



Scottish Information
Commissioner
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Decision Notice 262/2025

Information between a specific Police officer and the Scottish Ministers relating to the inquiry into Professor Sam Eljamel

Applicant: The Applicant

Authority: Chief Constable of the Police Service of Scotland

Case Ref: 202500143

Summary

The Applicant asked the Authority for information exchanged between it and the Scottish Government regarding the Eljamel Inquiry between October 2022 and April 2023. The Authority provided the Applicant with some information but withheld other information under various exemptions. The Commissioner investigated and found that the Authority was entitled to withhold some of the information but had wrongly withheld the remainder. It had also failed to demonstrate that it had carried out adequate searches for all of the information falling within the scope of the request.

The Commissioner required the Authority to provide the Applicant with the information wrongly withheld and to carry out fresh searches and issue a new review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 34(1)(a)(i) & (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) & (b) (Law enforcement); 38(1)(b) (Personal information); 47(1) and (2) (Application for decision by Commissioner).

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) (definition of “personal data”) (Definitions); 5(1)(a) (principles relating to processing of personal data).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to processing of personal data).

Background

1. On 22 November 2024, the Applicant made a request for information to the Authority. He asked for all details including any emails, minutes, notes, phone records, WhatsApp messages and any briefings from October 2022 until April 2023 between the Detective Inspector, Reactive CID, D Division, Police Scotland, and the Scottish Government, and to include civil servants and any other parties. To assist with this the Applicant named who he believed was the Police Officer concerned and stated it was in regard to the Eljamel Inquiry.
2. The Authority responded on 18 December 2024. It confirmed that it held information falling within the scope of the Applicants request and informed him it was withholding the information under the exemptions in sections 34(1)(a)(i) & (b) and 35(1)(a) & (b) of FOISA. It also explained why it considered withholding the information was in the public interest.
3. On 18 December 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant asked for a review on the grounds of transparency. In his requirement for review the Applicant made reference to correspondence that he was aware of between a Detective Inspector from the Authority and a civil servant in the Scottish Government. The Applicant questioned why the officer was contacting the Scottish Government in relation to this matter, which included details of a 'live' investigation, and why, if he was struggling with the case, did he not instead contact a superior officer, the Crown Office or the National Crime Agency for advice. The Applicant explained that it was this Officer's request that he was seeking information on. He believed the information requested was being withheld as it may show collusion between the Authority and the Scottish Government.
4. The Authority notified the Applicant of the outcome of its review on 24 January 2025. It upheld its original response. It also considered the questions the Applicant posed in his request for review:

Why was this officer contacting the Scottish Government with a request and giving the details of a "live" police investigation to a civil servant?

Also, if this officer was struggling with the case in question, then why didn't he contact one of his superior officers or the Crown Office or the National Crime Agency for advice?

as a new request and responded in terms of section 18 (refusing to confirm or deny whether the information sought existed or was held by the Authority) in conjunction with sections 34(1), 35(1)(a) & (b) and 38(1)(b) of FOISA.

5. On 24 January 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he disagreed with the Authority's refusal of his request on the grounds of the public interest and contended that there was no justification for the authority to withhold the requested information. The Applicant referred to email exchanges between the Authority and the Scottish Government that were already in the public domain, which he considered showed they were working together. The Applicant considered further investigation was required to answer questions raised over possible collusion between the Public Inquiry team and the Authority, and that full disclosure of all information was required

to achieve this. The Applicant also disagreed that his questions were a new information request, rather they were part of his statement and his request for review.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 13 February 2025, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the searches it had carried out to establish the information it held falling within the scope of the request and why it considered the exemptions cited to apply to this information, as well as its consideration of the application of the public interest test (where applicable).
9. On 15 May 2025 the Authority provided the Applicant with a revised review outcome. As part of this response the Authority disclosed some of the information previously withheld. This was subject to redaction of information it considered to be exempt in line with sections 30(c), 34(1), 35(1)(a) and (b) and 38(1)(b) of FOISA. Within its revised review outcome the Authority informed the Applicant that in addition to the exemptions previously cited, it was also relying on section 30(c) and section 38(1)(b) to withhold some of the information.
10. The Applicant was given the opportunity to provide his comments on the initial exemptions being relied upon by the Authority, as well as the additional ones indicated in the revised review outcome, together with why he considered the public interest to lie in disclosure of the information. Submissions were received from the Applicant.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Background information for context

12. The Authority explained that Operation Stringent is its investigation into Professor Sam Eljamel who had worked at Ninewells Hospital until December 2013. It was collating statements from former patients who had contacted it wishing to make a criminal complaint.
13. A Public Inquiry, to be led by Lord Weir into the professional practice of Professor Eljamel, was also announced by the Scottish Government. A preliminary hearing¹ for this Public Inquiry was held on 10 September 2025.

¹ <https://www.eljamelinquiry.scot>

Section 1(1) – General entitlement

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority subject to qualifications which, by virtue of section 1(6) of FOISA allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
15. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4) of FOISA.
16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
17. The Commissioner also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the authority.
18. The Authority outlined the searches carried out. It explained that it had contacted the department that handles all high-profile criminal investigations on the Authority's behalf. The staff member involved in the email chain undertook searches as he retained all of the emails connected with the investigation and knew personally that there had been only limited discussions via email and no other means, so was able to recover the email trail.
19. In its revised review response, the Authority provided the Applicant with an email chain containing three emails dated and timed as follows:
 - Email 1 - 29 November 2022, 12:20
 - Email 2 – 6 December 2022, 14:12
 - Email 3 – 7 December 2022, 12:23
20. The Commissioner issued [Decision 191/2025](#)² in relation to another information request the Applicant made to the Scottish Ministers that covered some of the same information. This request predated the one to the Authority that is the subject of this Decision.
21. The information identified in Decision 191/2025 by the Scottish Ministers included an additional email within the email chain (dated 29 November 2022 timed at 16:30) and which was provided to the Applicant in response to this request (initially with some information withheld).
22. The Commissioner acknowledges that asking the person who was involved in the email chain to search for the information was a reasonable approach that should have resulted in all of the recorded information that was held being identified. On the other hand, he notes that the Authority was not able to provide any evidence (e.g. search terms, screenshots) of the electronic searches that were conducted.

² <https://www.foi.scot/decision-1912025>

23. The Commissioner considers, in the circumstances there would be a realistic expectation that the Authority would also hold this additional email, given that the rest of the email chain was still held by it.
24. The Commissioner, therefore, is not in a position to find that this additional email is (or was at the time the request was received) held by the Authority, but he is also not satisfied that it does not hold it. He cannot be satisfied that adequate searches have been conducted and evidenced to say no further information is held.
25. The Commissioner requires the Authority to carry out fresh searches in relation to this email chain. He also requires the Authority to retain evidence of these searches.

Section 30(c) – prejudice to effective conduct of public affairs

26. The Authority is relying on this exemption to withhold telephone numbers, and the first part of email addresses in each of the three emails.

Test to be applied in the use of the exemption

27. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”.
28. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by the disclosure of the information, and how the harm would be expected to follow from disclosure.
29. There is no definition of “substantial prejudice” in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to occur; therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
30. The exemption is subject to the public interest tests in section 2(1)(b) of FOISA.

The Authority’s submissions about the exemption

31. In its revised review response to the Applicant, the Authority assessed that disclosure of this information would disrupt the well-established processes which members of the public were encouraged to use when contacting it, thus prejudicing the Authority’s ability to effectively manage such contact appropriately.
32. The Authority submitted that the email addresses and phone numbers were used for operational purposes only and that this information had been removed in order that internal processes were protected.
33. It considered that disclosure of this information would be likely to adversely affect the processes put in place, in order to provide an appropriate level of service internally as well as externally

The Applicant's submissions about the exemption

34. The Applicant considered that the use of this exemption seemed unjustified. He considered that the idea that the disclosure of contact details or internal processes would undermine public affairs was unconvincing, especially where the public's right to understand communication between the Authority and government was at stake. In his view the suggestion that publication would "disrupt contact channels" was weak and speculative, particularly where those details concerned official communications already managed within a public institution.

The Commissioner's view about the exemption

35. The Commissioner has considered the submissions from the Authority in relation to the type of information being withheld, and acknowledges that it does relate to email addresses and phone numbers which could be used to directly contact staff within the Authority or a partner agency (in this case the Scottish Government).

36. The Commissioner also recognises that these were provided in the email chain to allow these personnel to contact each other to discuss the matter at hand.

37. The Commissioner accepts that, if these contact details were placed in the public domain, as a result of a disclosure under FOISA, it could result in them being used by the public, or others to contact personnel, rather than using the recognised, and publicised, routes set up for that particular purpose. This, in turn, would undermine the Authority and partner agency being able to work effectively and follow relevant internal and external processes.

38. For these reasons, the Commissioner accepts that disclosure of the contact details would have the effect of prejudicing substantially the Authority/partner agency from being able to protect their internal and external processes. As a consequence, the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(c) of FOISA for refusing to disclose the information.

39. However, in relation to one of the email addresses withheld belonging to a civil servant, this address is already freely available in the public domain. The Commissioner therefore cannot find that the Authority was correct to rely on the exemption in relation to the email address of this individual.

40. As the Commissioner is satisfied that the Authority was entitled to rely on the exemption in section 30(c) for withholding most of this information, he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test - section 30(c)

41. The "public interest" is not defined in FOISA but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Authority's view on the public interest

42. The Authority acknowledged that there was a public interest in better informing the public as to the internal mechanisms used within, but noted that this must be balanced with the need to ensure that the appropriate channels are used for contact and that internal telephone numbers and mailboxes are not compromised.

43. It highlighted that there were already various ways in which the public could contact it and key partners involved, with a specific section of the Authority/key partners websites dedicated to this, and to that end it considered the public interest had been met.
44. The Authority could find no benefit in disclosing email addresses or telephone for members of it or partner agencies. It submitted that these were used for operational purposes and had been withheld in order to ensure that internal processes were protected. It considered disclosure could lead to misuse of the email/telephone numbers.

The Applicant's view on the public interest

45. The Applicant submitted his view on the public interest in relation to the request as a whole as opposed to in relation to each of the exemptions.
46. He noted that the request was rooted in the principle of transparency in the interaction between law enforcement and government. He believed it was essential to public confidence that the police act independently of government influence and, where senior civil servants or elected officials are involved in communications with operational policing departments, the public has a clear and compelling interest in knowing whether political or institutional pressure may have influenced decisions. This would include the level of engagement or direction that may have taken place and whether communications were appropriate, impartial and aligned with democratic accountability. He submitted that such scrutiny was fundamental in a democratic society and went beyond mere curiosity but that it ensured law enforcement agencies maintained public trust and operated without inappropriate interference.

The Commissioner's view on the public interest

47. The Commissioner does not consider disclosure of email addresses and telephone contact details for specific personnel would enlighten the public as to the nature of any discussions between the Authority and the Scottish Government in relation to the subject of the request.
48. Furthermore, the Commissioner can see no public interest in disclosure of information which would negatively impact the ability of the Authority and the Scottish Government from being able to effectively discharge their functions under internal or external processes.
49. As the Authority has pointed out, both it and the Scottish Government publish contact details for use by the public, and others, on their websites. This, in the Commissioner's view, fulfils any public interest in being able to contact it or Scottish Government directly.
50. Having carefully considered the circumstances, the Commissioner is satisfied that the public interest in withholding the information outweighs that in disclosing it. The Commissioner therefore concludes that Police Scotland were entitled to withhold the information under section 30(c) of FOISA.

Section 35(1)(a) and (b) – Law enforcement (prevention or detection of crime)

51. The Authority is withholding some information in the email chain under the exemptions in sections 35(1)(a) and (b) of FOISA.
52. Section 35(1)(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime.

53. As the Commissioner's [briefing on section 35](#)³ notes, the term "prevention or detection of crime" is wide ranging. It encompasses actions taken to anticipate and prevent crime, or to establish the identity, and secure prosecution, of people suspected of being responsible of committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.
54. Section 35(1)(b) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders. As the Commissioner's guidance also states, there is likely to be a considerable overlap between information relating to "the apprehension or prosecution of offenders" and that relating to "the prevention or detection of crime".
55. The Commissioner considers that section 35(1)(b) relates to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for criminal activity. Again, this term could refer to the apprehension or prosecution of specific offenders or to more general techniques (such as investigative processes and use of police intelligence).
56. The exemptions in section 35(1)(a) and (b) can only apply where disclosure of the information in question would, or would be likely to, prejudice substantially the prevention or detection of crime.
57. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers an authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and therefore more than simply a remote possibility.
58. The exemptions in sections 35(1)(a) and (b) are subject to the public interest test in section 2(1)(b) of FOISA.

The Authority's submissions on the exemption

59. In its response to the Applicant, the Authority stated that disclosure of the information being withheld under these exemptions would adversely impact the operational effectiveness of the service and would compromise any tactical advantage it may have when dealing with crime.
60. The Authority submitted that in the course of an investigation it would interview and gather evidence from any person who may be in a position to assist them. It considered there was an acceptance that the information gathered would not be disclosed to a third party other than in the course of court proceedings, a common law duty of confidentiality. It stated that to do so would undermine this expectation and deter victims or witnesses from assisting it in future. It considered this in turn would hamper investigations and would or would be likely to prejudice substantially the prevention or detection of crime and the apprehension of offenders. The Authority believed this was particularly relevant when considering the circumstances around the reporting and investigation of any, and certainly serious (as here), offences.

The Applicant's submissions on the exemption

61. The Applicant considered that the Authority's response to him as to why these exemptions had been relied upon vaguely referred to "operational effectiveness" and "tactical advantage" without any specific explanation of how the release would prejudice prevention or detection

³ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection35LawEnforcement.pdf>

of crime. He considered there was no concrete evidence of harm, and the use of the exemptions seemed to be preventative rather than responsive to an actual risk.

The Commissioner's view on the exemption

62. The Commissioner has considered carefully the submissions from the Applicant and the Authority.
63. He has also noted the content of the information being withheld in relation to the tests that must be met for this exemption to be engaged. As was mentioned before, identified harm of real and demonstrable significance that is likely and, therefore, more than a remote possibility must be demonstrated.
64. The Commissioner has also noted the Applicant's comments about the vagueness of the reasons provided to him by the Authority to support its reliance on these exemptions.
65. As mentioned above, the Applicant had made an earlier request to the Scottish Ministers that included within its scope the same information as falls within the scope of this request.
66. In its response to the Applicant (that predates the date of the request being considered in this Decision), the Scottish Ministers provided some of the information that was withheld by the Authority in this case.
67. Having considered all of the circumstances, the Commissioner is not satisfied that the level of harm or substantial prejudice required for the engagement of the exemption and anticipated by the Authority would result from disclosure of the information being withheld under these exemptions. His view is that the information reveals nothing that would not reasonably be expected in the early part of an investigation and that it is not particularly revelatory.
68. As the Commissioner does not consider that the exemptions in section 35(1)(a) and (b) have been correctly engaged in relation to the information, he is not required to consider the public interest test in section 2(1)(b) of FOISA in relation to this information.
69. The Authority is also relying on the exemptions in sections 34(1)(a)(i) and (b) to withhold the same information. The Commissioner will now go on to consider whether the Authority was correct to rely on these exemptions in relation to this information.

Section 34(1)(a)(i) and (b) – Investigations by Scottish public authorities and proceedings arising out of such investigations

70. The Authority withheld the same information under these exemptions as it did under sections 35(1)(a) & (b).

Tests to be applied in the use of this exemption

71. Section 34(1) of FOISA provides that information is exempt from disclosure if it has at any time been held by a Scottish public authority for the purposes of:
 - (i) an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
 - (ii) 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 (section 34(1)(b)).

72. The exemptions in section 34 are described as “class-based” exemptions. This means that if the information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test. The Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure in determining whether the exemption applies. The exemptions in section 34 are, however, subject to the public interest test contained in section 2(1)(b) of FOISA.

The Authority's submissions on the exemption

73. The Authority confirmed that Operation Stringent is an investigation which it has a duty to conduct. It explained that the withheld information was held as a result of an investigation carried out or in the process of being carried out that may lead to a decision to make a report to COPFS.

74. The Authority commented that the legislative duty to carry out such an investigation came from the Police and Fire Reform Act 2012.

The Applicant's submissions on the exemption

75. The Applicant considered that it was not clear whether the investigation in question was concluded, ongoing or dormant. He believed the exemption had been applied without any indication of the current status of proceedings or any actual risk posed by disclosure.

76. The Applicant's view was that once an investigation concluded, the justification for withholding related information diminished significantly, especially when transparency could contribute to public understanding.

The Commissioner's view on the exemption

77. The Commissioner has considered the information being withheld and is satisfied that the exemptions in sections 34(1)(a)(i) and (b) apply.

78. The Commissioner notes the views of the Applicant; however, the exemption applies to the information if it has been held at any time, it does not matter if the investigation is ongoing, dormant, complete or abandoned. As narrated in paragraph 72, there is no harm test with these exemptions and the Commissioner cannot consider whether disclosure would cause any prejudice to an interest or activity.

79. As the Commissioner is satisfied that the exemptions apply, he will go on to consider the public interest test set out in section 2(1)(b) of FOISA.

The public interest test

80. As noted above, the exemptions in sections 34(1)(a)(i) and (b) are subject to the public interest test in section 2(1)(b) of FOISA.

81. The Applicant did not consider the Authority had met the burden of justifying non-disclosure of the information under these provisions.

82. The Applicant's wider public interest arguments can be seen at paragraph 46.

83. The Authority acknowledged there was a public interest in disclosing information upon which the public could assess whether it had handled the case appropriately.

84. However, it considered that disclosure of the information sought would undermine its role with regard to the investigation of criminal activity. It stated that there was no provision in the

Scottish Justice system whereby case materials become subject to public scrutiny following the conclusion of investigations by the relevant authorities.

85. The Authority argued that it was wholly reliant on the cooperation of the public in order that cases could be thoroughly investigated, adding that information was its most valuable resource. It considered the public trusted the Authority to handle any information they provided appropriately, with due regard to confidentiality and their privacy. It considered there would be no expectation that case material would be publicly disclosed, outwith the criminal justice and other legal processes.
86. The Authority's view was that disclosure could cause a loss of trust and confidence, resulting in less public co-operation with its investigations, which would be detrimental to the Authority being able to fulfil its statutory function.
87. Balancing these competing factors, the Authority found that protecting the investigatory role of the Authority outweighed that in disclosure and so the balance lay in maintaining the exemption.
88. The Commissioner has considered the withheld information as well as the submissions from both the Applicant and the Authority.
89. The Commissioner has already provided his view on the information being withheld under this exemption earlier in this Decision in relation to the exemptions relied upon in section 35, where he stated his view that the information reveals nothing that would not reasonably be expected in the early part of an investigation and that it is not particularly revelatory. The exchange of information in this case is between the Authority and another public authority; no members of the public are concerned. The Commissioner is not satisfied he can relate the content of the information to the consequences of disclosure described by the Authority. The arguments put forward by the Authority in support of maintaining the exemption are not specific to the information under consideration in this case, but rather seem to be broad in their approach.
90. The Commissioner accepts the Authority's premise about case materials from its investigations not being publicly disclosed; however, as the Commissioner has already noted the information in this case appears more to be in relation to the gathering of information and much of it is factual or procedural in nature.
91. The Commissioner notes the Applicant's view in relation to the need for transparency around the subject matter of this request, and in this case disclosure would foster trust as opposed to endangering it.
92. The Commissioner must recognise that some of the information being withheld by the Authority had already been disclosed by another public authority as the result of an earlier FOI request (and so was already in the public domain). It is difficult, therefore, for the Commissioner to identify a public interest in withholding it.
93. The Commissioner does not consider disclosure of the remaining information (not already in the public domain) to be any more likely to result in the consequences described by the Authority.
94. The Commissioner has carefully weighed the public interest in both disclosing the information and maintaining the exemption. In all the circumstances of this case, he is satisfied that, the public interest in disclosing the information is not outweighed by that in maintaining the exemptions in section 34(1)(a)(i) and (b).

95. As the public interest in disclosing the information is not outweighed by that in maintaining the exemptions, the Commissioner finds that the Authority was not entitled to rely on sections 34(1)(a)(i) and (b) in responding to this request. As he has already found that it was not entitled to rely on the exemptions sections 35(1)(a) and (b) to withhold this same information, he requires the Authority to disclose this information to the Applicant.

Section 38(1)(b) – personal information

96. Section 38(1)(b), read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is “personal data” (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.
97. The exemption in section 38(1)(b), applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test in section 2(1)(b).
98. To rely on this exemption, the Authority must show that the withheld information is personal data for the purposes of the DPA 2018 and 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 found in Article 5(1) of the UK GDPR.
99. The Commissioner must decide whether the Authority was correct to withhold some of the information covered by the Applicant’s request under section 38(1)(b) of FOISA.

Is the withheld information personal data?

100. The first question the Commissioner must address is whether the specific information withheld by the Authority, is personal data for the purposes of section 3(2) of the DPA 2018.
101. “Personal data” is defined in section 3(2) of the DPA 2018 as “any information relating to an identified or identifiable living individual”. Section 3(3) of the DPA 2018 defines “identifiable living individual” as a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (i) an identifier such as a name, an identification number, location data, or an online identifier, or
 - (ii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
102. The two main elements of personal data are that the information must “relate” to a living person, and that person must be identified – or identifiable – from the data, or from the data and other accessible information.
103. Information will “relate to” a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
104. An individual is “identified” or “identifiable” if it is possible to distinguish them from other individuals.
105. The Commissioner has considered the information being withheld under this exemption by the Authority which comprises of the names of individuals. He accepts that all of the information withheld under this exemption is information that relates to identifiable living individuals and is therefore personal data in terms of section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

106. The Authority submitted that disclosure of the personal data would contravene the first data protection principle in Article 5(1) of the UK GDPR. This states that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
107. In terms of section 3(4)(d) of the DPA 2018, disclosure is a form of processing. In the case of FOISA, personal data is processed when it is disclosed in response to a request.
108. The Commissioner must now consider if disclosure of the personal data would be lawful (Article 5(1)(a)). In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
109. In its submissions, the Authority considered that the only potentially applicable conditions that would allow it to process the data were consent at article 6(1)(a) and legitimate interests at 6(1)(f). However, it was of the opinion that neither could be met in the circumstances.
110. The Commissioner considers that only condition (f) in Article 6(1) could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

111. Although Article 6 states that condition (f) cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
112. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - (i) Does the Applicant have a legitimate interest in obtaining the personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
 - (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

113. The Applicant submitted that he did not accept the blanket use of this exemption. He considered much of the redacted information likely related to officials and public servants acting in their professional capacity. In his view, there was a well-established public interest in transparency around the actions of such individuals, particularly when engaging in correspondence with the Authority on matters potentially related to criminal investigations or government policy.
114. He considered he had a legitimate interest in understanding the nature and context of these communications and that individuals in public roles should not expect anonymity in the exercise of their duties.
115. The Applicant submitted that the redactions appeared excessive and potentially included information already in the public domain.
116. The Authority accepted that, given his circumstances, the Applicant may have a legitimate interest in obtaining the personal data.

117. Having considered the submissions from both parties, the Commissioner accepts that the Applicant, and the public in general, have a legitimate interest in disclosure of the information.

Is disclosure of the personal data necessary?

118. Having accepted that the Applicant has a legitimate interest in the withheld personal data, the Commissioner must consider whether disclosure of that personal data is necessary for the Applicant's legitimate interests. In doing so, he must consider whether these interests might reasonably be met by any alternative means.

119. The Commissioner has considered this carefully in light of the decision by the Supreme Court in South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55⁴.

120. "Necessary" means "reasonably" rather than "absolutely" or "strictly" necessary. When considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.

121. The Authority considered that disclosure of the personal data may be necessary for the Applicant's legitimate interests.

122. The Commissioner has considered the personal data as well as the content of the rest of the information. It is clear that there is communication between the two authorities, and the name of one of the staff members from the Scottish Government has been disclosed.

123. The Commissioner recognises the significance of the subject matter and the Applicant's legitimate interest in understanding the exchanges between the two organisations involved. He is not persuaded, though, that the disclosure of the individuals concerned is necessary to meet that legitimate interest. The lack of knowledge of the individuals involved does not detract from an individual being able to understand the content of the information (particularly in light of the Commissioner's earlier finding regarding the information that is now, as a result of this Decision, to be provided to the Applicant).

124. As the Commissioner is not satisfied that disclosure of the withheld information is necessary to satisfy the Applicant's legitimate interests, he is not required to go on to consider whether the legitimate interests of the Applicant outweigh the interests or fundamental rights and freedoms of the data subjects.

125. Having found that disclosure of the personal data would not be necessary to fulfil the Applicant's legitimate interests, the Commissioner finds that condition (f) in Article 6(1) of the UK GDPR cannot be met in this case and that disclosure of the information in question would be unlawful.

Fairness and transparency

126. Given that the Commissioner has concluded that the processing of the personal data, would be unlawful, he is not required to go on to consider whether disclosure of such personal data would otherwise be fair and transparent in relation to the data subjects. The Commissioner is therefore satisfied that the Authority was entitled to rely on the exemption in section 38(1)(b) for all of the withheld information to which the exemption was applied.

⁴ <https://www.supremecourt.uk/cases/uksc-2012-0126>

Other matters raised in Application – handling of request for review

127. In his application to the Commissioner, the Applicant disagreed with the Authority's action in its review response to treat two questions that were contained within his request for a review as a new request. He stated that the points raised by him in these questions were simply part of his statement and part of the requested review.
128. The Investigating Officer, on seeking submissions, asked the Authority if consideration had been given to going back to the Applicant to ask if he had intended these questions to be a new request.
129. The Authority submitted that as the review was late, it had not considered seeking clarification. In its view the questions sought opinion on a specific matter, whereas the original request was for wide-ranging information and made no mention of looking for correspondence from a named individual.
130. The Commissioner has considered the submissions from both the Applicant and Authority, as well as the initial request and request for review. Having done so, he cannot agree with the Authority's position. The Applicant's initial request clearly asked about communications between a Detective Inspector from a particular division and the Scottish Government. In his initial request the Applicant suggested who this officer might be (name provided) and stated that it was in relation to the Eljamel Inquiry.
131. The Commissioner considers that the questions asked by the Applicant were not surprising. From the content of his request for review, it is clear that he had some knowledge of what the Authority may hold (although it had provided him with no information at that stage). The Commissioner can see that it would not be unreasonable for someone to see all of the issues discussed in these questions as related to the core matter being discussed, i.e. the Eljamel Inquiry and interaction between the Authority and the Scottish Government in relation to it, as well as any recorded information of the nature described by the Applicant in his request which may be held.
132. The Commissioner does not agree that the questions raised by the Applicant in the request for review constituted a new request. In his view they expanded on the Applicant's reasoning as to why he considered it to be in the public interest for information held by the Authority, falling within scope of his request, to be disclosed to him. The Commissioner is of the view that if more attention had been paid to the detail of the Applicant's initial request and request for review, this would have been evident – but, if there had been any doubt, then the Authority should have asked the Applicant.
133. As this did not affect the provision of a review outcome to the Applicant, the Commissioner does not require the Authority to take any further action in relation to this matter.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by relying on sections 30(c) and 38(1)(b) to withhold some information from the Applicant, the Authority complied with Part 1.

However, by wrongly withholding information under sections 30(c), 34(1)(a)(i) & (b) and sections 35(1)(a) & (b) of FOISA, and by failing to satisfy the Commissioner that it did not hold other information relevant to the Applicant's request, the Authority failed to comply with Part 1 (and, in particular, section 1(1)).

The Commissioner therefore requires the Authority to carry out new searches for information and issue a revised review response and provide the Applicant with the information detailed in the accompanying marked-up copy of the information, by **15 December 2025**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Euan McCulloch
Head of Enforcement

29 October 2025