



Scottish Information
Commissioner

**Decision 229/2006 Mr Edward Milne and the Scottish Criminal
Cases Review Commission**

Information relating to the applicant

**Applicant: Mr Edward Milne
Authority: Scottish Criminal Cases Review Commission
Case No: 200502272
Decision Date: 7 December 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Request for information relating to the applicant – number of exemptions applied by the SCCRC – following investigation, the Commissioner found the information to be exempt in terms of section 38(1)(a) of FOISA

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: section 38(1)(a) (Personal information).

The text of this provision is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Milne wrote to the Scottish Criminal Cases Review Commission (SCCRC), requesting information it held which related to him. The SCCRC identified a number of documents it considered to be within the scope of Mr Milne's request and provided him with some of that information.

However, the SCCRC refused to disclose some of the information on the basis of a number of different exemptions under the Freedom of Information (Scotland) Act 2002 (FOISA), such as section 30(c), section 34(1)(a)(ii) and section 38(1)(b).

The decision to withhold the information was upheld by the SCCRC on review. Mr Milne was dissatisfied with this response and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the information requested by Mr Milne was exempt from disclosure under section 38(1)(a) of FOISA as his request constituted a request for personal information of which he was the data subject.



Background

1. On 5 May 2005, Mr Milne contacted the SCCRC by e-mail and requested “all information that relates to me, Edward Milne, and which includes minutes of meetings, internal memo’s, correspondence and e-mails.”
2. On 26 May 2005, the SCCRC issued a response to Mr Milne’s information request. In its letter, the SCCRC stated that it had provided Mr Milne with a number of documents but had also withheld others on the basis of a number of exemptions under FOISA. (Further information was also provided to Mr Milne at a later date by the SCCRC - in line with the Data Protection Act 1998 - where that information was considered to constitute Mr Milne’s personal information and where it was not subject to any of the other exemptions in FOISA cited by the SCCRC).
3. The SCCRC considered all of the information it held in relation to Mr Milne and this consisted of the following classes of documents:
 - 1) Board minutes
 - 2) Committee minutes
 - 3) E-mails
 - 4) Internal memos
 - 5) Correspondence
 - 6) Precognitions/Statements.
4. In relation to the Board minutes, Committee minutes, e-mails, internal memos and correspondence, the SCCRC informed Mr Milne that these documents were exempt from release under sections 30(b)(i) and (ii), 30(c) and 34(1)(a)(ii) of FOISA.
5. Sections 30(b)(i) and (ii) of FOISA concern information which, if disclosed, would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Section 30(c) concerns information which, if disclosed, would or would be likely to, prejudice substantially the effective conduct of public affairs. Section 34(1)(a)(ii) of FOISA concerns information which is exempt by reason of being held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct in order to ascertain whether a person prosecuted for an offence is guilty of it.



6. As regards the precognitions and statements which the SCCRC identified as being within the scope of Mr Milne's request, the SCCRC refused to disclose these documents on the basis that they were exempt under section 34(1)(a)(ii) and section 38(1)(b) of FOISA. Section 38(1)(b) of FOISA exempts from release personal information, if the disclosure of the information to a member of the public would contravene any of the data protection principles set out in the Data Protection Act 1998.
7. Mr Milne wrote to the SCCRC on 27 May 2005. He informed the SCCRC that he was not content with its reasoning and requested a review of its decision to withhold the information in question. The SCCRC carried out a review and communicated the outcome of the review to Mr Milne on 14 June 2005. In its letter the SCCRC informed Mr Milne that the review had been conducted by a member of staff who had not been involved in the initial decision to withhold the information. The SCCRC stated that, having carried out the review, it had decided to uphold the original decision and withhold the information.
8. Mr Milne was dissatisfied with the SCCRC's response and applied to me for a decision on 15 June 2005. An investigating officer was then assigned to this case and Mr Milne's application was validated by establishing that he had made a written request for information to a Scottish public authority, and had appealed to me only after requesting that the authority review its response to his request.

The Investigation

9. The investigating officer contacted the SCCRC on 3 August 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The SCCRC was invited to provide comments on the issues raised by Mr Milne's application in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
10. The SCCRC responded on 17 August 2005. In its letter to my investigating officer, the SCCRC pointed out that, in terms of its founding legislation (section 194, as amended, of the Criminal Procedure (Scotland) Act 1995), the SCCRC operates under strict disclosure guidelines which reflect the nature of the work it carries out and the need for co-operation with other agencies in the Criminal Justice System, as well as with individual witnesses. This is also reflected in the SCCRC's case handling procedures.



11. The SCCRC outlined the unique role it plays within the Criminal Justice system; its role is to review and investigate alleged miscarriages of justice in relation to conviction or sentence where the convictions or sentences were imposed by a Scottish Court (the High Court, the Sheriff Court and the District Court). The SCCRC is not limited to examining materials which have already been considered at either trial or appeal and it can also consider any new evidence which has not been placed before any tribunal and it can actively seek out and obtain new evidence by, for example, tracing and interviewing witnesses and obtaining documents. The SCCRC also has a budget for instructing reports and expert analysis of evidence. This enables it to perform an inquisitorial function, similar to the functions of the police and Crown Office/Procurator Fiscal Service.
12. When reviewing and investigating solemn or summary cases, the SCCRC conducts an independent and impartial review and investigation of all cases it accepts for review. After a review has been completed the SCCRC will decide whether or not the case should be referred to the High Court. If it decides to refer a case, the case will be heard and determined by the High Court as if it were a normal appeal. In cases where the SCCRC decides not to refer a case to the High Court, it issues a full and detailed statement of reasons to the applicant explaining why it has decided not to refer the case. The applicant is then allowed time to respond to the SCCRC's findings and these are taken into account before a final decision to refuse or refer a case to the High Court is taken.
13. In relation to the question of whether precognitions and statements should be disclosed, the SCCRC stated that it was firmly of the view that the provision of such materials (e.g. from the Crown, the defence, or from its own interviews) is of vital importance to the proper exercise of its functions. It was argued that if the SCCRC's ability to obtain such materials was diminished in any way, then its ability to carry out its statutory functions would be severely hampered. The SCCRC insisted that if precognitions and statements were to be disclosed, this would lead to circumstances where organisations would not provide such materials to the SCCRC.
14. Similarly, it was argued that, in carrying out its own interviews, the SCCRC may not be able to obtain full and frank information from witnesses, who may feel that they have to curtail the potential evidence they might give for fear of disclosure. The SCCRC argued that the possibility of disclosure under FOISA of precognitions and statements may result in witnesses being reluctant to provide any statements at all.



15. The SCCRC referred to Article 11.2 of the Law Society of Scotland's Code of Conduct for Criminal Work (http://www.lawscot.org.uk/Members_Information/rules_and_guidance/guides/Rules/Codeconduct/CodeCrimConduct.aspx). The Guidance Note to Article 11.2 states that the view of the Law Society of Scotland is that solicitors should not give copies of precognitions, statements, documents or recordings to an accused or third parties unless there are exceptional circumstances justifying a departure from this general practice.
16. The Code of Conduct states that exceptional circumstances might include a case of particular complexity, necessitating giving the accused copies of documents to allow proper preparation. For instance, in a fraud case where documents were originally in the possession of the accused, this might constitute such an exception. Another example would be a request from an appropriate investigative or statutory body, such as the Law Society of Scotland, the SCCRC or the Scottish Legal Aid Board.
17. The SCCRC also pointed out that, although it is governed by strict non-disclosure provisions, it does issue full statements of reasons for its decisions. If relevant to the decision it has reached, the contents of any precognitions or statements would be contained within the statement of reasons. On occasions, and where the circumstances have merited it, precognitions and statements have been attached to a statement of reasons, but the Board of the SCCRC has decided that these should only be disclosed to the solicitor for an applicant; the onus would then be on the solicitor to relay the contents of such materials to his or her client.

The Commissioner's Analysis and Findings

18. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Milne and the SCCRC and I am satisfied that no matter of relevance has been overlooked.
19. The SCCRC withheld the information requested by Mr Milne under a number of exemptions in FOISA. The SCCRC was of the view that all of the information was covered by the exemption under section 34(1)(a)(ii) of FOISA, but additionally cited sections 30(b)(i), 30(b)(ii), 30(c) and 38(1)(b) of FOISA in relation to certain classes of documents.



20. It should be noted, however, that Mr Milne's request to the SCCRC stated that he required "all information that relates to me, Edward Milne, and which includes minutes of meetings, internal memos, correspondence and e-mails". I am of the opinion that this constitutes a request for personal information of which Mr Milne was the data subject in terms of section 7 of the Data Protection Act 1998. In other words it was a request from Mr Milne for his own personal data.
21. The term "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, 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."
22. The definition of what amounts to "personal data" for the purposes of the DPA was considered in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In that case, the Court of Appeal decided that whether or not data constituted "personal data" for the purposes of the legislation depended on the relevance or proximity of the data to the data subject. The Court considered that the information required to be biographical in a significant sense and that the information should have the subject as its focus. In other words, it should affect the subject's privacy.
23. I am satisfied in this instance that all of the information requested by Mr Milne was exempt from disclosure under section 38(1)(a) of FOISA on the grounds that his request constituted a request for the personal information of which Mr Milne was the data subject. The exemption in section 38(1)(a) is an absolute exemption in that it is not subject to the public interest test contained in section 38(1)(a) of FOISA.
24. In this instance the SCCRC applied a much broader interpretation of Mr Milne's request and appeared to treat it as a request for all of the information that the SCCRC held in Mr Milne's case file. In doing so, the SCCRC considered information which does not appear to fall within the scope of Mr Milne's request. However, given that I am satisfied that all of the information which is within the scope of Mr Milne's request is exempt from release under section 38(1)(a) of FOISA, I am not required to go on to consider any of the other exemptions cited by the SCCRC.



Decision

I find that the Scottish Criminal Cases Review Commission (the SCCRC) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Milne's information request.

I find that Mr Milne's request constituted a request for personal information of which he was the data subject and that such information was exempt from disclosure under section 38(1)(a) of FOISA. I find that the SCCRC misinterpreted the scope of Mr Milne's request and applied it to information it held which did not constitute his personal data.

Appeal

Should Mr Milne or the SCCRC wish to appeal against this decision, there is a right of 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.

Kevin Dunion
Scottish Information Commissioner
7 December 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

38 Personal information

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;