



Scottish Information
Commissioner

**Decision 019/2007 Mr S and the Chief Constable of
Northern Constabulary**

*Various requests relating to a police investigation involving the
applicant*

Applicant: Mr S

Authority: The Chief Constable of Northern Constabulary

Case No: 200502393

Decision Date: 30 January 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 019/2007 - Mr S and the Chief Constable of Northern Constabulary

Various requests relating to a police investigation – requests phrased ambiguously in terms of the Freedom of Information (Scotland) Act 2002 – Information withheld on the grounds of various exemptions – upheld by the Commissioner.

Relevant statutory provisions and other sources

The Freedom of Information Scotland Act 2002 (FOISA) section 1(1) (General entitlement); sections 38(1)(a) and 38(1)(b), read in conjunction with 38(2)(a)(i) and 38(5) (Personal information); section 73 (Interpretation)

The Data Protection Act 1998 (DPA) section 1 (Basic interpretative provisions); Schedule 1, Part 1, paragraph 1 (the first data protection principle) and Schedule 2, paragraph 6(1)

Relevant text from each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr S sent a letter containing seven separate questions to the Chief Constable of Northern Constabulary (Northern Constabulary). These questions sought information and comment from Northern Constabulary in relation to its handling of an investigation involving Mr S.

Northern Constabulary interpreted Mr S's questions as a request for a copy of its investigation report and witness statements. Northern Constabulary stated that this information was exempt from release under FOISA, citing various exemptions.

The Commissioner found that Northern Constabulary's interpretation of Mr S's request was appropriate in the circumstances of the case.

The Commissioner went on to find that Northern Constabulary acted correctly in withholding the information it considered fell within the scope of Mr S's request on the grounds of sections 38(1)(a) and 38(1)(b) of FOISA.



Background

1. On 22 April 2005, Mr S wrote to Northern Constabulary in relation to an investigation conducted into allegations that he had committed a criminal offence. This correspondence was headlined “Request for information” and asked seven questions regarding Northern Constabulary’s handling of that investigation. A redacted version of these questions is included under Appendix II of this Decision Notice.
2. Northern Constabulary responded to this correspondence on 25 May 2005. In doing so, Northern Constabulary provided a response to question 2, in the form of the provision of a short statement by Northern Constabulary’s Freedom of Information Officer which set out Northern Constabulary’s procedure with regard to the issuing of formal cautions. Northern Constabulary went on to indicate that it had interpreted the remainder of Mr S’s request for information as a request for a copy of the police report and witness statements held in relation to the investigation, and stated that these documents were considered to be exempt under the following sections of FOISA:
 - Section 35(1)(a), 35(1)(b), 35(1)(c) and 35(1)(g) - Law enforcement
 - Section 36(1) – Confidentiality
 - Section 37(1)(b) – Court records, etc.
 - Section 39(1) – Health, safety and the environment.Northern Constabulary also stated that it considered the information held which might be provided in response to question 7 to be exempt on the grounds of section 38(1)(a) (Personal information).
3. Mr S requested that Northern Constabulary review its decision on 8 June 2005.
4. A response was issued by Northern Constabulary on 6 July 2005. This response set out that, following review, Northern Constabulary had concluded that the original reasons for withholding information were both relevant and sufficient, and that as a result the decision to withhold was confirmed without modification.
5. Mr S submitted an application to my Office 29 July 2005.



6. Mr S's application was validated by establishing that he had made a request for information to a Scottish public authority (Northern Constabulary) and had appealed to me only after asking the authority to review its response to that request.

The Investigation

7. Following receipt of Mr S's application to the Commissioner, my investigating officer contacted Northern Constabulary, in terms of section 49(3)(a) of FOISA, to advise it of Mr S's application and to invite its comments in respect of the application. These submissions were received on 1 September 2005.
8. In its submission, Northern Constabulary expressed its view that questions 1, 3, 4, 5 and 6 of Mr S's initial correspondence were seeking information which was subjective to the investigating officers, and sought comment with regard to the process by which they investigated his complaint. Northern Constabulary informed my Office that it did not hold details of how individual officers process the information they collect during individual investigations, but it does hold copies of the reports created by those officers which detail the case and the enquiries carried out.
9. Northern Constabulary therefore indicated that it considered that Mr S's initial requests could be interpreted as a request for a copy of the relevant investigation report and witness statements.
10. Northern Constabulary was subsequently asked to provide further information in relation to the submissions made and, in particular, to provide further information and clarification in support of the various exemptions cited.
11. In response to this correspondence, Northern Constabulary informed my Office that it no longer wished to rely on the exemptions under sections 36(1) and 37(1)(b), with regard to the information requested. Northern Constabulary went on to state, however, that it considered that the investigation report could be exempted in its entirety under the following FOISA exemptions:
 - Sections 34(1)(a)(i) and 34(1)(b) – Investigations by Scottish public authorities and proceedings arising out of such investigations
 - Sections 35(1)(a), 35(1)(b) and 35(1)(c) – Law enforcement
 - Sections 38(1)(a) and 38(1)(b) – Personal information



- Section 39(1) – Health, safety and the environment
12. My Office also received an additional submission from Mr S during the investigation, which set out that he was dissatisfied with Northern Constabulary's interpretation of his request as being only for a copy of the investigation report and witness statements held by Northern Constabulary. In this correspondence, Mr S stated that he considered that a range of additional information might be held which could be provided in response to his individual questions. Mr S suggested that this information might include the following:
- extracts from officers' notebooks;
 - computer print-outs recording the reporting of the allegations;
 - computer and notebook records of interviews;
 - policy documents;
 - records of reports to specific agencies;
 - records of meeting with relevant agencies;
 - copies of all emails, memos or other notes held in relation to the investigation.

The Commissioner's Analysis and Findings

The scope of the request

13. In its submission to this Office, Northern Constabulary has indicated that it considers that Mr S's initial request was worded ambiguously, in that, rather than explicitly requesting recorded information, Mr S was "*asking questions which are subjective to the investigating officers and their process of investigation*". As a result, Northern Constabulary has indicated that it experienced problems in interpreting Mr S's request within the terms of FOISA, yet ultimately considered that a copy of the relevant investigation report and witness statements would represent an appropriate response to that request.
14. Mr S, on the other hand, has suggested in his submissions that Northern Constabulary's interpretation of his request as being only for a copy of the investigation report was unnecessarily restrictive, and has suggested that Northern Constabulary may hold a substantial amount of additional information which should have been considered within the scope of his request.



15. Before going on to consider the exemptions which have been applied by Northern Constabulary in relation to this case, therefore, it will first be appropriate to consider the scope of the request, and assess whether Northern Constabulary's interpretation of that request was appropriate in terms of FOISA.
16. Having reviewed in detail the various questions set by Mr S in his correspondence of 22 April 2005, I hold concerns with regard to the validity of those requests in terms of FOISA.
17. While it is clear that FOISA provides, under section 1(1), the right to request and receive information from Scottish public authorities, section 73 of FOISA goes on to set out that "information" should be considered to mean "information recorded in any form". In order for a request to be considered as a valid request under FOISA, therefore, that request should be seeking access to recorded information which is held by an authority.
18. The various questions posed by Mr S in his request of 22 April 2005 are not explicit requests for recorded information, however, but instead appear to be questions which seek explanation and comment with regard to aspects of Northern Constabulary's handling of the investigation into the complaint against Mr S. It is apparent from a review of these questions that Mr S's intention was not to gain access to specific recorded information held by Northern Constabulary, but was rather to have Northern Constabulary generate and provide him with a narrative which set out both the reasons for initiating the investigation, and the subsequent reasons why that investigation followed a particular route. Essentially, therefore, in seeking such a narrative Mr S was requesting that Northern Constabulary generate new information to be provided in response.
19. On receipt of such a request, the most appropriate course of action for Northern Constabulary to take in terms of FOISA would have been to contact Mr S to seek clarification with regard to his request. This would have allowed Northern Constabulary to clarify the scope of FOISA while also determining whether Mr S did indeed seek access to recorded information held by Northern Constabulary. Indeed, paragraph 20 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code) provides further guidance for authorities in circumstances such as this where the nature of the request in terms of FOISA is unclear.



20. Instead, however, Northern Constabulary chose to interpret the request as being a request for a copy of the investigation report and witness statements, in that it considered that these documents constituted recorded information which might be provided in response to Mr S's request. In interpreting Mr S's request in this way, it seems that Northern Constabulary appears to have assessed that, while such a response would not explicitly address the majority of the questions set by Mr S, it was this information in particular that would serve to shed light on the investigation process undertaken by Northern Constabulary, and the reasons why that investigation followed a particular course.
21. While I hold concerns as to whether Mr S's request should have been considered as a valid FOISA request on receipt, I am prepared to accept Northern Constabulary's position in this case, on the grounds that Northern Constabulary chose to interpret the request as a request for recorded information, and subsequently chose to respond to that request by considering recorded information held which might be provided in response.
22. While I note that Mr S has subsequently expressed his belief that his request should be considered to be interpreted as a broader request for a range of information beyond the report and statements, I cannot accept that the information suggested by Mr S (examples of which are listed under paragraph 12 above) should be considered within the scope of this investigation. Had Mr S's original intention been to seek access to the recorded information summarised under paragraph 12, then it is reasonable to assume that his request or request for review would have been formulated in such a way as to explicitly seek it.
23. In conclusion then, while I consider it to be a generous interpretation, I am of the view that Northern Constabulary's conclusion that Mr S's request be interpreted as a request for a copy of the investigation report and witness statements is appropriate in the circumstances of this case.
24. In general, an authority will be deemed to have responded to an information request appropriately where it can be demonstrated by the authority that its response was made in good faith, and was based on a reasonable interpretation of the applicant's request. Given the fact that Mr S's request does not seek access to specific recorded information, I am of the view that Northern Constabulary's subsequent interpretation of that request as being a request for copies of the investigation report and witness statements was reasonable and appropriate.
25. Northern Constabulary should be aware, however, that the issues which arose with regard to the interpretation of Mr S's request would almost certainly have been avoided if they had sought to seek clarification on receipt of Mr S's request, providing him with advice and assistance with regard to framing an appropriate request for information under FOISA.



The application of the exemptions

26. As stated above, Northern Constabulary considered that the following exemptions could be applied to the information it considered fell within the scope of Mr S's request:
- Sections 34(1)(a)(i) and 34(1)(b) – Investigations by Scottish public authorities and proceedings arising out of such investigations.
 - Sections 35(1)(a), 35(1)(b) and 35(1)(c) – Law enforcement
 - Sections 38(1)(a) and 38(1)(b) – Personal information
 - Section 39(1) – Health, safety and the environment

Section 38 – Personal information

27. Northern Constabulary has argued in its submissions that the information it considered fell within the scope of Mr S's request can be considered to constitute personal information. Northern Constabulary indicated that this personal information related either to Mr S himself or to witnesses interviewed in connection with Northern Constabulary's investigation.
28. Given that the specific exemptions under section 38 which were cited by Northern Constabulary are absolute exemptions, and are therefore not subject to the public interest test, it will be appropriate to consider these exemptions in the first instance. Should information be considered to fall within the scope of these exemptions, then that information will be absolutely exempt from release under FOISA, regardless of whether or not the remaining exemptions can be considered to apply.
29. The two section 38 exemptions cited by Northern Constabulary were section 38(1)(a) and section 38(1)(b) read in conjunction with section 38(2)(a)(i).



Section 38(1)(a) – Personal data of which the applicant is the data subject

30. Section 38(1)(a) of FOISA exempts information if it constitutes personal data of which the applicant (i.e. Mr S) is the data subject. In order to determine whether the report contains personal data, I have referred to the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (DPA). This defines “personal data” as:

“data which relate to a living individual who can be identified –

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

31. In its submissions to my Office, Northern Constabulary have advised me that it relied on the exemption in section 38(1)(a) on the basis that the entire investigation report contains personal data relating to Mr S, in that it is a report concerning an investigation into allegations that he had committed an offence. Northern Constabulary stated that such information, if sought, should therefore be requested under section 7 of the DPA (Right of access to personal data) as opposed to FOISA. Northern Constabulary went on to state, however, that if sought under the DPA, it would consider the information to be exempt from release under section 29 of the DPA (Crime and taxation).
32. In considering the information contained within the report, it is clear that the report concerns an investigation into allegations of an offence committed by Mr S and, as such, is composed of his own personal data. The report contains biographical information relating to Mr S, and describes offences he is alleged to have committed. As such, the report therefore clearly has Mr S as its focus, and relates solely to actions alleged to have been undertaken by him in his personal life.
33. The report also contains details of statements made by witnesses, and the accompanying witness statement documents set out these statements in full. While these statements are, by their nature, statements made by third parties, the content and focus of those statements relate solely to the allegations against Mr S. I am therefore satisfied that the majority of the personal data relating to the witnesses contained within the investigation report and the witness statements also constitutes the personal data of Mr S.



34. Having considered the nature and content of this material, I have no doubt that the information withheld by Northern Constabulary falls within the definition of personal data provided by the DPA. As a result, it is my view that this information is absolutely exempt from release under FOISA, by virtue of section 38(1)(a).
35. As noted above, the exemption in section 38(1)(a) is absolute. I am not therefore required to go on to consider whether the public interest lies in the information being released or withheld.
36. Finally, it should be noted by Mr S that it will not generally be appropriate for information of the type considered in this case to be accessible under FOISA. Information released under FOISA is generally considered to be released into the public domain and may be disclosed to any other individual who requests it.
37. It is also, of course, not for me to comment on Northern Constabulary's assertion that the information in question would also be would be exempt from disclosure under the DPA. Such matters fall within the separate jurisdiction of the Information Commissioner, who is responsible for overseeing and regulating the DPA on a UK-wide basis.

Section 38(1)(b) – third party personal information

38. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) of FOISA, absolutely exempts information if it constitutes personal data and the disclosure of the information to a member of the public would contravene any of the data protection principles set down in the DPA.
39. Northern Constabulary stated in its submissions that the exemption under section 38(1)(b) can be considered to apply to the relevant information which related to the witnesses themselves. In applying this exemption, Northern Constabulary argued that the information was personal in that it detailed the names, ages, dates of birth and address of those interviewed, along with details of their personal recollections and opinions in related to the alleged offence.
40. Northern Constabulary argued that the release of this information would contravene the first data protection principle, which states that personal data should be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA (and, in the case of sensitive persona data, at least one of the conditions in Schedule 3 of the DPA) are met.



41. Northern Constabulary has also argued in its submissions to this Office that it would be unfair to the individuals in question if the data were to be released to a member of the public (including Mr S). Northern Constabulary stated that this information was collected solely for the purpose of policing, and to release it to a member of the public on request would therefore be unfair to those individuals.
42. Having considered the definition of personal data contained in section 1(1) of the DPA I agree that the information about the third parties contained in the report is their personal data. In addition, with regard to information held in relation to three of the witnesses interviewed, I am of the view that specific information constitutes sensitive personal data relating to those individuals.
43. With regard to that sensitive personal data, I am fully satisfied that none of the conditions in Schedule 3 of the DPA are met in relation to the information in question. As such, I consider that this sensitive personal data is absolutely exempt under section 38(1)(b) of FOISA.
44. Turning now to the remaining personal data within the report, it is my view that the only condition which could be considered to apply is condition 6(1). Condition 6(1) states the following:

“The processing is necessary for the purposes of legitimate interest pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interest of the data subject.”
45. In considering whether condition 6(1) supports the disclosure of personal data, I am obliged to apply a number of tests. The first test is whether it can be established that the third party or parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates. The second is whether the processing is necessary for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced.
46. With regard to the first test, I am of the view that Mr S has a legitimate interest with regard to the release of the information, in that, as the subject of the investigation, he has a legitimate interest in terms of establishing that the investigation in question was undertaken objectively and appropriately. In addition, I also consider that there is a wider legitimate interest in terms of assuring the general public that such investigations are undertaken appropriately and without prejudice. As such, I find that the first test can be fulfilled.



47. With regard to whether disclosure is necessary for the purposes of the legitimate interests identified above, I have considered whether those interests might reasonably be met by any alternative means. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of certain of the personal data in the report and therefore that disclosure of this data is necessary for the purposes of those interests.
48. As is clear from condition 6(1), however, the third test requires me to consider such interests against the legitimate interests of the data subjects.
49. The data subjects in question are individuals interviewed as part of a police investigation into serious allegations made against Mr S. As Northern Constabulary have stated in their submissions to my Office, this information was collected solely for the purpose of investigating, and potentially prosecuting, the alleged offences. As such, and as asserted by Northern Constabulary, the individuals in question will have had no expectation that the information would be processed for any purpose other than those related directly to furthering that investigation. I consider, having fully reviewed the information in question, that this expectation of confidentiality, along with the nature and content of the information, ensures that the data subjects have substantial legitimate interests with regard to the non-disclosure of that information.
50. While I therefore acknowledge that Mr S has a legitimate interest with regard to the release of this information under FOISA, I am of the view that release of this information would nevertheless constitute an unwarranted prejudice to the legitimate interests of the data subjects.
51. I therefore find that Northern Constabulary acted correctly in applying the exemption under section 38(1)(b) to the third party personal data contained within the withheld documents, on the basis that release would contravene the first data protection principle on fair and lawful processing.
52. As I have concluded that the requested information is absolutely exempt from release under sections 38(1)(a) and 38(1)(b) of FOISA, I do not intend to consider the remainder of the exemptions cited by Northern Constabulary.



Decision

I find that Northern Constabulary acted in accordance with Part I of the Freedom of Information (Scotland) Act 2002 in concluding that the information held which it considered fell within the scope of Mr S's request was absolutely exempt from release under sections 38(1)(a) and 38(1)(b) of FOISA.

I also consider that Northern Constabulary's interpretation of Mr S's request can be considered to be reasonable and appropriate within the circumstances of this case.

Appeal

Should either Mr S or Northern Constabulary 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.

Kevin Dunion
Scottish Information Commissioner
30 January 2007



APPENDIX I

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
 - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles;

...

- (5) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

73 Interpretation

In this Act, unless the context requires a different interpretation –

...

"information" ... means information recorded in any form;

...



Data Protection Act 1998:

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

"personal data" means data which relate to a living individual who can be identified-

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

...

Schedule 1 The Data Protection Principles

Part 1 The principles

1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 Conditions relevant for the purposes of the first principle: processing of any personal data

...

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.



APPENDIX II

Mr S's initial request of 22 April.

“Request for information

At a meeting with [named police officer] at Fort William Police Station on [date of meeting] I was advised to write to you with my concerns about a joint investigation carried out by Social Work Services and the Police in [details of allegations].

I would like to raise the following points:

- 1. When the allegations were first made what steps were taken by the Police to establish the validity of these allegations and the motives of the adults involved.*
- 2. Why was I cautioned by investigating officers and a report sent to the Procurator Fiscal when a Lawyer instructed by Fort William Sheriff Court to carry out an Independent Review of the case...informed me that there was no evidence to substantiate the allegations made.*
- 3. What were the concerns investigating officers were referring to when they said there was “cause for concern” following my lawyer’s request to ascertain on what grounds I was being cautioned.*
- 4. If the police thought there was a case to answer why did part of the investigation not include...[applicant suggests those he considers appropriate for interview]*
- 5. Why did the police investigation not include...[applicant suggests those he considers appropriate for interview]*
- 6. What steps were taken by the Police to substantiate the statements given by adults during the course of the investigation as it was clear from my interview with the Police that false statements had been given to them by...[applicant refers to witness]*
- 7. Did the Police take statements from [applicant names two potential police witnesses]”*