

# Decision Notice

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## Decision 045/2018: Miss K and the Chief Constable of the Police Service of Scotland

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### Job evaluation

Reference No: 201701629

Decision Date: 9 April 2018



Scottish Information  
Commissioner

## Summary

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Police Scotland were asked for a range of information about the job evaluation of posts in the Information Management team. They provided some information, and decided that some should be withheld under exemptions in FOISA. They stated that they did not hold some information, and that other information was available online.

Following an investigation, the Commissioner partially upheld Police Scotland's response. He accepted that some information was exempt from disclosure or not held by Police Scotland. However, he did not accept that exemptions applied to all the withheld information and required the information which was wrongly withheld to be disclosed.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 30(c) (Prejudice to effective conduct of public affairs); 38(1)(a) and (b), (2)(a)(i) and (b) and (5) (definitions of data protection principles, data subject and personal data) (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part 1 - the principles) (the first data protection principle); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

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

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1. On 5 June 2017, Miss K made a request for information to the Chief Constable of the Police Service of Scotland (Police Scotland). The information request (in summary) consisted of the following parts (part 7 has been omitted as it falls outwith the scope of the investigation):
  1. All notes taken during the Information Management job evaluation interviews;
  2. As much detail as can be provided from the electronic system which was completed during those interviews – i.e. which fields were selected and what notes were input to the system;
  3. A log of any changes made to the selections made on the day of the interview – i.e. during quality assurance etc.;
  4. The overall score for each post in IM as well as a breakdown per each of the 13 factors;
  5. The same information as outline at Q4 but for all support staff posts;
  6. The factor framework being used which details each level within the factor and the associated points available; and

8. A list of all bands (with proposed pay scales) and the proposed points bracket for each, if this was already decided.
2. Police Scotland responded on 28 June 2017. As the information contained the personal data of third parties, they considered that there was an overlap between the DPA and FOISA, and asked Miss K for her legitimate interests in this personal data.
3. On 3 July 2017, Miss K responded to Police Scotland's questions about her legitimate interests. She also asked them to conduct a review of the way they had dealt with her request.
4. Police Scotland notified Miss K of the outcome of their review on 1 August 2017. They stated that the information covered by her request was exempt from disclosure under FOISA. They applied exemptions to the information covered by each part of her request as follows:
  - Parts 1 and 2: information exempt under section 38(1)(b) of FOISA (Personal information). Police Scotland told Miss K that individuals have a right to access information held about them by making a subject access request under the DPA, and provided a weblink to their Data Protection webpage<sup>1</sup>.
  - Parts 3, 4 and 5: information exempt under section 30(c) of FOISA (Prejudice to effective conduct of public affairs);
  - Part 6: exempt under section 25(1) of FOISA (Information otherwise accessible); and
  - Part 8: Police Scotland gave notice that they did not hold the requested information, in line with section 17(1) of FOISA.
5. On 13 September 2017, Miss K applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Miss K did not agree that the exemptions had been correctly applied, and believed Police Scotland should hold the information covered by part 8 of her request.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Miss K made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 5 October 2017, Police Scotland were notified in writing that Miss K had made a valid application. Police Scotland were asked to send the Commissioner the information withheld from Miss K. Police Scotland provided the information and the case was allocated to an investigating officer.
8. On 8 November 2017, Miss K was asked to clarify aspects of the matters she wanted the Commissioner to investigate. She responded on 15 November 2017.
9. 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 any provisions of FOISA they considered applicable to the information requested, and on the searches conducted in relation to the requested information.

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<sup>1</sup> <http://www.scotland.police.uk/access-to-information/data-protection/>

10. On 5 January 2017, Police Scotland responded to the investigating officer's questions. Aspects of these submissions were clarified during the investigation.
11. During the investigation, Miss K was asked to provide details of her expectations when providing responses to the job analysts who were responsible for the job evaluation of her role.
12. On 15 February 2018, Police Scotland were asked if any of the requested information was considered to be Miss K personal data. Police Scotland confirmed that they were relying on section 38(1)(a) of FOISA to withhold Miss K's personal data that fell within scope of parts 1 and 2 of the request.
13. On 5 and 6 March 2018, Police Scotland were asked for further comments on the personal data being withheld, as it was not clear whether individuals had been named in some of the withheld documents. Police Scotland confirmed that the job holders and interviewers had been named in some of the documents in part 1 of the request and this information was considered exempt under section 38(1)(b) of FOISA.
14. On 6 March 2018, Miss K confirmed that she did not require a decision on the withholding of the names of the interviewers. Accordingly, the Commissioner has not considered whether Police Scotland were correct to withhold this information under section 38(1)(b) of FOISA.

## **Commissioner's analysis and findings**

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

### **Parts 1 and 2 of request - section 38(1)(b) – personal data of third parties**

16. Police Scotland relied on section 38(1)(b) to withhold the information covered by parts 1 and 2 of the request.
17. 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 is "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.
18. 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.
19. 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 to be found in Schedule 1 to the DPA.

#### *Is the withheld information personal data?*

20. For this exemption to apply, the withheld information must fall within the definition of "personal data" contained in section 1(1) of the DPA. The full definition is set out in Appendix 1, but it applies to data relating to a living individual who can be identified from either (a) the data themselves or (b) those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

21. Police Scotland have stated that the job evaluation process is intended to evaluate posts rather than the individuals who hold these posts. However, the evaluation process is informed by evidence supplied in interviews with post holders, and as such it reflects the experience and activities of actual post holders. Therefore, although the information from the job evaluation process relates to the post concerned, it also relates to the holder(s) of that post, as they have provided their perception of the work their role involves.
22. Police Scotland explained individual post holders would be identifiable from their job title.
23. Police Scotland also confirmed that individual post holders had been named in the questionnaires (information falling within scope of part 1 of the request). As information covered by parts 1 and 2 of the request relates to the same posts, the Commissioner accepts that it would be possible to identify the post holders for information falling within part 2 of the request, even though they are not directly named in those documents.
24. The Commissioner has considered whether the information covered by part 2 of the request would be capable of identifying individual post holders if considered on its own. He accepts that it would be possible for a determined individual to identify the post holders from their job title and other information within the documents. In any case, the identity of the post holders is known to Miss K and colleagues within the department. As such, he is satisfied that the information comprises personal data.
25. Miss K is one of the post holders who were interviewed during the job evaluation process. The information relating to her post is therefore her personal data and should be considered under section 38(1)(a) of FOISA, not section 38(1)(b). The Commissioner has considered the application of this exemption later in this decision, and has excluded information which is Miss K's own personal data from his consideration of the exemption in section 38(1)(b) of FOISA.

*Would disclosure contravene the first data protection principle?*

26. Police Scotland submitted that disclosure of the withheld personal data would breach the first data protection principle, which 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. The processing in this case would be making the information publicly available in response to Miss K's request.
27. In the case of sensitive personal data (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner is satisfied that the personal data in question are not sensitive personal data for the purposes of section 2 to the DPA, so it is not necessary for him to consider the conditions in Schedule 3.

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

28. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47<sup>2</sup>* (the CSA case) that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject (i.e. the person or persons to whom the data relate).

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<sup>2</sup> <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

29. It appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure of the personal data to Miss K. In any event, neither Miss K nor Police Scotland have suggested that any other condition would be relevant.
30. Condition 6 allows personal data to be processed if that 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.
31. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Does Miss K have a legitimate interest or interests in obtaining the personal data?
  - (ii) If so, is the disclosure necessary to achieve those legitimate interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
  - (iii) Even if the processing is necessary for Miss K's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
32. There is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Miss K must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 permits personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that Police Scotland were correct to refuse to disclose the information to Miss K.

*Does Miss K have a legitimate interest or interests?*

33. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's published guidance on section 38(1)(b) of FOISA<sup>3</sup> states:
- "In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."
34. Miss K stated that she required disclosure so that she could be appraised of all information being taken into account in reaching a decision which will impact on herself and her colleagues (and the organisation as a whole, as well as having an impact in terms of public funds).
35. Police Scotland accepted that Miss K has a legitimate interest in this information: as an individual who is subject to the ongoing job evaluation process, she has an interest in the process and may wish to ensure that the process has, and will be, conducted fairly.

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<sup>3</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

36. The Commissioner agrees that Miss K has a legitimate interest in understanding what information about her role and the roles of her colleagues had been obtained as part of the interviews and input into the electronic job evaluation system, given her involvement and interest in the job evaluation process. The Commissioner is aware that Miss K agreed with her colleagues that she should make an information request on behalf of them all, and that her legitimate interest in the information extends to information about roles other than her own..

*Is the processing necessary for the purposes of these interests?*

37. In reaching a decision on this, the Commissioner must consider whether Miss K's legitimate interests might reasonably be met by any alternative means.

38. Police Scotland did not consider that disclosure was necessary, in terms of Miss K's legitimate interests. They stated that Miss K has asked for "excessive" information relating to individuals' perception of their roles. They did not see how disclosure would assist her in relation to her own role, as it would not enable Miss K to determine whether a role had been properly evaluated or not.

39. The Commissioner has considered all of the relevant submissions that he has received on this point along with the withheld personal data (i.e. the notes and information entered into the electronic job evaluation system).

40. The Commissioner notes that, under the job evaluation process, only the post holder can bring an appeal. However, although Miss K would not personally be able to use the information for this purpose, it has been clear from the start that she intended to share any information received about other posts with her colleagues. The analysis relating to other posts would also assist her in understanding the evaluation process more fully, and in establishing whether the process was fairly undertaken.

41. The decision for the Commissioner is whether disclosure is necessary and proportionate and whether the aims of Miss K can be achieved by any other means which would interfere less with the privacy of the post holders in question. He is satisfied that disclosure of the information is necessary for the purposes of the legitimate interest identified by Miss K, and cannot identify any other way of meeting those interests.

*Would disclosure nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?*

42. Miss K considered that disclosure would not result in unwarranted prejudice to the rights and freedoms of the data subjects. She submitted that these individuals went into the process as representatives of their colleagues (i.e. other individuals with the same role), and were simply providing factual information as regards their day-to-day professional lives.

43. She commented that the questions and their answers constitute information that forms the basis of job overview documents and job descriptions (i.e. information which will be made publicly available during recruitment, etc.). The questions included: how long do you go without interruptions; where would you go for guidance; do procedures influence your decisions or do you have full autonomy?

44. Miss K submitted that when she was selected for the job evaluation process, she was encouraged to discuss her role with other post holders. She was not given any expectation that the information provided either in the questionnaire or the interview would be kept confidential.

45. Police Scotland provided the Commissioner with details of the guidance given to individuals selected to complete questionnaires and be interviewed as part of the job evaluation process. The guidance confirms that individuals selected for the job evaluation process were expected to discuss the questions and their responses with other post holders occupying the same role.

#### The Commissioner's view

46. Having reviewed the submissions from both parties, the Commissioner considers that a key factor for his decision is that roles were evaluated, not individuals' performance within those roles. The individuals selected to participate in the job evaluation process were not given any assurances that the information they provided would be kept confidential and were actively encouraged to discuss the questions and answers with other post holders.
47. The Commissioner takes the view that the withheld information relates primarily to the post, rather than the post holder, and is not markedly different from the type of information which might be included in a recruitment pack to enable job applicants to check they can offer the relevant skill set, qualifications and experience.
48. The Commissioner finds that although the withheld information is capable of allowing individual post holders to be identified, it does not contain any sensitive information about the individual. There was no expectation of confidentiality and, accordingly, he finds that disclosure would not prejudice the rights, freedoms and legitimate interests of the post holders to any significant extent. He has concluded that Miss K's legitimate interest outweighs any prejudice that might occur.
49. Being satisfied that the three tests previously set out are fulfilled, the Commissioner finds that the processing of the personal data is permitted by condition 6(1) of Schedule 2 to the DPA.
50. The Commissioner must consider whether disclosure would be otherwise unfair or unlawful.
51. The Commissioner is satisfied that disclosure would not be unfair, for the reasons outlined above in relation to condition 6(1). Given that Police Scotland have not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles), the Commissioner is satisfied that the disclosure of the data under FOISA would not breach the first data protection principle.
52. Having found that disclosure would not breach the first data protection principle and that condition 6(1) of Schedule 2 of the DPA can be met, the Commissioner does not accept that the information requested is exempt from disclosure under section 38(1)(b) of FOISA.
53. The Commissioner requires Police Scotland to provide Miss K with the information covered by parts 1 and 2 of her request, with the exception of information which is her own personal data (as explained below).

#### **Parts 1 and 2 of request - section 38(1)(a) – personal data of the applicant**

54. The Commissioner found that some information falling within parts 1 and 2 of Miss K's request related to her own post and was her personal data.
55. Police Scotland were invited to comment, and agreed that the information held about Miss K's role in parts 1 and 2 of the request was her personal data and exempt from disclosure under section 38(1)(a) of FOISA.



56. Police Scotland stated that they had previously advised Miss K to submit a subject access request under the DPA for her own personal data.
57. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test in section 2(1)(b) of FOISA.
58. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (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 their own personal data, and govern the exercise of that right. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
59. The Commissioner is satisfied that the information about Miss K's role falling within parts 1 and 2 of the request is her own personal data and therefore exempt under section 38(1)(a) of FOISA.

### **Parts 3, 4 and 5 of request – section 30(c) – Prejudice to effective conduct of public affairs**

60. Police Scotland withheld the information covered by parts 3, 4 and 5 of Miss K's request under section 30(c) of FOISA.
61. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
62. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
63. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

#### *Police Scotland's submissions*

64. Police Scotland explained that, as a result of the merger of the nine legacy organisations on 1 April 2013, an organisation emerged that has 10 different significant variances in pay and reward approaches for the same or similar roles, with 126 different pay bandings in existence and "excess 450 different interpretations of terms and conditions". They submitted that this variance creates significant equal pay liabilities for the organisation and makes the progress of the job evaluation project highly sensitive with staff and Trade Unions. It also makes the

harmonisation one of the most complex of its kind to have taken place within the public sector in Scotland.

65. Police Scotland stated that there is continued and significant dissatisfaction at the scale of the variance in pay and rewards, with strong feelings of inequality and unfairness across the staff population.
66. Police Scotland argued that the withheld information relating to parts 3, 4 and 5 of the request reflected draft and developing positions that were subject to change and were not finalised at the date of the request. They considered that disclosure of this information had to be carefully controlled to avoid harming significant and sensitive negotiations with trades unions, or harming relations with staff delivering essential services. Police Scotland stated that industrial action is considered a major risk. They argued that disclosure of the withheld information would be misleading to staff and liable to cause increased anxiety, concern and dissatisfaction about potential rather than finalised outcomes.
67. Police Scotland stated that they had engaged with staff at an individual level over the draft Job Overview Documents for quality assurance purposes. This engagement was to confirm facts and interpretations. Police Scotland believed it was inappropriate to provide draft scorings as these would be subject to change before being finalised.
68. Police Scotland stated that the finalised Job Overview Documents, Job Evaluation Outputs and scores would be shared with staff. Their main concern was that the disclosure of incomplete and misleading draft data would be harmful to the operation of public affairs, with a likely outcome of staff discontent, staff and trade union disengagement, potential industrial action and, by consequence, reduced delivery of public services and reduced levels of public confidence in the police service. Police Scotland submitted that there were statements and parameters in the Scottish Councils' Job Evaluation Scheme (SCJES) that do not directly fit with the unique nature of some organisations (presumably, including Police Scotland), and often this lack of a direct fit was not understood until the process was worked through and quality assurance exercises undertaken. Police Scotland provided an example of a factor in the framework where tailored amendments had been made to the SCJES.
69. Police Scotland argued that disclosure of draft information that was still subject of development and continued quality assurance would have a disrupting effect on the timescales for the job evaluation project and would substantially disrupt the limited number of trained staff within this business area in their day to day work on the project.

#### *Miss K's submissions*

70. In relation to part 3 of the request, Miss K considered it was important to understand where points are gained or lost in the job evaluation and the reasons behind this. She suggested that the change could be genuine or could be due to misunderstanding or misinterpretation. She challenged the view that smooth running of the system would be prejudiced by staff being better informed as to how the process worked, and considered that the opposite would be true.
71. In relation to parts 4 and 5 of her request, Miss K again argued that there is no evidence to support the view that disclosure would in any way prejudice the job evaluation process or be otherwise disruptive. She found it strange that it was considered harmful to disclose specific scores (points per category) but not bands of scores. In her request, Miss K noted that similar information had been disclosed by other organisations and provided documents to support her point. Rather than disclosure causing "fear and alarm" among staff, she

considered that the opposite was true and that the lack of information regarding the process was having that effect.

### *The Commissioner's conclusions*

72. Having reviewed the information being withheld, the Commissioner considers it is necessary to reach separate conclusions on the information covered by part 3 of the request to that relating to parts 4 and 5. The information withheld for parts 4 and 5 of the request are the scores and factor level for each of the assessed roles within the Information Management department and for all assessed support roles.

### Part 3 of request

73. For part 3 of the request, the withheld information is a spreadsheet containing the information input into the electronic job evaluation system (i.e. the same information considered in relation to part 2 of the request) and a record of any changes made. A substantial volume of the information covered by part 2 of the request forms the basis of the information withheld in relation to part 3. Police Scotland did not rely upon section 38(1)(a) or (b) of FOISA to withhold any information covered by part 3 of the request.
74. In relation to the personal data contained in the spreadsheet, the Commissioner has reached the same conclusion as he did with the information being withheld in relation to parts 1 and 2 of the request. The information is the personal data of an identifiable individual; Miss K has a legitimate interest in the withheld information; and disclosure is necessary to fulfil that legitimate interest. Disclosure would not cause unwarranted prejudice to the rights, freedoms and legitimate interests of the post holders.
75. As Police Scotland have relied upon section 30(c) to withhold this information, the Commissioner will consider whether this exemption applies.
76. The Commissioner notes the similarities and relationship between the information covered by parts 2 and 3 of the request.
77. Police Scotland have stated that they anticipate disclosure of the information would result in increased dissatisfaction and potential industrial action, but they have not provided any evidence to explain why this would be a likely outcome following disclosure of the specific information withheld in relation to part 3 of the request. As noted, there is a large overlap between the information relating to part 2 of the request and the information relating to part 3. It is also quite different in nature from the information withheld for parts 4 and 5 of the request (discussed later), to which the same arguments have been applied.
78. Furthermore, the Commissioner has been provided with no explanation as to why the disclosure of the withheld information relating to part 3 would undermine Police Scotland's negotiating position with trades unions. He notes that the withheld spreadsheet does not contain any conclusion about the roles. The Commissioner considers Police Scotland's submissions in this respect to be essentially hypothetical and conjectural.
79. Having considered the nature and content of the withheld information covered by part 3 of the request, and the submissions of both parties, the Commissioner is unable to accept that disclosure of the information under consideration would, or would be likely to, have the prejudicial effects claimed by Police Scotland.
80. The Commissioner has concluded that the exemption in section 30(c) of FOISA is not engaged in relation to the information under consideration. He is therefore not required to consider the public interest test in section 2(1)(b).

81. The Commissioner now requires Police Scotland to disclose to Miss K the spreadsheet which it withheld in relation to part 3 of her request.

*Parts 4 and 5 of the request*

82. The information being withheld with respect to parts 4 and 5 of the request is the overall score for each post and a breakdown of the levels achieved or gained by each of the factors used to evaluate the post ("the factor levels").

83. The arguments put forward by Police Scotland for withholding this information are the same as those considered above, in relation to part 3 of the request. In summary, disclosure of draft or incomplete information would be likely to lead to staff discontent, prejudice negotiations with trades unions, and possibly lead to industrial action.

84. The Commissioner accepts that, at the date of the request, the information covered by parts 4 and 5 of Miss K's request was not finalised and was subject to change as the evaluation process continued. Police Scotland has described the data as "significantly incomplete".

85. As noted above, Police Scotland did not provide any definitive evidence to support its view of the harm that would be likely to result, following disclosure. However, the Commissioner is satisfied that disclosure would be likely to result in disruption to the job evaluation process. He accepts that the job evaluation process is challenging and difficult, particularly in a complex organisation like Police Scotland. He accepts that, at the time of Miss K's request, data was still being gathered and interpreted in order to clarify each role in the organisation, including legacy positions. Police Scotland have hundreds of posts to evaluate and amalgamate into a single system.

86. The Commissioner considers that Police Scotland should be given the opportunity to evaluate each post and determine the factor levels, without the concern that such information would be disclosed prior to it being finalised. Time should be allowed for this stage to be completed and discussed with the individual post holders before disclosing the information further. Police Scotland has stated that the finalised Job Overview Documents, Job Evaluation Outputs "and scores etc" will be shared with staff later in the process.

87. The Commissioner accepts that disclosing the points and factor levels for each post is likely to result in individuals using the information to submit challenges regarding the factor levels associated with their own post, before the evaluation process reaches the appropriate stage. This would be disruptive and likely to delay the completion of Police Scotland's job evaluation process.

88. Taking all of the above into account, the Commissioner finds that disclosure of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs. The information is subject to change and the Commissioner concludes that the job evaluation process should be allowed to proceed without the disruption that disclosure of draft or incomplete information is likely to cause.

89. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

**Public interest test**

90. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of

individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

#### *Police Scotland's submissions*

91. The arguments put forward by Police Scotland focused on the public interest in avoiding the harmful consequences of disclosure, as considered above.
92. Police Scotland stated that it intends to disclose the "core aspects" of the information to staff at the stage of completion, which is anticipated for mid-2018. They submitted that disclosure before then has the potential to impact directly on the level and quality of services delivered and, by consequence, public confidence.

#### *Miss K's submissions*

93. In relation to the public interest in disclosure, Miss K argued that the job evaluation was a subject of some significance not only to staff members but to the wider public, as it was inextricably linked to public finances and the ability of the organisation to attract quality personnel by grading jobs appropriately and paying a fair salary. She said she did not understand why providing her with the points for her post was acceptable, but to provide the actual score broken down to different categories would "throw the whole process into chaos, cause 'fear and alarm' and prejudice the 'smooth running of the service'".
94. Miss K considered that the information would simply allow individuals to understand the conclusions that have been reached in relation to their posts and other posts and understand the basis upon which these decisions had been reached. She submitted that disclosure would allow staff to understand the basis upon which decisions had been reached, which could lead to a more efficient appeals process as staff would be able to challenge only those aspects with which they disagreed.
95. Miss K noted that the results of the job evaluation were to be communicated with staff mid-2018, and acknowledged that disclosure at this point would not disrupt the job evaluation process in any way.

#### *The Commissioner's conclusions*

96. The Commissioner acknowledges the general public interest in transparency and accountability, particularly where this might contribute to understanding the job evaluation process. It is also in the public interest that changes to the job gradings are based on a process that is demonstrably fair and equitable for all posts being assessed.
97. Miss K has presented persuasive arguments as to why it would be helpful to staff to be given a breakdown of the factor levels for their post, so that they can adequately prepare for discussions or appeal about the outcome of the job evaluation process and question on an informed basis whether a certain factor level is correct for their post.
98. Police Scotland has indicated that staff will be provided with this information later in 2018, when the initial stages of the job evaluation process are complete and Police Scotland have finalised the factor levels and scores. While this may not enable staff to prepare appeals and discussions before that stage, it means that any such appeals and discussions will not be based on information which is not finalised and liable to change.
99. The Commissioner notes that Miss K accepts that disclosure at a later stage would not cause disruption to the job evaluation process. However, he must consider the effects of disclosure as they would have been at the time Miss K made her request for review.

100. The Commissioner is not satisfied that it would have been in the public interest for the points and factor levels for the posts requested by Miss K to be disclosed at the time of her request for review, given the stage the job evaluation process had reached. He accepts Police Scotland's view that disclosure would have encouraged staff to challenge the factor levels awarded to a post before the decision had been finalised, and that this was likely to have disrupted and complicated the job evaluation process.
101. The public interest in the disclosure of the information must be balanced against the public interest in withholding the information. The Commissioner has accepted that, at the time of Miss K's request, disclosure would, or would have been likely to, cause substantial prejudice to the effective conduct of public affairs, because the information relates to a process still underway. Such an outcome would not be in the public interest. Although there would be some public interest in the disclosure of the information, in terms of increasing staff understanding of the process in which they were involved, the Commissioner does not consider it strong enough to outweigh the public interest in maintaining the exemption.
102. On balance, therefore, the Commissioner is of the view that the public interest in withholding the information outweighs the public interest in disclosing it.
103. The Commissioner therefore finds that Police Scotland were entitled to withhold the information relating to parts 4 and 5 of the request under section 30(c) of FOISA, at the time of Miss K's request.

#### **Part 6 of request - section 25(1) of FOISA - Information otherwise accessible**

104. In this part of the request, Miss K asked for the factor framework used as part of the job evaluation process. Police Scotland stated in their review response that this information was available online<sup>4</sup> and therefore exempt under section 25(1) of FOISA.
105. Under section 25(1) of FOISA, information which a requester can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test in section 2(1)(b) of FOISA.

#### *Police Scotland's submissions*

106. In their review response, Police Scotland explained that they were using the Third Edition of the SCJES, and confirmed that this applied to all posts under evaluation. They intended to develop "a tailored scheme application guidance" which, at the end of the job evaluation phase, would result in production and publication of a Scottish Police Authority (SPA)/Police Scotland version of the SCJES Third Edition.
107. Police Scotland explained that, in line with SCJES guidance and industry practice, the SPA/Police Scotland version of the SCJES Third Edition will be made available following development of the pay and grading structure, which is the point at which the guidance is finalised. Police Scotland stated that it is intended that all staff will have access to this finalised version along with their finalised and completed Job Overview Document and personal position data relative to Pay and Reward, and Job Evaluation, from mid-2018. They will also receive details of the formal job evaluation appeals process.

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<sup>4</sup> [http://publications.fifedirect.org.uk/c64\\_SJCJobEvaluationScheme3rdEdition.pdf](http://publications.fifedirect.org.uk/c64_SJCJobEvaluationScheme3rdEdition.pdf)

108. During the investigation, Police Scotland provided a copy of a document which provides working guidance for job analysts on the application of the factor framework to the Police Scotland job population.

*Miss K's comments*

109. In her application, Miss K stated that staff had repeatedly asked for guidance all throughout the process and were repeatedly refused. She was unclear why Police Scotland had provided a link to guidance on another organisation's website; if the guidance is publicly available, she questioned why it was not made proactively available to all staff in Police Scotland. Miss K was also unclear whether Police Scotland's response meant that they were using the publicly available version of the SCJES or a "Police" version which was yet to be finalised.

*The Commissioner's view*

110. The Commissioner asked Police Scotland to clarify which version of the SCJES they were using. Police Scotland explained that they were developing specific guidance, but that this guidance would not be finalised until the job evaluation process had completed. They confirmed that they were using the Third Edition of the SCJES, which contains guidance and framework for the application of the scheme.

111. Having considered the explanations provided by Police Scotland, the Commissioner is satisfied that they did not hold (and were not using) a completed, customised version of the SCJES at the time of Miss K's request, and the only information they held which fell to be considered under part 6 of her request was the version of the SCJES available on another organisation's website.

112. The Commissioner notes that the response issued to Miss K could have led her to understand that, at that time, Police Scotland were using a customised version of the SCJES, but is satisfied that this was not the case.

113. As Police Scotland provided Miss K with a link to the version of the SCJES which they were using, the Commissioner is satisfied that this information was reasonably obtainable by Miss K. Consequently, the Commissioner concludes that Police Scotland were entitled to withhold the information under section 25(1) of FOISA.

**Part 8 of the request - section 17 – Notice that information is not held**

114. In part 8 of her request, Miss K asked for a list of all bands (with proposed pay scales) and the proposed points bracket for each, if it had been decided.

115. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.

116. Police Scotland stated that they did not hold the information Miss K had requested. They explained that, at the time of writing, although each post had an initial score attached to it, the grading and pay structures had not yet been developed.

117. Police Scotland explained that in conducting a pay and reward harmonisation project there are a number of distinct stages to go through that follow best practice and which are

conducted in a logical order. They outlined the process to the Commissioner, summarised as follows:

- A stage of data gathering regarding legacy positions and clarification of each role in the organisation. This is followed with a stage of data interpretation to enable, at a base level, an understanding of nomenclature so that comparisons can as far as possible be made in a like for like format.
- The formal job evaluation process provides a consistent analytical assessment of each role in the organisation against an agreed framework. The outputs of this process, following quality assurance, is a ranked order of roles in the organisation with associated job evaluation scores attached.
- Pay modelling is based on the outputs of the evaluation, which are used to design a pay and grading structure for the organisation. Grading structures and proposed spinal pay points are not determined before the conclusion of the job evaluation as this would mean design, without understanding of hierarchical structure and role groupings.

118. Police Scotland confirmed that, at the time of Miss K's appeal, no pay and grading structure or proposed spinal points had been developed.

119. The Commissioner has considered Police Scotland's explanation as to why they do not hold the information sought in part 8 of the request. Having done so, the Commissioner is satisfied that Police Scotland have provided a satisfactory explanation why they did not hold the requested information at the date of the request.

120. The Commissioner finds that Police Scotland were correct to give Miss K notice, in terms of section 17(1) of FOISA, that they did not hold the information covered by part 8 of the request.



## Decision

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

The Commissioner found that Police Scotland were entitled to:

- rely upon section 38(1)(a) to withhold Miss K's personal data falling within scope of parts 1 and 2 of the request;
- rely upon section 30(c) to withhold the information requested in parts 4 and 5 of the request;
- inform Miss K that the information requested in part 6 of the request was otherwise accessible in line with section 25(1) of FOISA; and
- give Miss K notice that they did not hold the information requested in part 8 of the request, in line with section 17(1) of FOISA.

The Commissioner found that Police Scotland failed to comply with Part 1 of FOISA (and, in particular, with section 1(1)), by:

- wrongly withholding information under section 38(1)(b) of FOISA (parts 1 and 2 of the request);
- wrongly withholding information under section 30(c) of FOISA (part 3 of the request);
- failing to apply the exemption in section 38(1)(a) of FOISA to information which was Miss K's own personal data.

The Commissioner therefore requires Police Scotland to disclose the information which was wrongly withheld by **Thursday 24 May 2018**. Police Scotland is not required to disclose information which is Miss K's personal data, but should consider providing this under the terms of the Data Protection Act 1998.

## Appeal

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Should either Miss K 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**

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

**Margaret Keyse**  
**Head of Enforcement**

**9 April 2018**

### 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 –
- (a) the provision does not confer absolute exemption; and
- ...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- ...
- (e) in subsection (1) of section 38 –
- ...
- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

#### 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.

...

## **25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

## **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

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

## **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.

...

- (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;

...

# 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;

...

## 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.

to "the authority" are to be construed as references to the Scottish Ministers.

**Scottish Information Commissioner**

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