

# Decision Notice



Decision 008/2009 Mr E and the Chief Constable of Central Scotland Police

Police reports and correspondence regarding a criminal investigation and associated complaint

Reference No: 200800483 & 200801172  
Decision Date: 5 February 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr E made two related and overlapping requests for information to the Chief Constable of Central Scotland Police (Central Scotland Police). Central Scotland Police's responses provided some information and indicated that the remaining information was being withheld under a number of exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA). Mr E was not satisfied with Central Scotland Police's responses and sought reviews in each case. Following reviews which addressed each request, Mr E remained dissatisfied and made two applications to the Commissioner for a decision.

Following an investigation, the Commissioner found that Central Scotland Police had dealt with Mr E's request for information in accordance with Part 1 of FOISA by correctly withholding the requested information under sections 38(1)(a) and 38(1)(b) of FOISA. He did not require Central Scotland Police to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement) and 38(1)(a), (b) and (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data"); 2(g) (Sensitive personal data); Part 1 of Schedule 1 (The data protection principles - the first data protection principle)

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

Information Commissioner's Freedom of Information Act Awareness Guidance No 1 – Personal Data [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_1\\_-\\_personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_1_-_personal_information.pdf).



## Background

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1. This decision is concerned with two separate but related and overlapping information requests made by Mr E.
2. Mr E's two applications were conjoined for the purpose of investigation and this decision.

### Request 1 (200800483)

3. On 27 November 2007, Mr E wrote to Central Scotland Police requesting copies of three reports and all supporting documentation. The relevant reports were specified by Mr E as:
  - a. The police report compiled and forwarded to the Procurator Fiscal in connection with an allegation (against Mr E).
  - b. The report produced by a named Inspector concerning a complaint made by Mr E (about the handling of the investigation).
  - c. The subsequent report sent to the Procurator Fiscal regarding Mr E's complaint.

Mr E made this request in writing and also included two subject access requests under the DPA for the same information. An individual has a right under the DPA to access information about themselves (by making a subject access request). This right provides for this information to be released to the individual solely, whereas information released in pursuit of the separate rights under FOISA is in effect releasing the information to the world at large.

4. Central Scotland Police responded to Mr E on 15 January 2008. They responded to Mr E's subject access request solely and released to Mr E a one page abstract of the police report (described in part (a) above) concerning the allegation made against him. Although this was not specified within the response, the Commissioner understands that the police disclosed this information in terms of the DPA (i.e. in pursuit of Mr E's rights as the subject of the information) rather than FOISA. All other information was withheld from Mr E, but no exemptions in FOISA were cited as being relied upon to withhold the information.
5. Mr E requested a review of Central Scotland Police's response in a letter dated 22 January 2008, as he was dissatisfied that the information he had requested had not been released. Mr E reiterated his request, and indicated that a one page abstract did not fulfil this.



### Request 2 (200801172)

6. Within Mr E's letter dated 22 January 2008, he also made a new request for information for any correspondence originating to or from a named individual within Central Scotland Police regarding "this matter". The Commissioner understands the words "this matter" within this request to refer to the allegation against him and / or his complaint.

### Further correspondence concerning Requests 1 and 2

7. Central Scotland Police acknowledged Mr E's letter of 22 January 2008 in a letter of 28 February 2008. This indicated that the matter of his dissatisfaction with the provision of an abstract of the report sought in part a. of Request 1 would be passed to the Data Protection Officer for consideration, but the report concerned was exempt from disclosure under FOISA in terms of section 38(1)(a). Central Scotland Police apologised for its failure to consider Mr E's request under the terms of FOISA, and indicated that a review would be conducted relating to the other parts of Request 1, and responses supplied to Request 2.
8. A further letter was sent by Central Scotland Police's Data Protection Officer to Mr E on 19 March 2008. This referred to Mr E's dissatisfaction with the provision of an abstract of the report sought in part a. of Request 1. This indicated that the abstract provided was what Mr E was entitled to under the terms of the DPA, and that data relating to third parties contained in the report could not be supplied without the explicit consent of those individuals.
9. Central Scotland Police notified Mr E of the outcome of their review of Request 1 on 26 March 2008 and, in the same letter provided a response to Request 2.
10. In response to Mr E's request for review, Central Scotland Police apologised for their handling of Request 1, in that they treated the request as a subject access request (a request for his information under the DPA) solely and did not consider whether the information could be released under FOISA. However, having considering Mr E's request in terms of FOISA, Central Scotland Police refused to supply the requested information as they considered that it was exempt from disclosure under sections 34(1)(a), 34(1)(b), 35(1)(a), 35(1)(g) (read in conjunction with 35(2)(b)), 38(1)(a) and 38(1)(b) of FOISA.
11. Although Central Scotland Police appear not to have included part a. of Request 1 within its formal review, it is clear from the various correspondence sent to Mr E that his request for review had been considered, and the relevant information has been determined to be exempt under section 38(1)(a) of FOISA. The Commissioner is satisfied that following receipt of his request for review, Central Scotland Police had considered and responded to all the points therein.
12. With respect to Request 2, Central Scotland Police indicated that the information was considered exempt under section 34(1)(b), 35(1)(a) and 38(1)(a) and (b).



## Request 2 - Review Request and Response

13. On 1 July 2008 Mr E wrote to Central Scotland Police requesting a review of their response to Request 2. This referred also to the information sought by Request 1.
14. Central Scotland Police notified Mr E of the outcome of their review on 30 July 2008 upholding their original decision without amendment in relation to the information set out in paragraphs 3 and 6 above.
15. On 31 March 2008 and 5 August 2008 Mr E made two separate applications to the Commissioner regarding Request 1 and Request 2 respectively. In each case Mr E stated that he was dissatisfied with the outcome of Central Scotland Police's review and applying to the Commissioner for decisions in terms of section 47(1) of FOISA. Mr E expressed dissatisfaction in each case on the grounds that the information he had requested had not been supplied.
16. The applications were validated by establishing that Mr E had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review their response to each request.

## Investigation

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17. On 26 June and 12 August 2008, Central Scotland Police were notified in writing that applications had been received from Mr E in relation to Request 1 and Request 2 respectively. In each case, they were asked to provide the Commissioner with any information withheld from the applicant. Central Scotland Police responded with the information requested and the cases were then allocated to an investigating officer. The cases were conjoined at that stage for the purposes of investigation and this decision.
18. The investigating officer wrote to Central Scotland Police on 11 September 2008 advising them of the scope of Mr E's applications and the Commissioner's investigation. The investigating officer provided Central Scotland Police with an opportunity to make comments on the applications (as required by section 49(3)(a) of FOISA) and asked them to respond to specific questions. In particular, Central Scotland Police were asked to confirm whether all information that fell within the scope of Mr E's requests had been identified and provide justification of their reliance on any provisions of FOISA they considered applicable to the information requested.



19. Central Scotland Police responded on 9 October 2008, providing copies of additional information had been identified as falling within the scope of Mr E's requests and which had not been provided previously. Background information was provided on the various reports requested by Mr E and the investigations to which these relate. Central Scotland Police also provided details of their reasoning when applying exemptions to the information withheld. Alongside the previously cited exemptions, Central Scotland Police also applied the exemption in section 25 of FOISA to three of the documents on the basis that they considered this information was reasonably obtainable by Mr E otherwise than under FOISA.
20. Further information and clarification on various points was sought from Central Scotland Police in subsequent correspondence. With respect to the three documents withheld under section 25 of FOISA, Central Scotland Police confirmed that these had been provided to them by Mr E during their investigations. Central Scotland Police subsequently decided that it was inappropriate to withhold this information from Mr E and posted copies of these documents to Mr E on 4 December 2008.
21. The investigating officer also wrote to Mr E on 12 September 2008 advising him of the scope of the Commissioner's investigation. Mr E wrote to the investigating officer on 5 November 2008 providing additional submissions as to why the information he had requested should be released.
22. The investigating officer wrote to Mr E on 24 November 2008 inviting him to provide any further submissions on the public and legitimate interest tests associated with the exemptions being relied upon by Central Scotland Police. Mr E responded on 3 December 2008, with his submissions.

## Commissioner's analysis and findings

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23. 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 E and Central Scotland Police and is satisfied that no matter of relevance has been overlooked.

### Interpretation / Scope of Mr E's Requests

24. In Request 1, Mr E requested a number of reports he understood had been created by Central Scotland Police.
25. In their submission of 9 October 2008, Central Scotland Police clarified that although reference had been made to a series of reports, such reports did not exist as single documents. The reports referred to were in fact a collection of documents (including correspondence from Mr E) that had been collated for the purposes of investigating the allegation and Mr E's complaint.





26. In total Central Scotland Police withheld 74 documents and one cassette tape in response to Mr E's requests. Three of these documents were released to Mr E during the investigation on 4 December 2008 and consequently will be excluded from consideration in the decision.

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

27. 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 information (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore 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 does not deny individuals a right of access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
28. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix.
29. The Commissioner is satisfied that almost all of the information withheld comprises reports, records and other documentation which relate to Mr E and from which Mr E can be identified. The records withheld in this case includes correspondence to and from Mr E, copies of witness statements and other documents created during the investigation of the allegation made against him and regarding the complaint made by him about events in which he was personally involved. Consequently this information relates to Mr E in a significant sense.
30. The Commissioner is aware that Mr E 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 E under the DPA, the information under consideration here must be evaluated solely in terms of the requirements of FOISA. The fact the information either has or has not been released via the DPA cannot be taken into account when considering release of personal data under FOISA.
31. It should be noted that FOISA and the DPA are mutually exclusive where the personal data of a data subject is concerned, i.e. information that is available under one piece of legislation is not available under the other: the two pieces of legislation serve two entirely different purposes. It is not possible for a person to obtain his or her own personal information under FOISA. This is because disclosure of information under FOISA is effectively disclosure to the world at large and the release by a public authority of an individual's personal information into the public domain without their consent would constitute a breach of their privacy rights under the DPA. 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.
32. Insofar as the information withheld relates to the allegation made against Mr E and his complaint, the Commissioner considers this information to be entirely Mr E's own personal data.



33. Where Central Scotland Police has cited this exemption, the Commissioner is satisfied that they were correct in doing so and that the information is therefore exempt from disclosure in terms of section 38(1)(a) of FOISA. The Commissioner has in fact found this exemption to apply more widely than was indicated in the schedule provided to him during the investigation.
34. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld.

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

35. Central Scotland Police have also relied upon section 38(1)(b) to withhold information, which they consider is the personal data of third parties mentioned within specific documents.
36. It is understood that Mr E represented himself at his trial and was given copies of witness statements; therefore Mr E does have copies of some of the information being withheld under this exemption. However, as commented above, release of information under FOISA is in effect releasing information into the public domain and not to the applicant solely. Therefore consideration needs to be given as to the exemptions being relied upon to withhold the information in response to Mr E's FOISA request.
37. 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. The first of these principles (which Central Scotland Police argue is the relevant principle in this case) states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (as it would be by disclosure), unless at least one of the conditions in Schedule 2 (to the DPA) is met. In the case of sensitive personal data, as defined in section 2 of the DPA, at least one of the conditions in Schedule 3 of the DPA must also be met.
38. The information considered under this exemption was gathered for the purposes of investigating the allegation against Mr E and his own complaint and relates to persons other than Mr E (in some cases within documents which are also partly or wholly Mr E's own personal data). Documents to which this exemption applies include 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.
39. 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 the allegation made against Mr E or the complaints he subsequently made. In each case the individuals concerned can be identified from the information and other information held by Central Scotland Police.
40. 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.





41. The Commissioner has also noted that, since that personal data contains allegations of criminality with respect to some of the individuals concerned, some of this personal data is also sensitive personal data as defined in section 2(g) of the DPA.
42. Having drawn this conclusion, the Commissioner has turned to consider whether disclosure would breach the first data protection principle.
43. According to guidance from the Information Commissioner (who is responsible for promoting observance of the requirements of the DPA, including the data protection principles, across the United Kingdom) in his *Freedom of Information Act Awareness Guidance No 1 – Personal Data*, the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
44. In this particular case, the Commissioner accepts that those providing information for the purposes of the investigations into the allegation and the complaint did so voluntarily, and in the belief that their contributions would be treated confidentially and would not be generally disclosed.
45. The Commissioner accepts that this would be the normal expectation when making contributions to an investigation into allegations of criminality. Perhaps more importantly in this connection, he also considers that those to whom the relevant information relates (not always the same persons as those contributing to the investigation in relation to them) would have had no reasonable expectation of general disclosure of their personal information in this context.
46. Central Scotland Police noted that consent had not been granted for the information to be disclosed, and that disclosure could be detrimental to the third parties concerned. The Commissioner accepts that disclosure would be an intrusion into the private lives of the individuals concerned, whether their involvement in this case was in a professional or private capacity; and whether they were the subject of a compliant or merely contributing the relevant investigations.
47. The Commissioner finds that disclosure in these circumstances would be unfair and therefore contrary to the first data protection principle.
48. Given that the Commissioner has determined that disclosure of the information would be unfair, he is not required to go on to consider whether release of the information would be unlawful or whether any of the conditions in Schedule 2 and/or 3 of the DPA could be met in relation to it. Like section 38(1)(a), this exemption is an absolute one and the Commissioner therefore finds that Central Scotland Police were correct to withhold these documents under section 38(1)(b) of FOISA.



### ***Conclusions on the exemptions***

49. Having considered the information, the Commissioner has found it to be exempt on the basis of one or more of the following exemptions:
- Section 38(1)(a) – to the extent that the information is Mr E's own personal data.
  - Section 38(1)(b) – to the extent that it is personal data relating to one or more third persons and disclosure of this information would contravene the first data protection principle.
50. Having reached the conclusions set out above, the Commissioner has not gone on to consider the application of the other exemptions quoted by Central Scotland Police.
51. Having concluded that all of the information falling within the scope of Mr E's requests is exempt from disclosure, the Commissioner has found that Central Scotland Police acted in accordance with Part 1 of FOISA by withholding the information in response to Mr E's requests.

## **DECISION**

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

## **Appeal**

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Should either Mr E or Central Scotland Police 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**  
**5 February 2009**



## Appendix

### 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.

##### 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.

#### Data Protection Act 1998

##### Basic interpretative provisions

1. In this Act, unless the context otherwise requires-

...

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

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;



## 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.