



Scottish Information
Commissioner

**Decision 018/2005 - Mr Robert Bennett and the Chief Constable
of Grampian Police**

*Request for copy of telephone call to Grampian Police; copy of statement
made to a police officer; and copies of all documents held by Grampian
Police concerning the applicant and another.*

**Applicant: Mr Robert Bennett
Authority: The Chief Constable of Grampian Police
Case No: 200500976
Decision Date: 10 August 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 018/2005 – Mr Bennett and the Chief Constable of Grampian Police

Request for copy of telephone call to Grampian Police from the applicant – information not held.

Request for copy of statement made by the applicant to a Police officer – information not held.

Request for copies of all documents held by Grampian Police concerning the applicant and another – withheld – section 35(1)(g) – prejudice to law enforcement – s.39(1) – health and safety of an individual – s.38(1)(a) and (b) – personal data.

Facts

Mr Bennett asked Grampian Police to provide a copy of a telephone call he made to Grampian Police on 3 December 1999. The tape of his phone call could not be located by Grampian Police.

Mr Bennett asked for a copy of a statement he made to a Grampian Police officer on 19 September 2000. Grampian Police stated that a formal statement was not taken on this occasion and provided copies of two missing persons reports with personal information redacted, which they believed represented the “statement” requested.

Mr Bennett also asked for copies of all documents relating to himself and another person. After discussions with my Office, all documents were released with the exception of several police statements in the form of subject reports and witness statements, one associated memorandum, and a letter which Grampian Police believed was in effect a statement. Some of the documents released had information redacted; these redactions are also considered in this decision notice.

Some of the information requested relates to a complaint of police misconduct previously raised against Grampian Police by Mr Bennett.



Outcome

The Commissioner found that the Chief Constable of Grampian Police has generally dealt with Mr Bennett's request for information in accordance with section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), and where information has been withheld under exemptions in FOISA, Grampian Police were generally justified in doing so. However, the Commissioner did find that Grampian Police had failed to comply with Part 1 of FOISA in that it has breached section 1(1) when withholding certain information which should have been provided. The Commissioner requires Grampian Police to provide Mr Bennett with one document in full and another in redacted form.

Where information was said not to be held, the Chief Constable of Grampian Police has supported this statement with evidence that the information is missing, to the satisfaction of the Commissioner, and has taken steps to identify and rectify problems with the relevant records management system.

Appeal

Should either the Chief Constable of Grampian Police or Mr Bennett wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 1 January 2005, Mr Bennett made a request to the Chief Constable of Grampian Police (Grampian Police) asking for all documents relating to himself and another; a copy of a telephone call he made on 3 December 1999 to Grampian Police headquarters; a copy of a statement he made to Grampian Police on 19 September 2000 and the name and rank of the Grampian Police officer who took the statement. Mr Bennett has previously made a complaint of misconduct against the police and some of the information requested relates to the incident which gave rise to his complaint.



2. The Freedom of Information Officer for Grampian Police contacted Mr Bennett by telephone on 10 January 2005 in order to find out whether Mr Bennett wished to receive copies of previous correspondence between himself and Grampian Police. A letter from Grampian Police dated 11 January 2005 confirms that Mr Bennett only wished to receive papers which he had not already seen.
3. On 31 January 2005 Grampian Police wrote to Mr Bennett in response to his request. The letter informed him that despite an extensive (and ongoing) search the tape recording of his phone call on 3 December 1999 could not be traced.
4. Mr Bennett was also informed that Grampian Police do not hold a formal statement given by him on 19 September 2000. In support of this they provided copies of internal correspondence relating to Mr Bennett's previous request for a copy of this statement. Grampian Police provided copies of two missing persons reports compiled by a named police officer in November 2004 from information provided by Mr Bennett. These copies were redacted to remove personal information relating to third parties.
5. Mr Bennett had also asked for copies of all documents relating to himself and another person. Grampian Police released a note of a meeting between Mr Bennett, Grampian Police and the Advocacy Service in September 2001. They also provided a copy of a cutting from the Press and Journal from 24 March 2004. All other information was withheld. Grampian Police cited 9 different exemptions from FOISA.
6. On 9 February 2005 Mr Bennett wrote to Grampian Police and asked for a review of the decision not to release some of the information he required. He also asked for the written details of what was said by third parties on page 2 paragraph 12 of the missing person form, accepting that personal names would be blocked out. His letter also stated that he did not accept that the tape of his phone call to police headquarters was missing.
7. After reviewing the decision Grampian Police wrote to Mr Bennett on 10 March upholding their decision and informing Mr Bennett that he would be advised whether the missing tape recording was found during the ongoing audit of records of calls to the Force Control Room, due to be completed by the end of March.
8. On 30 March 2005 Grampian Police wrote to Mr Bennett to let him know that the recording had not been found.
9. In the meantime, Mr Bennett applied to me for a decision in a letter dated 12 March 2005, and the case was allocated to an investigating officer.



The Investigation

10. Mr Bennett's appeal was validated by establishing that he had made a valid information request under FOISA to a Scottish public authority, and had appealed to me only after requesting Grampian Police to review the response to his request.
11. A letter was sent to Grampian Police on 29 March 2005, advising them that an appeal had been received and that an investigation into the matter had begun. Grampian Police were asked to provide:
 - a) Details of the investigation which has been carried out to establish the whereabouts of the tape of the call made by Mr Bennett on 3 December 1999.
 - b) The information which has been withheld which relates to another person.
 - c) The missing person's report with the redacted information reinstated.
12. On 31 March 2005 Grampian Police supplied:
 - a) copies of an email and two memoranda already supplied to Mr Bennett regarding efforts to trace the missing tape; the report of the audit carried out on phone calls to the Force Control Room after receiving Mr Bennett's request; and a copy of a letter to Mr Bennett advising him of the result of the audit;
 - b) a description of the files relating to Mr Bennett, comprising c. 1500 pages;
 - c) two missing persons reports, with a copy showing which information had been redacted from the report relating to one of the missing persons.
13. The investigating officer examined the files held by Grampian Police and, following discussions with Grampian Police, certain documents were released to Mr Bennett.
14. Following this, 9 documents continued to be withheld in full from Mr Bennett. Of the documents released, 7 had information redacted from them, and this redacted information has been included in my consideration of the case.



The Commissioner's Analysis and Findings

15. This decision notice will look at two issues:
- a) The missing tape recording of Mr Bennett's phone call on 3 December 1999 and
 - b) Whether the remaining information withheld should be released.

The Missing Tape

16. Mr Bennett had asked the Police to supply a copy of the tape recording of his phone call to Grampian Police headquarters on 3 December 1999. He had previously requested a copy of this recording in 2003, and memoranda provided to my Office show that at that date the relevant tape was retrieved. However, Mr Bennett had not been provided with a copy of the recording at that stage, as it was felt that locating his call on the tape would be an undue drain on Control Room resources.
17. Mr Bennett made a second request for a copy of his phone call on 1 January 2005, and Grampian Police discovered that the tape was now missing. Following this discovery Grampian Police carried out a full audit of the procedures in place for managing records of calls to the Force Control Room. These procedures were assessed against the Code of Practice on Records Management drawn up in terms of section 61 of FOISA. The audit also focused on the location of the missing recording.
18. The audit report noted that the tape containing Mr Bennett's phone call is marked as missing on the tape list and that two separate searches of the storage areas of the Force Control Room had not produced the tape. The memorandum of 5 March 2003, referred to in paragraph 18 above, indicates that at that time the missing tape had been withdrawn from storage in an attempt to locate Mr Bennett's call; that the Corporate Services Chief Inspector had instructed that the tape should not be destroyed without his notification; and that there is no record of any such notification that the tape should be destroyed. However, the officer who retrieved the tape in 2003 did not return it to the storage area, possibly in order to safeguard it from removal by technicians examining the problems experienced during recording. No record was kept of the location of borrowed tapes and the officer involved can no longer remember where the tape was stored. The audit report recommends measures that should prevent future failures to locate a Force Control Room tape or disk.



Conclusion

19. I have concluded that Grampian Police no longer hold a copy of the telephone call requested by Mr Bennett, on the basis that it has either been irretrievably lost or inadvertently destroyed. I am satisfied that this is due to a failure of the records management system, rather than any specific action taken by Grampian Police to prevent the release of the information requested.
20. The recommendations of the audit report lie outside the scope of this decision notice but I welcome the steps proposed by Grampian Police to rectify the records management failings brought to light by Mr Bennett's request, which will bring their procedures into line with the Code of Practice on Records Management under section 61 of FOISA.

Should the information withheld be released?

21. I will now consider whether the information referred to in paragraph 14 above should have been released to Mr Bennett.
22. Grampian Police have provided extensive arguments to support the case for withholding the information. They have relied upon 9 separate exemptions in FOISA: section 30; section 34(3)(a) and (b); section 34(4); section 35(1)(g) read in conjunction with section 35(2)(b); section 36(2)(b); section 38(1)(a) and (b); and section 39(1). They have also presented their reasons for believing that, on balance, the public interest is better served by withholding this information than by releasing it.
23. In passing I would like it to be noted that authorities should be aware that if they choose to rely on multiple exemptions for the same item of information withheld then they will have to provide a separate, detailed argument justifying the use of each exemption cited relating to the information withheld rather than simply citing the exemptions which they regard as applying. For this reason I would discourage the use of multiple exemptions without strong justification.
24. In this case, although Grampian Police have presented strong arguments to justify their use of each exemption cited above, I have found it necessary to consider only a few of the exemptions listed in order to reach my decision. I have not considered the other exemptions cited by Grampian Police or their justification for the use of those exemptions.



25. The nine documents completely withheld from Mr Bennett can be classified as follows:
- a) Three police witness statements relating to Mr Bennett's alleged conduct on 3 December 1999 (documents 55, 56 and one unnumbered document)
 - b) One memorandum serving as a cover note for attached witness statements relating to Mr Bennett's complaint of police misconduct. (document 85)
 - c) One letter sent with reference to the investigation of Mr Bennett's complaint against Grampian Police (document 70)
 - d) One civilian witness statement relating to an incident in which Mr Bennett was involved on 3 December 1999 (document 82)
 - e) One subject report regarding Mr Bennett and another individual, sent to another police force (document 287)
 - f) One subject report "Review of File..." which summarises the views of the Inspector responsible for investigating Mr Bennett's complaint against Grampian Police, and provides observations from a Detective Inspector on the case (document 91)
 - g) One subject report providing an additional police statement in relation to Mr Bennett's complaint against Grampian Police (document 77)

Prejudice to law enforcement – Section 35(1)(g)

26. Section 35(1)(g) of FOISA allows Scottish public authorities to withhold information if it would substantially prejudice their ability to carry out their functions for the purposes listed in section 35(2). Grampian Police believe that the disclosure of information would, or would be likely to, prejudice substantially their ability to ascertain "whether a person is responsible for conduct which is improper" (section 35(2)(b)).
27. Investigations into allegations of misconduct by police officers below the level of Assistant Chief Constable are governed by the Police Conduct (Scotland) Regulations 1996, and so are clearly a "function" of Grampian Police, a required condition before the exemption in section 35(1)(g) can be applied.
28. Grampian Police have stated that it is absolutely essential that those giving statements to officers carrying out investigations into allegations of misconduct must not be inhibited in any way from coming forward with information which may lead to the rooting out of misconduct or wrong doing within Grampian Police. They argue that this would limit the effectiveness of such investigations, and undermine the public interest in ensuring that vice or wrongdoing in Grampian Police is exposed and rooted out. The fear is that witnesses will be inhibited from being frank and candid if they believe their statements will be made generally available, for fear of reprisals.
29. A police investigating officer's report can also include his or her opinion on the matter under investigation, and offer advice for consideration by the Deputy Chief Constable on recommended action for dealing with the allegations. Grampian Police have argued that it is essential that officers providing such advice are not inhibited from being frank and candid by fear of reprisal and that the Deputy Chief Constable is able to take a decision on the basis of the best available advice.



30. I do not accept that police reports should be treated as a class exemption under FOISA. By this I mean that police reports should not be automatically exempt from a request for information under FOISA. FOISA requires the public interest to be considered before deciding to withhold information under section 35(1)(g), even where release would substantially prejudice police procedures. However, I do accept that there is generally a strong public interest in enabling police officers to make comprehensive and unreserved statements to assist with the processes of law and order. I further accept that it is likely that if such reports were routinely disclosed, this would have the effect of inhibiting the officers' and witnesses' comments, and as a result would substantially prejudice the ability of Grampian Police to exercise their function of investigating whether a police officer is responsible for conduct which is improper. I will consider the public interest in releasing police reports on a case by case basis. Arguments based on the public interest in disclosure will have to be specific and strongly persuasive to allow me to conclude that particular police reports should be released.
31. I therefore accept Grampian Police's argument that the release of those statements and reports could reasonably be expected to prejudice the effectiveness of future investigations. Such an outcome could reasonably be expected to have a significant adverse effect on the performance of Grampian Police's function of carrying out such investigations. Rather than considering at this stage whether public interest in the disclosure of the specific documents listed in paragraph 25 above might outweigh the general prejudice to the conduct of future investigations, I will first consider the arguments submitted by Grampian Police in support of the other exemptions listed below.

Health and safety

32. Grampian Police argued that some of the information withheld from Mr Bennett was done so on the grounds that disclosure would endanger the health and safety of another individual, making it exempt under section 39(1) of FOISA. Grampian Police have provided me with sufficient evidence to support their view on this matter, and I have accepted their argument.
33. I do not consider that there is any public interest in releasing such information. I uphold the decision of Grampian Police to withhold the documents numbered 55, 77, and 287 listed above, and to withhold the redacted information in document 286.

Personal data

34. Grampian Police also cited section 38(1)(b) of FOISA. Several of the documents listed in paragraph 25 contain personal data, as defined by Section 1 of the Data Protection Act 1998 ("DPA"), relating to other individuals. Such information can only lawfully be disclosed under FOISA if doing so would not contravene any of the data protection principles laid down in the DPA. The first data protection principle relates to fair and lawful processing of personal data, and the Information Commissioner, who is responsible for enforcing the DPA, has provided guidance on the consideration of the data protection principles within the context of freedom of information legislation.



35. This guidance recommends that public authorities consider such questions as:
- would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - would the data subject expect that his or her information might be disclosed to others?
 - has the person been led to believe that his or her information would be kept secret?
36. In this case it is clear from evidence provided to me that disclosure of this personal data would be likely to cause unnecessary and unjustified distress, and that some of this information was provided in the expectation that it would be kept secret. I am satisfied that it would therefore be a breach of the first data protection principle for Grampian Police to disclose the information in documents 56, 82, the unnumbered police witness statement, and paragraph 2 of document 91.
37. Grampian Police have redacted information from document 97 under section 38(1)(b). I find that only the first sentence of the redacted paragraphs should have been withheld on these grounds. However, I am satisfied that on the grounds of the arguments advanced in support of the exemption in 35(1)(g), already considered above, Grampian Police are justified in withholding the remainder of the redacted information in this document.

Remaining documents

38. The remaining documents to consider are no. 70, no. 85 and no.91, with the exception of paragraph 2 of no. 91, as described above in paragraph 25. I will also consider the remaining documents released in redacted form: 24, 26, 53, 197, and 293.
39. Document 85 is a memorandum serving as a cover note for Grampian Police reports relating to the investigation of Mr Bennett's complaint against Grampian Police. It seems to me that this document relates more to police internal procedure than to Mr Bennett or the third party in question, and that it would provide him with no fresh information of any substance beyond what has already been released to him. For the most part the content of the document places it outside the scope of Mr Bennett's request.
40. Document 91 is a Detective Inspector's report following his review of the file relating to Mr Bennett's complaint against Grampian Police. The first part of the document relates to police procedures, and falls outside the scope of his request. Also, I note that a document already released to Mr Bennett informed him that changes to police procedure have been made as a result of the enquiry into his complaint. The first part of Document no.91 is therefore disregarded for the purposes of this decision notice.
41. The second part of Document 91 consists of four numbered paragraphs with observations relating directly to Mr Bennett's complaint, with a final paragraph summarising the Detective Inspector's impressions of the case.



42. Paragraph 1 and the final summary paragraph put forward views about Mr Bennett's motivation for pursuing the complaint against Grampian Police. As this is personal data relating to Mr Bennett it is exempt from disclosure under section 38(1)(a) of FOISA. Paragraph 3, which describes Mr Bennett's conduct in relation to another complaint, is also exempt from disclosure on these grounds. If Grampian Police are unwilling to waive the exemption provided by 38(1)(a) and release this information to Mr Bennett then it would be open to Mr Bennett to apply for access to this information under the Data Protection Act 1998, although it should be noted that the Data Protection Act 1998 is also subject to a number of exemptions.
43. Paragraph 2 has been dealt with already in this decision notice (see para. 36 above).
44. Paragraph 4 summarises statements provided by a civilian witness. A similar summary has been redacted from document 24, and a reference to it in document 26. It is clear from evidence provided to me that this witness was anxious that his or her identity would not be made known to Mr Bennett. Grampian Police have stated that "statements from witnesses taken in connection with Police misconduct investigations are not released to the complainant or anyone else legally representing him, unless the witness is required to attend a formal Misconduct Hearing, quite a rare event." This case did not lead to a formal Misconduct Hearing. In this instance, to release the summary of the witness' statement would undermine the witness' confidence in the arrangements for giving evidence and make it less likely that he or she would agree to provide evidence in any future investigation. As there is no general public interest in the release of this information I consider that Grampian Police were justified in withholding it under section 35(1)(g) of FOISA.
45. Document 70 is a letter provided by a medical practitioner who was asked to provide a statement in relation to Mr Bennett's complaint against Grampian Police. Although the letter itself does not provide a statement, its substance is such that Grampian Police initially regarded it as a statement. However, after discussion during the investigation, Grampian Police agreed that this was in fact a letter from a medical practitioner writing in his professional capacity to state his position regarding Grampian Police's request for a statement, and that this document could be released, with the redaction of personal data relating to another individual.
46. Document 53 has already been provided to Mr Bennett with some redactions. Grampian Police have now agreed to release the entire document.
47. Document 197 was also released with some information redacted. This information is legal advice from Grampian Police's solicitors, and as such is exempt under section 36(1). I do not consider there to be sufficient public interest in the information to override this exemption.
48. In document 293 the redacted information relates to another complaint against the police and falls outside the scope of Mr Bennett's request.



Decision

I find that Grampian Police has generally dealt with Mr Bennett's request for information in accordance with section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paragraphs 16 – 48 above and that, where information has been withheld under exemptions in FOISA, Grampian Police were generally justified in doing so. However, I also find that Grampian Police has failed to comply with Part 1 of FOISA in that it has breached section 1(1) in respect of documents 70 and 53. Grampian Police must therefore take the following steps within the next 45 calendar days:

- release document 70 to Mr Bennett with personal data redacted, as described in paragraph 45 above;
- release document 53 to Mr Bennett in full (Grampian Police have already undertaken to do this).

I find that, where the information cannot be provided on the grounds that it is no longer held, Grampian Police were correct to claim that this is the case. Grampian Police have demonstrated that considerable efforts were made to locate the information and that procedures have been recommended which should help to prevent information from being mislaid in such circumstances in future.

Kevin Dunion
Scottish Information Commissioner
10 August 2005