

# Decision Notice



Decision 027/2013 Ms R and the Chief Constable of Tayside Police

Disposal of court case

Reference No: 201202183

Decision Date: 22 February 2013

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

Ms R asked the Chief Constable of Tayside Police (Tayside Police) about the outcome of a court case. Tayside Police refused to confirm or deny whether they held any information about the outcome of the case.

During the investigation, Tayside Police confirmed to Ms R that they held the information, but advised that they were withholding the information as it was the individual's personal data and its disclosure would be unlawful. After investigation, the Commissioner found that Tayside Police were entitled to withhold the information on this basis.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 18(1) (Further provision as respects responses to requests); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

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

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

## Background

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1. On 30 August 2012, Ms R wrote to Tayside Police. She attached a copy of her letter to her landlord concerning the alleged anti-social behaviour of a named person, referring to conduct of a criminal nature. Ms R also attached court reports, which she indicated were "published by the Courier Newspaper and, therefore, constitute information which is fully accessible to the public." She explained that she had forwarded the court reports – which related to the named person – to her landlord, who had expressed an interest in respect of certain allegations.



2. Ms R noted that the published court report did not provide any information on the conclusion and disposal of the case. Her landlord had suggested that such information would be beneficial in the process of considering her complaint, and Ms R therefore requested “additional information relating to the outcome of the case” from Tayside Police.
3. Tayside Police responded on 3 September 2012. They explained that it was important to highlight that FOISA was “applicant-blind” and that a public authority was therefore required to process requests for information without consideration of the identity or status of the applicant. Tayside Police responded that, in accordance with section 18 of FOISA, they could neither confirm nor deny that they held the information Ms R had requested.
4. On 5 September 2012, Ms R wrote to Tayside Police requesting a review of their decision. She commented that the information she had requested was routinely published by the media and therefore constituted information which was fully accessible to the public.
5. Tayside Police notified Ms R of the outcome of their review on 3 October 2012. They confirmed their initial decision that section 18 of FOISA applied, while also explaining that they worked in conjunction with various housing associations in an attempt to tackle crime and anti-social behaviour. As part of this process, they shared relevant information with the housing associations as appropriate: the existence of this process, in their opinion, further strengthened the decision neither to confirm nor deny whether they held the requested information.
6. On 24 October 2012 Ms R wrote to the Commissioner, stating that she was dissatisfied with the outcome of Tayside Police’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Ms R had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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8. The investigating officer subsequently contacted Tayside Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, Tayside Police were asked to justify their reliance on section 18 of FOISA.
9. During the investigation, Tayside Police accepted that, as the named individual’s name and case details were already in the public domain via newspaper reports, it was not unreasonable to expect that Tayside Police would hold information on the outcome of the relevant court case. They therefore confirmed that the information was held.



10. However, they went on to refuse to provide the information, citing the exemptions in sections 34(1)(a) and (b), 35(1)(a) and (b), and 38(1)(b) of FOISA. Tayside Police were of the view that the information was the sensitive personal data of the named individual. Tayside Police conveyed this view to Ms R by an email of 15 February 2013.
11. The relevant submissions received from both Tayside Police and Ms R will be considered fully in the Commissioner's analysis and findings below.

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

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12. In coming to a decision on this matter, the Commissioner has considered all the submissions made to her by both Ms R and Tayside Police and is satisfied that no matter of relevance has been overlooked.

#### **Section 18 of FOISA**

13. Tayside Police initially gave reasons why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held, in terms of section 18 of FOISA. However, as stated above, during the investigation Tayside Police revised their view and indicated that they no longer wished to rely on section 18.
14. In the circumstances, the Commissioner finds that Tayside Police were not entitled to apply section 18 of FOISA in dealing with Ms R's request.

#### **Section 38(1)(b)**

15. Tayside Police applied the exemption in section 38(1)(b) of FOISA to the information. Section 38(1)(b), 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.
16. In order to rely on this exemption, therefore, Tayside Police must show, firstly, that the information being withheld is personal data for the purposes of the DPA, and secondly that disclosure of the information 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.

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

17. Personal data is 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).

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18. Tayside Police applied the exemption to the outcome of a specified case for a named individual. Having considered this information, the Commissioner is satisfied that it is the personal data of that individual. It is possible to identify the individual from the data themselves. The withheld information clearly relates to the individual and the Commissioner is satisfied that it is their personal data.

*Would disclosure contravene the first data protection principle?*

19. In their submissions, Tayside Police have argued that disclosure of the information would contravene the first data protection principle.
20. 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 under consideration in this case is disclosure of the personal data into the public domain in response to Ms R's information request.
21. Tayside Police submitted that the information would fall under the definition of "sensitive personal data" in terms of section 2(g) and (h) of the DPA.
22. Section 2(g) includes within the definition of "sensitive personal data" personal data "consisting of information as to the commission or alleged commission by [the data subject] of any offence", while section 2(h) brings within the definition personal data "consisting of information as to 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."
23. Having considered these definitions of sensitive personal data, the Commissioner agrees with Tayside Police that the information requested by Ms R is sensitive personal data.
24. Given the additional restrictions surrounding the disclosure of sensitive personal data, it makes sense to look at whether there are any conditions in Schedule 3 which would permit the data to be disclosed, before considering the Schedule 2 conditions.

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

25. 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, and the Commissioner has therefore considered the additional conditions for processing sensitive personal data contained in secondary legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000. None of these are applicable in this case.



26. The Commissioner's guidance<sup>1</sup> on the section 38 exemption 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:
- the data subject has given explicit consent to the release of the information (condition 1); or
  - the information contained in the personal data has been made public as a result of steps taken deliberately by the data subject (condition 5).
27. The Commissioner accepts that the data subject has not given explicit consent to the release of the withheld information and, given the subject matter, she would not expect Tayside Police to attempt to obtain such consent. Consequently, she is satisfied that condition 1 in Schedule 3 cannot be met in this case.
28. Similarly, from the information available to her, the Commissioner is unable to conclude that condition 5 in Schedule 3 could be met in this case.
29. Having also considered the other conditions in Schedule 3, and (as indicated above) 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. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.
30. In light of the above, the Commissioner is not required to consider whether the information is also exempt from disclosure under sections 34 or 35 of FOISA.

## DECISION

The Commissioner finds that Tayside Police failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms R. The Commissioner finds that Tayside Police were not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the requested information existed or was held by them.

However, the Commissioner finds that Tayside Police were correct to apply the exemption in section 38(1)(b) of FOISA to the information requested. Given that Tayside Police responded to Ms R during the investigation by issuing a refusal notice to that effect, in line with the requirements of section 16 of FOISA, the Commissioner does not require Tayside Police to take any action in response to the failure identified above.

<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



## Appeal

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Should either Ms R or the Chief Constable of Tayside Police wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Margaret Keyse**  
**Head of Enforcement**  
**22 February 2013**



## Appendix

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### 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 –

- (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.

##### 18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.





...

**38 Personal information**

(1) Information is exempt information if it constitutes-

...

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

...

(2) The first condition is-

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

(i) any of the data protection principles; or

...

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

...

(5) In this section-

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

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

...



## 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 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.  
...