



Scottish Information
Commissioner

**Decision 054/2005 – Paul Hutcheon, The Sunday Herald and
the Chief Constable of Central Scotland Police**

*Request for names of police officers against whom race-related
complaints have been substantiated.*

**Applicant: Paul Hutcheon, The Sunday Herald
Authority: The Chief Constable of Central Scotland Police
Application: 200500547
Date of decision: 22 November 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 054/2005 – Paul Hutcheon, The Sunday Herald and the Chief Constable of Central Scotland Police

Request for the names of police officers who have had race-related complaints made against them, including the total number of complaints made against each of these officers and the number of complaints which were upheld – information withheld under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 – decision upheld by Commissioner

Facts

Mr Hutcheon requested information held by the Chief Constable of Central Scotland Police (the Chief Constable) detailing the names of police officers who, in each of the last three years, have had race-related complaints made against them, including the total number of complaints made against each of these officers in each of the last three years, as well as the number of those complaints that were upheld. The Chief Constable released all of the information requested by Mr Hutcheon, except the names of the officers. This information was withheld on the basis that the information was exempt under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Outcome

The Commissioner agreed that the information was exempt in terms of section 38(1)(b) of FOISA and accordingly found that the Chief Constable had complied with Part 1 of FOISA in withholding the names of the officers from Mr Hutcheon.

Appeal

Should either the Chief Constable or Mr Hutcheon wish to appeal this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.



Background

1. On 25 January 2005, Mr Hutcheon emailed the Chief Constable requesting the names of the police officers who, in each of the last three years, have had race-related complaints made against them, including the total number of complaints made against each of these officers in each of the last three years and the number of those complaints upheld.
2. On 1 February 2005, the Chief Constable responded by email to Mr Hutcheon advising him that he would release all of the information requested other than the names of the officers concerned on the basis that the names of the individual officers were exempt from release under section 38(1)(b) of FOISA.
3. Later the same day, Mr Hutcheon emailed the Chief Constable requesting a review of the decision not to release the names of the officers. He also asked him to release the total number of complaints made against each officer. Mr Hutcheon was advised the following day that none of the officers were the subject of more than one complaint.
4. On 4 February 2005, the Chief Constable confirmed to Mr Hutcheon that, on review, the decision not to release the names of the officers had been upheld.
5. On 14 February 2005, Mr Hutcheon emailed the Commissioner and asked him to investigate the matter. The case was subsequently allocated to an Investigating Officer within my Office.

The Investigation

6. Mr Hutcheon's appeal was validated by establishing that he had made a request under FOISA to a Scottish public authority (i.e. the Chief Constable) and had appealed to me only after asking the authority to review its response to his request.
7. A letter was sent to the Chief Constable on 17 February 2005, confirming that a valid request had been received and asking, amongst other matters, for comments from the Chief Constable in line with section 49(3)(a) of FOISA.



8. In response, the Chief Constable confirmed that the exemption being relied on to withhold the information is the exemption in section 38(1)(b) of FOISA as read in conjunction with section 38(2)(a)(ii). This particular exemption allows third party personal data to be withheld if the release of the data to a member of the public would contravene section 10 of the Data Protection Act 1998 (the DPA). The exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(ii), is subject to the public interest test.
9. Under section 10 of the DPA, a notice (commonly known as a Section 10 Notice) can be issued by an individual requiring a data controller to stop processing data about that individual if the processing of the data is causing, or is likely to cause, the data subject or another person unwarranted substantial damage or distress.
10. The data controller in this case is the Chief Constable. Releasing information as a result of a request having been made under FOISA is considered to be processing under the terms of the DPA. A Section 10 Notice needs to be accepted by the data controller before it stops processing the information about the individual. Guidance from the Information Commissioner's Office (ICO) states that a Section 10 Notice should be complied with unless there is some overriding justification for the processing.
11. A letter was sent to the Chief Constable on 11 March 2005, asking him to confirm whether he had received any Section 10 Notices from the individuals about whom the information had been requested. Copies of the Section 10 Notices were subsequently provided to my Office. I note that, at the time of the request, no Section 10 Notices had been submitted to the Chief Constable but that, as a result of the request by Mr Hutcheon, all of the officers involved had submitted Section 10 Notices which were subsequently accepted by the Chief Constable.
12. On 5 April 2005, Mr Hutcheon contacted my Office to confirm that he wished to restrict his request for information to the names of the individuals against whom complaints had been substantiated. This narrowed the scope of the investigation to the consideration of whether the names of two police officers should be revealed to Mr Hutcheon.

The Commissioner's Analysis and Findings

13. The Chief Constable has relied on the exemption in section 38(1)(b) read in conjunction with section 38(2)(a)(ii) to withhold the information the names of the two officers from Mr Hutcheon.



14. The first question to consider is whether the information requested constitutes personal data as defined by the DPA. "Personal data" is defined in section 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...*

15. I am satisfied that the names of the two constables, together with the fact that race related complaints have been upheld against them, are personal data.
16. I am also satisfied that by releasing this data the Chief Constable would breach section 10 of the DPA, given that Section 10 Notices have been served on and have been accepted by the Chief Constable. As a result, I find that the exemption in section 38(1)(b) applies to this information. However, as mentioned above, this particular exemption is subject to the public interest test, which means that even if the exemption is satisfied, the information should still be released unless the public interest in disclosing the information is outweighed by the public interest in withholding the information.

Consideration of the public interest test

17. In considering whether the exemption can be applied to the information which has been requested, I must consider the public interest in favour of releasing the information and the public interest in favour of withholding the information.
18. In considering whether to release the information to Mr Hutcheon, the Chief Constable gave consideration to the public interest test, as he is required to do by virtue of section 16(2) of FOISA.
19. The arguments presented by the Chief Constable in favour of release were:
- public concern
 - accountability and
 - openness and transparency.
20. The arguments presented by the Chief Constable against disclosure included the following:
- the processing of information would be likely to cause harm, upset or anguish of a real nature to the individuals and to their families
 - the information could be misconstrued to the detriment of the individuals concerned
 - the individuals have not been convicted or prosecuted of a criminal offence



- there is no evidence of public concern or disquiet regarding the handling of race-related incidents and the methods used
 - neither officer has been the subject of a complaint of racially discriminatory behaviour from a member of the public, as both complaints were internal and
 - to disclose information which relates to internal disciplinary proceedings would expose police officers and, by extension, all public sector employees to a discriminatory regime whereby, unlike private sector employees, they would be at risk of having their name and the nature of the complaint released into the public domain.
21. Mr Hutcheon was also given an opportunity to present his arguments in relation to the consideration of the public interest test, but he chose not to do so.
22. FOISA does not define 'in the public interest'. However, in considering the public interest test, I need to consider not what is *of* interest to the public but what is *in* the interest of the public. What is in the public interest will change over time. It is clear that any consideration of the public interest involves a balancing act. If the balance is equally in favour of and against release, my decision must be to release the information.
23. The Chief Constable has argued that the names of the two individuals should not be released as the police officers would be exposed to a discriminatory regime, whereby names of public sector employees would be made available in circumstances where the names of private sector employees would be kept private. While I appreciate the point which the Chief Constable is making here, I believe that members of the public sector and, in particular, members of the uniformed services hold a very different position in society to those in the private sector.
24. I note the comment made by the Chief Constable that the disclosure of the information is likely to cause distress to the individuals involved. In the circumstances, I am not entirely sympathetic to the fact that the release of the names could cause distress to the officers.
25. I need to consider whether the release of these names is in the public interest in this particular case or more generally. There is nothing to suggest that there are specific circumstances which require the release of these particular officers' names in respect of the nature of the incidents, the manner in which the complaints were dealt with or the seniority of those involved.



26. More generally it could be argued that the release of the names would indicate that the consequences of inappropriate or offensive behaviour are significant, and would act as a deterrent to others. Equally, however, it could be argued that this could deter employees from making complaints to management about the inappropriate behaviour of colleagues. I think it is particularly important to note that in both cases the disciplinary action taken against the police officers stemmed from an internal complaint by a colleague. I am concerned that ordering the release of the names of the officers involved would reduce the likelihood of such complaints being made in the future. Clearly, it is important that a matter as important as race relations within the police force can continue to be considered and addressed by the Chief Constable.
27. The Information Commissioner, who is responsible for enforcing and regulating the DPA, has issued guidance on the release of personal data about employees of public authorities under freedom of information (Freedom of Information Act Awareness Guidance No 1). Although the guidance from the Commissioner relates to circumstances where the release of personal data would breach the data protection principles, rather than where there would be a breach of section 10 of the DPA (as in this case), the guidance is still relevant in considering where the public interest would lie.
28. In his guidance, the Information Commissioner recognises that an issue which will often arise is whether the DPA prevents the disclosure of information identifying members of staff. If the information consists of the names of officials, their grades, job functions or decisions which they have made in their official capacities, then disclosure would normally be made. On the other hand, information such as home addresses or internal disciplinary matters would not normally be disclosed. The Information Commissioner also points out that it may be relevant to consider the seniority of staff: the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.
29. In my view, the information requested concerns internal disciplinary matters (related to internal complaints) and from details which have been provided to me by the Chief Constable, I am satisfied that the officers involved were not sufficiently senior to warrant the releasing of their names.
30. On balance, therefore, I am not satisfied that the public interest in withholding the information is outweighed by the public interest in releasing the information.



Decision

I find that the Chief Constable complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding from Mr Hutcheon the names of the two police officers against whom race related complaints have been substantiated.

Kevin Dunion
Scottish Information Commissioner
22 November 2005