

Decision Notice

Decision 233/2016: Mr Alastair Tibbitt and the Chief Constable of the Police Service of Scotland

Referrals under the “Prevent” Professional Concerns process

Reference No: 201502422

Decision Date: 03 November 2016



Scottish Information
Commissioner

Summary

On 11 October 2015, Police Scotland were asked for information about the “Prevent” duty guidance for Scotland (which relates to preventing people from being drawn into terrorism). Police Scotland withheld information under exemptions relating to national security, crime prevention and personal data.

As part of her deliberations, the Commissioner considered Police Scotland’s interpretation of “information”. She did not agree with Police Scotland’s approach and consequently found that they did not hold some of the information requested.

Where they did hold the information, the Commissioner found that Police Scotland were not entitled to withhold it and ordered them to disclose it.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 31(1) (National security and defence); 35(1)(a) and (b) (Law enforcement); 38(1)(b), (2)(a)(i), 2(b) and (5) (definitions of “data protection principles”, “data subject” and “personal information”) (Personal information); 73 (Interpretation) (definition of “information”)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provision) (definition 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. On 11 October 2015, Mr Tibbitt made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The request concerned the “Prevent” duty guidance for Scotland¹. The information requested was as follows:
 - (i) How many people have been referred by public bodies in Scotland into a local Prevent Professional Concerns process?
 - (ii) Please provide a breakdown of this number by area.
 - (iii) Of the total number, how many are aged between 13 and 16 years old?
 - (iv) Of the total number, how many are 12 years old or younger?
 - (v) Please provide a breakdown of this number by religious orientation and ethnicity, if possible.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445978/3799_Revised_Prevent_Duty_Guidance_Scotland_V2.pdf

- (vi) Please provide a breakdown of this number by source, e.g. educational establishments, NHS etc.
 - (vii) Please provide a breakdown of this number by gender.
 - (viii) Please provide a breakdown of the total number for Scotland by month, providing a time-series to the start of the Prevent programme in Scotland.
 - (ix) What is the age of the youngest person and the oldest to be referred?
2. Police Scotland responded on 11 November 2015. Police Scotland informed Mr Tibbitt that they held the information requested. They withheld the information under the exemptions in sections 31(1) (National security and defence), 35(1)(a) (Law Enforcement) and 38(1)(b) (Personal Information) of FOISA.
 3. On 13 November 2015, Mr Tibbitt wrote to Police Scotland, requesting a review of their decision. He stated that similar information had been disclosed for England and Wales, and saw no reason why there should be less transparency in Scotland.
 4. Police Scotland notified Mr Tibbitt of the outcome of their review on 14 December 2015, upholding their original response without modification. They explained why they did not believe equivalent harm would be caused by disclosing figures for the whole of England and Wales
 5. On 16 December 2015, Mr Tibbitt wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Tibbitt stated he was dissatisfied with the outcome of Police Scotland's review as similar information had been disclosed by police forces in England and Wales and he considered there was a strong public interest in the disclosure of the information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 7 January 2016, Police Scotland were notified in writing that Mr Tibbitt had made a valid application. They were asked to send the Commissioner the information withheld from Mr Tibbitt. Police Scotland provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Police Scotland were invited to comment on this application and answer specific questions on the information held and exemptions applied.
9. Police Scotland responded, providing submissions on the exemptions applied to the withheld information. Police Scotland stated that they were now applying the exemptions in sections 31(1), 35(1)(a) and 35(1)(b) to all parts of the request; the exemption in section 38(1)(b) was being applied to parts (ii) to (ix) of the request.
10. Specifically in relation to part (iv) of the request, Police Scotland stated that the answer was "zero". In their view, this comprised recorded information for the purposes of FOISA, to which they were entitled to apply exemptions.

11. In subsequent correspondence, Police Scotland provided additional submissions clarifying and supporting their application of the exemptions. Police Scotland also clarified the manner in which the information was collated and recorded.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Tibbitt and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

Part (iv) of the request

13. When asked to provide the withheld information to the Commissioner, Police Scotland confirmed that the answer to this part of the request was "zero".

Interpretation of "information"

14. Section 73 of FOISA defines "information" (subject to conditions that are not relevant here) as meaning information recorded in any form.
15. Police Scotland explained that information relating to each individual referred through the Prevent process was recorded on a "tracker" spreadsheet, which included the personal data of the individual along with other contextual information relevant to the case.
16. Police Scotland explained that the information was collected initially on a regional basis and then collated centrally. The age of the individual was not specifically recorded. Instead, the data held included their date of birth, from which an individual's ages at any time could be calculated and thereafter categorised into age bands (as was requested in this case).
17. Police Scotland confirmed that there was no specific record detailing that none of the individuals were aged 12 or under; the only way they knew the answer to this part of the request was zero was by interrogating the tracker spreadsheet. In Police Scotland's view, although the answer did not exist in a specific record, it could be calculated (from the information that was held). Consequently, they considered the information was held and should be exempt from disclosure.
18. The Commissioner disagrees with Police Scotland's interpretation. In her view, the definition of information contained in section 73 of FOISA is unequivocal; it can apply only to information that is held in recorded form. She does not accept that the absence of information (in this case, the absence of recorded information of individuals within the specified age parameters) comprises "information" for the purposes of FOISA.
19. In the circumstances of this case, "zero" would only have comprised recorded information for the purposes of FOISA had the document or record concerned contained, as part of its content, the figure "0" or word "zero".
20. Consequently, the Commissioner does not accept that Police Scotland can apply exemptions to information which is not recorded (i.e. to part (iv) of the request).
21. In such circumstances, the appropriate response from Police Scotland would have been either to give notice to this effect, as required by section 17(1) of FOISA, or to have applied section 18(1) to say that it was not in the public interest to either confirm or deny whether the information existed and was held. By failing to give appropriate notice, the Commissioner finds that Police Scotland failed to comply with Part 1 (in particular section 1(1)) of FOISA.

22. The Commissioner would remind Police Scotland (and other Scottish public authorities) that they cannot say they are withholding information under exemptions in Part 2 of FOISA, and serve notice to this effect, if they do not hold it. Exemptions can only be applied, and notice given, in accordance with section 16, which requires the public authority to disclose that it holds the information in question.

Section 38(1)(b) – Personal information

23. Police Scotland applied this exemption to the information sought in parts (ii) to (ix) of Mr Tibbitt's request. As the Commissioner has concluded that Police Scotland did not hold any information falling within the scope of part (iv), she will consider this exemption in relation to parts (ii), (iii) and (v) to (ix) of the request only.
24. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b), exempts information from disclosure if it comprises "personal data" (as defined in section 1(1) of the DPA) and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
25. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
26. In order to rely on this exemption, Police Scotland must show that the information being withheld is personal data for the purposes of the DPA and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Schedule 1.

Is the information under consideration personal data?

27. The Commissioner will firstly consider whether the information withheld is personal data. "Personal data" are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. (The full definition is set out in the Appendix.)
28. The DPA gives effect to Directive 95/46/EC² on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (the Directive) and so the DPA should, if possible, be interpreted in a manner which is consistent with the Directive.
29. In considering the definition of "personal data", the Commissioner has taken account also of the opinions delivered by the House of Lords in *Common Services Agency v Scottish Information Commissioner (2008) UKHL 47*³, by the High Court of England and Wales in *Department of Health v Information Commissioner (2011) EWHC 1430 (Admin)*⁴ and by the Court of Session in *Craigdale Housing Association and others v Scottish Information Commissioner (2010) CSIH 43*⁵.
30. In the *Common Services Agency* case, Lord Hope's view (which attracted majority support) was that the definition of personal data under section 1(1) of the DPA provides for two means of identification: identification will either be from the data itself (which would not apply in the

² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN>

³ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

⁴ <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1430.html>

⁵ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=9a5f86a6-8980-69d2-b500-ff0000d74aa7>

case of anonymous statistics) or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

31. Lord Hope's approach is to ask whether the other information (if provided to a hypothetical member of the public) *adds anything to the statistics* which would enable them to identify the underlying individuals. If the answer is "no", the statistics are not personal data. The words in italics are important: if identification can be achieved from the "other information" *in isolation* (i.e. rather than when added to the statistics), then the statistics themselves are truly anonymous and are not personal data.
32. This approach was considered by the High Court of England and Wales in the *Department of Health* case. That case involved a request for abortion statistics held by the Department of Health. The Department of Health argued that because it held the data which would identify individual patients, the numbers of abortions which had been carried out were personal data. This approach was rejected in the High Court by Cranston J, who commented:

"If that were the case, any publication would amount to the processing of ... personal data ... Thus the statistics that 100,000 women had an abortion ... would constitute personal data about each of these women, provided that the body that publishes this statistic has access to information which would enable it to identify each one of them. That is not a sensible result and would seriously inhibit the ability of healthcare organisations and other bodies to publish medical statistics."
33. In deciding whether the disclosure of apparently anonymous statistics could identify an individual, the Commissioner has also noted the approach taken by the Court of Session in the *Craigdale Housing Association* case. The Court of Session referred to Recital 26 of the Directive, which states that, when determining whether a person is identifiable, account should be taken of all the means likely reasonably to be used to identify the data subject. As noted by the Court, the test is therefore whether disclosure of the information would lead to the identification of an individual or whether there is other information in the public domain which, when taken with the information, would reasonably allow for such identification.
34. Guidance entitled "Determining what is personal data"⁶ has been produced by the (UK) Information Commissioner (who is responsible for enforcing the DPA throughout the UK). This states, when considering identifiability, it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street. You should also consider the means that are likely to be used by a determined person with a particular reason to want to identify individuals.
35. The Commissioner has therefore considered whether the information requested by Mr Tibbitt, together with other material in the public domain already (or which would be likely to become so as a result of action taken by a determined person to identify the individuals if the information were to be disclosed) would reasonably allow individuals to be identified. If disclosure of the information would reasonably allow for identification, then the information comprises personal data and cannot be disclosed unless there is a condition in Schedule 1 to the DPA which would permit disclosure. If the information would not reasonably allow for identification, then it is not personal data and the exemption in section 38(1)(b) could not apply.

⁶ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

36. Police Scotland submitted that the age, gender and location of the individuals, combined with the identity of the referral agencies would lead to the identification of those individuals. In Police Scotland's view, such identification would almost certainly be by their peers and their communities, but also by any individual intent on trying to identify them.
37. Police Scotland provided an example whereby an individual was successfully identified following the disclosure of similar information into the public domain. The Commissioner is unable (for obvious reasons) to include full details of this case. It involved a disclosure, to a public meeting, that a specified number of individuals in the local area had been subject to Prevent case management. Police Scotland stated that this led to local speculation about the identity of the individuals and resulted in at least one local resident being able to identify one of the subjects.
38. In Police Scotland's view, social media forums could be used to great effect to seek to identify any individuals within the Prevent Professional Concerns process. Police Scotland submitted that such forums had been used to a significant extent to seek to identify individuals such as registered sex offenders living in the community and thereafter target them.
39. In his application to the Commissioner, Mr Tibbitt stated that he was not interested in receiving information that could identify any specific individual and was content to accept information in a format that mitigated against this.
40. The Commissioner has considered the information which would be disclosed into the public domain in this case and which has been withheld under section 38(1)(b) of FOISA. This would comprise:
 - the numbers of individual referrals by area;
 - the numbers for the whole of Scotland aged between 13 and 16;
 - the numbers for the whole of Scotland broken down by religious orientation and ethnicity;
 - the numbers for the whole of Scotland by referral agency type;
 - the numbers for the whole of Scotland by gender; and
 - the age of the youngest and oldest person to be referred in the whole of Scotland.
41. If this information is viewed in isolation, it appears to be anonymous, in that it does not permit the identification of any individual data subject. However, the Commissioner must consider whether there are any other factors or publicly available materials which, considered alongside the information, would permit identification of any of the individual data subjects. She must be able to satisfy herself that disclosure of the information would be the decisive factor leading to the identification of a specific individual or would make identification possible where it was previously impossible.
42. In the example above from Police Scotland, considerably more information about the individual's personal and family circumstances was disclosed than would be the case in relation to Mr Tibbitt's request. Given the amount of information disclosed in that example which directly related to the individual in question, the Commissioner is not surprised that a determined person would have been able to identify the individual. Given the significant

differences in the level of detail involved, she does not consider that the previous disclosure is relevant to her consideration of the question of identifiability in the present case.

43. In this case, the Commissioner is not satisfied that any individual could be identified as a result of the disclosure of the information withheld. Mr Tibbitt has requested a breakdown of the total number of referrals by area, while all other parts of the request (which focus on more specific aspects relating to the individuals referred) are for Scotland-wide figures.
44. The Commissioner is unable to ascertain any conceivable manner by which individuals could be identified from such limited information. By way of example, the 2011 census for Scotland⁷ indicates that there were (in 2011) almost 250,000 individuals aged between 13 and 16 in Scotland. The numbers for ethnicity and religious orientation across Scotland as a whole are very high, even broken down by age and gender.
45. Given the limited information which would be made available through disclosure of the information requested in this case, and the fact that the vast majority of that information relates to Scotland-wide figures, the Commissioner does not accept that the information withheld comprises personal data as defined in section 1(1) of the DPA.
46. As the Commissioner is satisfied that the information withheld does not comprise personal data, she finds that Police Scotland were not entitled to withhold this information under the exemption in section 38(1)(b) of FOISA.

Section 31(1) – National security and defence

47. Police Scotland applied this exemption to all nine parts of Mr Tibbitt's request. As the Commissioner has concluded that Police Scotland did not hold any recorded information for part (iv) of the request she will consider Police Scotland's application of this exemption only in relation to the information sought in parts (i) to (iii) and (v) to (ix).
48. Section 31(1) provides that information is exempt information if exemption from section 1(1) of FOISA (i.e. the right to request information from a Scottish public authority) is required for the purpose of safeguarding national security.
49. The expression "national security" is not defined in FOISA. The Commissioner considers that the phrase covers matters such as defence of the realm; the prosecution of war; the disposition of the armed forces; nuclear weapons; security and intelligence services, and potential threats to the economic wellbeing of the UK (including terrorism, espionage and subversion).
50. It should be noted that section 31(1) specifies that the information is exempt from disclosure if exemption is required *for the purposes of safeguarding* national security, a condition which has a narrower scope than information which *relates* to national security. (See the Commissioner's briefing on section 31(1)⁸.)
51. Police Scotland noted that the referral numbers in England and Wales to which Mr Tibbitt referred were very different from those in Scotland. They considered this may be due to the larger population in England and Wales. They also suggested that the threat from terrorism north and south of the border might be substantially different. Police Scotland declined to speculate why (or whether) this might be the case.

⁷ <http://www.scotlandscensus.gov.uk/ods-web/home.html>

⁸ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section31/Section31.aspx>

52. In Police Scotland's view, the number of referrals alone, without going into more specific details such as their timing, ages, locations etc., was significantly prejudicial to the safeguarding of national security. Police Scotland submitted that disclosure of the information would provide significant insight into the level of information they had regarding the threat from extremism in Scotland.
53. Police Scotland submitted that there were possibly many more individuals throughout the whole of Scotland who are at risk from extremist radicalisation and, in parallel, groups whose interests would be furthered by an increase in such radicalisation. In their view, disclosure of this information would inform all of those individuals that their activities had thus far gone undetected; such reassurance was contrary to the Prevent thread of the UK counter-terrorism strategy, which seeks to disrupt such activities and prevent acts which seek to threaten national security.
54. Police Scotland stated that the UK threat level was at its second highest level: "severe". In their view, disclosure of the information would identify by omission those individuals who were thus far unknown to the police: anyone outside of the locations, genders, ethnic backgrounds, etc. contained in the withheld information.
55. Police Scotland noted that the figures for each area would obviously change over time. They were concerned that any change would be significantly highlighted and people could draw conclusions from that; for example, that their activities continued to go unnoticed. In Police Scotland's view, this would provide invaluable intelligence for those individuals seeking to commit crime and place national security at risk.
56. Police Scotland also considered there was link between this exemption and the identification of particular individuals. In Police Scotland's view, if any individuals were identified in their communities, they would be the subject of significant negative attention from their peers, the wider community and the media. Police Scotland submitted that this would undermine the good work and success achieved by the Prevent strategy and would lead to increased community tensions.
57. Police Scotland submitted that the principles of the Prevent process required the subject to work with authorities to reduce any identified risks. In their view, this process would be significantly more challenging, if not impossible, if individuals were publicly identified and thereafter isolated in their communities. Police Scotland considered the relationship of trust and confidentiality would be irretrievably broken down. In their view, disclosure of the information would undoubtedly make the individuals less likely to engage with the work of Prevent and drive them towards a more radicalised position.
58. In his application to the Commissioner, Mr Tibbitt pointed out that police forces in England and Wales had disclosed similar information; apparently, these forces had not judged such disclosure as a threat to national security.
59. Mr Tibbitt disagreed with Police Scotland's assertion that the disclosure of the information could somehow undermine the effectiveness of counter-terrorism programmes in Scotland. On the contrary, he contended that greater transparency would be likely to engender more trust in public services on this matter and that disclosing the information could be of benefit to Police Scotland.

The Commissioner's view

60. The Commissioner has considered these submissions carefully. She acknowledges that there is a relationship between intelligence regarding the threat from extremism and

protecting national security. However, it does not follow automatically that any such information held by Police Scotland will require to be exempted under section 31(1) of FOISA, for the purposes of safeguarding national security. The Commissioner must consider each case, and the information withheld, individually.

61. In this case, the Commissioner is not persuaded, in relation to the specific information under consideration, that exemption from section 1(1) of FOISA is required for the purpose of safeguarding national security.
62. The Commissioner has not accepted that the information under consideration comprises personal data for the reasons outlined in her consideration of the exemption in section 38(1)(b) above. Accordingly, she is unable to accept Police Scotland's assertions that the identification of individuals, or the risk of that identification, would place national security at risk.
63. The exemption in section 31(1) is not subject to a test of substantial prejudice, but exemption must still be "required". The Commissioner would expect some link to be demonstrated between disclosure and national security being compromised.
64. In this case, Police Scotland did not provide any evidential basis to support their view that there might be individuals whose activities have gone undetected thus far. Neither did they provide any evidential basis for concluding that disclosure of the information would make the targeting of individuals more likely.
65. In the Commissioner's view, Police Scotland's assertions about the threat to national security (should the information be disclosed) are unsubstantiated, speculative and essentially hypothetical. She does not accept that Police Scotland have demonstrated any tangible link between the withheld information and any direct bearing disclosure would have on national security and the safeguarding of that security.
66. Consequently, the Commissioner is not satisfied that Police Scotland were entitled to withhold the information under the exemption in section 31(1). As the Commissioner is not satisfied that the information is exempt from disclosure under section 31(1), she is not required to consider the public interest test in section 2(1)(b) of FOISA.

Section 35(1)(a) and (b) – Law enforcement

67. Police Scotland applied these exemptions to all nine parts of Mr Tibbitt's request. Again, as she has already concluded that Police Scotland did not hold any recorded information for part (iv) of the request, she will consider Police Scotland's application of this exemption in relation to the information sought in parts (i) to (iii) and (v) to (ix).
68. Section 35(1)(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime. As the Commissioner's guidance on this exemption highlights⁹, the term "prevention or detection of crime" is wide ranging, encompassing any action taken to anticipate or prevent crime, or to establish the identity and secure prosecution of persons suspected of being responsible for crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.
69. Section 35(1)(b) exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance

⁹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

also states, there is likely to be a considerable overlap between information relating to “the apprehension or prosecution of offenders” and that relating to “the prevention or detection of crime”. She considers section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as investigative processes and the use of police intelligence).

70. There is no definition of “substantial prejudice” in FOISA, but the Commissioner considers authorities have to be able to establish harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.
71. The exemptions in section 35(1)(a) and (b) are also subject to the public interest test in section 2(1)(b) of FOISA.
72. Police Scotland restated their view that disclosure of the information would demonstrate the level of awareness that they had regarding individuals at risk from radicalisation.
73. In Police Scotland’s view, given the nature of radicalisation, there would be individuals or groups of individuals actively seeking to incite extremist behaviour, who could be certain that the individuals they were targeting had not yet been identified by authorities as “at risk”.
74. Although the focus of the Prevent Professional Concerns process was prevention of crime, Police Scotland submitted that there would often be an opportunity to gather intelligence or pursue an actual criminal case, so disclosure would also prejudice the apprehension and prosecution of offenders. In their view, disclosure would send a clear message to those actively seeking to commit crime that Police Scotland were unaware of their activities.
75. Police Scotland again linked their arguments to the identification of individuals. They submitted that the targeting or vilification of individuals was contrary to their statutory function. They claimed the trolling of individuals or face-to-face confrontations would put those individuals at risk and create a diversion of Police resources, to deal with issues which would not otherwise have materialised.
76. Police Scotland submitted that additional media coverage could heighten community tensions and focus attention on particular community groups. They considered this to be clearly prejudicial in terms of the prevention and detection of crime and the apprehension or prosecution of offenders. In their view, it could lead to an increase in hate crime and anti-social behaviour, as well as significantly damaging the relationships between community groups to the extent that individuals became further isolated and more susceptible to extremist views and radicalisation.
77. Mr Tibbitt did not make any specific submissions in relation to section 35(1), beyond those made in relation to the exemption in section 31(1).

The Commissioner’s view

78. The Commissioner has considered carefully the submissions made by both Police Scotland and Mr Tibbitt. Having done so, she is unable to conclude on the basis of the arguments presented that either exemption is engaged in relation to the information under consideration.
79. As with the exemption in section 31(1), the Commissioner does not accept that the information under consideration comprises personal data, for the reasons outlined in her consideration of the exemption in section 38(1)(b) above. Accordingly, she is unable to accept Police Scotland’s submissions in relation to the identification of individuals and any

consequential prejudice to the prevention or detection of crime or the apprehension or prosecution of offenders.

80. As with the exemption in section 31(1), the Commissioner is not satisfied that Police Scotland have properly explained or evidenced any link between the information under consideration and the prevention or detection of crime, or the apprehension or prosecution of offenders, let alone any substantial prejudice that would ensue from disclosure.
81. In the Commissioner's view, Police Scotland's arguments are essentially speculative and hypothetical in nature, and she is unable to accept that they have provided any cogent argument for the exceptions being engaged.
82. The Commissioner does not accept that the disclosure of the withheld information would have caused, or would have been likely (at the time they responded to Mr Tibbitt's requirement for review) to cause, substantial prejudice to Police Scotland's ability to prevent or detect crime or apprehend or prosecute offenders. She does not agree that such a conclusion can be reached on the basis of the general assertions made by Police Scotland in this case.
83. Accordingly, the Commissioner is unable to conclude that Police Scotland was entitled to withhold the information under the exemptions in section 35(1)(a) and (b) of FOISA. As the Commissioner is not satisfied that the information is exempt from disclosure under section 35(1)(a) or (b), she is not required to consider the public interest test in section 2(1)(b) of FOISA.

Conclusion

84. As the Commissioner has concluded that Police Scotland were not entitled to withhold the information sought in parts (i) to (iii) and (v) to (ix) of the request under any of the exemptions applied, she now requires them to disclose that information to Mr Tibbitt.
85. In relation to part (ii) of the request (a breakdown of the numbers referred by area), the Commissioner notes that Mr Tibbitt did not stipulate any specific definition of "area" or indicate any kind of geographical unit. In the Commissioner's view, this part of the request can be satisfied by disclosure of the information by reference to Police Scotland divisional areas.

Decision

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

In relation to part (iv) of the request, the Commissioner finds that Police Scotland did not hold the requested information. She finds that they failed to give notice to Mr Tibbitt in terms of either section 17(1) or section 18(1) of FOISA, and thereby failed to comply with section 1(1) of FOISA.

The Commissioner finds also that Police Scotland incorrectly withheld the information requested in parts (i) to (iii) and (v) to (ix) of the request under the exemptions in sections 31(1), 35(1)(a), 35(1)(b) and (in relation to all except part (i)) 38(1)(b) of FOISA. By doing so, they failed to comply with section 1(1) of FOISA.

The Commissioner requires Police Scotland to disclose the withheld information to Mr Tibbitt by **19 December 2016**.

Appeal

Should either Mr Tibbitt or the Chief Constable of the Police Service of 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 the Chief Constable of the Police Service of Scotland (Police Scotland) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Police Scotland have failed to comply. The Court has the right to inquire into the matter and may deal with Police Scotland as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

03 November 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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.

...

31 National security and defence

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.

...

35 Law enforcement

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

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;

...

38 Personal information

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

...

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

...

- (2) The first condition is-

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

...

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

...

- (5) In this section-

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

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

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

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

...

Data Protection Act 1998

1 Basic interpretative provisions

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

...

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

(a) from those data, or

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

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

...

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