



Scottish Information
Commissioner

Decision 006/2006 Mr D and Grampian Police

Request for information held relating to the applicant

Applicant: Mr D
Authority: Grampian Police
Case No: 200502171
Decision Date: January 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 006/2006 – Mr D and Grampian Police

Request for information relating to the applicant – failure to comply with sections 10(1) and 21(1) of FOISA by failing to respond to the applicants correspondence within 20 working days – information withheld under sections 38(1)(a), 38(1)(b), 34(1)(a)(i) and (b) and 35(1)(a) and (b)

Facts

Mr D submitted a request to Grampian Police for information relating to the handling by Grampian Police of his case. Grampian Police failed to respond to both Mr D's initial request and his subsequent request for review within the statutory period allowed by FOISA.

During the course of the investigation, Grampian Police applied the exemption under section 38(1)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA) to the majority of the information, on the grounds that it constituted personal data of which Mr D was the subject. Grampian Police informed Mr D that such information was accessible under the Data Protection Act 1998 (DPA) as opposed to FOISA, and proceeded to supply the information under that Act.

A small amount of information was withheld from Mr D. Grampian Police cited sections 34(1)(a)(i) and (b), 35(1)(a) and (b) and section 38(1)(b) of FOISA as the reasons for this non-disclosure.

Decision

The Commissioner found that Grampian Police failed in its duties under section 10(1) and 21(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), by failing to respond to Mr D's initial request and request for review within the statutory 20 working day periods allowed by FOISA.



However, the Commissioner also found that Grampian Police acted correctly in refusing access to the requested information under section 38(1)(a) of FOISA, on the grounds that it constituted personal information of which the applicant was the data subject.

The Commissioner also found that section 38(1)(a) of FOISA applied to all the information requested by Mr D.

Appeal

Should either Grampian Police or Mr D 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. Mr D submitted an information request to Grampian Police on 27 March 2005. The request was part of a series of ongoing correspondence between Mr D and the force.
2. In his correspondence, Mr D referred to a complaint made to Grampian Police regarding its 'views of and conduct towards' him between September 2003 and March 2004, and requested copies of all information held by the force relating to the case. Mr D explicitly referred to the Freedom of Information (Scotland) Act 2002 (FOISA) in making his request, and indicated that he wished access to the information under that legislation.
3. When no direct response was received to this communication, Mr D wrote again to Grampian Police on 13 May 2005.
4. On 21 June 2005, Mr D contacted my Office in relation to this case. In this correspondence, Mr D indicated that he sought my intervention as a result of Grampian Police's failure to respond to both his initial request and his subsequent request for review.



The Investigation

5. Mr D's appeal was validated by establishing that he had made a valid information request under FOISA, and had submitted an appeal only after asking the public authority to review its response to his request.
6. My investigating officer contacted Grampian Police for their submissions in relation to this case on 4 July 2005.
7. A response to this correspondence was received on 20 July 2005. Subsequent submissions were also received from Grampian Police on 12 August 2005 and 14 September 2005. Key aspects of these submissions were as follows:
 - a. Grampian Police acknowledged that they were in breach of FOISA by failing to respond to either Mr D's initial request or his request for review within 20 working days.
 - b. Grampian Police stressed that this failure was not a deliberate attempt to breach the legislation, nor to frustrate Mr D's rights, but rather stemmed from a failure to identify the information request immediately on receipt.
 - c. Grampian Police stated that Mr D's request was sent directly to the officer investigating his complaint, and was received within the context of lengthy ongoing communications relating to the complaint. It was also stated that the information request was contained within a number of other documents submitted simultaneously by Mr D, which were not directly related to the information request. As a result, the request was not identified by Grampian Police until these submissions were fully reviewed by the investigating officer during May 2005.
 - d. Following my correspondence informing Grampian Police of the commencement of my investigation, the case was brought to the attention of Grampian Police's Information Disclosure Unit. This Unit then conducted a full review of Mr D's request.
 - e. As a result of this review, Grampian Police stated that the information requested by Mr D was covered by the Data Protection Act 1998 (the DPA) as opposed to FOISA. The information was therefore claimed to be exempt under section 38(1)(a) of FOISA, which exempts personal information of which the applicant is the data subject.



- f. Grampian Police also stated that, given the initial failure to respond to Mr D's request, it had dispensed with any administrative formalities under the DPA and sent a significant amount of the requested information directly to Mr D.
 - g. Grampian Police had, however, withheld a small amount of information from Mr D. This information comprised a copy of a Police report made to the Procurator Fiscal which related to an incident involving Mr D, along with witness statements collected in relation to that incident.
 - h. Grampian Police stated that this information was withheld under the following sections of FOISA:
 - Section 34(1)(a)(i) and (b) – Investigations by Scottish public authorities
 - Section 35(1)(a) and (b) – Law Enforcement
 - Section 38(1)(b) – Personal information
8. Grampian Police also submitted to my Office a copy of lengthy additional communications and clarification sent to Mr D by the Disclosure Unit. These communications were sent in response to a letter received from Mr D containing approximately 30 questions and requests for clarification relating to the information supplied.

The Commissioner's Analysis and Findings

9. There are two central issues to be addressed in relation to this case – the manner in which Grampian Police dealt with Mr D's information request following receipt, and the nature of the information withheld from Mr D following the force's subsequent consideration of his request. I will consider the latter of these issues first, before going on to comment on the force's handling of the request.

The information which was withheld



10. Unlike the other applications made by Mr D (see decisions 069/2005 and 088/2005), Mr D has not, in this case, disputed the fact that the information provided was processed under the DPA as opposed to FOISA. Mr D has, however, disputed the decision by Grampian Police to withhold certain documents from him. These documents - copies of the police report and related witness statements – were withheld by Grampian Police under the following sections of FOISA:
 - Section 34(1)(a)(i) and (b) – Investigations by Scottish public authorities
 - Section 35(1)(a) and (b) – Law Enforcement
 - Section 38(1)(b) – Personal information

11. Having reviewed the withheld information, however, it is my view that the bulk of this information is, in common with the information which was supplied to Mr D, absolutely exempt from release under FOISA by the terms of section 38(1)(a).

12. Section 38(1)(a) of FOISA contains an absolute exemption relation to personal data of which the applicant is the data subject. 'Personal data' is defined in section 1(1) of the DPA as:

'data which relates to a living individual who can be identified:

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

13. The (UK) Court of Appeal ruling in *Durant v Financial Services Authority* [2003] EWCA Civ 1746 (the Durant ruling) provides further guidance when considering the definition of personal data. In this decision, the Court held that, if information is to be viewed as personal data, that information must be *'biographical in a significant sense'*. It therefore has to go beyond simply recording an individual's involvement in a matter or event that has no personal connotations, and should feature the individual as the focus of the information. The Court of Appeal summarised personal data as information which *'affects [a person's] privacy, whether in his personal or family life, business or professional capacity'*.



14. The information withheld from Mr D comprises a Police report and witness statements which directly relate to, and describe, an incident involving Mr D. As a result of this incident Mr D was cautioned and charged by Grampian Police. While the witness statements are, by their nature, statements made by third parties, the content and focus of those statements relates solely to Mr D and his alleged actions. Mr D is, therefore, the sole focus of the information, and the information contained within the withheld documents clearly concerns Mr D's private life.
15. Having considered the nature and content of this material, I have no doubt that the information withheld from Mr D falls within the definition of personal data provided by the DPA and the Durant ruling. As a result, it is my view that this information is absolutely exempt from release under FOISA, by virtue of section 38(1)(a).
16. It will not generally be appropriate for information of this type to be accessible under FOISA. It is important to note that information released under FOISA may be disclosed to any other individual that requests it. The type of information requested by Mr D should not, therefore, be made publicly available under FOISA, as to release such information without the data subject's explicit consent would be a clear breach of that individual's privacy rights. The DPA, however, provides individuals with an exclusive right of access to personal data which is held about them, subject to certain exemptions. It is not, of course, for me to comment on whether the information in question would be accessible to Mr D under the DPA or would be exempt from disclosure under that Act.
17. Given my view that the withheld information constitutes personal information about the Mr D, and is therefore absolutely exempt from release under section 38(1)(a) of FOISA, I do not intend to consider at this time the application of the additional exemptions cited by Grampian Police in relation to this information.
18. I find, therefore, that Grampian Police acted correctly in withholding the disputed information from Mr D under FOISA, albeit for different reasons than those advanced by Grampian Police. I do not therefore find that Grampian Police acted in breach of Part 1 of FOISA by failing to provide Mr D with copies of the relevant Police report and witness statements.

The handling of the request

19. I will now turn to Grampian Police's handling of Mr D's original request.



20. It should first be noted that Mr D explicitly made reference to FOISA when submitting his information request to Grampian Police and, as such, clearly intended to exercise his rights under that legislation in making his request. Therefore, on receipt of his request, the authority should have provided a response in terms of FOISA, regardless of whether it was in fact personal information he sought access to. Such a response would normally involve issuing a refusal notice under section 38(1)(a) of FOISA, while also informing the applicant of the route by which information may be accessed under the DPA.
21. Grampian Police has, however, stated in its submissions that Mr D's information request was, at first, not recognised as a request which should be processed under either FOISA or the DPA. Grampian Police states that this was because it initially appeared to be part of ongoing correspondence with Mr D relating to his complaint, and that the request for information was not clearly identifiable within the correspondence.
22. While I hold a degree of sympathy with the force regarding this position, and particularly with regard to the volume of ongoing correspondence which has passed between Mr D and Grampian Police concerning his complaint, it cannot be accepted as a valid reason for failing to respond to Mr D's information request (and his subsequent request for review) within the statutory period. This is particularly the case given that Mr D's original correspondence both referred directly to FOISA, and explicitly sought information under that legislation.
23. Since 1 January 2005, every Scottish public authority faces a statutory obligation to respond to the information requests they receive within 20 working days. In fulfilling this obligation, authorities must be mindful that any written correspondence they receive may contain a FOISA request, regardless of the context in which the correspondence is sent, or the previous communications which have passed between the parties. As a result, it is imperative that authorities ensure they have sufficient procedures in place to allow all incoming correspondence to be fully reviewed on receipt, and relevant information requests (and subsequent requests for review) identified.
24. In this case, Grampian Police failed to identify Mr D's requests, and as a result, clearly failed to meet its statutory obligations under FOISA.
25. I therefore find that Grampian Police failed in its handling of Mr D's request with respect to the following sections of FOISA:
 - Section 10(1) – Failure to respond to Mr D's request within 20 working days
 - Section 21(1) – Failure to respond to Mr D's request for review within 20 working days



26. I note, however, that the force has since informed my Office that steps have been taken to improve the procedures which led to these failures. I also note that, following the identification of Mr D's request, the force offered substantial additional advice and assistance to Mr D in order to work towards the resolution of this case. This assistance included the provision of requested information under the DPA while waiving the required fee associated with that legislation, and the provision of a considerable degree of comment and clarification on the information supplied, as described under paragraph 8 above.
27. Finally, I would advise Mr D that, if he wishes to pursue access to withheld information in relation to this case, he does so within the scope of the DPA. I am aware that Mr D has been in contact with the UK Information Commissioner's Office (ICO) in Wilmslow in relation to other cases which have been appealed to this Office, and would suggest that he make further contact with the ICO in order to seek advice in relation to this case.

Decision

I find that Grampian Police failed in its duties under section 10(1) and 21(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), by failing to respond to Mr D's initial request or request for review within the statutory 20 working day periods allowed by FOISA.

I do not require Grampian Police to take remedial action in relation to this failure.

I also find that Grampian Police acted correctly in refusing access to the requested information under section 38(1)(a) of FOISA, on the grounds that it constituted personal information of which the applicant was the data subject.

In addition, I find that section 38(1)(a) of FOISA applies to all the information requested by Mr D.

Kevin Dunion
Scottish Information Commissioner
19 January 2006