

Decision Notice



Decision 179/2010 Mr Allan McLeod and the Chief Constable of Northern Constabulary

Retiral date of named police officer

Reference No: 201000044
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Summary

Mr McLeod requested from the Chief Constable of Northern Constabulary (Northern Constabulary) the date on which a named officer retired from the police. Northern Constabulary responded by withholding the information Mr McLeod sought. Following a review, Mr McLeod remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Northern Constabulary had dealt with Mr McLeod's request for information in accordance with Part 1 of FOISA, on the basis that the date of the officer's retiral was personal data, the disclosure of which would breach the first data protection principle.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and 2(e)(ii) (Effect of exemptions); 38(1)(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"); Schedules 1 (The data protection principles) (the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (Condition 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. On 3 November 2009, Mr McLeod wrote to Northern Constabulary, requesting the date on which a named officer had retired from the force.
2. Northern Constabulary responded on 27 November 2009, indicating they were withholding the information Mr McLeod had requested and citing the exemption in section 38(1)(b) of FOISA.
3. On 28 November 2009, Mr McLeod wrote to Northern Constabulary requesting a review of its decision. He did not accept Northern Constabulary's refusal to disclose the information.



4. Northern Constabulary notified Mr McLeod of the outcome of their review on 22 December 2009, upholding the original decision with more detailed reasoning as to why they considered disclosure would breach data protection principles.
5. On 23 December 2009, Mr McLeod wrote to the Commissioner, stating that he was dissatisfied with the outcome of Northern Constabulary's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr McLeod 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

7. On 12 January 2010, Northern Constabulary were notified in writing that an application had been received from Mr McLeod and were asked to provide the Commissioner with any information withheld from him. Northern Constabulary responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Northern Constabulary, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. With particular reference to the requirements of section 38(1)(b), Northern Constabulary were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. Northern Constabulary responded with submissions citing exemptions in FOISA under sections 26(a) (Prohibitions on disclosure), 38(1)(b) (Personal information) and 39(1) (Health, safety and the environment). Insofar as relevant, these will be discussed in more detail below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr McLeod and Northern Constabulary and is satisfied that no matter of relevance has been overlooked.

Consideration of section 38(1)(b) (Personal information)

11. Northern Constabulary relied on the exemption in section 38(1)(b) of FOISA for withholding the retiral date requested by Mr McLeod, on the basis that the information was the named officer's personal data. One of their reasons for claiming the exemption was that disclosure of the withheld information would contravene the first data protection principle on fair and lawful processing.



12. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, where appropriate, 38(2)(b)), exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure would contravene any of the data protection principles set out in Schedule 1 to the DPA. This exemption is absolute in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

13. "Personal data" are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
14. In this case, the Commissioner is satisfied that the withheld information is the officer's personal data. It consists of data (the retiral date) from which that individual can be identified, taken along with other information in the possession of the data controller (i.e. Northern Constabulary). The information is biographical of that individual and focuses on them. Consequently, the Commissioner is satisfied that it relates to the individual.
15. The Commissioner must now go on to consider whether disclosure would breach any of the data protection principles contained in Schedule 1 to the DPA. As noted above, Northern Constabulary argued that disclosure would breach the first data protection principle.

Would disclosure contravene the first data protection principle?

16. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, 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 to the DPA is also met.
17. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data under consideration in this case do not fall into any of the categories set out in that definition. It is therefore not necessary to consider the conditions in Schedule 3 to the DPA in this case.
18. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in the schedules which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.



19. When considering the conditions in Schedule 2 of the DPA, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner 2008 UKHL 47*¹ (the Collie judgement) 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.
20. In line with Northern Constabulary's submissions on this point, the Commissioner considers condition 6 to be the only condition in Schedule 2 which might permit disclosure in this case. Condition 6 permits personal data to be processed if the processing (which in this case would be by disclosure in response to Mr McLeod's information request) 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, freedoms or legitimate interests of the data subject (the individual to whom the withheld information relates). It is clear from the wording of this condition that each case will turn on its own facts and circumstances.
21. There are, therefore, a number of different tests which must be considered before condition 6 can be met. These are:
 - Does Mr McLeod have a legitimate interest in obtaining the withheld personal data?
 - If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the 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 individual in question?
 - Even if the processing is necessary for Mr McLeod's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individual concerned? As noted by Lord Hope in the Collie judgement there is no presumption in favour the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr McLeod must outweigh the rights, freedoms or legitimate interests of the individual before condition 6(1) will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that Northern Constabulary were correct to refuse to disclose the personal data to Mr McLeod.

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



Does Mr McLeod have a legitimate interest?

22. In considering the legitimate interests of Mr McLeod, the Commissioner is aware that he has a particular interest in understanding the circumstances surrounding the death of his nephew Kevin McLeod and the investigations subsequently undertaken by the police. These have been the subject of a number of subsequent inquiries and investigations, by or on behalf of a number of agencies, and certain information has been placed in the public domain as a result. The Commissioner has also considered several applications from Mr McLeod on related matters, not all of which have led to the disclosure of further information.
23. In this case, Mr McLeod requested that Northern Constabulary disclose the date on which a particular police officer retired from the force. In his submissions, Mr McLeod asserted that in the past Northern Constabulary had, without question, provided retiral dates for other police officers, and had also disclosed other police officers' dates of retiral on its website. He also indicated that in its annual reports (which were also published on its website), Northern Constabulary disclosed the names, ranks and retiral dates of all police officers and police staff who retired in the relevant year. He questioned why the retiral date of the named officer had been withheld, given his understanding that such information would generally be publicly available.
24. Mr McLeod indicated that he had a particular interest in the retiral date of this particular officer because at one stage the officer had been involved in the investigation of matters relating to his nephew's death. He also believed that, as the officer was acting as a public authority employee, any information relating to this part of their working life (i.e. their retirement date) should be disclosed.
25. In this case, the Commissioner has taken into account all of Mr McLeod's reasons for requiring the information and the strong personal involvement, both of himself and his family, in investigating and understanding the circumstances surrounding the death of his nephew. In the circumstances, the Commissioner is satisfied that Mr McLeod has a legitimate interest in obtaining the withheld information.

Is disclosure of the information necessary to achieve those legitimate interests?

26. The Commissioner must next consider whether disclosure is necessary for the purposes of the legitimate interest he has identified.
27. Having considered Mr McLeod's legitimate interest, the Commissioner accepts that it could not reasonably be met in any way which would be less intrusive on the data subject's privacy than provision of the withheld information. In the circumstances of this particular case, therefore, he is satisfied that disclosure of the withheld information is necessary to meet Mr McLeod's legitimate interests.



Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

28. The Commissioner is now required to consider whether disclosure of the withheld information would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individual data subject. As noted above, this involves a balancing exercise between the legitimate interests of Mr McLeod and the individual in question. Only if the legitimate interests of Mr McLeod outweigh those of the individual in question can the information be disclosed without breaching the first data protection principle: also, as noted above, in relation to personal data there is no presumption in favour of disclosure.
29. In the Commissioner's briefing on section 38 of FOISA, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
 - the potential harm or distress that might be caused by disclosure;
 - whether the individual has objected to the disclosure;
 - the reasonable expectations of the individuals as to whether the information would be disclosed.
30. When considering the question of whether the retiral date of a public employee or office holder relates to their public duties or their private life, the Commissioner notes that this point has been considered in a recent decision from the (UK) Information Commissioner in Decision Notice FS50279800,² concerning the retiral date of a District Judge and arising out of a request made to the Ministry of Justice. Concluding that the individual in question would have a reasonable expectation that this information would remain private, the Commissioner considered:
- "... that a retirement date can reasonably be described as information about an individual's personal life. It undoubtedly relates to the role of the individual as a public servant; however there is limited public interest in releasing such information. A retirement date does not contribute to the accountability of the judiciary. It does not shed light on how public duties have been performed or how public money is spent."*
31. In this case, of course, the Commissioner has to consider the facts and circumstances present in relation to Mr McLeod's request. However, he is satisfied that it would still be appropriate to conclude here that the retiral date of the officer concerned relates to that individual's personal life. In reaching this conclusion, the Commissioner has noted Mr McLeod's belief that the retiral date is of particular relevance to his concerns about the investigation of the death of his nephew, but is not persuaded that this makes the information any less personal to the data subject.

² http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50279800.pdf



32. The Commissioner has also noted that the data subject has made his objections to disclosure of the withheld information clear, together with Northern Constabulary's comment that they would concur with any request received from the officer concerned that such information should not be published (which it has not been).
33. In considering the data subject's reasonable expectations as to disclosure, the Commissioner has noted that the individual in question, while perhaps having significant responsibilities in relation to the matters Mr McLeod is concerned about, occupied a relatively junior position in the organisational structure of Northern Constabulary. He has also taken into consideration specific representations made by Northern Constabulary regarding certain patterns of behaviour and communications in relation to officers connected in some way with the investigation of Kevin McLeod's death.
34. The communications identified by Northern Constabulary include communications connected with the retirement of certain officers. Having considered these, and while not considering it necessary to comment on their intended effect, the Commissioner is satisfied that it would not be unreasonable for a retired officer with a previous connection with the investigation to have an apprehension of distress as a consequence of disclosure of the withheld information. Mr McLeod has himself admitted that the data subject falls into this category.
35. In all the circumstances of this case, therefore, the Commissioner has concluded that the individual concerned would not reasonably expect information detailing his date of retirement to be made known in response to Mr McLeod's request.
36. Having balanced the legitimate interests of the named police officer against the legitimate interests identified by Mr McLeod, the Commissioner has found that the legitimate interests which would be served by disclosure would not, in this particular case, outweigh the unwarranted prejudice that disclosure would cause to the data subject's rights, freedoms or legitimate interests. Accordingly, the Commissioner is satisfied that condition 6 of Schedule 2 of the DPA cannot be met in relation to the withheld information.
37. For the same reasons, the Commissioner has concluded that disclosure would be unfair and, in breaching of the first data protection principle, unlawful. Accordingly, the Commissioner finds that Northern Constabulary was correct to withhold the personal data of the named police officer under section 38(1)(b) of FOISA. Northern Constabulary also cited other grounds for relying on section 38(1)(b), which in the circumstances the Commissioner does not find it necessary to consider here.
38. Given that the Commissioner has upheld the withholding of the information in its entirety under this exemption, he is not required to consider the other exemptions cited by Northern Constabulary in this case.



DECISION

The Commissioner finds that Northern Constabulary complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr McLeod.

Appeal

Should either Mr McLeod or the Chief Constable of Northern Constabulary wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
14 October 2010



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 –

...

- (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.



38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (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.