



Scottish Information  
Commissioner

## **Decision 084/2005 – Ms S and Highland Council**

*Request for police report about applicant which had been received  
by Highland Council*

**Applicant: Ms S**  
**Authority: Highland Council**  
**Case No: 200502887**  
**Decision Date: 20 December 2005**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Decision 084/2005 – Ms S and Highland Council**

**Request for a Police report that had been prepared concerning Ms S and passed onto Highland Council – withheld on the basis of section 38(1)(a) of the Freedom of Information (Scotland) Act 2002 – personal data of which the applicant is the data subject - section 36 of the Act – confidential information**

### **Facts**

---

Ms S submitted an information request to Highland Council (the Council) for all the information that they held about her and also a Police report that the Council had obtained from Northern Constabulary about Ms S. The Council provided Ms S with the information that they held about her but did not disclose the Police report. This decision was upheld by the Council on review and Ms S applied to the Commissioner for a decision.

### **Outcome**

---

The Commissioner found that the Council had complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) . The Commissioner found that the information requested by Ms S was exempt by virtue of section 38(1)(a) in that the information amounted to her personal data.

The Commissioner found that the information requested by Ms S was also exempt under section 36(2) of FOISA as the information related to a confidential document which had been provided to the Council under an expressed obligation of confidence and further that if the Council did disclose this information it might harm the relationship the Council had with Northern Constabulary under an agreed protocol.

The Commissioner found that the Council had failed to comply with Part 1 of FOISA in that they failed to advise Ms S which exemptions they were relying on in not disclosing the information (as required by section 16(1)(c)) and further failed to explain why those exemptions applied (as required by section 16(1)(d)).



The Commissioner found that the Council had failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in failing to outline to Ms S the rights that she had to request a review from the authority and to make an appeal to the Scottish Information Commissioner, as required by section 19(b).

## Appeal

---

Should either Ms S or Highland Council 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 7 September 2005, Ms S submitted a request for information to the Council. The information requested was all the information that the Council held about her and also a Police report that the Council had requested from Northern Constabulary about Ms S.
2. The Council replied to Ms S's letter on 13 September 2005 and indicated that it was collating all the information that its Housing Service held about her and that this would be sent out to her. The Council indicated that the Police report was information which had been provided to them by Northern Constabulary in confidence and as such they were required to seek the permission of Northern Constabulary before disclosing this. In this letter the Council did not state which exemption(s) it was relying on in withholding the information from Ms S nor did it outline the right that Ms S had to request a review of its decision.
3. Ms S challenged the Council's decision in respect of the Police report in a letter dated 3 October 2005.
4. The Council responded to Ms S on 6 October 2005 and indicated that it had not received permission from Northern Constabulary to release the Police report to Ms S and therefore could not disclose this information to Ms S. The response letter to Ms S was written by the same person who had replied to her initial request for information. Also this letter did not outline the right that Ms S has to make an appeal to me.



5. On 14 October 2005, Ms S applied to me for a decision as to whether the Council had breached Part 1 of FOISA in withholding the Police report. The case was subsequently allocated to an investigating officer.

## **The Investigation**

---

6. Ms S appeal was validated by establishing that she had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Council to review its response to her request. Given the Council's failure to inform Ms S of her right to request a review, I was satisfied that her letter of 3 October 2005 constituted a valid requirement for review for the purposes of section 20 of FOISA.
7. A letter was sent by the Investigating Officer to the Council on 31 October 2005, asking for its comments on Ms S's application. The Council was asked to provide an explanation of why it had not released the information to Ms S, with analysis of the exemption(s) under FOISA it was relying on in not releasing the information and of the public interest test if applicable. The Council was also asked to provide information to allow the Investigating Officer to carry out the investigation, in particular the information withheld.

## **Submissions from Highland Council**

---

8. The submissions from the Council stated that the information withheld was considered to be exempt from disclosure under section 38(1) (a) or section 36 of FOISA.
9. The Council stated in their submissions that it believed the information was subject to section 38(1) (a) of FOISA as the request for information was for personal information of which Ms S was the subject.
10. In their submissions the Council went on to say that, if it were argued that the information did not come under section 38(1)(a) exemption, then it would question whether the report was exempt under section 36 of the Freedom of Information (Scotland) Act 2002, as it was provided in confidence via an information sharing protocol with Northern Constabulary.



11. The Council has included with its submissions a copy of the Housing Liaison Protocol among Highland Council, Northern Constabulary and Housing Associations. This protocol outlines the agreement that the Council has with Northern Constabulary in respect of the sharing of information for the purposes of addressing anti-social behaviour. Although this protocol was drawn up and agreed by the signatories in 2000 and this was before the Freedom of Information (Scotland) Act 2002 came into force the terms and obligations laid down in the Protocol would still apply and would still be relevant when considering an application under the Freedom of Information (Scotland) Act 2002.
12. Section 4 of the protocol covers the confidentiality of information shared between the signatories to the protocol. It states that information will only be exchanged under private and confidential cover between the Area Police Commander and the local Housing Manager. The information will be held securely and only acted upon under the terms of the protocol by both agencies.
13. The protocol goes on to provide that any information disclosed remains the property of the disclosing agency. It can only be used for the purpose(s) the information was requested for and only by the agency requesting the information. If the agency requesting the information requires using the disclosed information for another purpose or they need to disclose the information to another third party (not already notified to the disclosing agency) or a third party requests copies of the disclosed information then the original disclosing agency must be contacted to confirm their approval of the disclosure. The Protocol also states that the exchange of information must be made within the confines of data protection legislation and other relevant legal requirements.
14. The protocol was agreed among the signatories because of the powers to share information that were afforded to them under section 115 of the Crime and Disorder Act 1998. The protocol provides for sharing information for the purposes of addressing anti-social behaviour and similar information-sharing powers are now to be found in section 139 of the Antisocial Behaviour etc (Scotland) Act 2004 (the current legislation governing anti-social behaviour in Scotland).
15. The protocol states that new residents/prospective tenants will be made fully aware of the conditions of the tenancy agreement and the scheme provided for in the protocol. They will also be provided with a statement of intent in relation to the purposes of the protocol.
16. Following correspondence with the Council it is apparent that new residents/prospective tenants do not receive this protocol or the statement of intent. They do however receive a document that outlines their rights under the Data Protection Act 1998 in respect of access to information.



17. In its submissions to my office the Council has acknowledged that procedures have not been followed in relation to Ms S's request. They have stated that, firstly the applicant should have been informed that the information request was exempt under section 38(1)(a) and that it would be handled via the Data Subject Access process. Secondly, they indicate that the applicant's request could have been transferred to Northern Constabulary following the section 60 Code of Practice. ( However, it should be noted that the section 60 Code discourages the transfer of an applicants request unless when making their request or following correspondence from the public authority the applicant has made it clear that they are happy for their request to be transferred to another public authority on the basis that this other public authority has the information which they are seeking.) The Council have also submitted that the applicant was not informed of her rights under FOISA.

### **The Commissioner's findings and analysis**

---

18. Section 38(1)(a) of FOISA exempts information if it constitutes personal data of which the applicant is the data subject;
19. The exemption under section 38(1)(a) of FOISA is an absolute exemption. This means that where a public authority considers that the information which has been requested falls within the scope of this exemption then it is not required to consider the public interest test and the information would not require to be disclosed.
20. In their submissions the Council has stated that they are relying on section 38(1)(a) in withholding the information from Ms S, although they have gone on to say that if the information did not fall within the scope of this exemption they would instead rely upon the exemption under section 36. The Council has not quoted which particular subsection of section 36 it would seek to rely on.
21. The exemption under section 36 relates to Confidentiality. Section 36 contains 2 exemptions.
22. The exemption under section 36(1) states that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. The exemption under section 36(1) is a qualified exemption, which means that where a public authority considers that the information requested falls within the scope of this exemption it is required to apply the terms of the public interest test to determine whether the public interest in disclosure of the information outweighs the public interest in withholding the information. Where the two are evenly balanced presumption should always be in favour of disclosure.



23. The exemption under section 36(2) states that information is exempt information if it was obtained by a Scottish public authority from another person (including another such authority); and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. The exemption under section 36(2) is like the exemption under section 38(1)(a) in that it is an absolute exemption and is not subject to the public interest test (although the public interest defence applicable under the common law of confidentiality would require to be considered).
24. The information that has been withheld from Ms S is a report which was prepared by Northern Constabulary which relates to Ms S.
25. This report had been made available to the Council's Housing Services by Northern Constabulary under the terms of the Housing Liaison Protocol which has been mentioned in paragraphs 10 to 16 above. As mentioned already this protocol provides for the sharing of information among the parties. Information is shared among the parties on the basis that it is confidential and only to be used for the purposes which are laid down in the protocol.
26. Ms S has asked for the report as it contains information about her.
27. In determining whether this Police report should be disclosed to Ms S I am required to look at the application of the exemptions that the Council are relying on.



28. As I have already indicated the exemption under section 38(1)(a) is an absolute exemption. This section of the Act exempts the information that has been requested if the information constitutes personal data of which the applicant is the data subject. In order to determine whether the report contains personal data I have referred to the definition of personal data in the Data Protection Act 1998. Section 1(1) of the 1998 Act defines “personal data” as:

*“any 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 an individual and any indication of the data controller or any other person in respect of the individual.”*

29. The interpretation of the decision in *Durant v the Financial Services Authority* (2003) EWCA CIV 1746 case is important in determining what constitutes personal data. In this decision, the Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of an individual’s involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom the individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person’s privacy whether in his personal or family life, business or professional capacity.
30. In looking at the information that has been withheld from Ms S it is clear that this information comprises a report that has data concerning Ms S at its focus. The report relates to actions that Ms S has taken in relation to her personal life and clearly identifies Ms S as being the subject of the report. In that regard I am satisfied that it would constitute personal data as defined in the *Durant* case. The information that is contained in the report does give sufficient information which would identify Ms S and this is one of the primary definitions for Personal Data under the Data Protection Act 1998. The report also contains personal data relating to other individuals, although it is acknowledged that they are not the main focus of the report. and I am satisfied in the circumstances that it is appropriate that these be dealt with in the context of Ms S’s personal data rather than separately.. I consider that the information in the report falls within the definition of Ms S’s personal data under section 1(1) of the Data Protection Act 1998. In particular I have taken into account that the definition explicitly 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 an individual”.





31. In considering the application of the exemption under section 38(1)(a) and the submissions from the Council together with the information which has been withheld from Ms S I am satisfied that the information in the Police report does contain personal data of which Ms S is the subject. Therefore, I am satisfied that this report is exempt under section 38(1)(a) of FOISA.
32. I would like to take this opportunity to clarify the relationship that exists between the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998 as I feel that this may be of assistance to the applicant in this case – and others in a similar position. As I have indicated section 38(1)(a) provides an absolute exemption to release of personal information under FOISA where the person making the request is the subject of the information. This is to protect the privacy of the individual concerned, as disclosure under FOISA is to the world at large. The information may, however, be available to that person alone under the Data Protection Act 1998.
33. In their submissions to my office the Council has indicated that if the information were not to be found to be exempt under section 38(1)(a) then it would question whether the information would be exempt under section 36. Although I consider that the information is exempt under s38(1)(a), I will go on to consider the exemption under section 36 for the sake of completeness.
34. As I have previously indicated, the Council has been unable to pinpoint which exemption under section 36 it would rely on should the information not be found to be exempt under section 38. Having looked at the documentation that the Council has provided by way of submissions to support its case I am satisfied that the relevant exemption under section 36 would be the exemption under section 36(2).
35. The exemption under section 36(2) is an absolute exemption and is not subject to the public interest test, however the public interest defence under the common law of confidentiality would require to be considered.
36. In order for the Council to be able to rely on this exemption it would have to show that the information was obtained by it from another person (including another public authority); and that its disclosure of the information to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person.



37. In the case of the Police report that Ms S is seeking, the Housing Liaison Protocol that exists between the Council, Northern Constabulary and Housing Associations clearly indicates that any information that is passed between the signatories remains the property of the disclosing agency. Where the agency that has received the information wishes to disclose the information to a third party or use the information for a purpose other than that for which they requested the information then they are required to seek the authority of the disclosing agency to do this. I am satisfied that the Police report that was provided to the Council's Housing Services was provided by another public authority (namely Northern Constabulary).
38. Under the terms of the Housing Liaison Protocol dissemination of information between the signatories is carried out by virtue of the relevant legal powers which are afforded to them. The protocol clearly states that information will only be exchanged under private and confidential cover between certain designated officers. Further that it must be clear that the onus is on each partner to ensure that confidential information is protected against unauthorised disclosure. There is an express obligation of confidentiality on the signatories to the Protocol.
39. I am satisfied that the information that Ms S is seeking is not simply factual information or general information. Rather, the information relates to comments that have been made by Ms S and the information includes details of actions that have been taken and descriptions of behaviour which can only have been known to the parties involved; that is Ms S and Northern Constabulary.
40. I am satisfied that the information in question has the necessary quality of confidence and was received in circumstances which imposed an obligation of confidentiality on the Council in respect of its disclosure to the public. I am satisfied that if this information were to be disclosed to the public then this may have a detrimental effect on the Council as this may affect the relationship that they have with the other signatories to the Housing Liaison Protocol, and consequently the effective delivery of strategies to address anti-social behaviour.
41. Although I am not required to apply the public interest test to any information which falls within the scope of this exemption as I indicated earlier the public interest defence under the common law of confidence has to be addressed.



42. In considering the public interest for this purpose I am required to determine whether the three main requirements of confidentiality have been attained. As I have outlined above I am satisfied that the information which has been withheld from Ms S contains the necessary quality of confidence. I am also satisfied that the information has been provided to the Council in circumstances that import an expressed obligation of confidentiality on to the Council. Finally I am satisfied that the unauthorised disclosure of the information by the Council would have a detrimental effect on the relationship that exists between the signatories to the protocol and consequently on the effective delivery of services. On the other hand, I can identify no obvious countervailing public benefit which is likely to accrue from disclosure. With that in mind the balance of the public interest is in favour of withholding the information.
43. In its response to Ms S's original application the Council failed to comply with section 19(b) of FOISA in that it did not advise Ms S of her right to request a review of its decision. Further the Council failed to comply with section 19(b) in responding to her request for review as it did not outline to Ms S her right to make an appeal to the Scottish Information Commissioner if she was unsatisfied with the Council's response.
44. In its initial response to Ms S the Council failed to identify which exemption(s) it was relying on in withholding the information from Ms S and why these exemptions were applicable, contrary to section 16(1)(c) and 16(1)(d) of FOISA.
45. The Council have also failed to comply with section 66 of the Code of Practice made under section 60 of FOISA in that the person who carried out the review of Ms S request was the same person who replied to the original application.
46. The Housing Liaison Protocol which has been drawn up between Highland Council, Northern Constabulary and Housing Associations states within its terms that new residents/prospective tenants would be made fully aware of the protocol and would receive a copy of the statement of intent. In correspondence with the Investigating Officer Highland Council stated that at present this does not happen. It is my view that if the Statement of Intent were to be made available to all new residents/prospective tenants then they may be clearer on the fact that such a protocol exists and what it is for.



## Decision

---

I find that Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding a Police report from Ms S. The exemption in section 38(1)(a) of FOISA was relied on correctly by the Council and, as a result, section 1 (1) was applied correctly.

I find that Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding a Police report from Ms S. The exemption in section 36(2) of FOISA was relied on correctly by the Council and, as a result, section 1 (1) was applied correctly.

I find that Highland Council failed to comply with Part 1 of FOISA in that they failed to advise Ms S which exemptions they were relying on in not disclosing the information (as required by section 16(1)(c)) and further failed to explain why those exemptions applied (as required by section 16(1)(d)).

I find that Highland Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in failing to outline to Ms S the rights that she had to request a review from the authority and to make an appeal to the Scottish Information Commissioner, as required by section 19(b).

In response to the latter two breaches I do not require the Council to take any action as these are technical breaches of the Act in relation to the procedure followed by the Council and do not affect whether the Council have applied the exemptions correctly in withholding the information from Ms S. The Council have acknowledged in their submissions to my Office that they have not dealt with this request as they should have done and Ms S was not in fact impeded in exercising her rights as a consequence.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**20 December 2005**