

Decision Notice



Decision 059/2013 Mrs N and the Police Complaints Commissioner for
Scotland

Correspondence regarding a complaint

Reference No: 201201886
Decision Date: 28 March 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 20 July 2012, Mrs N asked the Police Complaints Commissioner for Scotland (the PCCS) for correspondence and meeting notes relating to a complaint she had made (amongst other items). The PCCS refused to disclose the information contained within a meeting note and two emails.

During the investigation, most of the information in the emails was disclosed. The Commissioner found that the PCCS was entitled to withhold the remaining information, but had been wrong to withhold the information in the emails which has now been disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(i) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 38(1)(a) and (b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal Information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data") and Schedules 1 (The data protection principles – the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data – conditions 1 and 6)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. In 2002, Mrs N submitted a complaint to Dumfries and Galloway Police Authority (the Police Authority) which it responded to in 2003. In 2010, Mrs N applied to the PCCS for a review of the Police Authority's handling of the complaint. In July 2011, the PCCS issued its findings¹ and made a single recommendation; however, the Police Authority did not properly implement the recommendation. In April 2012, a meeting was held to discuss this matter with Dumfries and Galloway Council (the Council), following which the Council prepared an enquiry report which was provided to Mrs N on 6 August 2012 (but which was not published).
2. On 20 July 2012, Mrs N emailed the PCCS requesting (amongst other things not the subject of this decision) all correspondence and meeting minutes from April 2012, when a named individual from the PCCS met with the Council to discuss a complaint which the PCCS had investigated.
3. The PCCS responded on 17 August 2012. It informed Mrs N that it considered the information to be exempt from disclosure under section 30(b)(ii) of FOISA.
4. On 24 August 2012, Mrs N asked the PCCS to review its decision. Mrs N asked for further explanation as to why the exemption in section 30(b)(ii) of FOISA applied, in the circumstances of her request.
5. The PCCS notified Mrs N of the outcome of its review on 12 September 2012. It upheld its previous decision to withhold the requested information under section 30(b)(ii).
6. On 25 September 2012, Mrs N wrote to the Commissioner, stating that she was dissatisfied with the outcome of the PCCS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mrs N had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 2 October 2012, the PCCS was notified in writing that an application had been received from Mrs N and was asked to provide the Commissioner with the information withheld from her. The PCCS responded with the information requested, which consisted of a meeting note and two emails, and the case was then allocated to an investigating officer.

¹ PCCS/110/10/PA Report of a Complaint Handling Review in relation to Dumfries and Galloway Police Authority



9. On 22 October 2012, the investigating officer contacted the PCCS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The PCCS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested (with specific reference to the provisions cited in its responses to Mrs N).
10. The PCCS responded on 16 November 2012, providing submissions to support its reliance on section 30(b)(ii) to withhold the requested information. The PCCS submitted that the exemptions in sections 38(1)(a) and 38(1)(b) of FOISA also applied to the withheld information.
11. On 22 March 2013, following further correspondence with the investigating officer, the PCCS provided Mrs N with redacted versions of the emails it had previously withheld.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mrs N and the PCCS. She is satisfied that no matter of relevance has been overlooked.

Withheld information

13. The withheld information in this case consists of a meeting note from 5 April 2012, and an email chain confirming the action points arising from the meeting. As noted above, redacted versions of the emails have now been provided to Mrs N.
14. The PCCS informed the Commissioner that the Council had not been sent a copy of the meeting note, but had received the email summarising the actions agreed at the meeting.

Section 30(b)(ii) – Prejudice to effective conduct of public affairs

15. The PCCS withheld the information covered by Mrs N's request under section 30(b)(ii) of FOISA. In order for the PCCS to rely on this exemption, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
16. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.



17. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, and is not simply a remote or hypothetical possibility. For inhibition to be likely, there must, in the Commissioner's view, be at least a significant probability of it occurring.
18. Each request should be considered on a case by case basis, taking into account the effects on the future exchange of views anticipated from disclosure of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.

The PCCS's submissions

19. The PCCS explained that its role is to review the manner in which complaints are handled. It does not have the power to independently investigate complaints, so in order for the PCCS to satisfy itself that complaints are handled in a reasonable manner, it is essential that it has the co-operation of the police bodies within its oversight remit.
20. The PCCS commented that, in 2011, it had issued statutory guidance intended to promote police bodies moving to a learning, rather than blame, culture during their investigation of complaints. A key factor in achieving this shift of emphasis is that police bodies and employees should be willing to exchange frankly with the PCCS.
21. The PCCS explained that, as it does not have the power to independently investigate complaints, it relies heavily upon the co-operation of police forces in providing all available information in respect of complaints, not only what has been documented during a police investigation, but also the views and opinions of those involved.
22. The PCCS had welcomed the frank and open nature of the comments made by the Council official at the meeting on 5 April 2012. It took the view that if the official had not been so frank, it would have affected the type of enquiry carried out, which would have been to the detriment of the investigation of the complaint.
23. The PCCS feared that, if the requested information was disclosed, there would be a real risk that police bodies and employees would not be as frank and open and would tend towards circumspection in their communications, especially if such communications were routinely disclosed under FOISA. The PCCS believed this would have a detrimental effect on the complaints system as a whole.
24. The PCCS also commented that, if the individuals involved in investigating complaints do not feel they can exchange their views in private forum, there is a real risk that a proper deliberation of issues will not take place.



Commissioner's conclusion

25. The Commissioner has considered the withheld information carefully, in light of the PCCS's submissions. She agrees with the PCCS that the comments and views recorded within the meeting notes are expressed in very frank terms, but she finds that the remaining withheld information in the emails is devoid of such comments and is more procedural in nature.
26. The Commissioner considers it is important to be clear that the meeting note was created for internal purposes, to record the matters discussed, and to inform the PCCS's investigation. It was not shared with the Council. The Commissioner notes that the PCCS's investigation resulted in an enquiry report, which was a formal record of its findings in this matter and which was provided to Mrs N. The information withheld in this meeting note is of a different nature, and is very much an informal and open discussion of the issues, recording views which were expressed frankly in the expectation that they would be treated confidentially.
27. Given the nature of the information in the meeting note, and the context in which it was created, the Commissioner accepts that its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, as it would be likely to deter participants in similar meetings from expressing or recording views so frankly, and from co-operating with the investigation so openly and honestly. Accordingly, she accepts that the exemption in section 30(b)(ii) of FOISA applies to this information. She will go on to consider whether the public interest in disclosure of the information outweighs the public interest in maintaining the exemption and withholding the information.
28. The Commissioner has reached a different conclusion with respect to the information in the withheld emails. Although one of them includes references to the meeting of 5 April 2012, it does not include similar free and frank comments. It is simply a summary of actions which the Council had agreed to during the course of that meeting, which was then sent to the Council. The Commissioner has therefore concluded that the exemption contained within section 30(b)(ii) is not engaged with respect to the information in the emails. (As noted above, the PCCS has now provided Mrs N with copies of the emails, with personal data redacted. The decision to withhold some personal data is considered later, in relation to the exemptions in section 38(1)(a) and (b) of FOISA.)

Public interest test

29. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is found to have been correctly applied, the Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information (in this case, the meeting note) is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).



The PCCS's submissions

30. The PCCS acknowledged that it was in the public interest to have a complaints system that is transparent to the public, because this enhances scrutiny of decision-making processes and thereby improves accountability. However, in relation to the public interest in disclosing or withholding the information requested by Mrs N, the PCCS argued that whilst Mrs N would no doubt be interested in the note of the meeting, disclosure of this information would not be in the public interest.
31. The PCCS pointed out that, as a result of the further work carried out by the Council, Mrs N has received an apology for the length of time taken for the Police Authority to implement the PCCS's recommendation. It believed that the frank comments provided by the Council official attending the meeting have therefore resulted in a satisfactory outcome for Mrs N. The PCCS found no issue of general interest or importance to the public relating to disclosure of the withheld information which would outweigh the public interest in ensuring that participants in such investigations could express views frankly.
32. In conclusion, after carrying out the balancing exercise described above, the PCCS considered that, on balance, the public interest lay in favour of withholding the information in question.

Mrs N's comments

33. Mrs N commented that the PCCS had not offered any real justification for withholding the information, stating only that it would affect the working relationship between themselves and the Council. Mrs N went on to comment that the meeting was held to remedy wrongdoing, and in the past the PCCS had been willing to discuss information of this type in relation to her complaint.

Commissioner's findings

34. The Commissioner has considered all of the comments made by Mrs N and the PCCS. The Commissioner acknowledges that Mrs N has a genuine interest in information which would help her understand more fully the investigation into her complaint, and which might show whether any action could have been taken sooner.
35. The Commissioner also finds a more general public interest in understanding why the Police Authority did not implement the recommendation by the PCCS sooner; in other words, why the meeting of 5 April 2012 was required. However, the Commissioner notes that the report published by the PCCS in June 2011 goes some way towards satisfying this.²

² PCCS/110/10/PA Report of a Complaint Handling Review in relation to Dumfries and Galloway Police Authority



36. The Commissioner takes the view that the enquiry report provided to Mrs N goes some way towards helping her understand more fully the investigation of her complaint, and perhaps lessens the public interest in disclosure of the meeting note, for this purpose. The Commissioner also acknowledges that the PCCS has given strong reasons why disclosure would not be in the public interest, in relation to the public interest in enabling participants to provide free and frank views in future in the context of its regulatory activities (as already discussed in relation to section 30(b)(ii)).
37. Having considered the information withheld, and the arguments for and against its disclosure, the Commissioner finds the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure in this case. Accordingly, she finds that the PCCS was correct to withhold the information from the meeting note under this exemption.
38. Having reached this conclusion, the Commissioner has not found it necessary to go on to consider the application of section 38(1)(a) and (b) to the information in the withheld meeting note. She will consider the application of these exemptions to the information in the withheld email.

Section 38(1)(a) - Personal information of the data subject

39. During the investigation, the PCCS noted that some of the information contained within the withheld documents is Mrs N's own personal data, exempt from disclosure under section 38(1)(a) of FOISA.
40. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
41. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. This ensures that such information is disclosed to the data subject (rather than to the world at large, which is the effect of disclosure under FOISA) under a regime designed for such purposes.
42. 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 other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix). Having considered the withheld information and the submissions received from the PCCS, the Commissioner is satisfied that parts of the withheld email fall within this definition, the individual to whom they relate being Mrs N (the information discusses Mrs N's complaint), who is identifiable from that information.
43. In the circumstances, the Commissioner is satisfied that the PCCS was entitled to withhold parts of one of the withheld emails, comprising Mrs N's personal data, under section 38(1)(a) of FOISA.



Section 38(1)(b) – Personal information of third parties

44. The PCCS stated that it considered some of the information in the emails to be exempt from disclosure under section 38(1)(b) of FOISA, on the basis that it was the personal data of individuals other than Mrs N, the disclosure of which would breach the first data protection principle.
45. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) (as appropriate), exempts personal data if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.

Is the information under consideration personal data?

46. The Commissioner has considered the information withheld under this exemption together with the relevant submissions provided by the PCCS. She is satisfied that it falls within the definition of personal data. The information relates to living individuals who can be identified from the information, being either direct contact details or information about an officer's involvement in the case.
47. The Commissioner will now go on to consider whether disclosure of the information would breach the first data protection principle.

The first data protection principle

48. The first data protection principle requires that personal data be processed fairly and lawfully and, in particular, must not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. (The Commissioner is satisfied that none of the information withheld under this exemption is sensitive personal data.) The processing under consideration in this case is disclosure into the public domain in response to Mrs N's information request.
49. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*³ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.
50. Condition 1 of Schedule 2 permits personal data to be processed if the data subject consents to the data being processed. The PCCS stated that they had not sought the data subjects' consent for disclosure; consequently, the PCCS considered that consent for disclosure had not been obtained.
51. In the circumstances, the Commissioner has concluded that the data subjects have not consented to disclosure and that condition 1 in Schedule 2 cannot be met in this case.

³ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



52. The Commissioner considers that the only other condition in Schedule 2 to the DPA which might apply in this case is condition 6. Condition 6 allows personal data to be processed if that 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.
53. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Mrs N have a legitimate interest in obtaining these personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects (i.e. the individuals to whom the data relate)?
 - Even if disclosure is necessary for Mrs N's legitimate interests, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? As noted by Lord Hope in the *CSA* case, there is no presumption in favour of the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mrs N must outweigh the rights, freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the PCCS was correct to refuse to disclose the personal data to Mrs N.

Does Mrs N have a legitimate interest?

54. In her correspondence with the PCCS and this office, Mrs N sought information about what was discussed at the meeting. The only information that is still withheld from the two emails is the personal information of the individuals involved in that meeting. The withheld information does not relate to the matters discussed at the meeting.
55. The Commissioner takes the view that there is no obvious interest which would require disclosure of the personal data withheld from Mrs N. Information about the substance of the meeting has been disclosed; only contact information and personal data not relevant to the meeting discussion has been withheld. The redaction of this information will not affect public understanding of what was discussed at the meeting. In these circumstances, the Commissioner finds that Mrs N does not have a legitimate interest in the personal data withheld by the PCCS.
56. The Commissioner therefore finds that none of the conditions in schedule 1 of the DPA can be met, and accordingly, that the PCCS was entitled to withhold the information in question under section 38(1)(b) of FOISA.



DECISION

The Commissioner finds that the Police Complaints Commissioner for Scotland (PCCS) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs N.

The Commissioner finds that the PCCS complied with Part 1 of FOISA in withholding the note of the meeting under section 30(b)(ii) of FOISA and in withholding some information in two emails under sections 38(1)(a) and 38(1)(b) of FOISA.

However, the Commissioner has found that the PCCS incorrectly withheld certain information in two emails, which were not exempt from disclosure under section 30(b)(ii) or section 38(1)(b) of FOISA. In withholding this information, she finds that the PCCS failed to comply with section 1(1) of FOISA.

As the PCCS has now provided Mrs N with the information which was wrongly withheld from her, the Commissioner has not required it to take any further action in this matter.

Appeal

Should either Mrs N or the Police Complaints Commissioner for Scotland 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
28 March 2013



Appendix

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption..

- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d)

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...



- (ii) the free and frank exchange of views for the purposes of deliberation;

...

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; or

...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

- (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;



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 I – 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 purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

...

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.

...