

Decision Notice 081/2022

Correspondence relating to policing level in Glasgow on weekend of 6/7 March 2021

Applicant: the Applicant

Public authority: Chief Constable of the Police Service of Scotland

Case Ref: 202100703



Summary

Police Scotland were asked for correspondence relating to the planned level of policing in Glasgow on the weekend of 6/7 March 2021.

Police Scotland withheld some information from the Applicant. The Commissioner investigated and found that not all of the withheld information was exempt from disclosure. He ordered Police Scotland to disclose the non-exempt 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) and (c) (Prejudice to the effective conduct of public affairs); 35(1)(b) (Law enforcement); 38(1)(b), (2A), (5) (definitions of “data protection principles”, “data subject”, “personal data”, “processing” and “the UK GDPR”) and (5A) (Personal information)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data)

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. The matter which forms the subject of the Applicant’s request concerns celebrations carried out by Rangers Football Club supporters on the weekend of 6/7 March 2021. This was the weekend when Rangers Football Club became aware that they had won the SPFL Premiership.
2. Due to the prevalence of the COVID-19 pandemic at that time, the Scottish Government had publicly urged fans not to gather to celebrate the achievement. However, fans gathered in their thousands in both George Square in Glasgow and outside Ibrox stadium to mark the occasion.
3. This was widely reported in the press at the time.
4. On 8 March 2021, the Applicant made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information requested was:
Correspondence between Police Scotland, Glasgow City Council, the Scottish Government, and/or Rangers Football Club on the planned level of policing of Glasgow on weekend of March 6/7 2021.
5. Police Scotland responded on 8 April 2021, acknowledging that they held information falling within scope of the request, but relying on exemptions in sections 30(b) (Prejudice to effective conduct of public affairs) and 35(1)(b) (Law enforcement) of FOISA for withholding this from the Applicant. Police Scotland argued that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation (section 30(b)). Disclosure would also, Police Scotland contended, be likely to prejudice substantially the prevention or

detection of crime (section 35(1)(a)) and the apprehension or prosecution of offenders (section 35(1)(b)). Police Scotland also concluded that the balance of the public interest lay in maintaining these exemptions.

6. On 8 April 2021, the Applicant wrote to Police Scotland, requesting a review of its decision as he considered the public interest in policing decisions taken around the celebrations of Rangers fans to be of intense public interest. The Applicant also considered it to be self-evidently in the public interest for the public to be made aware of the decisions made by Police Scotland around the incident. In addition, he stated that not releasing the information would disregard transparency and accountability as integral parts of FOI law and policing.
7. Police Scotland notified the Applicant of the outcome of their review on 7 May 2021. In doing so, Police Scotland provided the Applicant with redacted copies of the information held and falling within scope of his request. Police Scotland upheld their reliance on the exemptions in sections 30(b) and 35(1)(b) for certain of the redactions, and additionally relied on the exemptions in sections 30(c) (Prejudice to the effective conduct of public affairs) and 38(1)(b) (Personal information), with explanations, for other redactions made to the requested information.
8. On 6 June 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Police Scotland's review because he considered the level of redaction and reasons for it to be fundamentally misplaced and erroneous.
9. In the Applicant's view, Police Scotland applied a wide-ranging exemption to a narrow request, on an issue of major public interest due to the celebrations of Rangers fans in Glasgow (which led to upwards of 30 arrests). The Applicant considered there to be no reason why, in the interests of transparency, discussions between the Scottish Government and other stakeholders and Police Scotland, ahead of the celebrations, should be kept secret.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. On 10 June 2021, Police Scotland were notified in writing that the Applicant had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from the Applicant. Police Scotland provided the information and the case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland was invited to comment on this application and to answer specific questions. These asked Police Scotland to justify why they considered the various exemptions relied upon allowed them to withhold information from the Applicant. Police Scotland were also asked to set out their consideration of the application of the public interest test, where appropriate.

Commissioner's analysis and findings

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

Withheld information

14. Police Scotland originally disclosed information in five documents to the Applicant, subject to redaction of certain information. During the investigation, Police Scotland informed the Commissioner that information in two of these documents (4 and 5) was disclosed in error as the content of the information fell out with scope of the Applicant's request.
15. The Commissioner has reviewed the wording of the request made by the Applicant, along with the information in documents 4 and 5 that Police Scotland considered to be out with scope, and is satisfied that the out-of-scope information has been correctly identified. The Commissioner will not, therefore, consider that information any further in this decision.
16. During the investigation, Police Scotland disclosed the name of an individual to the Applicant that had previously been redacted from information disclosed in documents 1 and 3. In submissions, Police Scotland confirmed that this name had been redacted in error and they were no longer seeking to rely on the exemption in section 38(1)(b) of FOISA for this. Police Scotland had also relied on the exemption in section 30(c) of FOISA in one instance where this name had been redacted.
17. As Police Scotland disclosed the name of an individual previously redacted in documents 1 and 3, the Commissioner must find that they were not entitled to rely on the exemptions in sections 30(c) and 38(1)(b) of FOISA for withholding this information.
18. Consideration in this Decision Notice will be given to the information redacted by Police Scotland from documents 1, 2 and 3 that they continue to withhold.

Section 30(b)(i) – Substantial inhibition to the provision of free and frank advice

19. Police Scotland are withholding information in documents 1 and 3 under section 30(b)(i) of FOISA. Section 30(b)(i) provides that the information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
20. In applying the exemption in section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

Police Scotland's submissions

21. In their submissions, Police Scotland provided context to the situation to which the withheld information relates. Specifically, Police Scotland explained that Scotland, like the rest of the UK, was, on the weekend of 6/7 March 2021, in the midst of a worldwide pandemic and subject to a strict lockdown. New restrictions imposed for public health reasons had to be applied in a way that balanced people's rights under the European Convention on Human Rights. This presented challenges for Police Scotland in the midst of anti-lockdown protests and other related protests/gatherings/house parties, and its approach continued to evolve as

it worked with key partners to ensure that the restrictions remained effective within a wider proportionate and considered policing response.

22. Police Scotland commented that, on the weekend of 6 March 2021, Rangers football club were playing a game which would decide if they won the League. On 7 March 2021, Celtic football club were playing a League game. Both these football clubs have a large support, Police Scotland noted, and at times sections of the support require a high degree of policing. The level of disorder which can and has occurred before, during and after these games is, they submitted, well documented.
23. Police Scotland noted that there was the potential of large numbers being in attendance in a small area of Glasgow, thereby causing issues to public safety during the restrictions. Police Scotland commented that the weekend of 6/7 March 2021 was a challenging period for policing, with a large number of supporters making their way from Ibrox Stadium to George Square, despite warnings to stay at home. This resulted in arrests being made, fines being issued for breaches of COVID restrictions, with wider public order and road safety issues for the Police.
24. Police Scotland asserted that intelligence is the key to overall policing of these events, to ensure that the proper level of policing is deployed, minimising risk and ensuring public safety. Police Scotland considered it vital that it could discuss freely with those involved in the organisation of such events, to ensure that each event is managed in a safe and controlled manner. At the heart of this, Police Scotland submitted, there has to be free and frank discussions to ensure public safety. Police Scotland explained to the Commissioner the nature of the discussions that would usually ensue during such communications, along with the likely harm that would occur should the content of these communications be disclosed.
25. Police Scotland argued that all partners involved in discussions would be inhibited from providing advice and views if the withheld information were to be disclosed. Discussion would, Police Scotland submitted, be stifled as individuals would fear that their comments/opinions would be disclosed. This would impact greatly on the policing of such events as Police Scotland and key partners would not have the same level of knowledge/discussion, which in turn could lead to events being incorrectly policed and public safety being compromised.

Commissioner's findings

26. The Commissioner has considered all of Police Scotland's submissions and those from the Applicant, along with the withheld information under consideration.
27. The Commissioner acknowledges that certain of the information redacted from documents 1 and 3 involves discussion between Police Scotland and other partners where advice is sought and given. However, he is not satisfied that the nature of the discussion is such that it relates to specific or even hypothetical operational decisions, procedural planning or the deployment of resources, with a view to Police Scotland and/or others managing events on 6/7 March 2021.
28. While the Commissioner recognises that Police Scotland and other partners should be free to provide advice on matters of policing and public safety, he is not persuaded that this particular information, if disclosed, would inhibit discussion around current or future policing or stifle discussion on such matters between relevant stakeholders in future.

29. The Commissioner therefore does not accept, from the submissions he has received or from the content of the information itself, that disclosure of the information withheld under section 30(b)(i) would result in the harm claimed by Police Scotland.
30. As the Commissioner is not satisfied that Police Scotland were entitled to rely on the exemption in section 30(b)(i), of FOISA he is not required to go on to consider the application of the public interest test in relation to that exemption.

Section 30(b)(ii) – Substantial inhibition to the free and frank exchange of views

31. Police Scotland are withholding the same information in documents 1 and 3 under section 30(b)(ii) of FOISA. Section 30(b)(ii) of FOISA provides that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
32. As is the case with the exemption contained in section 30(b)(i), the chief consideration when applying the exemption in section 30(b)(ii) is not whether the information constitutes opinions and views, but whether disclosure of the information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

Police Scotland's submissions

33. Police Scotland relied on the same submissions set out under consideration of section 30(b)(i) of FOISA above for the application of the exemption in section 30(b)(ii) of FOISA.

Commissioner's findings

34. The Commissioner has fully considered the submissions from Police Scotland and the Applicant, along with the content of the withheld information.
35. The Commissioner recognises that the withheld information does contain an exchange of views over the subject matter under discussion. However, he cannot agree that disclosure of this exchange would, or would be likely to have the effect of inhibiting substantially the free and frank exchange of view in future.
36. Whilst the withheld information does reveal Police Scotland's and its partners' view on a particular issue, the Commissioner does not consider this to be of such sensitivity or controversy that disclosure would hamper frank and candid discussions in future. Furthermore, as mentioned under consideration of section 30(b)(i) above, nothing in the withheld information reveals particular tactics, resource allocation or operational or actual decision making around how Police Scotland and/or its partners would manage events on 6/7 March 2021.
37. In the circumstances, the Commissioner is not persuaded that disclosure of this particular information would, or would be likely to, inhibit the free and frank exchange of views on such matters in future.
38. As a consequence, the Commissioner is not convinced, from the submissions he has received or the content of the information itself, that disclosure of the information withheld under section 30(b)(ii) would result in the harm claimed by Police Scotland.
39. Given that the Commissioner is not satisfied that Police Scotland were entitled to rely on the exemption in section 30(b)(ii) of FOISA, he is not required to go on to consider the application of the public interest test in relation to that exemption.

40. As Police Scotland are also relying on the exemption in section 35(1)(b) of FOISA for certain of the information withheld in documents 1 and 3, the Commissioner will now go on to consider the application of that exemption to this information.

Section 35(1)(b) – Apprehension or prosecution of offenders

41. Under section 35(1)(b) of FOISA, information is exempt information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders.
42. As the Commissioner’s guidance on [section 35 notes](#)¹, there is some overlap between information relating to “the apprehension or prosecution of offenders” and “the prevention or detection of crime”. In his view, “apprehension or prosecution of offenders” is narrower, focussing on the process of identifying, arresting or prosecuting anyone suspected of being responsible for unlawful activity. This term could refer to the apprehension and prosecution of specific offenders, or to more general techniques (such as investigative processes used, information received, or guidance given) and strategies designed for these purposes.
43. The exemption in section 35(1)(b) can only apply where disclosure of the information in question would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. FOISA does not define “substantial prejudice”, but the Commissioner considers an authority would have to identify harm of real or demonstrable significance. The harm would also have to be at least likely and, therefore, more than a remote possibility. Police Scotland must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice the exemption is designed to protect.
44. As with the exemptions in section 30(b), the exemption in section 35(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.

Police Scotland’s submissions

45. Police Scotland argued that, if they were to disclose certain of the information in documents 1 and 3, this would show what intelligence they held and would give a heads-up on the quality of its information and its reasoning in relation to future matches, celebrations, protests, marches etc.
46. Police Scotland submitted that the threat from disorder was not hypothetical – recent events had taken place in both Scotland and England and the threat was both sustained and serious. Police Scotland also highlighted the importance of protecting individuals and communities from disorder/criminality more generally, as many offences, by their nature, had long-lasting, devastating effects for the victims and witnesses.
47. In reaching their decision that the specific information requested in this case should remain withheld, Police Scotland commented that it was more than a question of simply preventing a crime from taking place – it was ensuring that the public and officers were safeguarded effectively and risk managed.
48. Police Scotland asserted that knowing this information would allow those intent on causing disorder to be able to take steps to avoid detection.

¹ <https://www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

Submissions from the Applicant

49. The Applicant is of the view that seasoned football fans and members of ultras groups would not only be well-versed but would also be given advance notice of Police plans for events such as the one covered by this information request. The Applicant referred to comments made in an internal report by Police Scotland, where they said that they held discussions with the likes of the Union Bears ultras group to help to police the situation. The Applicant therefore considered it hard to see how disclosure of this information further damaged the ability of the Police to apprehend offenders.
50. It was the Applicant's conclusion that, in order for there to be continued confidence in Police Scotland, there was a need for total transparency and accountability as to its, the Scottish Government's and Rangers Football Club's approach to the March 6/7 weekend. The Applicant asserts that anything short of that would undermine confidence in the Police, undermine policing by consent, and suggest to the public that Police Scotland were more interested in protecting their own reputation than the people of Scotland.

Commissioner's findings

51. Having considered the content of the information withheld in documents 1 and 3, the Commissioner acknowledges that disclosure of this information may give insight into some of the intelligence held by Police Scotland and its sources. He does not agree, however, that it provides enough detail about likely strategies or resources that would be deployed to enable anyone to understand or pre-empt Police Scotland's policing of this or future matches, celebrations, protests or marches.
52. Indeed, attendance during the celebrations themselves, and coverage in the media afterwards, would have been likely to provide more of an insight.
53. Similarly, while the Commissioner agrees that protection of individuals and communities from crime and disorder is of the utmost importance, he is not persuaded from the withheld information or the submissions made by Police Scotland that the detail in the withheld information would allow anyone, even a determined individual, to take steps to avoid detection or increase the threat of criminal behaviour.
54. Furthermore, in terms of sources of intelligence, given modern communication methods it would be expected that Police Scotland should access intelligence from these sources and it would be unusual were it not to do so. Also, given that certain of these intelligence sources are open sources, it would be highly likely that the content of them would be known (at the time of the weekend of 6/7 March 2021 and the request and requirement for review) by particular sectors of the public in any case.
55. The Commissioner is not, therefore, satisfied that Police Scotland have identified a causal link between the disclosure of the specific information in documents 1 and 3 and substantial prejudice to its ability to apprehend and prosecute offenders. As a consequence, he is not satisfied that Police Scotland were entitled to rely on the exemption in section 35(1)(b) of FOISA.
56. Given that the Commissioner is not satisfied that Police Scotland were entitled to rely on the exemption in section 35(1)(b) of FOISA, he is not required to go on to consider the application of the public interest test in relation to that exemption.

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

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

Police Scotland's submissions

59. Police Scotland relied on this exemption for certain information redacted from documents 1, 2 and 3.
60. Police Scotland explained that the phone numbers and email addresses that had been redacted were used for operational purposes only, and had been removed to ensure that internal processes were protected.
61. It is Police Scotland's view that, if this information were to be disclosed, it would be likely to adversely affect the processes put in place in order to provide an appropriate level of service both internally and externally. Such disclosure could also, Police Scotland submitted, lead to the misuse of the email addresses/telephone numbers.
62. There are, Police Scotland commented, already various ways in which the public can contact Police Scotland and the key partners involved, with specific sections of Police Scotland/key partners websites dedicated to this. To that end, Police Scotland considered the public interest to have been met.

Commissioner's findings

63. The Commissioner has fully considered the submissions from Police Scotland in relation to certain of the information redacted from documents 1, 2 and 3, and acknowledges that this does relate to email addresses and phone numbers which could be used to directly contact specific members of staff within either Police Scotland or one of its partner agencies.
64. The Commissioner also recognises that these were provided to enable key personnel to contact each other, to either discuss the matter in hand or during specific operational activities.
65. The Commissioner accepts that, if these contact details were placed into the public domain, as the result of disclosure under FOISA, it could lead to them being used by the public, or others, to contact key personnel, rather than using emergency, helpline or general numbers set up for that particular purpose. This, in turn, would undermine Police Scotland and its partner agencies from being able to work effectively and follow relevant internal and external processes.

66. For these reasons, the Commissioner accepts that disclosure of the contact details would have the effect of prejudicing substantially Police Scotland and its partner agencies from being able to protect their internal and external processes. As a consequence, the Commissioner is satisfied that Police Scotland were entitled to rely on the exemption in section 30(c) of FOISA for refusing to disclose this information.
67. As the Commissioner is satisfied that Police Scotland were entitled to rely on the exemption in section 30(c) for withholding this information, he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest

68. The “public interest” is not defined in FOISA, but has been described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. The public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. disclosure must serve the interests of the public.

Submissions from the Applicant

69. The Applicant considered the public interest fell on the side of disclosure of the requested information for several reasons, which he set out.
70. The Applicant commented that the main issue was that the policing of Rangers fans, and football fans in general, had been in the limelight due to perceived failures on behalf of the Police to plan appropriately and react appropriately.
71. The Applicant submitted that the scale of the disorder on the dates asked about was predictable and yet, in his view, Police Scotland seemed to fail to deal with it. Their failure to do so led to similar and more violent scenes in May 2021. At a time of strict Covid-19 restrictions on the vast majority of the population, the Applicant believed it to be significantly in the public interest to understand Police Scotland’s and the Scottish Government’s discussions around this incident, and with Glasgow Rangers FC as well. The Applicant believed the principles of transparency and accountability would only be met with disclosure.

Submissions from Police Scotland

72. As mentioned previously, Police Scotland explained that there were various ways in which the public could contact Police Scotland and key partners involved, with specific sections of the Police Scotland/key partners websites dedicated to this. For this reason, Police Scotland considered the public interest in disclosure of the information to have been met.

Commissioner’s view on the public interest

73. As stated above, the public interest should be considered in the context of FOISA as “something which is of serious concern and benefit to the public”. The Applicant has argued that the withheld information falls within this category. The Commissioner agrees that the large crowds who gathered at both Ibrox and in George Square on the weekend of 6/7 March 2021 drew significant public attention, not least because of the stringent and unprecedented restrictions in place on people’s movements as a consequence of Covid-19, but also because of the requests that this should not happen and the management of these crowds.
74. That said, the Commissioner does not consider disclosure of email addresses and telephone contact details for specific personnel would enlighten the public as to the nature of any discussions between Police Scotland and key partners, or operational decision-making around policing in Glasgow over that weekend.

75. Furthermore, the Commissioner can see no public interest in disclosure of information which would negatively impact the ability of Police Scotland and its key partners from being able to effectively discharge their functions under internal or external processes.
76. As Police Scotland have pointed out, both they and their key partners publish contact details for use by the public, and others, on their websites. This, in the Commissioner's view, fulfils any public interest in being able to contact Police Scotland or its key partners directly.
77. Having carefully considered the circumstances, the Commissioner is satisfied that the public interest in withholding the information outweighs that in disclosing it. The Commissioner therefore concludes that Police Scotland were entitled to withhold the information under section 30(c) of FOISA.

Section 38(1)(b) – Personal information

78. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is “personal data” (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK General Data Protection Regulation (the UK GDPR).
79. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the withheld information personal data?

80. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018.
81. “Personal data” is defined in section 3(2) of the DPA 2018 as “any information relating to an identified or identifiable living individual”. Section 3(3) of the DPA 2018 defines “identifiable living individual” as a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (i) an identifier such as a name, an identification number, location data, or an online identifier, or
 - (ii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
82. Information will “relate to” a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
83. The Court of Justice of the European Union looked at the question of identification in *Breyer v Bundesrepublik Deutschland*². The Court took the view that the correct test to consider is whether there is a realistic prospect of someone being identified. When making that determination, account can be taken of the information in the hands of a third party. However, there must be a realistic causal chain – if the risk of identification is insignificant, the information will not be personal data.
84. Although this decision was made before the UK GDPR and the DPA 2018 came into force, the Commissioner considers that the same rules will apply. In accordance with Recital 26 of

² [CURIA - Documents \(europa.eu\)](https://eur-lex.europa.eu/curia/doclist/curia.do?method=docsList)

the GDPR (the source of the UK GDPR), the determination of whether a natural person is identifiable should take account of all means reasonably likely to be used to identify the person, directly or indirectly. In considering what is reasonably likely, the Recital states that all objective factors should be taken into account, such as the costs and amount of time required for identification, taking into consideration the available technology at the time of processing and technological developments.

85. Police Scotland submitted that certain of the information withheld from documents 1, 2 and 3 was personal data, from which a living individual could be identified.
86. Having considered the withheld information (names of individuals and an identification number), the Commissioner accepts that it “relates” to identifiable living individuals. The Commissioner therefore concludes that the withheld information is personal data, for the purposes of section 3(2) of the DPA 2018.

Which of the data protection principles would be contravened by disclosure?

87. Police Scotland stated that disclosure of the personal data would contravene the first data protection principle (Article 5(1)(a) of the UK GDPR). Article 5(1)(a) states that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
88. In terms of section 3(4) of the DPA 2018, disclosure is a form of processing. In the case of FOISA, personal data is processed when it is disclosed in response to a request for information.
89. Police Scotland submitted that disclosure of the personal data could not be lawful unless one of the conditions in Article 6 was met and the only potentially applicable conditions were consent at Article 6(1)(a) and legitimate interests at Article 6(1)(f). Police Scotland argued that neither could be met in the circumstances of this case.
90. The Commissioner must now consider if disclosure of the personal data would be lawful (Article 5(1)(a)). In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed. The Commissioner considers condition (f) in Article 6(1) to be the only one which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

91. Condition (f) states that the processing will be lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data (in particular where the data subject is a child).
92. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
93. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?

- (iii) Even if processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

94. In submissions to the Commissioner, the Applicant considered many of the individuals involved in the correspondence covered by his request were likely to be high profile civil servants or those with a high public profile. The Applicant did not believe these individuals should be given anonymity, especially on an issue such as the controversial policing of Rangers fans in March 2021.
95. Police Scotland explained that they had not asked the Applicant what his interest in the information might be. However, they considered that as a journalist he would want to write a story for publication, and disclosure of the withheld information would be the only means by which this interest could be achieved.
96. Having fully considered the submissions from both parties, the Commissioner accepts that, given the public requests made that football fans should not gather on the weekend of 6/7 March 2021 and the ensuing disorder that occurred, it would be within the legitimate interests of both the Applicant and the public as a whole to better understand the nature of the discussions that took place prior to that weekend and who was involved in these discussions and decision making. The Commissioner is therefore satisfied that the Applicant has a legitimate interest in the personal data.

Is disclosure of the personal data necessary?

97. The Commissioner will now consider whether disclosure of the personal data requested is necessary for the Applicant's identified legitimate interest. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
98. The Commissioner has considered this carefully in light of the decision of the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55³. In this case, the Supreme Court stated (at paragraph 27):
- A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less.*
99. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subjects.
100. In their submissions, Police Scotland commented that disclosure of the information would be the only means by which the Applicant's legitimate interest in writing a story for publication could be achieved.
101. In this case, the Commissioner must consider the information requested against the legitimate interest he has identified (in relation to the names of those individuals involved in

³ <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

discussions), and whether disclosure of that information is necessary to achieve the Applicant's legitimate interest.

102. Having done this, the Commissioner is aware that the information already disclosed to the Applicant (including that disclosed during the course of the investigation) reveals the identities of some of those individuals involved in the discussions (including those in high profile positions). The Commissioner does consider that it is necessary for the remaining personal data to be disclosed as it would not, in his view, provide any greater enlightenment as to those who were involved in discussions or decision-making over policing arrangements for the weekend in question.
103. As a consequence, the Commissioner does not consider that it is necessary for the remaining withheld information to be disclosed to fulfil the legitimate interests of the Applicant and the public as a whole.
104. As the Commissioner is satisfied that full disclosure of the remaining withheld information is not necessary for the purposes of the identified legitimate interest of the Applicant, he finds that disclosure would be unlawful and would contravene the first data protection principle. Accordingly, he is satisfied that Police Scotland properly withheld this information under section 38(1)(b) of FOISA.

Decision

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

The Commissioner finds that by relying on the exemptions in sections 30(c) and 38(1)(b) of FOISA for withholding certain information from the Applicant (other than that disclosed during the investigation), Police Scotland complied with Part 1.

However, the Commissioner finds that Police Scotland was not entitled to rely on the exemptions in sections 30(c) and 38(1)(b) of FOISA for information it disclosed during the investigation and, by relying on these exemptions, it failed to comply with section 1(1) of FOISA.

The Commissioner also finds that Police Scotland had not been entitled to rely on the exemptions in sections 30(b)(i), 30(b)(ii) and 35(1)(b) for withholding other information from the Applicant and, in doing so, it failed to comply with section 1(1).

The Commissioner therefore requires Police Scotland to disclose the information contained in documents 1 and 3 for which it relied on the exemptions in sections 30(b)(i), 30(b)(ii) and 35(1)(b), by **Monday, 5 September 2022**.

Appeal

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

Enforcement

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

Margaret Keyse
Head of Enforcement

22 July 2022

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.

...

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

2 Effect of exemptions

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

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

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

...

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

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (b) the apprehension or prosecution of offenders;

...

38 Personal information

(1) Information is exempt information if it constitutes-

...

(b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);

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

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

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

...

(5) In this section-

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

(a) Article 5(1) of the UK GDPR, and

(b) section 34(1) of the Data Protection Act 2018;

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

...

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

"the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

(5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

...

UK General Data Protection Regulation

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

a. processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency")

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

...

- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

...

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to subsection (14)(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –
 - ...
 - (d) disclosure by transmission, dissemination or otherwise making available,
 - ...
- (5) “Data subject” means the identified or identifiable living individual to whom personal data relates.
- (10) “The UK GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and see section 205(4)).

...

- (14) In Parts 5 to 7, except where otherwise provided –
 - (a) references to the UK GDPR are to the UK GDPR read with Part 2;

...

- (c) references to personal data, and the processing of personal data, are to personal data and processing to which Part 2, Part 3 or Part 4 applies;
- (d) references to a controller or processor are to a controller or processor in relation to the processing of personal data to which Part 2, Part 3 or Part 4 applies.

...

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