

Our Ref: IM-FOI-2018-1771
Date: 20 August 2018



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.

My request:

"2. What legal base you would process subject's information in relation to GiRFEC, SHANARRI, wellbeing, (to be clear, not welfare), and the reason for the legal base you would use, e.g. if the base would be public interest, please also describe WHY this base would apply."

Police response:

"Police Scotland rely on a number of lawful bases for sharing personal information, whilst continuing to comply with the requirement of the new legislation. This includes provision within Section 32 of Police and Fire Reform which outlines the purpose of policing in Scotland as being 'to improve the safety and well-being of persons, localities and communities'.

Public Task "The processing is necessary for you to perform a task in the public interest or for your official functions; the task has a clear basis in law"

This will be used for the sharing of wellbeing concerns for Children with statutory agencies. The clear basis in law referred to in Public Task is:

Section 32 – Police and Fire Reform (S) Act 2012 – Main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland.

It must be clear that it is necessary, proportionate, justified and relevant to do so and must be balanced with individual's Human Rights – Article 8 ECHR: right to a private and family life, the Duty of Confidentiality and individual's views.

In addition to the above lawful basis for processing, where Police Scotland wishes to share 'special category' information e.g. race, religion, ethnicity, health, sexual orientation with statutory partners, Police Scotland will adopt either of the following additional processing conditions where sharing is likely to be necessary for that purpose;

Article 9(h) – Provision of Health or Social Care or; Article 9(g) - Substantial Public Interest (Schedule 1, part 2, paragraph 6 - Statutory purpose).

Police Scotland rely on the following processing conditions for the sharing of wellbeing concerns with non-statutory bodies;

Lawful Processing Condition - Article 6(1)(a) – Consent

In addition to the above lawful basis for processing, where Police Scotland wishes to share 'special category' information e.g. race, religion, ethnicity, health, sexual orientation with statutory partners, Police Scotland will adopt the following additional processing condition;

Article 9(2)(a) – Explicit Consent"

My response:

You have referred directly to Police and Fire Reform Act Scotland (2012), Section 32, "...to improve the safety and wellbeing of persons,..." as being the lawful basis in relation to Public Task legal base for processing GiRFEC, SHANARRI, wellbeing data at lower than the current lawful threshold of risk of significant harm.

I would be grateful for the definition of wellbeing at this date of Police and Fire Reform Act Scotland (2012), Section 32, and any subsequent changes to the definition of wellbeing, given that the Supreme Court ruled that "'Wellbeing'" is not defined. The only guidance as to its meaning is provided by section 96(2), which lists eight factors to which regard is to be had when assessing wellbeing. The factors, which are known under the acronym SHANARRI, are that the child or young person is or would be: "safe, healthy, achieving, nurtured, active, respected, responsible, and included". These factors are not themselves defined, and in some cases are notably vague" (Para 16, Supreme Court, July 2016), and are open to subjective interpretation based on state outcomes.

With reference to Police and Fire Reform Act Scotland (2012), Section 32, "Policing principles The policing principles are—

- (a) that the main purpose of policing is to improve the safety and well-being of persons, localities and communities in Scotland, and
- (b) that the Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which—
 - (i) is accessible to, and engaged with, local communities, and
 - (ii) promotes measures to prevent crime, harm and disorder."

Section 32 is limited by overarching laws:

ECHR Article 8(2)

"Right to respect for private and family life

1

Everyone has the right to respect for his private and family life, his home and his correspondence.

2

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Local Government Scotland Act (2003) Section 22 "Limits on power under section 20, Power to advance wellbeing.

(1) The power under section 20 above does not enable a local authority to do anything which it is, by virtue of a limiting provision, unable to do.

(2) In subsection (1) above, a "limiting provision" is one which—

(a) prohibits or prevents the local authority from doing anything or limits its powers in that respect; and

(b) is expressed in an enactment (whenever passed or made)."

And the Supreme Court Ruling on Named Person "The promotion of the wellbeing of children and young people is not, however, one of the aims listed in article 8(2) of the ECHR. At the most general level, it can be said to be linked to the economic wellbeing of the country,...", (Para 89, Supreme Court, July 2016), meaning that there is a duty to improve services to support and enhance general wellbeing, however, any action on personal wellbeing is unlawful as this would constitute an interference in family and private life, contravening ECHR Article 8(2).

My request:

"3. How you will notify each data subject, including 3rd party subject, in advance that you intend to process their GIRFEC, SHANARRI, wellbeing data, (not welfare) by sharing with another organisation."

Police response:

"Where officers attend an incident where there is a requirement to record data on the interim Vulnerable Persons Database (iVPD), all individuals are informed that information from a specific incident WILL be recorded and assessed on police systems and Police Scotland MAY share relevant information at the time of the incident. Similar to previous legislation, there will be occasions where exemptions exists in relation to notification, namely the prevention/detection of crime or where there is a serious identifiable risk of harm to the data subject."

My response:

I would be grateful for clarification of what the requirements are for recording data on the interim Vulnerable Persons Database.

You have stated that all individuals are informed that their information WILL be recorded, which implies there is no choice. GDPR Article 21 allows subjects to object to this.

"Art. 21 GDPR

Right to object

1The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. 2The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims." (GDPR-info. 2018) You have provided the basis for processing subject's information as Public Task Article 6(1)(e). How would a subject object when you state you WILL record their information on iVPD?

As previously highlighted the Police Scotland internet page contains the following information in relation to the right to object:

"The GDPR and the Data Protection Act 2018 strengthen the rights that you, as a data subject, possess in relation to the personal data that Police Scotland holds about you. These rights are:

- Right of access – you can make a 'subject access request' for a copy of the information we hold about you (see [Subject Access Requests](#))
- Right to rectification – you can instruct us to correct any personal data we hold about you that is inaccurate
- Right to erasure ('right to be forgotten') – you can ask for us to destroy any personal data that we hold about you
- Right to restrict or object to processing – in some circumstances, you can place restrictions on, for example, who can access your data or who we share it with

All of the above rights are subject to exemptions that we may apply, for example if your data is being processed for law enforcement purposes or under a legal obligation.

If you wish to exercise any of these rights, please call 101 and ask to speak to the Information Management team in your local area."

Should you require any further assistance please contact Information Management - Edinburgh on 0131 311 3901 quoting the reference number given.

If you 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.

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.pnn.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.