



Scottish Information
Commissioner

**Decision 082/2007 – Mr David Emslie and the Chief
Constable of Grampian Police**

*Request for information about incidents reported to Grampian
Police*

**Applicant: Mr David Emslie
Authority: Chief Constable of Grampian Police
Case No: 200600990
Decision Date: 29 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 082/2007 – Mr David Emslie and the Chief Constable of Grampian Police.

Requests for information to the Chief Constable of Grampian Police about incidents reported to Grampian Police by the applicant; whether the Police Officers who responded to these reports had a criminal record

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); section 12(1) (Excessive cost of compliance); section 17(1) (Notice that information is not held) and section 38(1)(b), (2)(a)(i) and (2)(b) (Personal information)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 regulation 5 (Excessive cost – prescribed amount)

Data Protection Act 1998 section 1(1) (Basic interpretative provisions) (definition of “personal data”); section 2(g) (Sensitive personal data); Schedule 1 (The data protection principles) (the first data protection principle) and Schedule 3 (all except conditions 2(2), 7(2) and 10) (Conditions relevant for purposes of the first principle: processing of sensitive personal data)

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

Facts

Mr Emslie made six information requests to the Chief Constable of Grampian Police (the Police) in respect of incidents that he had reported to the Police.

Mr Emslie subsequently applied to the Commissioner for a decision as to whether the Police had dealt with his requests in line with the Freedom of Information (Scotland) Act 2002 (FOISA).



Following an investigation, the Commissioner found that the Police had complied with FOISA in dealing with Mr Emslie's requests for information. He agreed that some of the information sought by Mr Emslie was not held by the Police; that the cost of dealing with part of his request would exceed the maximum amount and, finally, that some of the information sought by Mr Emslie was exempt in terms of section 38(1)(b) of FOISA.

Background

1. On 27 March 2006, Mr Emslie submitted six information requests to the Chief Constable of Grampian Police. The information requests can be summarised as follows:
 - Information about all of the incidents reported by Mr Emslie at a specific address since 1991 (the first question)
 - Whether these incidents were investigated by police officers with criminal records (the second question)?
 - How many police officers who have been at a specific address have criminal records (the third question)?
 - How many police officers with criminal records had given Mr Emslie advice on sufficiency of evidence (the fourth question)?
 - How many police officers with criminal records and were allocated a complaint made by Mr Emslie failed to contact him or carry out an investigation (the fifth question)?
 - Did the police officers who attended a specific incident have criminal records for violence or for threatening to kill someone (the sixth question)?
2. These questions appear to have come about following an article in The Scotsman newspaper shortly before the request was made, where it was reported that the Police had confirmed that there were 24 serving police officers (out of around 1,400 police officers) with a criminal conviction.



3. The Police responded to Mr Emslie's information request on 24 April 2006. In this response, the Police confirmed that they held information on which police officers had criminal convictions and also on the police officers who had been involved in investigating specific incidents. The Police refused to disclose this information about criminal convictions to Mr Emslie and relied on the exemption in section 38(1)(b) of FOISA for doing so, but did not respond in full to the rest of his information request.
4. Mr Emslie submitted a request for review to the Police on 29 April 2006.
5. The Police responded on 29 May 2006. In this response, the Police indicated that they were aware that they had not fully addressed all of Mr Emslie's questions in their original response to him. They upheld their original decision to rely on the exemption in section 38(1)(b) (Personal information) in respect of information that would address some of Mr Emslie's questions. The Police also sought to rely on section 12 (Excessive cost of compliance) of FOISA in respect of some information that they hold which would address part of Mr Emslie's questions. The Police also cited section 17 (Notice that information is not held) of FOISA in respect of other information.
6. On 31 May 2006, Mr Emslie applied to me for a decision as to whether the Police had breached Part 1 of FOISA in withholding information from him.
7. Mr Emslie's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had applied to me only after asking the Police to review their response to his request. The case was subsequently allocated to an investigating officer.

The Investigation

8. The Police were notified of the application and asked for comments in terms of section 49(3)(a) of FOISA on 13 July 2006. In addition, the Police were asked to provide, amongst other items, a copy of the information that had been withheld from Mr Emslie and an analysis of the exemption that they were relying on in withholding information from Mr Emslie. The Police were also asked to provide an explanation of the searches that they had carried out in order to establish whether information that may address some of Mr Emslie's questions was held by the Police.
9. A full response was received from the Police on 27 July 2006.



Submissions from the Police

10. In their submissions, the Police indicated that they were unable to define the incidents referred to by Mr Emslie in his questions, due to the lack of information held by the Police. The Police therefore sought to rely on section 17 of FOISA in respect of information which would address part of Mr Emslie's questions.
11. The Police also submitted that it would have proved too costly to define the incidents Mr Emslie was referring to, due to a lack of indexes to crime and offence reports produced prior to 1997. The Police submitted that the cost of complying with this part of Mr Emslie's request would be £2460.00 and that, under section 12 of FOISA, they were therefore not obliged to consider this part of Mr Emslie's request.
12. The Police also indicated in their submissions that they were relying on the exemption in section 38(1)(b) of FOISA for withholding information about the criminal records of police officers .

Submissions from Mr Emslie

13. In his submissions to my Office, Mr Emslie advised me that he believes that release of the information that he has requested would be in the public interest. He is also interested in the reporting and detecting of crime in the area in which he lives.

The Commissioner's Analysis and Findings

14. As indicated already in this decision notice, Mr Emslie's information request to the Police was made up of a number of separate questions. Because the questions are connected, I do not intend to look at each question separately, but will instead consider the questions under three separate headings: whether the information is held by the Police; whether the cost of dealing with part of the information exceeds the maximum amount and whether the information which has been withheld is exempt in terms of section 38(1)(b) of FOISA.



The application of section 12 – Excessive cost of compliance

15. Section 12 of FOISA relates to excessive cost of compliance. This section provides that a Scottish public authority need not comply with a request for information if the authority estimates that the cost of compliance will exceed the amount set out in regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations). The limit set by the Fees Regulations is currently £600.
16. The projected costs that the public authority can take into account in relation to the request for information are the total costs, whether direct or indirect, which the public authority reasonably estimates it will incur in locating, retrieving and providing the information requested. The public authority may not charge for the cost of ascertaining whether it actually holds the information or whether or not it should provide the information.
17. In calculating the projected costs, the Fees Regulations have placed a cap on the maximum hourly rate that a public authority can charge for staff time. The maximum rate that can be charged is £15 an hour.
18. In Mr Emslie's first question, he requests information about incidents reported by him at a specific address from 1991 onwards. However, the crime recording system currently used by the Police does not contain records prior to March 1997. Reports of crime and offences prior to that date are held as paper records and recorded onto microfiche. Although the Police still have the microfiche records, they no longer hold the finding aids and indexes for the reports. The Police advise me that these will have been destroyed in accordance with the previous Force retention policy which required these records to be retained for five years. As a result of this, in order for the Police to be able to identify the information which would answer part of Mr Emslie's first question, they would have to trawl through 118,499 microfilmed crime reports from 1 January 1991 to 28 February 1997. The Police submit that the cost of providing this information to Mr Emslie would be £2,460.00. The Police have provided me with a breakdown of this estimated cost.



19. During the investigation, the investigating officer asked the Police to clarify why they were charging the maximum hourly rate of £15 for the member of staff who would be involved in locating, retrieving and providing the information. In their response, the Police advised that the member of staff who would undertake this work would be the Records Manager/Archivist as this is something that this person would undertake as part of their normal duties. The Police provided me with details of the annual salary for this member of staff for financial year 2005/06. The hourly rate for this member of staff, without taking on costs into consideration, would exceed the maximum limit of £15 an hour. The Police submit that if they had trained and tasked a clerical assistant to search all of these records and had only claimed an hourly rate of £7, the amount of time it would take to complete the search would still mean that the cost of locating, retrieving and providing the information would exceed the maximum amount prescribed in the Fees Regulations.
20. I am satisfied that the costs to the Police of complying with part of Mr Emslie's first question (i.e. up 1991 to 1997) exceeds the maximum amount set out in the fees regulations and that the Police were entitled to refuse to respond to this request on the basis of section 12(1) of FOISA.

Section 17 – Notice that information is not held

21. In order to determine whether the Police were correct to cite section 17 of FOISA in respect of information which may have answered part of Mr Emslie's first question to the Police, and his questions two, three and four, I must be satisfied that the Police do not hold (and did not hold at the time of Mr Emslie's request) information which would answer these questions.
22. In their submissions to my Office, the Police have provided some background information relating to the recording systems that they employ for recording requests for assistance and for compiling reports following an incident that police officers have attended.
23. The Police use two systems. The first, the command and control system is used for recording requests for assistance from police officers. This system is also used where police officers are allocated to deal with requests for assistance and for handling an incident. The other system is their crime recording system, which is used by police officers to compile a report following an incident.



24. The Police have indicated that the two recording systems they currently use have only been in place since the late 1990s (1997 in the case of the crime recording system and 1996 in the case of the command and control system). As noted above, prior to the introduction of the crime recording system, the Police had a system that consisted of paper records which were microfilmed, and the information, by way of indexes which were used to access these records, has since been disposed of in line with the Force's records retention policy that was current at the time. The Police submit that the records currently held on the command and control database date back to December 2000, as this is in line with the Force retention policy.
25. In their submissions to my Office, the Police provided me with a copy of the Force general order related to the records retention and disposal guidelines for force documentation, which was in place in September 1997. The Police also provided me with a copy of the general order which was in place in 2004, together with the current records retention policy dated June 2006. The Police have submitted that the retention policy contained in its standard operating procedures of 2005 contains the same retention periods for the records which Mr Emslie is seeking as that of the 2004 version.
26. The Police also provided submissions to my Office in respect of the way in which they answered Mr Emslie's questions and why, in their view, they do not hold the information that would fully answer part of Mr Emslie's first question to them, in which he was seeking information from 1991 onwards which is contained in both the crime recording system and the command and control system. The submissions from the Police also indicate why, in the Police's view, they do not hold information which would fully answer Mr Emslie's second, third and fourth questions.
27. In considering these submissions from the Police, which also included an example of the information that they do hold, together with the information that is contained in the various record retention policies which the Police have provided me with, I am satisfied that the information which Mr Emslie is seeking which would address part of his first question and which would fully address his second, third and fourth questions, is not information which is held by the Police. I am therefore satisfied that the Police have relied on section 17 of FOISA correctly in respect of their response to part of Mr Emslie's first question and his second, third and fourth questions.

Section 38(1)(b) – Personal Information

28. As indicated previously in this decision notice, in their response to his request for information, the Police applied the exemption in section 38(1)(b) to the information Mr Emslie was seeking about the criminal records of police officers.



29. The Police have acknowledged publicly that there are serving police officers in Grampian Police who have criminal convictions. The officers have not been named by the Police, although following a conviction of a police officer for dangerous driving (the conviction was reported in the newspaper article mentioned earlier and the officer named in the article), the Police had confirmed that the officer had served with the Police. However, the Police do not wish to confirm to Mr Emslie whether the police officers who responded to incidents reported by him have a criminal record on the basis that the release of any information connecting a limited number of police officers to a set of criminal convictions has the potential to identify individuals. The Police have also indicated their concern that release of this information may lead to a small number of police officers being isolated and their criminal convictions being identified.
30. Section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or section 38(2)(b)) of FOISA), exempts information if it constitutes personal data, the disclosure of which to a member of the public would contravene any of the data protection principles contained in the DPA. This particular exemption is an absolute exemption, in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. This means that where a Scottish public authority considers that information falls within the scope of this exemption, it is not required to consider whether the public interest would be better served by the information being disclosed or withheld.
31. I must therefore be satisfied that the information in question is personal data. If I find that it is, I must then go on to consider whether the release of the information would breach any of the data protection principles (the Police have argued that the release of the information would breach the first data protection principle).
32. Mr Emslie basically wants to know whether the police officers who dealt with incidents reported by him have criminal convictions. Many of these officers will be known to Mr Emslie. The names and badge numbers of the officers is contained in the command and control database records. The same information, with the addition of details of the division in which the officers are based, is available from the crime recording database records. I am satisfied that this amounts to their personal data within the definition laid down in section 1(1) of the DPA. I also note that, given that information concerns criminal convictions, the information in fact falls within the definition of sensitive personal data in section 2(g) of the DPA. As is noted below, this means that the information is afforded further protection.
33. As I am satisfied that the information about criminal convictions sought by Mr Emslie is personal data, I must now go on to consider whether release of this information would breach any of the data protection principles. As mentioned previously the Police have argued that release of this information would contravene the first data protection principle.



34. 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 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 of the DPA is also met.
35. Given that Mr Emslie wants to access sensitive personal information, I will first of all consider whether any of the conditions in Schedule 3 can be met.
36. The Schedule 3 conditions are set out in the Appendix to this decision. I cannot find any conditions which would permit the release of the information in question to Mr Emslie. Given that there are no conditions in Schedule 3 which can be met, I am not required to go on to consider whether the release of the information is otherwise fair, lawful or permitted by Schedule 2. I accept that disclosure of this information would breach the first data protection principle and am therefore satisfied that the Police have relied on the exemption in section 38(1)(b) correctly in respect of this information.

Decision

I find that the Chief Constable of Grampian Police (the Police) dealt with Mr Emslie's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in relying on section 12, in respect of the information contained within the microfiche records.

I find that the Police dealt with Mr Emslie's request for information in accordance with Part 1 of FOISA in relying on section 17 in respect of certain information which would answer part of Mr Emslie's first question, and his second, third and fourth questions.

I find that the Police dealt with Mr Emslie's request for information in accordance with Part 1 of FOISA in relying on section 38(1)(b) in respect of certain information which would answer part of Mr Emslie's first question and his fifth and sixth questions.



Appeal

Should either Mr Emslie or the 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
29 May 2007



Appendix

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.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

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.



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 the 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; ...
- (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.

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

5 Excessive cost – prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

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

...

Schedule 1: The data protection principles

Part 1: 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.
2. (1) The processing is necessary for the purposes of exercising of performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.
...
3. The processing is necessary -
 - (a) in order to protect the vital interests of the data subject or another person, in a case where –



- (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
4. The processing –
- (a) is carried out in the course of its legitimate activities by any body or association which –
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical, religious or trade union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
 - (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.
5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
6. The processing –
- (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
 - (b) is necessary for the purposes of obtaining legal advice, or
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
7. (1) The processing is necessary –
- (a) for the administration of justice,
 - (aa) for the exercise of any functions of either House of Parliament,



- (b) for the exercise of any functions conferred on any person by or under an enactment, or
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

...

- 8. (1) The processing is necessary for medical purposes and is undertaken by –
 - (a) a health professional, or
 - (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.
- (2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of health services.

- 9. (1) The processing –
 - (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
 - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
 - (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

...