1. At today’s meeting of the Justice Committee, I undertook to write to the Committee regarding the interaction of the Data Protection Act 1998 with the statutory provisions governing the Scottish Criminal Cases Review Commission. This was in respect of suggestions made by the Justice for Megrahi campaign that if the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 were amended, the Data Protection Act 1998 would provide no barrier to the disclosure of information by the Commission. I am conscious that the Committee may have obtained further guidance on this issue from the witnesses who gave evidence after me: I was, unfortunately, not able to remain in the committee room for that part of proceedings.

2. The starting point in this matter is section 194J of the Criminal Procedure (Scotland) Act 1995. This was inserted into the 1995 Act by the Crime and Punishment (Scotland) Act 1997, which created the Scottish Criminal Cases Review Commission. Section 194J provides as follows:

   A person who is or has been a member or employee of the [Scottish Criminal Cases Review] Commission shall not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 194K of this Act.

3. Any person who contravenes that provision is guilty of a criminal offence.

4. Section 194K sets out a number of circumstances in which disclosure would be exempt from section 194J and so would not amount to an offence. These include “any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State” (section 194K(1)(f)).

5. The Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 is such an order. This Order permits the Commission to decide to disclose information in circumstances such as that applicable in the Al Megrahi case, but only if “any person who provided the information to the Commission (whether directly or indirectly) has consented to its disclosure”. This is the “2(b)” provision which was referred to in evidence before the Committee.

6. The position taken by Justice for Megrahi is that if 2(b) were deleted, there would be no impediment to the Commission deciding to publish information relating to Al Megrahi’s case. This is because of section 194K(4) of the 1995 Act, which provides as follows:

   “Where the disclosure of information is excepted from section 194J of this Act by subsection (1) or (2) above, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure
(including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section."

7. Justice for Megrahi’s position, as expressed by Professor Robert Black QC and repeated in the campaign’s written submission, is that section 194K(4) means that “UK data protection legislation, or any other legislative or common law obligation of secrecy, is no bar to disclosure”.

8. There are reasons to doubt this conclusion, although I should caution that I would not regard myself as in any way expert in data protection legislation.

9. Importantly, however, the Data Protection Act 1998 is a comprehensive piece of legislation which post-dates the provisions creating the Scottish Criminal Cases Review Commission. It is not clear how section 194K(4) can be taken as pre-emptively carving out an exception to it.

10. The 1998 Act does provide that personal data is exempt from its non-disclosure provisions “where the disclosure is required by or under any enactment, by any rule of law or by the order of a court” (section 35(1)). This is, however, of no avail, because section 194K(4) would merely permit rather than require disclosure.

11. The existence of section 35(1) is important, because it suggests that Parliament did not consider that existing legal obligations to disclose information would be left intact by the Data Protection Act. Section 35(1) was necessary to preserve such obligations. By contrast, there seems to be no equivalent to section 35(1) in respect of a statutory permission to disclose, which is the most that section 194K(4) of the 1995 Act can be said to create.

12. I have difficulty seeing, in summary, how a statutory provision enacted in 1997 (section 194K(4)) can be interpreted as creating an exception to a statute enacted in 1998 (the Data Protection Act).

13. I may, of course, be wrong in this conclusion. However, the Commission is not required to disclose information relating to the Al Megrahi case, and neither the Bill as it stands nor the alternative route proposed by the Justice for Megrahi campaign would change that. It is difficult to see why it would or should be expected to exercise a discretion to disclose information without being certain of the legality of its actions in so doing. While I would reiterate that I am not an expert in the law of data protection, section 194K(4) appears, at the very least, not to provide such certainty.

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