

Decision Notice



Decision 084/2009 Mr David Emslie and The Police Complaints
Commissioner for Scotland

The work of the PCCS and its communications with other specified bodies

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Summary

Mr David Emslie (Mr Emslie) requested from The Police Complaints Commissioner for Scotland (the PCCS) information relating to the PCCS and its communications with certain other specified bodies.

The PCCS responded by releasing some of the information requested, and notified Mr Emslie in terms of section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA) that it did not hold some of the information he had requested. It refused to comply with some parts of the request in terms of section 12 of FOISA, on the grounds that compliance would exceed the £600 prescribed cost limit. The PCCS withheld the remaining information sought in terms of sections 30, 35 and 38 of FOISA. Following a review, Mr Emslie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the PCCS had dealt with Mr Emslie's request for information in accordance with Part 1 of FOISA. He found that the PCCS had applied sections 12 and 17 of FOISA appropriately, and that it had correctly withheld information under the exemptions in sections 38(1)(a) and 38(1)(b) of FOISA. He also concluded that the PCCS had provided reasonable advice and assistance to Mr Emslie in line with its duty under section 15 of FOISA. He did not require the PCCS to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1), 1(3) and (6) (General entitlement); 2(1) and (2)(e)(i) and (ii) (Effect of exemptions); 8(1) (Requesting information); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 38(1)(a),(b), (2)(a)(i) and (b) (Personal information) and 73 (Interpretation) (definition of information)

Data Protection Act 1998 (the DPA): sections 1(1) (Basic interpretative provisions) (definition of personal data); 2(g) (Sensitive personal data) and Schedules 1 (The data protection principles) (the first data protection principle), 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1)) and 3 (Conditions relevant for the purposes of the first principle: processing of sensitive personal data)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations): regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. This, along with Appendix 2, forms part of this decision.



Background

1. On 6 March 2008, Mr Emslie wrote to the PCCS with an information request broken down into nine separate parts. Parts 3 to 9 of Mr Emslie's request are reproduced (with minor modification of part 3) in Appendix 2 to this decision.
2. The PCCS wrote to Mr Emslie for further clarification on some parts of his request and Mr Emslie provided clarification on these points (as also shown in Appendix 2), in a fax sent on 27 March 2008.
3. The PCCS responded on 4 April 2008 as follows:
 - a. It released information to Mr Emslie in response to parts 1, 2 and 3 of his request.
 - b. In respect of parts 4 and 5, gave notice in terms of section 17 of FOISA that it did not hold such information.
 - c. In respect of parts 6, 7 and 9 it indicated in terms of section 12(1) of FOISA that it was not required to comply, since the cost doing so would exceed the prescribed amount of £600 as set out in paragraph 5 of the Freedom of Information (Fees for required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations).
 - d. In respect of part 8, the PCCS confirmed that it held the information but withheld it under the terms of the exemptions in sections 38(1)(a) and (b); 35(1)(a),(b),(c) and (g) together with 35(2)(b), and 30(c) of FOISA.
4. On 23 April 2008, Mr Emslie wrote to the PCCS requesting a review of its decision.
5. The PCCS notified Mr Emslie of the outcome of its review on 2 May 2008. It upheld the decision of 4 April in full.
6. On 4 May 2008, Mr Emslie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the PCCS's review and applying to him for a decision in terms of section 47(1) of FOISA.
7. In a further letter to the Commissioner dated 26 November 2008, Mr Emslie explained his reasons for dissatisfaction with the PCCS's handling of his request. He stated that he felt that the information should have been released to him in respect of parts 4 to 9 of his request and that the PCCS could have given him a better explanation and clearer advice in relation to part 3 of his request. Mr Emslie confirmed that he was satisfied with the PCCS's responses to parts 1 and 2 of his request.
8. The application was validated by establishing that Mr Emslie had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

9. On 28 November 2008, the PCCS was notified in writing that an application had been received from Mr Emslie and was asked to provide the Commissioner with any information withheld from Mr Emslie.
10. The PCCS responded to this request on 18 December 2008. It provided copies of the information it had withheld in response to part 8 of Mr Emslie's request and provided background information on the files from which this information had been retrieved.
11. The PCCS also informed the Commissioner that, in the course of responding to his request, a further file had been identified as relevant, but which had not been considered in its responses to Mr Emslie. It indicated that this file would now be considered.
12. On 9 January 2009, the PCCS wrote to Mr Emslie apologising for its omission and explaining that the additional file had been identified and now considered. It provided dates of conversations between the PCCS and Grampian Police and Her Majesty's Inspectorate of Constabulary about Mr Emslie's complaints, but noted that it did not hold information on the times of these.
13. The PCCS confirmed that it considered the correspondence and other information relating Mr Emslie's complaints within this file to be his own personal data and so exempt from disclosure in terms of section 38(1)(a) of FOISA. However, having considered the information also in terms of Mr Emslie's rights under section 7 of the DPA, the PCCS disclosed most of the information in the file to Mr Emslie.
14. The PCCS provided the Commissioner with a copy of the relevant information that had been retrieved from the additional file and the case was then allocated to an investigating officer.
15. The investigating officer subsequently contacted the PCCS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the PCCS was asked to justify its reliance on the specific FOISA exemptions it had cited and to provide a schedule detailing which exemption/s it wished to apply to each piece of information it was withholding.
16. Mr Emslie was also contacted by the investigating officer and asked to provide his views and comments, in particular on his legitimate interests and the public interest test.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Emslie and the PCCS and is satisfied that no matter of relevance has been overlooked.



Scope of Mr Emslie's application

18. Since Mr Emslie has indicated that he is satisfied with the PCCS's response to parts 1 and 2 of his request, the Commissioner's decision in this case relates only to parts 3 to 9. These are considered in turn below.

Part 3 of the information request - section 15(1) of FOISA

19. This part of the request sought details of the number of complaints investigated by the PCCS, and what benefit or reparation had been given to complainants since it came into being.
20. The PCCS's response provided the number of complaints received and explained that "by way of benefit or reparations", a range of recommendations had been made. It provided examples of the recommendations given, including improving the handling of complaints, apologising or looking at a complaint again.
21. Mr Emslie was dissatisfied this response because he felt the PCCS could have advised him as to whether it has powers to order compensation to complainants and whether it has powers to make police forces pay compensation to such members of the public.
22. Under section 15 of FOISA, a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Where the authority has complied with the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (commonly known as "the Section 60 Code") in providing advice and assistance in any particular case, it is taken to have complied with this duty.
23. The PCCS acknowledged that its response to Mr Emslie did not explain that it has no power to order compensation or reparation to complainants.
24. However, the PCCS provided the Commissioner with a file note of a telephone conversation with Mr Emslie dated 8 August 2007, during which one of the PCCS case officers had noted that Mr Emslie described the PCCS as "a toothless tiger" because it could not order compensation or reprimand police officers. The case officer had also documented that he had explained the remit of the PCCS to Mr Emslie.
25. Taking account of the above, the Commissioner is of the opinion that Mr Emslie was already aware of the remit of the PCCS at the time of submitting his information request and therefore the PCCS acted reasonably in its interpretation and response to Part 3 of Mr Emslie's information request.
26. He has concluded that the PCCS acted in accordance with its duty to provide advice and assistance Mr Emslie in responding to this part of Mr Emslie's request.



Parts 4 and 5 of the information request - section 17(1) of FOISA

27. These requests are set out in full in Appendix 2 to this decision. In response to each, the PCCS indicated in terms of section 17(1) of FOISA that it did not hold the information requested by Mr Emslie.
28. Section 17(1) of FOISA requires an authority, which receives a request for information that it does not hold, to give an applicant notice in writing that it does not hold the information.
29. The Commissioner has first of all reviewed the content of parts 4 and 5 of Mr Emslie's information request, and has considered whether these are valid information requests. Section 8(1) of FOISA specifies that any information request must specify which *information* the requestor wishes to access. Section 73 of FOISA defines *information* as "information recorded in any form".
30. The Commissioner finds it difficult to imagine what recorded information might be held by a public authority that would answer questions of this type. He notes that these parts of the request seek opinion and comment, but also incorporate the requester's own views of police forces in Scotland and the bodies that inspect and handle complaints about them. To answer these questions would require the respondent to accept the premises of the requester, including allegations of corruption and criminal activity on the parts of these bodies.
31. While it is always possible that opinions or comments will be held in recorded form by a public authority, the Commissioner does not consider it credible that Mr Emslie made these parts of his request in the expectation that the PCCS would, before receiving his request, hold recorded information incorporating the views or comments he requested.
32. In this context, the Commissioner has concluded that the PCCS could have indicated to Mr Emslie that parts 4 and 5 of his request were not valid information requests in terms of section 8 of FOISA and declined to provide a response in terms of FOISA. However, the PCCS, by responding in terms of section 17(1), treated these requests as valid information requests, to which a response could be provided stating that no such information was held.
33. Given the approach taken by the PCCS to these requests, the PCCS was asked to explain its rationale in providing notice in terms of section 17(1), and whether it had undertaken any searches to establish that the information requested was not held.
34. In its submissions, the PCCS acknowledged that its response to Mr Emslie did imply that the PCCS was treating these parts of the request as valid in terms of section 8 FOISA. It indicated that it felt Mr Emslie was asking questions which could be only be answered subjectively or through personal opinion and as such gave him notice that no information was held by the PCCS which could answer these questions. No searches were undertaken to establish whether any relevant recorded information was held.



35. As noted above, the Commissioner considers that it would have been appropriate not to consider these requests under the terms of FOISA, given that they cannot reasonably be read as seeking pre-existing recorded information. The PCCS's decision to undertake no searches to establish whether or not the "information" sought by Mr Emslie was reasonable given the terms of the request, because there was no possibility that such information could be expected to be found.
36. Having considered this matter in terms of FOISA, as the PCCS has chosen to do in this case, the Commissioner accepts that it was correct to notify Mr Emslie that it did not hold the information requested in terms of section 17(1) of FOISA.

Parts 6, 7 and 9 of the information request – Section 12 of FOISA

37. The PCCS submitted that it could not provide Mr Emslie with information that would address Parts 6, 7 and 9 of his request without exceeding the prescribed limit for the purposes of section 12(1) of FOISA and that it was therefore not obliged to consider these parts of Mr Emslie's request. These sought:
- a. Part 6: dates and times any member of the PCCS has met with any police officers in any of the Scottish Police Forces and dates and times of any conversations with any Police Officers or Police Forces in Scotland.
 - b. Part 7: dates and times of any meetings or telephone conversations between the PCCS and Her Majesty's Inspectorate of Constabulary.
 - c. Part 9 copies of all correspondence between the PCCS and the Scottish Government.
38. Section 12 of FOISA relates to excessive cost of compliance. This section provides that a Scottish public authority need not comply with a request for information if the authority estimates that the cost of compliance will exceed the amount set out in regulation 5 of the Fees Regulations. The limit set by the Fees Regulations is currently £600.
39. In terms of regulation 3 of the Fees Regulations, the projected costs that the public authority can take into account in relation to the request for information are the total costs, whether direct or indirect, which the public authority reasonably estimates it will incur in locating, retrieving and providing the information requested. The public authority may not charge for the cost of ascertaining whether it actually holds the information or whether or not it should provide the information.
40. In calculating the projected costs, the regulation 3 of the Fees Regulations has also placed a cap on the maximum hourly rate that a public authority can charge for staff time. The maximum rate that can be charged is £15 an hour.
41. The PCCS explained that answering each of parts 6, 7 and 9, would require it to search through the contents of each 323 case files. Having tested the process with a sample of files, the PCCS estimated that it would take 20 minutes to locate and retrieve information within each case file.



42. The PCCS also explained that answering parts 6 and 7 would require a comprehensive review of the calendars of PCCS staff since the creation of the organisation. Such a review for each member of staff was estimated as taking 3 hours and 10 minutes per request (15-20 minutes for checking each member of staff's diary).
43. The PCCS maintained that part 9 of the request would also require a comprehensive examination of all files in relation to the creation and ongoing governance and daily operation of the PCCS. The PCCS identified 14 administration files and estimated that it would take 15 minutes to locate and retrieve relevant information within each. This part of the search was therefore estimated as taking 3.5 hours in total.
44. Having identified the files to be searched and the estimated time it would take a clerical worker to undertake this task, the PCCS calculated the cost of responding to each request based on a staff time of £9.50 per hour. The cost of compliance was calculated as £1042.53 for each of parts 6 and 7 and £1045.86 for part 9.
45. Having reviewed the PCCS's estimated costs and the rationale upon which these were reached, the Commissioner is satisfied that the estimate produced by the PCCS is a reasonable one. He is therefore satisfied the costs PCCS of complying with parts 6, 7 and 9 of Mr Emslie's request would exceed the prescribed limit set out in the Fees Regulations and that the PCCS was entitled to refuse to respond to these parts of the request in terms of section 12(1) of FOISA.

Part 8 of the information request

46. In this part of his information request, Mr Emslie asked for "copies of all letters and all information in [the PCCS's] possession in relation to my complaints against the Corrupt Inspectorate of Constabulary and the Corrupt Police Force Grampian Police, dates and times of all conversations with the above organisations about my complaints."
47. The information being considered in respect of Part 8 of Mr Emslie's request incorporates documents from the following files:
 - three numbered files which are the PCCS's own files pertaining to complaints made by Mr Emslie;
 - two numbered files which are files provided to the PCCS by Grampian Police in relation to Mr Emslie's complaints;
 - one file containing information provided to the PCCS by Her Majesty's Inspectorate of Constabulary (HMIC) in relation to one of Mr Emslie's complaints.
48. The Commissioner notes that a number of documents have been released in full to Mr Emslie under the terms of the DPA, because they contained his own personal data. These released documents will not be considered in this decision. However, a number of documents were released within certain information redacted. The information which was redacted within these documents has been considered in what follows.



49. Mr Emslie argued that he believed that release of the information which he had requested would be in the public interest. He stated that he has concerns about criminality and police corruption in the area within which he lives. He submitted that he and one of his neighbours had been victims of criminal activities and that he had found the police to be obstructive in investigating his complaints. He argued that he felt the police to be complicit in these criminal threats to himself and his neighbour.
50. The PCCS confirmed in its submissions that it was relying on the exemptions in sections 30(c), 35(1)(a), (b), (c) and (g) and 38(1)(a) and (b) of FOISA when withholding information which would address Part 8 of Mr Emslie's request.
- 51.** The Commissioner will begin by considering the exemptions relating to personal data.

Consideration of section 38(1)(a) – personal information of the applicant

52. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. This exemption exists under FOISA because individuals have a separate right make a request for their own personal data (commonly known as a subject access request) under section 7 of the DPA. The DPA will usually determine whether a person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the DPA and not under FOISA.
53. There is a separate mechanism for challenging the extent of the information released under the DPA and this is by making an application to the Information Commissioner who has responsibility for promoting and enforcing the DPA throughout the United Kingdom.
54. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in Appendix 1 to the decision.
55. The PCCS submitted that the information being considered under this exemption consisted of statements made by Mr Emslie himself and details about his correspondence with Grampian Police in relation to his complaints. As a result, it applied the exemption in section 38(1)(a) of FOISA to this information.
56. Having examined the documents in question, the Commissioner is satisfied that a large part of the information withheld comprises reports, records and other documentation which relates to Mr Emslie and from which Mr Emslie can be identified.
57. The records withheld in this case include correspondence to and from Mr Emslie, copies of witness statements and other documents created during the investigation of the complaints made by him about events in which he was personally involved. Consequently this information relates to Mr Emslie in a significant sense.



58. The Commissioner is aware that Mr Emslie has also sought to access information relating to his case using his subject access rights under the DPA. Although some information was released to Mr Emslie under the DPA, the remaining information under consideration here must be evaluated solely in terms of the requirements of FOISA.
59. Insofar as the information withheld relates to complaints and allegations made by and against Mr Emslie, the Commissioner considers this information to be entirely Mr Emslie's own personal data.
60. In the documents where the PCCS has cited this exemption, (the majority of the documents withheld from Mr Emslie) the Commissioner is satisfied that it was correct in doing so and that this information is exempt from disclosure in terms of section 38(1)(a) of FOISA.
61. Having reviewed all of the documents that were withheld in this case, the Commissioner has also concluded that a number of documents that were not identified by the PCCS as being exempt in terms of section 38(1)(a) were either partly or wholly Mr Emslie's own personal data and so were also exempt in terms of section 38(1)(a).
62. Where third party personal data has been removed from documents that were otherwise judged to be Mr Emslie's personal data, the Commissioner has found that, in this context, that third party personal data is also the personal data of Mr Emslie. These items removed from documents provided under Mr Emslie's subject access rights under DPA will therefore not be considered further.
63. As the exemption in section 38(1)(a) is an absolute one, the Commissioner is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Consideration of section 38(1)(b) – personal information of other individuals

64. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA.
65. This particular exemption is also an absolute exemption and so is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
66. The PCCS has relied upon section 38(1)(b) to withhold information which it considers contains the personal data of third parties, on the grounds that disclosure would contravene the first data protection principle.

Is the information under consideration personal data?

67. As noted above, the definition of personal data is contained in section 1(1) of the DPA and is reproduced in Appendix 1.



68. The information considered under this exemption was gathered for the purposes of investigating Mr Emslie's complaints to the PCCS and complaints made to Grampian Police involving Mr Emslie himself. It relates to persons other than Mr Emslie (generally within documents which are also partly or wholly Mr Emslie's own personal data). Documents to which this exemption has been applied include allegations by and against third parties, opinions expressed by third parties, witness statements from both police officers and civilians, correspondence with third parties, and commentary on the actions of third parties within correspondence or internal documents.
69. In relation to these third parties, information is contained within the withheld information which relates to the individual in some biographical sense, detailing their involvement in the investigations into complaints and allegations made by Mr Emslie. In each case the individuals concerned can be identified from the information and other information held by the PCCS.
70. Having considered these items, the Commissioner is satisfied that the information is the personal data of those persons for the purposes of section 1(1) of the DPA.
71. Again, following his review of all of the documents, the Commissioner has identified personal data of third parties within documents to which the PCCS had not applied the exemption in section 38(1)(b). These documents contain information about third parties similar to the types elsewhere which the PCCS consider to be exempt under section 38(1)(b). Where he has identified such third party personal data, the Commissioner has considered whether that exemption applies also to the personal data.

Would disclosure of the information breach the first data protection principle?

72. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (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 also met.
73. Therefore there are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are inter-linked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.

Sensitive personal data

74. Sensitive personal data is defined in section 2 of the DPA. Under section 2(g), the definition of sensitive personal data includes data as to the commission or alleged commission by a data subject of any offence. Having considered the information being withheld by the PCCS, the Commissioner is satisfied that some of this personal data falls within the definition of sensitive personal data as defined in section 2(g) of the DPA, given that it relates to the investigation of allegations of offences committed with respect to some of the individuals concerned.



75. Given the additional restrictions which surround the disclosure of sensitive personal data, the Commissioner will first of all consider whether this is exempt under FOISA. As noted above, for the disclosure of sensitive personal data to be fair and lawful, at least one of the conditions in each of schedule 2 and schedule 3 to the DPA must apply.
76. The Commissioner has examined the conditions in Schedule 3 (and other legislation made under Schedule 3 which sets out the conditions under which sensitive personal data can be disclosed) and is not satisfied that any of the conditions are, or can be, met in the circumstances of this case.
77. The Commissioner has recently issued updated guidance on the interpretation of the exemption in section 38¹. In that guidance, he notes that for the purposes of section 38 of FOISA, it is likely that only conditions 1 and 5 of schedule 3 will be relevant, given that the other conditions in Schedule 3 are very restrictive. It is clear that the data subjects have not given their explicit consent to the personal data being disclosed in response to the freedom of information request (condition 1 of Schedule 3) and it is also clear that the information has not been made public as a result of steps deliberately taken by the data subjects (condition 5 of Schedule 3). The Commissioner has, of course, considered all of the other conditions in Schedule 3, but remains satisfied that there are no conditions which would allow the information to be disclosed.
78. As the Commissioner is satisfied that there are no conditions in Schedule 3 which would permit the release of the information, he is not required to go on to consider whether any of the conditions in Schedule 2 can be met in relation to the sensitive personal data or whether the disclosure of the sensitive personal data would otherwise be fair and lawful. He therefore finds that the sensitive personal data withheld from Mr Emslie is exempt from disclosure in terms of section 38(1)(b) of FOISA.

Non-sensitive personal data

79. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the non-sensitive personal data to be disclosed and whether the disclosure of this personal data under FOISA would be fair and lawful.

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

80. When responding to Mr Emslie's request, the PCCS focused on the question of whether disclosure of third party personal data was fair, and it provided details of its reasoning when judging that disclosure would be unfair. In its submissions to the Commissioner, the PCCS explained that having drawn this conclusion, it had not gone on to consider the Schedule 2 conditions.

¹ "Personal information"- <http://www.itspubliknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>



81. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and has reached the view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued 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.
82. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does the applicant (Mr Emslie) have a legitimate interest in obtaining this personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the 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 subject?
 - Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subjects can the personal data be disclosed.
83. The Council was asked to provide comments on this condition to supplement those made on the test of fairness (although a number of its comments on fairness are relevant also to the consideration of Condition 6). In response, the Council indicated that disclosure of the information may cause distress or damage to the data subjects, potentially prejudicing the rights and freedoms of that person.

Does the applicant have a legitimate interest?

84. Mr Emslie has submitted that that release of the information which he had requested would be in the public interest. He has stated that he has concerns about criminality and police corruption in the area within which he lives and states that he has been harassed and threatened over a number of years by the criminal element in the area and that Grampian Police have failed to take his complaints seriously. He submits that the release of the information would illuminate whether his complaints to and about Grampian Police have been thoroughly investigated and that it is in the wider public interest to see evidence of the police carrying out their civic duty by handling complaints from the public proactively.



85. The Commissioner accepts that Mr Emslie has a legitimate interest being pursued in this instance which would necessitate the processing of the information requested. He finds that it could also be argued that there is a wider legitimate interest which is shared by the general public in favour of disclosing the information insofar as Grampian Police, and the bodies that investigate complaints against it, all being public bodies, should expect to be open to such scrutiny. The Commissioner therefore finds that the first test can be fulfilled and he concludes that Mr Emslie has a legitimate interest in obtaining the personal data that has been withheld by the PCCS.

Is disclosure of the information necessary to achieve those legitimate interests?

86. The Commissioner must now consider whether disclosure is necessary for those legitimate interests. In considering the second test, with regard to whether disclosure is necessary for the purposes of the legitimate interests identified in the preceding paragraph, the Commissioner has considered whether these interests might reasonably be met equally effectively by any alternative means.
87. In this case the Commissioner, in taking account of the specific information requested by Mr Emslie, is satisfied that disclosure is proportionate and that Mr Emslie's aims cannot be achieved by any other means which would interfere less with the privacy of the data subjects in question.

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

88. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects whose personal data is contained in the documents concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Emslie and those of the data subjects (the witnesses, police officers, civilians, court staff etc. who gave opinions, made statements and drew conclusions). Only if the legitimate interests of Mr Emslie outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
89. In his guidance on this exemption (referred to above), the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that may be caused by the disclosure
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information would be disclosed.



90. The PCCS submitted that consent had not been granted for the information to be disclosed, and that disclosure could be detrimental to the third parties concerned.
91. The PCCS went on to argue that it had taken into consideration the likely expectations of the data subjects, who had provided their opinions in the course of an investigation into potential misconduct. It submitted that, while these individuals may have been acting in a professional capacity, and would have expected their statements to be used in subsequent reports into the investigation, they would not expect them to be released to the general public.
92. The Commissioner accepts this and further considers that those to whom the relevant information relates, and about whom complaints have been made (not always the same persons as those contributing to the investigation in relation to them) would have had no expectation of general disclosure of their personal information in this context.
93. The Commissioner is of the view that disclosure would be an intrusion into the private lives of the individuals concerned, whether their involvement in the matters to which Mr Emslie's complaints relate was in a professional or private capacity; and whether they were the subject of a complaint or merely contributing the relevant investigations.
94. In the circumstances, the Commissioner has concluded that disclosure of the information involved would entail a breach of the privacy of those third parties concerned and would be prejudicial to the legitimate interests of these persons.
95. Having balanced the legitimate interests of the data subjects against the legitimate interests identified by Mr Emslie, the Commissioner finds the legitimate interests of Mr Emslie to be outweighed by those of the data subjects given that disclosure of the information would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects.
96. For the same reasons, he concludes that disclosure would be unfair to the data subject.
97. Having found that disclosure of the third party personal data under consideration would be unfair, and that no condition within Schedule 2 of the DPA can be met, the Commissioner concludes that disclosure in these circumstances would be contrary to the first data protection principle.
98. The Commissioner therefore finds that the PCCS was correct to withhold the third party personal data under consideration in terms of the exemption in section 38(1)(b) of FOISA.

Conclusions on sections 38(1)(a) and (b)

99. Having considered all the information withheld from Mr Emslie in response to Part 8 of his information request, the Commissioner has found it all to be exempt on the basis of one or more of the following exemptions:



100. Section 38(1)(a) – to the extent that the information is Mr Emslie’s own personal data. Since the information withheld is information generated in the course of investigations into complaints made by Mr Emslie about events in which he was involved, almost all of the documents under consideration were found to be either partly or wholly Mr Emslie’s own personal data.
101. Section 38(1)(b) – to the extent that it is personal data relating to one or more third parties and disclosure of this information would contravene the first data protection principle.
102. Having reached the conclusions set out above, the Commissioner has not gone on to consider the application of the other exemptions cited by the PCCS in relation to Part 8 of Mr Emslie’s request.
103. The Commissioner therefore finds that all of the withheld information falling within the scope of part 8 of Mr Emslie's request is exempt from disclosure, and that the PCCS acted in accordance with Part 1 of FOISA by withholding the information in response to Mr Emslie's request.

DECISION

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

Appeal

Should either Mr Emslie or the PCCS wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
23 July 2009



Appendix 1

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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

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

2 Effect of exemptions

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

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

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

...

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



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

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-
 - (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.

...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or



- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

38 Personal information

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

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

...

- (2) The first condition is-

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

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

...

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

...

73 Interpretation

"information" (subject to sections 50(9) and 64(2)) means information recorded in any form



Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

...

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

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

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

...

2 Sensitive personal data

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

...

- (g) the commission or alleged commission by him of any offence, or

...

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 the first principle: processing of sensitive personal data

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

...

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or



- (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
- (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

...

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.



Appendix 2

Mr Emslie's information request (excluding parts 1 and 2, and with minor modification to part 3)

3. How many complaints have been investigated by this organisation, and what benefit or reparation has been given to complainants since your office came into being.
4. Is it value for the money to the Scottish Taxpayers to fund an organisation that is helping to protect and cover up Corrupt Police Forces including a corrupt Inspectorate of Constabulary.
5. As the Police Forces in Scotland are fully protected by a Corrupt Inspectorate of Constabulary, what is the benefit of another useless organisation to further help cover up the fraudulent, corrupt, criminal, and persistent failures by the above organisations to investigate crime and its failure to follow their own investigation legislation and procedures.
- 6 Dates and times any member of the PCCS has met with any Police Officers in Scottish Police Forces. Dates and times of any conversations with any Police Officers or Police Forces in Scotland.
7. Dates and times of any meetings or telephone conversations with any members of the Inspectorate of Constabulary in Scotland. Subsequently clarified:

"I am requesting all the dates, times of meetings and telephone conversations with anyone in the PCCS, whether they work part time or full time for the PCCS, these meetings are with any member of the Inspectorate of Constabulary, whether that person works part time or full time with the Inspectorate of the Constabulary, these meetings are between any employee or part time employee or consultant of the PCCS and between any employee or part time employee or consultant of the Inspectorate of Constabulary, and this would be a third party."
8. Copies of all letters and all information in your possession in relation to my complaints against the Corrupt Inspectorate of Constabulary and the Corrupt Police Force Grampian Police, dates and times of all conversations with the above organisations about my complaints.
9. Copies of all correspondence with the Scottish Government about your organisation, and who the PCCS is accountable and responsible to at the Scottish Government. Subsequently clarified:

"I am requesting copies of all correspondence between the PCCS and the Scottish Government. I have no specific aspect or specific topic, I just request all correspondence that you have had or been sent by the Scottish Government and the PCCS, and all correspondence between the PCCS and the Scottish Government, since the PCCS started.