

Decision Notice



Decision 106/2014 Mr Rob Edwards and the Chief Constable of the Police
Service of Scotland

Arrest of two filmmakers: Menie Estate

Reference No: 201300452
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www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

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Summary

On 31 October 2012, Mr Edwards asked the Chief Constable of Police Scotland (the Police) for information about the arrest of two filmmakers at the Menie Estate. The Police withheld the information on the basis that it was exempt under FOISA.

The Commissioner investigated Mr Edward's application. During the investigation, the Police disclosed further information. Following the investigation, the Commissioner found that the Police were entitled to withhold the remaining information under sections 34(1) and 38(1)(b) of FOISA as it comprised, respectively, information held by the Police for the purposes of a criminal investigation, and personal data, disclosure of which would breach the first data protection principle.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 34(1)(a) and (b); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "the 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"); section 2(g) and (h) (Sensitive personal data); Schedule 1 (The data protection principles) (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(1)) and Schedule 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 Appendix 1 to this decision. Both Appendices form part of this decision.

Note: Mr Edward's request was made to the Chief Constable of Grampian Police. However, the decision has been issued in the name of the Chief Constable of the Police Service of Scotland as the statutory successor to the Chief Constable of Grampian Police under the Police and Fire Reform (Scotland) Act 2012. Both chief constables are referred to in this decision as "the Police".



Background

1. In 2010, two documentary filmmakers, Anthony Baxter and Richard Phinney (the filmmakers), were arrested for breach of the peace after the Trump Organization accused them of entering its offices on Menie Estate, Aberdeenshire and filming documents without permission. The filmmakers denied the allegations against them.
2. The filmmakers' documentary, "You've Been Trumped" was released in 2011 and was shown on BBC2 in October 2012. A number of complaints were made to the Police in relation to the arrest. Northern Constabulary also undertook an internal investigation into Grampian Police's actions.
3. On 31 October 2012, Mr Edwards wrote to the Police, requesting all information held relating to the arrest of the filmmakers, their subsequent complaint and their documentary. He made it clear that he did not want any information which was already in the public domain.
4. The Police responded to Mr Edward's request on 12 December 2012. They confirmed they held information falling within the scope of his request, but they considered the information to be exempt from disclosure, relying on the exemptions under
 - (i) section 34(1) of FOISA as it related to information held for the purposes of conducting an investigation, and
 - (ii) section 38(1)(b) of FOISA to withhold the information they considered to be the sensitive personal data of the two filmmakers.
5. On 9 January 2013, Mr Edwards wrote to the Police requesting a review of their decision as he did not agree that the exemptions applied. Mr Edwards commented that:
 - (i) the charges against the filmmakers had been dropped, so the information could be released.
 - (ii) disclosure would not infringe the filmmakers' privacy, given that their arrest had already been the subject of reports in the media.
 - (iii) the filmmakers would consent to the information being disclosed.
6. The Police notified Mr Edwards of the outcome of their review on 11 February 2013. They confirmed their original decision.
7. On 12 February 2013, Mr Edwards wrote to the Commissioner, stating that he was dissatisfied with the outcome of the review by the Police and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Edwards provided reasons for his dissatisfaction. These are addressed below.



8. The application was validated by establishing that Mr Edwards made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

9. On 13 February 2013, the Police were notified in writing that an application had been received from Mr Edwards and were asked to provide the Commissioner with the information withheld from him. The Police responded, provided the information and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Police, providing them with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA).
11. On 7 August 2013, following discussions between the investigating officer and the Police, the Police provided Mr Edwards with four documents which fell within the scope of his request, and which they originally withheld. The Police confirmed they were continuing to rely on the exemptions in section 34(1) and 38(1)(b) to withhold the remaining information.
12. The Commissioner notes that part of one of the documents disclosed to Mr Edwards forms part of one of the other documents which has been withheld. Given that the information in question has already been disclosed, the Commissioner has not considered it further.

Commissioner's analysis and findings

13. In coming to a decision, the Commissioner has considered the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Edwards and the Police. She is satisfied that no matter of relevance has been overlooked.
14. As noted above, Mr Edwards' request was for unpublished information. Having reviewed document 27, the Commissioner notes that this is already in the public domain. As such, she does not consider that this falls within the scope of the Mr Edwards' request. This document is not considered further in this decision.¹

Section 34(1)(a) and (b) of FOISA

15. The Police withheld most of the documents (see Appendix 2) on the basis that they were exempt from disclosure under both sections 34(1)(a) and (b) of FOISA. These exemptions are set out in full in Appendix 1. Generally, they allow authorities which are required to carry out

¹ <http://freepdhosting.com/ba2762d5cd.pdf>



investigations to ascertain whether someone should be prosecuted for an offence, to withhold the information held for the purposes of the investigation.

16. These are class-based exemptions. In other words, provided the information falls within the description in the exemptions, it will be exempt from disclosure. There is no harm test to be passed before the exemptions are engaged.
17. It is also worth noting that the exemptions in section 34(1)(a) and (b) apply to information held "at any time" for the purposes of a relevant investigation. In other words, even if the investigation is at an end the exemptions continue to apply. The Commissioner understands this to be the case here.
18. However, these exemptions are subject to the public interest test in section 2(1)(b) of FOISA. This means that, even if the exemptions are engaged, the information must be disclosed unless the public interest in withholding it (i.e. in maintaining the exemptions) outweighs that in disclosing it.
19. The Police told the Commissioner that the information they hold relates to an investigation into an alleged breach of the peace at the Menie Estate. The purpose of the investigation was to determine whether the filmmakers should be prosecuted for an offence, and whether a report should be submitted to the procurator fiscal in regard to the alleged offence.
20. The Police noted that some of the information withheld under the exemptions in section 34(1) does not appear to focus on the investigation, particularly the information relating to subsequent media coverage. However, the Police argued that these documents contain information about the criminal investigation, even if their focus is different: this included information describing the alleged incident at the Menie Estate, the progress of criminal proceedings and the final disposals by the procurator fiscal.
21. Having viewed the information, the Commissioner considers that the Police have interpreted the exemptions in section 34(1)(a) and (b) too widely. She is not satisfied that all of the information which has been withheld is information held for the purpose of an investigation envisaged by either section 34(1)(a) or (b). The Commissioner considers that information is held for other purposes, such as for responding to a (non-criminal) complaint made to the Police; for the purpose of responding to press statements and in relation to the public screening of the documentary. As such, the Commissioner does not consider that the exemptions apply to this information. (All of this information has also been withheld under the exemption in section 38(1)(b), and this is considered below.)
22. Appendix 2 lists the documents which the Commissioner considers to be caught by the exemptions in both section 34(1)(a) and (b). As the exemption applies to withheld information, she is required to consider the public interest test in section 2(1)(b) of FOISA in relation to that information.



Public interest arguments: Mr Edwards

23. Mr Edwards argued that the public interest lay in disclosing the information, given that the information is no longer held as part of an active investigation and charges have been dropped. Mr Edwards noted that there was widespread public and political interest in the arrest of the filmmakers following the arrest (as a result of the documentary film broadcast on BBC2).
24. Mr Edwards also argued that there is a huge public interest in knowing more about the way in which the Police handled the arrest and subsequent events. In Mr Edwards' view, this calls into question the Police's decision to withhold the information.

Public interest arguments: the Police

25. The Police agreed that it is in the public interest for people to understand how decisions are made by senior police officers in relation to specific types of incidents, given that this would allow for more full and accurate public debate.
26. The Police also recognised that it is in the public interest for the Police to be accountable for their actions and that disclosure of the information Mr Edwards has asked for would contribute to transparency.
27. On the other hand, the Police were concerned that providing detailed information about how some decisions are reached and the frank discussions that take place about such matters would lead to future discussions not being recorded. This would compromise the way that dynamic matters are handled by the Police, ultimately damaging their ability to deal with such situations. In the view of the Police, this would not be in the public interest.
28. The Police also argued that disclosure would inhibit individuals from coming forward with information, for fear that the information they gave would later be placed in the public domain. This would, in the Police's view, ultimately have a negative effect on their ability to prevent and detect crime and to keep communities safe.
29. On balance, the Police considered that the public interest lay in maintaining the exemptions. They commented that, although the factors in favour of disclosure are strong, the adverse consequences of releasing the information are compelling. The reduction in the Police's ability to prevent crime, ensure public safety and conduct thorough investigations would have a very negative impact on the community.
30. The Police noted Mr Edwards' belief that a far greater weight should have been given to the public interest in accountability, given the level of interest in the incident shown by the members of the public who saw the documentary and by the politicians involved in the debates surrounding the development of the Menie Estate. The Police commented that a higher level of interest had been shown in relation to this alleged breach of the peace than in relation to almost all other allegations of a similar nature made to Grampian Police. According to the Police, they made considerable efforts to respond to these concerns, sending a full and frank reply to each person who had watched the film and subsequently made a complaint. Those



replies included the conclusions of the independent review by Northern Constabulary of Grampian Police's actions in respect of the Menie Estate development. The Police considered that this had gone a long way to satisfying the public interest in the disclosure of the information.

31. The Police also noted that Mr Edwards believed that the information could be disclosed, given that it is no longer held as part of an active investigation. However, despite the passage of time, the Police argued that disclosure would still have a detrimental effect on their investigatory and criminal justice processes. The Police referred the Commissioner to *Decision 071/2013 Russell Findlay and the Chief Constable of the Police Service of Scotland*, which involved a request for details of all unsolved murders in the Strathclyde area.² In that case, the Commissioner agreed that the information Mr Findlay had asked for was exempt under section 34(1)(a) of FOISA and that, in that case, the public interest lay in maintaining the exemption.

Public interest: the Commissioner's conclusion

32. As in *Decision 071/2013*, the Commissioner accepts that section 34(1) of FOISA reflects an inherent public interest in ensuring the proper and effective conduct of police investigations (and of investigations of a similar nature). This highlights the public interest in ensuring that the various investigatory processes making up the criminal justice system are not hampered in any way.
33. The Commissioner is not persuaded by the arguments in relation to record keeping put forward by the Police. However, she is satisfied that there is a genuine risk that disclosure of the information requested by Mr Edwards (and which she has found to be exempt under section 34(1)(a) and (b)) would inhibit individuals from providing information to the Police, whether as witnesses or victims, for fear that the information they provide could be disclosed at a later date. This would compromise the investigatory processes required to pursue crimes and would not be in the public interest.
34. Having considered carefully the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure of the information which she has found to be exempt under section 34(1)(a) and (b) of FOISA is significant enough to outweigh that in withholding the information in question. The Commissioner therefore concludes that the Police were entitled to maintain the exemption.

Section 38(1)(b) of FOISA

35. The Police withheld all of the information falling within the scope of Mr Edwards' request under the exemption in section 38(1)(b) of FOISA, on the basis that the information is personal data for the purposes of the DPA and that disclosure of this information would contravene the first data protection principle.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201202319.aspx>



36. The Commissioner will consider whether this exemption applies to all of the information withheld from Mr Edwards, with the exception of the information in document 27, which falls outwith the scope of the request, and in the documents which the Commissioner has found to be exempt under section 34(1)(a) (see Appendix 2).
37. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b) (as appropriate), exempts personal data from disclosure where its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles in Schedule 1 to the DPA.
38. The Commissioner must first determine whether the withheld information is personal data as defined in section 1(1) of the DPA. Where she is satisfied that information is personal data, she must then consider whether disclosure of the information would breach any of the data protection principles.

Is the information under consideration personal data?

39. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller" (the full definition is set out in Appendix 1).
40. The Commissioner has considered the submissions received from the Police on this point, along with the withheld information. In the circumstances, she is satisfied that the information relates to living individuals who could be identified from those data. The information focuses on the criminal investigation into the actions of the filmmakers and subsequent complaints made about their arrest and clearly relates to them.
41. The information also relates to a number of other individuals who can be identified from the documents, such as members of the public who contacted the Police to complain about the arrests of the filmmakers. The Commissioner is satisfied that the information is also those individuals' personal data, as defined by section 1(1) of the DPA.

Is the information under consideration sensitive personal data

42. The Police submitted that most of the withheld information is sensitive personal data, because it related to criminal investigations.
43. Under section 2 of the DPA, some types of personal data are "sensitive personal data". This type of data is afforded additional protection under the DPA. Sensitive personal data includes personal data consisting of information as to the commission or alleged commission of any offence (section 2(g)) and as to any proceedings for any offence committed or alleged to have been committed, the disposal of such proceedings or the sentence of any court in such proceedings (section 2(h)).



44. The Commissioner is satisfied that the information in the following documents under consideration comprises sensitive personal data for the purposes of section 2(g) and/or (h) of the DPA: 2, 9, 11, 14, 16, 17, 19, 20, 23, 26 and 31.
45. The Commissioner will now consider whether disclosure of the personal data would breach the first data protection principle, as the Police have argued.

Would disclosure breach the first data protection principle?

46. The first data protection principle requires 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. "Processing" here means disclosing the personal data into the public domain in response to Mr Edward's information request.
47. The Commissioner considered this in respect of both sensitive and non-sensitive personal data.

Withheld sensitive personal data

48. As so much of the withheld information is sensitive personal data for the purposes of the DPA, and given the additional restrictions on disclosing this type of personal data, the Commissioner will first consider whether there are any conditions in schedule 3 to the DPA which would allow the data to be disclosed.
49. The conditions listed in schedule 3 to the DPA have been considered by the Commissioner, as have the additional conditions for processing sensitive personal data contained in legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000.
50. The Commissioner's guidance on section 38(1)(b)³ notes that the conditions in Schedule 3 are very restrictive in nature and that, generally, only the first and fifth conditions are likely to be relevant when considering a request for sensitive personal data under FOISA.
51. **Condition 1** allows sensitive personal data to be processed where the data subject has given explicit consent to the processing.
52. In his application, Mr Edwards informed the Commissioner that the two filmmakers had told him that they would have no objections to the information he had requested being released.
53. For condition 1 of Schedule 3 to apply, consent must be explicit. According to guidance issued by the (UK) Information Commissioner, who regulates the DPA throughout the UK, consent must be freely given, specific and informed.⁴ The guidance goes on to say that, when dealing with sensitive personal data, the individual's consent should be absolutely clear and should cover the specific processing details, the type of information (or even the specific

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

⁴ http://ico.org.uk/for_organisations/data_protection/the_guide/conditions_for_processing#consent



information), the purposes of the processing and any special aspects that may affect the individual.

54. Although the filmmakers told Mr Edwards that they would have no objections to the information being released to him, the Commissioner does not consider that this is sufficient to denote “explicit” consent in terms of condition 1 of Schedule 3 to the DPA. The Commissioner understands that, at least at the time he made his application, the filmmakers were in the process of making their own information requests to the Police (the Commissioner presumes that this is a reference to subject access requests being made under section 7 of the DPA as opposed to information requests being made under section 1 of FOISA). This suggests strongly that the filmmakers were not fully aware of all of the personal data held about them. That being the case, they would therefore not be in a position to give explicit consent to their personal data being disclosed into the public domain.
55. Given that no explicit consent exists, the Commissioner has concluded that condition 1 of Schedule 3 cannot be met.
56. **Condition 5** allows sensitive personal data to be processed where information contained in the personal data has been made public as a result of steps deliberately taken by the data subject. In this case the filmmakers would need to have taken steps to make the information public. Although, as the Police noted, some of the personal data may have been published, Mr Edwards’ request specifically is only for information which is not in the public domain. Consequently, condition 5 cannot apply.
57. Having reached these conclusions, and also having concluded that no other condition in Schedule 3 applies in the circumstances of this case, the Commissioner finds that there are no conditions in Schedule 3 which would allow the sensitive personal data to be disclosed.
58. In the absence of a condition in Schedule 3 permitting the sensitive personal data to be disclosed, the Commissioner must find that disclosure would be unfair. In the absence of such a condition, disclosure would also be unlawful. Consequently, disclosure of the information contained in the documents listed in paragraph 44 would contravene the first data protection principle. The information is therefore exempt from disclosure under section 38(1)(b) of FOISA.

Withheld non-sensitive personal data

59. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA which would permit the withheld non-sensitive personal data to be disclosed. The Commissioner will consider the non-sensitive personal data in documents 1, 4, 8, 10, 12, 13, 21 and 28. These documents generally deal with the second part of Mr Edwards’ request, i.e. the subsequent complaint and documentary, rather than with the investigation of the alleged offence.
60. In the circumstances, the Commissioner considers that condition 6 in Schedule 2 to the DPA is the only condition which might permit disclosure to Mr Edwards. Mr Edwards has not argued that any other condition in schedule 2 would be relevant.



61. Condition 6 allows personal data to be processed if 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 (the individual(s) to whom the data relate).
62. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Mr Edwards pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing involved necessary for the purposes of those 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 subject?
 - (iii) Even if the processing is necessary for Mr Edwards's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
63. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Mr Edwards must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Police were correct to refuse to disclose the personal data to Mr Edwards.

Is Mr Edwards pursuing a legitimate interest or interests?

64. Mr Edwards emphasised the public interest in knowing more about what happened as a result of the arrests.
65. The Police acknowledged that the arrest of the filmmakers was a high profile incident which triggered considerable media interest and public debate on the relationship between public authorities (including themselves) and the stakeholders in the Menie Estate development. They considered that Mr Edwards had a legitimate interest in the information.
66. The Commissioner accepts that Mr Edwards is pursuing a legitimate interest.

Is the processing involved necessary for the purposes of those interests?

67. The Commissioner must now consider whether disclosure of the (non-sensitive) personal data is necessary for the purposes of Mr Edwards' legitimate interests she has identified. This will include considering whether these interests might reasonably be met by any alternative means.
68. The Police argued that disclosure of the personal data was not necessary. The Police referred to the information they had already disclosed, in the light of the interest in this case, e.g. correspondence with elected members and members of the public and the conclusions of an



independent review by Northern Constabulary. In their view, this reduced the need to disclose additional information.

69. In his application, Mr Edwards expressed dissatisfaction with the Police's refusal to disclose the information, given how much was already known as a result of the documentary by the filmmakers. Mr Edwards also suggested that the filmmakers would have no objection to the information being disclosed if the Police were to ask them.
70. The Police did not ask the filmmakers for their consent to disclose their personal data as it is not their normal practice to do so. The Commissioner accepts that it would not have been reasonable to expect the Police to seek consent from the data subjects in the circumstances, particularly given that so much of the information could also be exempt from disclosure under section 34(1) of FOISA.
71. In any event, the documents contain personal data relating to parties other than the filmmakers, e.g. members of the public who contacted the Police in relation to the arrest. In the Police's view, there would be no expectation on the behalf of these third parties that their personal data would be made public.
72. Having considered carefully the withheld information, it is the view of the Commissioner that disclosure of this information is necessary to achieve Mr Edward's legitimate interests. Mr Edwards (and the wider public) could not be expected to access the correspondence the police entered into regarding the subject matter in hand. Also, as the police themselves recognised, Mr Edwards could not be expected to access anything within the scope of his request which remained unpublished (i.e. the database records, internal emails, memos, notes etc).

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

73. The Commissioner considered the rights, freedoms and legitimate interest of the data subjects; i.e. the third parties and the filmmakers.
74. The focus of this withheld information is the investigation of the two filmmakers and subsequent complaints to the police for the purpose of the administration of justice. It is clear the fact that the filmmakers were arrested was public knowledge and that the filmmakers released some details about themselves in the process. That said, the Commissioner is mindful that there is no evidence that any of the third parties or filmmakers either expected or gave their consent for the actual information being withheld in this case to be made public at the time of Mr Edwards' request, despite Mr Edwards comments that the Filmmakers may be open to this possibility.
75. The legitimate interests of Mr Edwards must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. The Commissioner does not consider that Mr Edwards' legitimate interests here outweigh those of the filmmakers and the third parties involved.

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76. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data (including the sensitive personal data) under consideration. In the absence of a condition permitting disclosure, that disclosure would be unlawful.
77. 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.

DECISION

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

She finds the Police breached section 1 of FOISA by initially withholding from Mr Edwards four documents which they disclosed during the investigation.

She also finds that the Police were wrong to apply the exemptions in sections 34(1)(a) and (b) of FOISA to much of the information withheld from Mr Edwards. However, this information is exempt from disclosure under section 38(1)(b) of FOISA.

The Commissioner does not require the Police to take any action in relation to this decision.

Appeal

Should either Mr Edwards or the Chief Constable of 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.

Rosemary Agnew
Scottish Information Commissioner
14 May 2014



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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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.

...

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of –

- (a) an investigation which the authority has a duty to conduct to ascertain whether a person –
 - (i) should be prosecuted for an offence; or



- (ii) prosecuted for an offence is guilty of it;
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
- ...

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 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.

Appendix 2

Schedule of documents

REF.	S.34(1)(a)/(b) APPLIED?	OUTCOME	S.38(1)(b) APPLIED?	OUTCOME	COMMENTS
1	No	n/a	Yes	Uphold	Withhold information
2	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
3	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
4	Yes	Exemption does not apply	Yes	Uphold	Withhold information
5	n/a	n/a	n/a	n/a	Not considered – disclosed by the Police 07/08/13
6	n/a	n/a	n/a	n/a	Not considered – disclosed by the Police 07/08/13
7	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
8	Yes	Exemption does not apply	Yes	Uphold	Withhold information
9	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
10	No	n/a	Yes	Uphold	Withhold information
11	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
12	No	n/a	Yes	Uphold	Withhold information
13	No	n/a	Yes	Uphold	Withhold information
14	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold

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REF.	S.34(1)(a)/(b) APPLIED?	OUTCOME	S.38(1)(b) APPLIED?	OUTCOME	COMMENTS
15	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
16	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
17	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
18	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
19	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
20	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
21	No	n/a	Yes	Uphold	Withhold
22	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
23	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
24	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
25	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
26	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
27	n/a	n/a	n/a	n/a	Not considered – outwith scope of the request

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REF.	S.34(1)(a)/(b) APPLIED?	OUTCOME	S.38(1)(b) APPLIED?	OUTCOME	COMMENTS
28	Yes	Exemption does not apply	Yes	Uphold	Withhold information
29	n/a	n/a	n/a	n/a	Not considered – disclosed by the Police 07/08/13
30	n/a	n/a	n/a	n/a	Not considered – disclosed by the Police 07/08/13
31	Yes	Exemption does not apply	Yes	Uphold	Sensitive personal data - withhold
32	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
33	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
34	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
35	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
36	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information
37	Yes	Exemption applies – public interest favours maintaining exemption	Yes	Not considered	Withhold information