



Scottish Information  
Commissioner  
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# Decision Notice 263/2025

## Alleged distribution of offensive written material

Authority: Chief Constable of the Police Service of Scotland

Case Ref: 202500931

### Summary

The Applicant asked the Authority for information relating to two males who had been charged in relation to the alleged distribution of offensive written material. The Authority withheld information relating to the alleged offences as it related to a criminal investigation and it withheld the names of the two males on the basis that it was third party personal data. The Commissioner investigated and found that the Authority was entitled to withhold the information requested.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 34(1)(b) (Investigations by Scottish public authorities); 38(1)(b), (2A)(a), (5) (definitions of “the data protection principles”, “data subject”, “personal data”, “processing” and “the UK GDPR”) (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); 10 (Processing of personal data relating to criminal convictions and offences).

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10) and (14)(a), (c) and (d) (Terms relating to the processing of personal data); 10(4) and (5) (Special categories of personal data and criminal convictions etc data); 11(2) (Special categories of personal data; supplementary); Schedule 1, Part 1, 2 and 3 (Additional conditions relating to criminal convictions etc.)

## **Background**

1. On 26 February 2025, the Applicant made a request for information. He referred to media reporting relating to two males who had been charged in relation to offences regarding the distribution of offensive written material in several posters placed around Largs town centre. Among other things, he asked the Authority:
  - 1) How many posters were discovered?
  - 2) Did the posters all contain the same material?
  - 3) Were the posters removed by police?
  - 4) Precisely what material did each poster contain?
  - 5) What were the names of the defendants?
2. The Authority responded on 26 March 2025 in the following terms:
  - for parts 1-4 of the request, the Authority withheld the information requested under the exemption in section 34(1)(b) of FOISA
  - for part 5 of the request, the Authority withheld the information requested under the exemption in section 38(1)(b) of FOISA.
3. On 14 April 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because:
  - for parts 1-4 of his request, he considered that the public interest test favoured disclosure
  - for part 5 of his request, he argued that it was central to the principle of open justice for the names of individuals charged with crimes to be disclosed and that the exemption in section 38(1)(b) did not apply.
4. The Authority notified the Applicant of the outcome of its review on 14 May 2025, which fully upheld its original decision.
5. On 13 June 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review because he did not consider that either exemption applied and, in any event, the public interest favoured disclosure.

## **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 4 July 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 related to its application of the exemptions in sections 34(1)(b) and 38(1)(b) of FOISA.

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

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

### ***Section 34(1) – Investigations by Scottish public authorities and proceedings arising out of such investigations***

10. The exemption in section 34(1)(b) 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 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.
11. The exemptions in section 34 are described as “class-based” exemptions. This means that if 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.
12. The Commissioner has considered the context of the Applicant’s request, the terms of parts 1-4 of his request and he has reviewed the relevant withheld information. Having done so, he is satisfied that the information withheld from the Applicant is held by the Authority for the purposes of an investigation covered by section 34(1)(b) of FOISA. Consequently, he must conclude that the exemption applies in this case.

### ***The public interest test – section 34(1)(b)***

13. As noted above, the exemption in section 34(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
14. 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 Applicant’s submissions***

15. The Applicant argued that disclosure of the withheld information was important to the wider public as it was crucial to uphold the principle of open justice.
16. The Applicant noted that there were numerous examples of cases having been brought to court where an individual was alleged to have distributed offensive material and where the nature of that material had been disclosed, whether by police, prosecutors or media, in advance of the court hearing. He submitted that in none of these cases had the path of justice been obstructed by disclosure of such information.

17. The Applicant considered that there was plainly a public interest in knowing, in broad terms, the details that led to two citizens being charged with an offence. He said that open justice demanded that these details ought not to be kept secret and submitted that it was undeniable that the Authority's position conflicted sharply with the principles of open justice.

*The Authority's submissions*

18. The Authority recognised that there is a public interest in disclosure of the withheld information in so far as it would provide some understanding as to the processes involved in police investigations. It acknowledges that the principles of accountability and transparency relating to the actions of the Authority and its officers would therefore favour disclosure of the withheld information.
19. However, the Authority noted that at this stage (and at the date of the review outcome), the withheld information formed "a material factor" in the charges against the two accused individuals.
20. The Authority submitted that the key consideration was the potential prejudice to the forthcoming criminal prosecution. It explained that evidence which will be relied upon in court is considered sub judice until such time that proceedings have concluded.
21. The Authority noted that it was unaware how relevant all of the withheld information might be to these proceedings as it had no way of knowing precisely how they might develop. However, it said that the rules of evidence and disclosure were complex and that its position was, given the potential prejudice to the forthcoming criminal prosecution, that this evidential material should not be disclosed outwith the criminal justice process.
22. The Authority argued that criminal proceedings should be the appropriate forum for bringing such information into the public domain. It considered that disclosure of such information outwith this process, when proceedings had yet to conclude, would result in the public losing confidence in the Authority and make them less willing to co-operate with police investigations, which would have a significantly detrimental impact on the Authority's ability to fulfil its statutory functions.
23. Furthermore, the Authority considered that persons under investigation should not be subject to the risk of "trial by media", without the protection that it considered was provided when information was disclosed as part of criminal proceedings.
24. However, the Authority indicated that, once proceedings had concluded, it could see no issue with disclosing the withheld information for parts 1 to 3 of the Applicant's request. (It said that it could see no circumstance under which it would disseminate – to the world at large – the precise contents of the posters.)

*The Commissioner's view*

25. The Commissioner has carefully considered all the arguments presented by the Authority and the Applicant, together with the withheld information.
26. The Commissioner agrees that there is a clear public interest in ensuring transparency and accountability in the Authority's work, especially in relation to criminal investigations. He also recognises that there is a public interest in understanding the circumstances relating to the specific alleged offences referred to in the Applicant's request, given the backdrop of ongoing public debates on the proper limits of freedom of expression.

27. However, the Commissioner also considers that there is a strong public interest in avoiding potential prejudice to criminal proceedings. He has previously found (for example, in paragraph 40 of [Decision 030/2024](#)<sup>1</sup>) that investigative materials should only be disclosed where the public interest considerations favouring disclosure are overwhelming. Having carefully considered the submissions of both the Authority and the Applicant, together with the withheld information (and acknowledging that each case must be considered on its own merit), the Commissioner does not consider this to be the case, in this instance.
28. The Commissioner acknowledges that elements of the Applicant's request appear innocuous – specifically, the number of posters that were discovered. However, he accepts the Authority's position that it does not (and cannot) know precisely what information will be relevant as part of the criminal proceedings. Also, while the nature of the information may be relevant in assessing and balancing the public interest, in this case he considers that the apparently innocuous nature of elements of the Applicant's request means that there is a relatively limited public interest in disclosure of that information.
29. In all the circumstances of the case, therefore, the Commissioner is satisfied, on balance, that the public interest in maintaining the exemption in section 34(1)(b) of FOISA would outweigh the public interest in disclosure of the information requested. He therefore concludes that the Authority was correct in its application of the exemption in section 34(1)(b) to withhold the information requested.

### ***Section 38(1)(b) – Personal information***

30. Section 38(1)(b) of FOISA, 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 Data Protection Act 2018 (the DPA) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.
31. As stated above, the Authority withheld information under this exemption in response to part 5 of the Applicant's request.
32. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
33. To rely on the exemption in section 38(1)(b), the Authority must show that the 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 in Article 5(1) of the UK GDPR.

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

34. "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 with reference to:
  - (a) An identifier such as a name, an identification number, location data, or an online identifier, or
  - (b) One or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual

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<sup>11</sup> <https://www.foi.scot/decision-0302024>

35. The Commissioner is satisfied that the information withheld under section 38(1)(b) of FOISA is personal data: the information consists of the names of living individuals and therefore clearly both identifies and relates to those individuals.

#### ***Criminal offence data***

36. The Commissioner is also satisfied that the information withheld under section 38(1)(b) of FOISA constitutes criminal offence data.
37. Information relating to criminal convictions and offences (including suspicion or allegations of criminal activity) is given special status in the UK GDPR: Article 10 makes it clear that the processing of this type of personal data can be carried out only under the control of official authority or when the processing is authorised by domestic law providing for appropriate safeguards for the rights and freedoms of the data subjects.
38. Section 11(2) of the DPA 2018 makes it clear that personal data relating to criminal offences include personal data relating to the alleged commission of offences. Given the nature of the information (the names of individuals alleged to have committed particular offences) the Commissioner is satisfied that the personal data requested fall within this definition.
39. Criminal offence data can only be processed if one of the stringent conditions in Parts 1 to 3 of Schedule 1 to the DPA 2018 can be met (section 10(5) of the DPA 2018).
40. “Processing” of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.
41. The Commissioner has considered each of the conditions in Parts 1 to 3 of Schedule 1 of the DPA 2018 and whether any of them could be relied on to disclose the criminal offence data in this case. Having done so and having taken into account the restrictive nature of the conditions, he considers that they could not. (He notes the Applicant’s comments about open justice, but open justice is not a condition in Parts 1 to 3 of Schedule 1 of the DPA 2018.)
42. The Commissioner is also satisfied that none of the conditions required for processing personal data of this nature are satisfied. Consequently, there can be no legal basis for its disclosure, and this information is exempt from disclosure under section 38(1)(b) of FOISA.
43. The Applicant suggested that the Authority had failed to identify Article 6(1)(e) of the UK GDPR as being potentially applicable to permit disclosure. As the Commissioner has found that none of the conditions for processing Parts 1 to 3 of Schedule 1 of the DPA 2018 are met in this case, disclosure under FOISA would be unlawful, regardless of whether Article 6(1)(e) could otherwise be relied upon.
44. The Commissioner therefore finds that the Authority complied with Part 1 of FOISA by withholding this information.

## **Decision**

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

## **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.

**Euan McCulloch**  
**Head of Enforcement**

**30 October 2025**