schedule 3.

Can any of the conditions in Schedule 2 be met?

59. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*⁹, that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject (i.e. the person or persons to whom the data relate).
60. It appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr Ellison. In any event, neither Mr Ellison nor Police Scotland have suggested that any other condition would be relevant.
61. Condition 6 allows personal data to be processed if that 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.
62. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- (i) Does Mr Ellison have a legitimate interest in obtaining the personal data?
 - (ii) If so, is the disclosure necessary to achieve those legitimate interests? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subjects?
 - (iii) Even if disclosure is necessary for those purposes, would it nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects? As noted by Lord Hope in the above judgment, there is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr Ellison must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed.

Does Mr Ellison have a legitimate interest in obtaining the personal data?

63. 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 FOISA¹⁰ states:

⁹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

¹⁰ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

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.

64. Police Scotland acknowledged that Mr Ellison has a legitimate interest in the information as he is a journalist who may wish to write a story regarding the results of the survey.
65. In the Commissioner's view, Mr Ellison (with the wider public) has a legitimate interest in obtaining the withheld personal data. Disclosure of the Division, Rank and Department information would allow some insight into the range of police officers who completed the survey and whether certain departments or ranks were more inclined to do so than others. Because individual officer's responses on the multiple-choice questions were disclosed by Police Scotland, she considers that disclosure of the Division, Rank and Department information would give Mr Ellison a greater understanding of how well Police Scotland's approach to stop and search, and the training and support provided, has been received by police officers in a certain Division, Rank or Department.

Is disclosure necessary to achieve those legitimate interests?

66. Having concluded that Mr Ellison has a legitimate interest in obtaining the withheld personal data, the Commissioner must now consider whether disclosure of the personal data is necessary to achieve those legitimate aims. In doing so, she must consider whether these interests might reasonably be met by any alternative means, interfering less with the privacy of the individuals concerned.
67. In Police Scotland's view, there was an overarching need to ensure that the process which had taken place remained confidential and effective. They were unable to see why there would be an overwhelming public interest in disclosing the information.
68. Having reviewed the withheld information, the Commissioner cannot identify any other viable means of meeting Mr Ellison's interests which would interfere less with the privacy of the data subjects than providing the withheld personal data. For this reason, the Commissioner is satisfied that disclosure of the information is necessary for the purposes of Mr Ellison's legitimate interests.

Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

69. The Commissioner is satisfied that disclosure of the withheld personal data is necessary to fulfil Mr Ellison's legitimate interests, but must now consider whether that disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. This involves a balancing exercise between the legitimate interests of Mr Ellison and the data subjects. Only if the legitimate interests of Mr Ellison outweigh those of the data subjects can the data be disclosed without breaching the first data protection principle.
70. In the Commissioner's briefing on the personal information exemption, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
 - whether the information relates to an individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that might be caused by disclosure

- whether the individual objected to the disclosure
 - the reasonable expectations of the individual as to whether the information should be disclosed.
71. Police Scotland submitted that the survey participants were advised that their contributions would remain confidential, and provided evidence of this. They stated that the officers who took part in the survey had no reasonable expectation that their comments might be disclosed through Freedom of Information legislation and it would therefore be unfair to take such action now.
72. The Commissioner has considered Police Scotland's submissions carefully. The Commissioner recognises that assurances of confidentiality were provided to police officers completing the survey, and notes that Police Scotland intends to conduct a similar survey in future.
73. The personal data under consideration in this part of the decision is not the individual police officers' comments, in the free-text fields on the survey form. Rather, it is information which (in some cases) would confirm that certain identifiable police officers took part in the survey. In doing so, it would also reveal the individual officer's answers to the multiple choice questions in the survey, as this information has already been disclosed in anonymised form in the redacted version of the spreadsheet provided to Mr Ellison. As so few officers took part, and identification is a possibility, the Commissioner considers that disclosure would cause the individual officers distress or annoyance (given that confidentiality was assured), and inhibit them from participating fully in the next survey.
74. Having considered the competing interests in this particular case, the Commissioner finds that Mr Ellison's legitimate interests are outweighed by the prejudice to the rights and freedoms of the data subjects that would result from disclosure. On balance, therefore, she must find that the requirements of condition 6 cannot be met here.
75. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the requested information. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently the Commissioner finds that disclosure of the information would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.

Decision

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

Appeal

Should either Mr Ellison 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.

Margaret Keyse
Head of Enforcement

9 November 2016

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 –

...

- (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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or

...

38 Personal information

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

...

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

...

(2) The first condition is-

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

- (i) any of the data protection principles; or

...

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

...

(5) In this section-

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

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

...

Data Protection Act 1998

1 Basic interpretative provisions

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

...

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

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

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

...

Schedule 1 – The data protection principles

Part I – The principles

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

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

...

**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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info