

Decision Notice

Decision 129/2016: Mr Dominic Kennedy and the Chief Constable of the Police Service of Scotland

Illegal shellfish diving

Reference No: 201502204

Decision Date: 22 June 2016



Summary

On 10 August 2015, Mr Kennedy asked the Chief Constable of the Police Service of Scotland (Police Scotland) for communications about criminal teams involved in shellfish diving.

Police Scotland withheld the information under a number of exemptions in FOISA.

The Commissioner found that Police Scotland partially failed to respond to Mr Kennedy's request for information in accordance with the EIRs. The Commissioner accepted that some of the information should be withheld, but found that other information was wrongly withheld.

The Commissioner requires Police Scotland to disclose the information which was wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (3) and (5)(b) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data") and 2 (Sensitive personal data) (definitions (g) and (h)); Schedules 1 (The data protection principles, Part 1: the principles) (the first data protection principle), 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 6) and 3 (Conditions relevant for purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data: Recital 26

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 10 August 2015, Mr Kennedy made a request for information to Police Scotland. He asked for communications since and including 2010, between the Health and Safety Executive (HSE), Marine Scotland and Police Scotland about criminal teams identified to be involved in shellfish diving.
2. Police Scotland responded on 26 October 2015. They withheld the requested information under a number of exemptions in FOISA.
3. On 26 October 2015, Mr Kennedy emailed Police Scotland requesting a review of their decision on the basis that he did not accept that the information should be withheld.

4. Police Scotland notified Mr Kennedy of the outcome of their review on 23 November 2015. They upheld their previous decision without modification.
5. On 23 November 2015, Mr Kennedy applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Kennedy stated he was dissatisfied with the outcome of Police Scotland's review because he was not persuaded that the information in its entirety was exempt. If it was, he considered that the public interest should allow the disclosure of some of the information, possibly in a redacted form.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Kennedy 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 22 December 2015, Police Scotland were notified in writing that Mr Kennedy had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Mr Kennedy. 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 Mr Kennedy's application and to answer specific questions. These questions focused on the searches conducted by Police Scotland to identify information covered by the request, whether Police Scotland considered the information to be environmental information, and the exceptions relied upon to withhold the requested information.
9. Police Scotland responded on 24 February 2016. They agreed that the requested information was environmental and confirmed that they intended to rely upon section 39(2) of FOISA (environmental information). They also confirmed that they wished to rely on regulation 11(2) (third party personal data) and regulation 10(5)(b) (substantial prejudice to the course of justice, etc.) to withhold the information. They also identified an additional 23 documents containing information which fell within the scope of Mr Kennedy's request.
10. Mr Kennedy was invited to provide his views as to why the withheld information should be disclosed, and did so.
11. On 7 and 8 March 2016, the investigating officer contacted Police Scotland, and requested further submissions on regulation 11(2), and whether they held any correspondence with the HSE. Police Scotland responded to both questions by 18 March 2016.
12. On 13 April 2016, the investigating officer asked Mr Kennedy if he wanted the Commissioner's decision to consider whether the personal data of Police Scotland and Marine Scotland staff should be disclosed. Mr Kennedy confirmed that this information could be excluded.
13. In their submissions of 7 March 2016, Police Scotland identified information within the documents previously provided to the Commissioner which they no longer considered excepted from disclosure under the EIRs. They were willing to disclose this information to Mr Kennedy. The information has not yet been provided to Mr Kennedy: the Commissioner

therefore requires its disclosure. Given that Police Scotland has confirmed that they will disclose the information, the Commissioner will not consider it further in this decision.

Commissioner's analysis and findings

14. 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 Kennedy and Police Scotland. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

15. Police Scotland responded to Mr Kennedy's request solely in terms of FOISA. They were asked to consider whether the requested information was environmental. Police Scotland agreed that the information was environmental and identified exceptions in the EIRs which they considered applied to the withheld information.
16. Having considered the nature of the withheld information, the Commissioner is satisfied that it is environmental information as defined within regulation 2(1) of the EIRs. The Commissioner is satisfied that it would fall within paragraph (b) of the definition (as factors affecting or likely to affect the elements listed in paragraph (a)), or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
17. The Commissioner concludes that by initially failing to consider and respond to Mr Kennedy's request in terms of the EIRs, Police Scotland failed to comply with regulation 5(1) of the EIRs.

Section 39(2) of FOISA - environmental information

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. During the investigation, Police Scotland confirmed that they wanted to apply the exemption in section 39(2) to the information requested by Mr Kennedy. In this case, the Commissioner accepts that Police Scotland were entitled to apply the exemption to the requested information, given her conclusion that it is properly classified as environmental information.
19. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request (insofar as it concerns environmental information) in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
20. As the withheld information in this case is solely environmental information, the Commissioner will consider Police Scotland's handling of the request in terms of the EIRs.

Regulation 5(1) – information falling within scope of the request

21. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold.

22. On receipt of a request for environmental information, therefore, the authority must establish what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (see regulation 5(2)(b)).
23. Mr Kennedy's request concerned correspondence between Police Scotland and other agencies about criminal teams involved in shellfish diving since 2010. Police Scotland noted that this includes the period in which the former police forces and national agencies operated. Neither Police Scotland nor the former forces operated a central correspondence register that could be searched simply by subject matter: the volume of daily interaction with other criminal justice partners precludes this approach. To ensure their searches identified the relevant information, Police Scotland explained that they had identified the business areas involved in the activity in order to pinpoint relevant information.
24. Police Scotland provided details of the business areas they had contacted. They explained that this contact had led to the identification of other business areas likely to hold relevant information, which were also contacted. Police Scotland provided details of the individuals who had been contacted and asked to search their emails for relevant information.
25. Police Scotland explained that they had later been made aware that another policing division might also hold information which fell within scope of the request. Following a search by this division, additional relevant information had been identified. This information was provided to the Commissioner during the investigation. Police Scotland noted that this information encompassed the period from 2013 to 2015. They considered that this should address some of the Commissioner's concerns about the range of information that had been traced and forwarded previously.
26. In response to a query regarding correspondence relating to operations co-ordinated by other agencies, Police Scotland explained that their record retention policy dictates that correspondence is retained for the current year plus three years. They noted that, as the request was made in 2015, it was likely that correspondence pre-dating 2012 would have been destroyed prior to receipt of the request, if it had existed.
27. Police Scotland were asked about references in the withheld correspondence which appeared to indicate that they might hold more correspondence covered by the request. Police Scotland confirmed that all relevant electronic and hard copy files had been searched, and all information retrieved had been provided to the Commissioner.
28. Police Scotland were asked if they had searched for relevant correspondence with the HSE. Police Scotland confirmed that they did not hold any such correspondence. They were satisfied that their searches had encompassed all relevant information and explained that, generally, they do not share a lot of information with the HSE.
29. Having considered all the relevant submissions and the withheld information, the Commissioner is satisfied that, by the end of the investigation, Police Scotland had taken adequate and proportionate steps to establish the information they held which falls within the scope of Mr Kennedy's request. She is also satisfied that they are unlikely to hold any other information covered by the request.
30. However, by failing to identify all relevant information when they responded to Mr Kennedy's request and request for review, the Commissioner finds that Police Scotland failed to comply fully with regulation 5(1) of the EIRs.

Regulation 11(2) of the EIRs - personal data of third parties

31. Police Scotland provided an annotated copy of the withheld information, identifying information which was considered to be the personal data of private individuals and the personal data of Police Scotland and Marine Scotland staff. As Mr Kennedy does not require the Commissioner to consider the personal data of Police Scotland and Marine Scotland staff in reaching her decision, this information will not be considered further.
32. The Commissioner will consider only the decision to withhold personal data relating to private individuals.
33. In order for a Scottish public authority to rely on the exception in regulation 11(2), it must show (i) that the information is personal data for the purposes of the DPA, and (ii) that making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, Police Scotland argued that the first data protection principle would be contravened if the information was disclosed.

Is the withheld information personal data?

34. Police Scotland submitted that the withheld information is the personal data of individuals targeted as part of the operations by Marine Scotland and Police Scotland. They stated that the data includes information such as names, addresses and dates of birth. Police Scotland considered the information to be personal data, as it is biographically significant information about identifiable individuals.
35. "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). The DPA gives effect to Directive 95/46/EC 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 this has a bearing on how the DPA should be interpreted.
36. In interpreting "personal data", the Commissioner has also taken account of the opinions delivered by the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2007] 1 WLR 1550 and the opinion of the High Court of England and Wales in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin)¹. In the *Common Services Agency* case, the Lords concluded that the definition of "personal data" in the DPA must, in terms of recital 26 of the Directive (recital 26 is set out in full in the Appendix), be taken to permit the disclosure of information which had been rendered fully anonymous in such a way that individuals were no longer identifiable from it, without having to apply the data protection principles.
37. Recital 26 also makes it clear 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 of Session in the case of *Craigdale Housing Association and others v The Scottish Information Commissioner* [2010] CSIH 43², the test is whether disclosure of the information would lead to the identification of an individual or what other

¹www.bailii.org/ew/cases/EWHC/Admin/2011/1430.html

²www.scotcourts.gov.uk/opinions/2010CSIH43.html

information when taken with the withheld information would reasonably allow for such identification.

38. The Commissioner has therefore considered whether the information under consideration, together with other information already in the public domain (or as a result of action likely to be taken by a determined person to identify the individuals) would reasonably allow the individuals to be identified. If it would, then the information will be personal data, provided that it relates to the individual in question. If it would not, the information is not personal data for the purposes of section 1(1) of the DPA, and the exception in regulation 11(2) of the EIRs will not apply.
39. During the investigation, Police Scotland identified some information which they no longer considered to be excepted from disclosure under regulation 11(2) of the EIRs. However, they maintained their position that the remaining information was personal data and excepted under the EIRs, and provided additional submissions.
40. Police Scotland explained that they had made redactions (for personal data) by removing whole sentences which contain information from which an individual could be identified, rather than redacting single or multiple words to leave phrases which (in their view) did not make sense.
41. In the early years after FOISA was enacted, the Commissioner commented on the practice of withholding whole sentences or paragraphs out of concern that disclosure of individual words would lead to misinterpretation or confusion on behalf of the requester (*Decision 166/2006, Mr Martin Williams and the Scottish Executive*³). The Commissioner's view remains the same, that it is not appropriate for public authorities to withhold information from the public simply for fear that the redacted information is potentially confusing, or on the basis that the information might be misinterpreted. Information can only be withheld where an exemption/exception applies.
42. The Commissioner has found that not all of the information identified by Police Scotland is personal data of individuals targeted as part of the operations by Marine Scotland and Police Scotland. The exception has been applied to some information, which, in itself, does not identify or relate to a living individual, but simply appears in the same sentence as the personal data. Because such information is not personal data, the Commissioner finds that Police Scotland was incorrect to withhold it under regulation 11(2) of the EIRs.
43. Police Scotland did not rely upon any other exception to withhold this information: therefore, the Commissioner requires this information to be disclosed to Mr Kennedy. The Commissioner will provide Police Scotland with a marked-up copy of documents, which will indicate the information which should be disclosed as is not exempt.
44. The Commissioner accepts that the remaining information identified as personal data could identify a living individual or individuals. She will consider whether this information was correctly withheld under regulation 11(2) of the EIRs.

Sensitive personal data

45. Police Scotland submitted that some of the information recorded about the individuals named in the documents extends to details of criminal activity or criminal proceedings. Police

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200501513.aspx>

Scotland considered that this was sensitive personal data in accordance with the definitions in section 2(g) or (h) of the DPA (the definitions are in Appendix 1).

46. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA. She finds that all of the withheld information is sensitive personal data for the purpose of sections 2(g) and/or 2(h) of the DPA.
47. The Commissioner will now consider whether disclosure of the sensitive personal data would breach the data protection principles in the DPA.

Consideration of the first data protection principle

48. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing in this case would be disclosure in response to Mr Kennedy's information request.
49. The Commissioner will first of all consider whether any of the conditions in Schedule 3 can be met, to allow the processing of the personal sensitive data. If none of these conditions can be met, there will be no requirement to go on to consider the application of the conditions in Schedule 2.

Can any of the conditions in Schedule 3 to the DPA be met?

50. There are 10 conditions listed in Schedule 3 to the DPA. One of these, condition 10, allows sensitive personal data to be processed in circumstances specified in an order made by the Secretary of State. The Commissioner has therefore considered the additional conditions for processing sensitive personal data as contained in secondary legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000⁴. None of these are applicable in this case.
51. The Commissioner's guidance⁵ on the section 38 exemption (which is also relevant when considering regulation 11(2) of the EIRs) concludes that (in practical terms) there are only two conditions in Schedule 3 which would allow sensitive personal data to be processed in the context of a request for information under FOISA, namely:
 - (i) Condition 1, the data subject has given explicit consent to the release of the information; or
 - (ii) Condition 5, the information contained in the personal data has been made public as a result of steps taken deliberately by the data subject.
52. In relation to the sensitive personal data under consideration here, the Commissioner accepts that the data subjects have not given explicit consent to the disclosure of the information. In the circumstances, she would not expect Police Scotland to attempt to obtain such consent. Consequently, she is satisfied that condition 1 in Schedule 3 cannot be met.
53. Similarly, from the information available to her, the Commissioner is unable to conclude that condition 5 in Schedule 3 can be met in this case.

⁴ http://www.legislation.gov.uk/uksi/2000/417/pdfs/ukxi_20000417_en.pdf

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

54. Having also considered the other conditions in Schedule 3, and the additional conditions contained in secondary legislation, the Commissioner has come to the conclusion that there is no condition which would permit disclosure of the sensitive personal data under consideration here. In the absence of a condition permitting disclosure, that disclosure would be unlawful.
55. Consequently, the Commissioner finds that disclosure of the sensitive personal data would breach the first data protection principle and that, in line with regulation 11(2) of the EIRs, the duty to make environmental information available does not apply here.

Regulation 10(5)(b) of the EIRs

56. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all of the exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way, with a presumption in favour of disclosure.

Police Scotland's submissions

57. Only a small amount of information was excepted under this regulation. Police Scotland submitted that disclosure of the withheld information would undermine their ability to conduct an inquiry of a criminal nature because it specifies the tactics that they have adopted to investigate illegal shellfish diving. Police Scotland explained how the withheld information in each document would lead to the identification of their tactics and methods. For obvious reasons, the Commissioner cannot repeat or analyse these comments in full in this decision.
58. Police Scotland submitted that there are links between illegal shellfish activity and organised crime and, if disclosed, the withheld information would be used by those involved in such crime. The information would enable those with the means to do so to frustrate and disrupt investigations by the authorities, substantially prejudicing the ability of Police Scotland and Marine Scotland to detect criminal activity of this type and to protect this particular type of marine environment from illegal and harmful fishing.

Mr Kennedy's submissions

59. Mr Kennedy questioned whether there is a real likelihood of substantial prejudice to an individual's fair trial if any of the information is disclosed. If the Commissioner found that substantial prejudice would result, then he was satisfied that the information should be withheld.
60. He also questioned whether Police Scotland's concern about being unable to conduct a criminal or disciplinary inquiry (if the information was disclosed) was based on a specific case which would be prejudiced by the disclosure of the information, or just a generalised suggestion that disclosure of any information of this type might make investigations harder to conduct. Mr Kennedy indicated that the former would be acceptable, but believed the latter would be against the letter and spirit of the EIRs.

Commissioner's conclusions

61. The Commissioner also notes that Police Scotland have withheld information from four documents under this exception, applying the exception in a restricted manner only to the information which they consider should be withheld.

62. The Commissioner notes that the withheld information was less than a year old at the date of Mr Kennedy's request. The Commissioner is aware that it takes time for the police to investigate and prosecute a case and, although she has not been provided with any specific evidence on this point, she considers that the withheld information is likely to be still relevant to Police Scotland's investigation of the matter and could be used in future prosecutions.
63. When the Freedom of Information Bill was going through the Scottish Parliament, the then Lord Advocate commented that the exemptions in section 34(1) of FOISA (Investigations by Scottish public authorities and proceeding arising out of such investigations) were essential for an effective justice system. He believed that witnesses would be inhibited from co-operating in criminal investigations if there was a possibility that the information they gave could be disclosed under FOISA. The Lord Advocate was also concerned that the possibility of disclosure would "undermine the informant system".⁶ While this case concerns information withheld under regulation 10(5)(b) of the EIRs, not section 34(1) of FOISA, the Commissioner considers these comments to be relevant in this case.
64. The Commissioner has also taken note of comments made at that time by the then Justice Minister, Jim (now Lord) Wallace of Tankerness, about information held as part of an investigation:
- "We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons."
65. Mr Kennedy queried whether the withheld information was of a specific or general nature. He was not convinced that disclosure of any general information would make investigations harder to conduct. The Commissioner is satisfied that the withheld information is not general in nature, and does provide insight into the tactics and methods used to investigate whether there has been any criminal activity in relation to specific incidents. She accepts that disclosure of such information could prejudice further, related investigations, and would make it harder for similar investigations to be successfully conducted in future.
66. Having considered the submissions from both parties and the withheld information, the Commissioner has concluded that disclosure of the information withheld under regulation 10(5)(b) of the EIRs would, or would be likely to, prejudice substantially the ability of Police Scotland to conduct an inquiry of a criminal nature. She therefore accepts that Police Scotland were entitled to withhold this information under the exception. Being satisfied that the exception is engaged in relation to such information, the Commissioner will go on to consider whether the public interest test favours disclosure of this information.

Public interest test

67. Having found that Police Scotland correctly applied the exception in regulation 10(5)(b) to this information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

⁶ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section34/Section34.aspx>

Police Scotland's submissions

68. Police Scotland acknowledged that there is a public interest in transparency to inform the public about the level of resources deployed on this activity. This is of significant weight, considering the stated nature of Mr Kennedy's investigation.
69. However, Police Scotland considered that there is a countervailing public interest in enabling public authorities to pursue their statutory activities. Police Scotland has agreed that a substantial proportion of the non-personal data identified in its searches will be disclosed to Mr Kennedy, providing him with information on the prioritisation, co-operation and resources dedicated to this activity by Police Scotland and Marine Scotland. Police Scotland considered that disclosing such information diminishes the weight of the public interest in transparency in this particular case to the extent that the public interest in disclosure is outweighed by the public interest in withholding the information and in "enabling the authorities to pursue their activities for the public benefit".

Mr Kennedy's submissions

70. Mr Kennedy considered that it was in the public interest to know how the police protect the environment and the public from the risks involved in illegal shellfish diving and how they co-operate with other agencies (or fail to do so) when tackling illegal shellfish diving. He submitted that the priority (or otherwise) given by the police to this area of inquiry is a matter of public interest, so the public can understand how police rate the importance of this problem.
71. Mr Kennedy also considered that the preservation of shellfish stocks and the safety of vulnerable people who may be attracted to take part in this illegal and dangerous work are also matters of public interest.
72. Mr Kennedy noted that the work of the police is done on behalf of the public and is paid for by the public. He considered that this was not a private matter between police forces and suspects, and that the public is entitled to the fullest practical understanding of what the force is doing in its name and how public resources are being spent.

The Commissioner's conclusions

73. The Commissioner acknowledges the public interest arguments submitted by Mr Kennedy and accepts that it is in the public interest to understand what the police are doing to prevent illegal and dangerous shellfish diving.
74. However, the Commissioner considers that disclosure of the information which Police Scotland has now agreed to disclose, and disclosure of the information which she has found to be incorrectly withheld, will do much to meet the public interest in disclosure.
75. The Commissioner recognises that Police Scotland is in the process of investigating the illegal shellfish activities identified in the withheld information. She considers that there is a considerable public interest in ensuring that the steps taken by the police to conduct a thorough investigation should be kept confidential, to avoid undermining these investigations.
76. The Commissioner also believes it is unquestionably and strongly in the public interest that the public remains confident in, and willing to co-operate with, the criminal justice system by providing witness statements and other assistance to police in the course of their investigations.
77. Having weighed up the arguments advanced by Mr Kennedy and Police Scotland, the Commissioner finds that, on balance, in all the circumstances of this case, the public interest

in making the remaining withheld information available to Mr Kennedy is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs. The Commissioner finds that the public interest in transparency and accountability, in relation to the actions and decisions of Police Scotland, is outweighed by the public interest in ensuring that Police Scotland's investigations are not substantially prejudiced by disclosure. Therefore, although there are good reasons why disclosure of the information might be in the public interest, the Commissioner accepts that, on balance, it is in the public interest for the information to be withheld.

78. The Commissioner therefore finds that Police Scotland were correct in applying the exception at regulation 10(5)(b) of the EIRs to the withheld information in question.

Summary of information to be disclosed

79. The Commissioner has concluded that some of the information identified as personal data by Police Scotland should be disclosed to Mr Kennedy. In addition, Police Scotland also identified information they no longer considered to be exempt from disclosure. **To aid compliance with her decision, the Commissioner will provide Police Scotland with a marked up copy of the withheld documents.**

Decision

The Commissioner finds that the Chief Constable of the Police Service of Scotland (Police Scotland) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kennedy.

The Commissioner finds that Police Scotland:

- (i) breached regulation 5(1) of the EIRs by failing to identify and respond to Mr Kennedy's information request as one seeking environmental information as defined in regulation 2(1) of the EIRs, and by failing to identify all information which they held and which was covered by Mr Kennedy's request when they responded to his request and request for review.
- (ii) correctly withheld some of the personal data under regulation 11(2) of the EIRs, but wrongly withheld information which was not personal data.
- (iii) correctly withheld information under regulation 10(5)(b) of the EIRs.

The Commissioner requires Police Scotland to disclose the information which was wrongly withheld, by **Monday, 8 August 2016**

Appeal

Should either Mr Kennedy 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 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 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.

Rosemary Agnew
Scottish Information Commissioner

22 June 2016

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 –

...

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

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements:
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

11 Personal data

...

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

- (3) The first condition is-

- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998^[6] that making the information available otherwise than under these Regulations would contravene-

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

...

- (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

...

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;

...

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 [the data subject] of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by [the data subject], the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1 – The data protection principles

Part I – The principles

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

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

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Schedule 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data

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

...

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

...

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Recital 26

Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable....

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