

Decision Notice



Decision 089/2008 Ms B and the Chief Constable of Grampian Police

Request for police reports into a criminal investigation and complaints against Grampian Police

Reference No: 200701015
Decision Date: 30 July 2008

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Ms B asked the Chief Constable of Grampian Police (Grampian Police) to provide her with a range of information concerning a criminal investigation conducted by Grampian Police and related complaints against Grampian Police. Grampian Police refused to disclose the information to Ms B on the basis that it was exempt from disclosure in terms of Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA).

Following an investigation, the Commissioner found that Grampian Police had been entitled to refuse to disclose the information to Ms B on the basis that the information was either her own personal data or was the personal data of one or more third parties and disclosure of the third party data would breach the first data protection principle. He also found some of the information to be exempt under section 34(1) of FOISA (which deals with criminal investigations) and that, when considering whether the exemption should be maintained, that the public interest in an effective criminal justice system outweighed any public interest in disclosure of the information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 17(1) (Notice that information is not held); 34(1)(a)(i) and (b) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 38(1)(a), 38(1)(b), and 38(2)(a)(i) and (b) (Personal information).

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretive provisions) (definition of personal data); 2 (sensitive personal data) and Part 1 of Schedule 1 (The data protection principles)

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. On 3 June 2007, Ms B wrote to Grampian Police requesting all information about her case, and about a subsequent complaint made against Grampian Police concerning the handling of this case. The request specifically sought correspondence with a range of other parties.



2. The case to which this request relates was prompted by criminal allegations first made by Ms B in 2000. These were investigated by Grampian Police but no person was ever prosecuted. A member of Ms B's family has since made complaints to Grampian Police concerning various aspects of the handling of this case and a related criminal injuries compensation hearing. These complaints have also raised other matters with Grampian Police which do not relate to Ms B's case.
3. Grampian Police responded to Ms B's request on 11 June 2007. In their response, Grampian Police advised Ms B that they considered the information to be exempt from disclosure in terms of section 34(1)(a)(i) and (b) and section 38(1)(a) and (b) of FOISA.
4. On 14 June 2007, Ms B wrote to Grampian Police requesting a review of its decision.
5. Grampian Police notified Ms B of the outcome of its review on 6 July 2007, advising her that they were upholding the original decision and, additionally, that they also considered that the information in question was exempt from disclosure in terms of section 35(1)(g) (read with section 35(2)(b)) of FOISA.
6. On 12 July 2007, Ms B wrote to the Commissioner, stating that she was dissatisfied with the outcome of Grampian Police'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 Ms B 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 30 August 2007, Grampian Police were notified in writing that an application had been received from Ms B and asked to provide the Commissioner with any information withheld from Ms B. Grampian Police responded with the information requested and the case was then allocated to an investigating officer.
9. At this stage, Grampian Police advised the Commissioner, in relation to the part of the request seeking correspondence with a specified residential establishment, that it did not hold any such information and so it should have applied section 17(1)(b) of FOISA (Notice that information is not held) in its original response to Ms B.
10. The investigating officer subsequently contacted Grampian Police providing it with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, Grampian Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.



11. Grampian Police responded by providing detailed submissions on the exemptions they considered applicable to the withheld information and the documents to which they considered each exemption applied.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Ms B and Grampian Police and he is satisfied that no matter of relevance has been overlooked.

The scope of the request

13. The request submitted by Ms B was for all information concerning her case (i.e. the investigation into criminal allegations made by her) and the complaint made against Grampian Police by a member of her family (the complainer) concerning their handling of the criminal investigation and a related criminal injuries compensation hearing.
14. Grampian Police provided the Commissioner with copies of all documentation which they considered came within the scope of this request. Among the information withheld, Grampian Police supplied copies of documents concerning investigations into complaints made by the complainer about matters other than Ms B's case. These complaints were made and investigated at the same time as those directly concerning Ms B's case referred to above.
15. Although the investigations into the other complaints made by the complainer have been conducted by Grampian Police contemporaneously with the complaints regarding Ms B's own case, the Commissioner does not consider that these fall within the scope of Ms B's request. This sought only documents relating to her own case and the complaints concerning the handling of this.
16. Having considered all documents provided to him by Grampian Police, the Commissioner has judged that the following fall outwith the scope of Ms B's information request: 27, 47 (all parts), 48 (all parts), 49 (all parts), 50 (all parts), 51, 55(O), 63, 86, 88, 90, 91, 94, 104, 105, 109-119, 121, 122, 124.

Consideration of section 38(1)(a) – personal information of the applicant

17. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. This exemption exists under FOISA because there exists a right for individuals to make a request for their own personal information (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA does not deny individuals a right of access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.



18. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix.
19. The Commissioner is satisfied that much of the information withheld comprises reports, records and other documentation which relate to Ms B and from which Ms B can be identified. The records withheld in this case provide details and the views of a range of individuals of events that were of great personal significance to Ms B and which relate to her private and family life. The Commissioner is aware that Ms B has also sought to access information relating to her case using her subject access rights under the DPA.
20. Insofar as the information withheld relates to her case and the investigation of the allegations made by Ms B, the Commissioner considers this information to be entirely Ms B's own personal data. A significant proportion of the information relating to the complaints made about the handling of this case also constitutes Ms B's own personal data.
21. Where Grampian Police has cited this exemption, the Commissioner is satisfied that they were correct in doing so and that the information is therefore exempt from disclosure in terms of section 38(1)(a) of FOISA. The Commissioner has in fact found this exemption to apply more widely than was indicated in the schedule provided to him during the investigation.
22. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld.

Consideration of section 38(1)(b) – personal information of third parties

23. Grampian Police has applied section 38(1)(b) of FOISA to the information which they consider to be the personal data of the third parties mentioned within specific documents.
24. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is also an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
25. In order for a public authority to rely on this exemption, it must therefore show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
26. Grampian Police submitted that a large amount of the withheld information consists of information about Ms B's family and other third parties, including allegations made against some of those persons, their criminal history and information about their mental health and ability. Grampian Police consider that this information is the personal data of those individuals which would fall within the scope of section 38(1)(b).



27. Grampian Police also submitted that any person disclosing such personal data to them would do so in the belief that it would be kept confidential and only used by them for the purposes of their investigations. Grampian Police considered that a similar expectation of privacy would relate to personal data collected about individuals during the course of a police investigation.
28. Grampian Police submitted that releasing such information provided by, or relating to, identifiable third parties would be unfair and as such would breach the first data protection principle.

Is the information personal data?

29. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or 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 definition is set out in full in the Appendix).
30. Having considered this definition and the information withheld, the Commissioner is satisfied that the information under consideration contains personal data relating to a number of a number of third parties, including:
 - a. The complainer (a member of Ms B's family)
 - b. Other members of Ms B's family
 - c. Persons accused of criminal offences
 - d. Police officers and other professionals involved in the investigation of Ms B's criminal allegations
 - e. Police officers complained against by the complainer
 - f. Witnesses
31. In relation to each of the above, information is contained within the withheld information which relates to the individual in some biographical sense, detailing their involvement in the investigations into Ms B's criminal allegations or the complaints made concerning this case. In each case the individuals concerned can be identified from the information and other information held by Grampian Police.
32. The Commissioner has also concluded that some of the personal data that has been withheld clearly falls within one or more of the parts of the definition of sensitive personal data contained in section 2 of the DPA, including section 2(e) (the data subject's physical or mental health or condition) and 2(g) (the commission or alleged commission by the data subject of any offence).



Would disclosure of the information breach the first data protection principle?

33. As noted above, Grampian Police have argued that, in this case, to disclose the personal data of a third party would breach the first data protection principle of the DPA.
34. The first data protection principle requires that the processing of personal data (which would include the disclosure of data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall 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 is also met.
35. Grampian Police have not made any submissions which suggest that disclosure of the information requested by Ms B would be unlawful, other than by contravening the first data protection principle. The Commissioner has therefore solely considered whether disclosure of the information in this case would be fair.
36. According to guidance from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK ("Freedom of Information Act Awareness Guidance No 1"), which can be viewed at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf, the assessment of fairness includes looking at whether the disclosure would cause unnecessary or unjustified distress or damage to the person whom the information is about, whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
37. Having considered this guidance for the purposes of this case and having considered all of the information withheld under section 38(1)(b), the Commissioner has found that the disclosure of the information would contravene the first data protection principle in that it would be contrary to the reasonable expectations of one or more of the individuals concerned. The Commissioner is also satisfied that disclosure of the information would cause unnecessary or unjustified distress or damage to the subjects of the information and that the disclosure of the information under FOISA (i.e. into the public domain) is therefore unfair.
38. Given that the Commissioner has found that the disclosure of the information would be unfair, he is not required to go on to consider whether it would be unlawful, or whether any of the conditions in schedule 2 and/or 3 of the DPA could be met.
39. The Commissioner finds that Grampian Police was correct to withhold information under the exemption in section 38(1)(b) of FOISA.



Consideration of section 34(1)

40. Grampian Police have applied the exemptions in section 34(1)(a)(i) and (b) of FOISA to a number of the withheld documents on the basis that the information has been held for the purposes of an investigation into allegations made, to ascertain whether a person should be prosecuted for the alleged offence and to decide whether a report should be submitted to the procurator fiscal. The information withheld under this exemption generally comprises notebook extracts, crime reports and tasks and correspondence with legal agents and the procurator fiscal all held in relation to various investigations undertaken by Grampian Police.
41. The exemptions in sections 34(1)(a) and (b) (set out in full in the Appendix) are class-based exemptions. This means that if information falls within the description set out in the exemption, the Commissioner is obliged to accept it as exempt. There is no harm test; the Commissioner is not required or permitted to consider whether disclosure would, or would be likely to, prejudice substantially an interest or activity, or otherwise to consider the effect of disclosure. The exemptions are, however, subject to the public interest test required by section 2(1)(b) of FOISA.
42. Having considered the contents of the documents to which these exemptions have been applied, the Commissioner is satisfied that these fall within the scope of the exemptions in section 34(1)(a)(i) and (b) of FOISA. These documents relate to the steps taken to investigate the criminal allegations made by Ms B, and certain other matters relevant to the investigation of these.
43. In each case, the Commissioner has found that the documents to which these exemptions were applied contain information that has been held at some time for the purposes of one or more investigation(s) that Grampian Police have a duty to conduct in order to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i)), and which in the circumstances had the potential to lead to a decision to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted (section 34(1)(b)).

Consideration of the public interest test

44. As noted above, the exemptions in section 34(1) are subject to the public interest test required by section 2(1)(b) of FOISA. This requires the Commissioner to carry out a balancing exercise in respect of those arguments in favour of disclosing the information and those arguments against disclosure. Unless he is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosure of the information, he must order the information to be disclosed (unless he considers that the information is exempt under one or more other exemptions in FOISA).



45. The "public interest" is not defined in FOISA but it has been variously described as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interest of the public", i.e. it serves the interests of the public.

Arguments in favour of withholding the information on public interest grounds

46. The Commissioner is aware of the concerns surrounding the disclosure of information of this kind. During Parliamentary debates concerning this exemption, the then Justice Minister, Jim Wallace, argued that there were considerations relating to the presumption of innocence, the privacy and reputation of witnesses and informants, the effective conduct of prosecutions and investigations and the role of the criminal proceedings as the forum for bringing information into the public domain. He also said: "We are concerned that witnesses and persons under investigation should not be subject to the risk of trial by media without any protection as could happen if information became freely available. We should not disturb arrangements that ensure the confidentiality, privacy and reputation of witnesses and the presumption of innocence of accused persons".
47. In their submissions, Grampian Police argued that it is not in the public interest to inhibit the provision of information and that members of the public could be discouraged from providing information to the police if they were aware that information could be later released without a compelling reason for doing so.
48. Grampian Police have also argued that it is not in the public interest for the roles of the police to be compromised by the release of information about how information is gathered and how investigations are undertaken as this would make it difficult for the police to carry out investigations to the highest standard. Grampian Police also considered that the confidentiality of police reports is essential, as the release of such information would prejudice substantially the freedom with which the police gather information and report to the procurator fiscal.

Arguments in favour of disclosure of the information

49. In many decisions to date, the Commissioner has pointed out that there is a general public interest in releasing information which may lead to an increase in accountability and scrutiny of public officials' actions. In general, the Commissioner considers that there are a number of reasons why disclosure of this kind of information could be in the public interest. There is a general public interest in information being accessible, because this enhances scrutiny of decision making processes and thereby improves accountability.
50. In her correspondence with the Commissioner's Office, Ms B stated that she was seeking access to the documents because she was dissatisfied with the action taken by Grampian Police to investigate her criminal allegations. Disclosure would enable Ms B and others to see the steps taken to investigate her allegations and the subsequent complaints made about the handling of the case.



51. In their submissions, Grampian Police have also acknowledged that factors in favour of disclosure would include allowing the public to assess whether they were fulfilling their duties effectively and understanding more fully how investigations are carried out.

Conclusion on the public interest

52. The Commissioner accepts that there is a degree of public interest in scrutinising the actions of Grampian Police and in ensuring that investigations into alleged criminal offences are carried out thoroughly and that all relevant matters are taken into account.
53. Nonetheless, the Commissioner considers that there are, in general, strong public interest arguments why information gathered during an investigation falling within the scope of section 34(1)(a)(i) and (b) should be afforded some protection.
54. The Commissioner considers that there are strong reasons for upholding this exemption in this case; in particular, there should be no inhibitions or deterrence to the flow of information and evidence to and from the police in relation to criminal investigations. Were this flow of information to be impeded, the police would find it difficult to investigate crime, one of their core duties.
55. Having considered the information withheld and the arguments for and against disclosure, the Commissioner finds that the public interest in maintaining the exemptions outweighs that of disclosure in this case and accordingly finds that Grampian Police have correctly applied this exemption to the documents under consideration.

Conclusions on exemptions

56. Having considered all of the information that he has found to fall within the scope of Ms B's information request, the Commissioner has found it all to be exempt on the basis of one or more of the following exemptions:
- a. Section 38(1)(a) – to the extent that the information is Ms B's own personal data.
 - b. Section 38(1)(b) – to the extent that it is personal data relating to one or more third persons and disclosure of this information would be unfair and so contravene the first data protection principle.
 - c. Section 34(1)(a)(i) and (b) – to the extent that the information has been held at any time for the purposes of one or more relevant investigations.



57. Having reached the conclusions set out above, the Commissioner has not gone on to consider the application of the exemption in section 35(1)(g) of FOISA. He notes that there were two items which Grampian Police had identified as being exempt only under this particular exemption. However, having considered these items (56K and 81), he has found them to comprise the personal data of the complainer. Although Grampian Police did not apply the exemption in section 38(1)(b) to these items, the Commissioner found these to be exempt from disclosure for reasons put forward by the Police in relation to other information. On this basis, the Commissioner has found these specific items to be exempt under section 38(1)(b) rather than section 35(1)(g) as submitted.
58. Having concluded that all of the information falling within the scope of the request is exempt from disclosure, the Commissioner has found that Grampian Police acted in accordance with Part 1 of FOISA by withholding this in response to Ms B's information request.

Technical breach of FOISA : section 17(1)

59. As noted at paragraph 9 above, in relation to one aspect of Ms B's request (for copies of correspondence between Grampian Police and a named residential establishment), Grampian Police explained that they did not in fact hold any such correspondence.
60. In their submissions, Grampian Police explained that all documents held by them in relation to Ms B's request have been collated and examined and it is evident that no correspondence between it and the residential establishment exists.
61. Having considered their representations on this point, the Commissioner is satisfied that Grampian Police does not hold any information in relation to this aspect of Ms B's request.
62. In terms of section 17(1) of FOISA, if a Scottish public authority does not hold the information, it is required to give the applicant notice in writing that it does not hold the information.
63. Grampian Police's response to Ms B did not advise her that the information sought in this part of her request was not held by them..
64. As noted above, Grampian Police have acknowledged that it failed to comply with the technical requirements of section 17 of FOISA in relation to one aspect of Ms B's request. As Grampian Police have acknowledged this technical failing, the Commissioner does not require them to take any action in response to this decision in relation to this failure.



DECISION

The Commissioner finds that the Chief Constable of Grampian Police (Grampian Police) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms B.

The Commissioner finds that Grampian Police were entitled to withhold the information falling within the scope of Ms B's request on the basis of exemptions in Part 2 of FOISA.

The Commissioner also finds that Grampian Police failed to comply with the requirements of section 17(1) of FOISA by failing to inform Ms B that it did not hold some of the information requested by her. In failing to do so, Grampian Police breached Part 1 of FOISA. However, the Commissioner does not require them to take any action in respect of this breach.

Appeal

Should either Ms B or Grampian Police 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 Investigations
30 July 2008



Appendix 1

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.

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 –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
 - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
 - (i) should be prosecuted for an offence
 - ...
 - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted

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.

Data Protection Act 1998

1 Basic interpretative provisions

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;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,



- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

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