

Our Ref: IM-FOI-2022-2638
Date: 09 January 2023



FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I refer to your recent request for information which has been handled in accordance with the Freedom of Information (Scotland) Act 2002.

For ease of reference, your request is replicated below together with the response.

This request relates to a case where a member of the public found a red kite and lapwing killed by poisoning and which Police Scotland attended to collect the birds and send for a toxicology analysis. Six months later in September 2022, the member of the public was advised that, "enquiries are complete, nobody has been charged and the case is now closed".

Please provide information as follows:

1) Where exactly did the police find the bodies of the two birds which had been killed by poisoning?

The information requested is considered to be exempt in terms of the Freedom of Information (Scotland) Act 2002 (the Act).

Section 16 of the Act requires Police Scotland to provide you with a notice which:

- (a) states that it holds the information,
- (b) states that it is claiming an exemption,
- (c) specifies the exemption in question and
- (d) states, if that would not be otherwise apparent, why the exemption applies.

Where information is considered to be exempt, this letter serves as a Refusal Notice that information is held and an explanation of the appropriate exemption is provided.

The exemptions that I consider to be applicable to the information requested are as follows:

Section 38 (1) (b) – Personal Information

Whilst I accept that you may have a legitimate interest with regards the disclosure of this information and that disclosure may well be necessary for that purpose, I am nonetheless of the view that those interests are overridden by the interests or fundamental rights and freedoms of the data subject(s).

To explain, the release of personal information, either directly or inadvertently is exempt under the Freedom of Information (Scotland) Act 2002.

Specifically there is an increased chance that individuals would speculate and at worst, potentially target individuals whom they believe to be linked to the case based on the locus.

This is an absolute exemption and does not require the application of the public interest test.

Section 34 (1) (b) – Investigations

Section 35 (1) (b) – Law Enforcement

Section 34(1) (b) of the Act provides an absolute exemption from disclosure in that information is exempt information if it has at any time been held by Police Scotland for the purposes of an investigation which may lead to a decision to make a report to the Procurator Fiscal to enable it to be determined whether criminal proceedings should be instituted.

This, in turn, would be likely to prejudice substantially the ability of the police to investigate and detect crime, and would have a similar detrimental impact on the apprehension or prosecution offenders – making the information exempt from disclosure in terms of Section 35(1) (a) & (b).

These exemptions are non-absolute and require the application of the public interest test.

Public Interest Test

It could be argued that it is in the public interest that an understanding exists as to the processes involved in police investigations. Accordingly, it could be argued that accountability and transparency relating to the actions of the Service and our officers would favour disclosure of the information.

That said, disclosure must be tempered against what is *of interest to the public* and what is *in the public interest*. Disclosure of information pertaining to investigations has to be disclosed appropriately, to ensure that neither the investigation, nor the future potential for proceedings to be brought against an individual(s) are put at risk. To that end, Police Scotland will not release any information that could prejudice any investigation or put individuals at risk.

Accordingly, at this time the public interest in the disclosure of the requested information is outweighed by the harm that could be created by revealing information.

**2) What did toxicology tests reveal to be the type of poison used to kill these birds?
Was it one of the banned poisons?**

Toxicology tests revealed that 'Bendiocarb' poisoning was the cause of death for the red Kite.

3) Did Police Scotland issue a press release concerning the killing of these birds? In the event no press release was issued, why was this? Who made the decision not to issue a press release?

The decision not to issue a press release was an operational decision, balancing risk vs reward.

To explain, the locus was remote, the bait and bird had been removed and no longer posed a risk. Given there was no nearby path it was deemed highly unlikely that any members of the public would have been able to provide useful or relevant witness evidence. From the main road nearest the locus any persons on the land would not have been able to identify any suspect given the distance involved.

Further consideration was given in regards to the requirement not to alert the perpetrator to the investigation at this time to aid further investigative strategies. Any intelligence identifying the methodology or focus of this activity could have been used to the advantage of the perpetrator to frustrate such investigations and/or seek support other individuals to do so. As such, any press release would have been detrimental to planned further enquiry and Police activity.

4) Did Police Scotland ask the public for information on this crime? How and when was this done?

No - see the response at Q3 above.

5) Given the risk to the public and animals from the deadly toxic poison, did Police Scotland issue a warning to members of the public and the vicinity? In the event no warning was issued, why was this? Who made the decision not to advise the public of the risk of harm?

No - see the response at Q3 above.

6) Who was responsible for making the decision to close the case and fail to issue any information relating to it?

In terms of Section 16 of the Freedom of Information (Scotland) Act 2002, I am refusing to provide you with the names of individual officers.

Section 16 requires Police Scotland when refusing to provide such information because it is exempt, to provide you with a notice which:

- (a) states that it holds the information,
- (b) states that it is claiming an exemption,
- (c) specifies the exemption in question and
- (d) states, if that would not be otherwise apparent, why the exemption applies.

I can confirm that Police Scotland holds the information that you have requested.

The exemption that I consider to be applicable to the information requested by you is section 38(1)(b) - Personal Data.

Personal data is defined in Article 4 of the General Data Protection Regulation (GDPR) as:

'Information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'

Section 38(2A) of the Act provides that personal data is exempt from disclosure where disclosure would contravene any of the data protection principles set out at Article 5(1) of the GDPR which states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'

Article 6 of the GDPR goes on to state that processing shall be lawful only if certain conditions are met.

The only potentially applicable condition is set out at Article 6(1)(f) which states:

'Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'

These individual officers, do not occupy a senior or public facing role and whilst I accept that you may have a legitimate interest with regards the disclosure of this information and that disclosure may well be necessary for that purpose, I am nonetheless of the view that those interests are overridden by the interests or fundamental rights and freedoms of the data subject.

On that basis, it is my view that disclosure of the information sought would be unlawful. This is an absolute exemption, which is not subject to the public interest test.

In general terms I can advise you that the reporting officer along with their senior management made this decision once all potential enquiries were complete. The relevant complainers were updated accordingly.

7) What were the grounds for failing to take action against those responsible for killing these two birds by poisoning them?

One of the main responsibilities of Police in Scotland is to investigate crimes and criminal offences and where there is a sufficiency of evidence, report the circumstances to the Crown Office & Procurator Fiscal Service (COPFS). Investigation of this particular incident did not provide sufficient evidence to charge any individual.

To clarify, corroborative evidence is required to liable any charge in relation to the poisoning of birds of prey.

If you require further assistance or are dissatisfied with the way in which Police Scotland has dealt with your request, you are entitled, in the first instance, to request a review of our actions and decisions.

OFFICIAL

Your request must specify the matter which gives rise to your dissatisfaction and it must be submitted within 40 working days of receiving this response - either by email to foi@scotland.police.uk or by post to Information Management (Disclosure), Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH.

If you remain dissatisfied following the outcome of that review, you are thereafter entitled to apply to the Office of the Scottish Information Commissioner within six months for a decision. You can apply [online](#), by email to enquiries@itspublicknowledge.info or by post to Office of the Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS.

Should you wish to appeal against the Office of the Scottish Information Commissioner's decision, there is an appeal to the Court of Session on a point of law only.

As part of our commitment to demonstrate openness and transparency in respect of the information we hold, an anonymised version of this response will be posted to the Police Scotland Freedom of Information [Disclosure Log](#) in seven days' time.