

Decision Notice



Decision 028/2012 Mr Derek Cooney and the Chief Constable of Dumfries and Galloway Constabulary

Correspondence and reports relating to events involving the applicant

Reference No: 201102107
Decision Date: 7 February 2012

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Summary

Mr Derek Cooney requested from the Chief Constable of Dumfries and Galloway Constabulary (Dumfries and Galloway Constabulary) information relating to certain events which affected him in November 2000. Dumfries and Galloway Constabulary responded and advised Mr Cooney that the requested information was considered to be his own personal data and therefore exempt from disclosure under section 38(1)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Cooney remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Dumfries and Galloway Constabulary had dealt with Mr Cooney's request for information in accordance with Part 1 of FOISA, by withholding the information under section 38(1)(a) of FOISA. He did not require Dumfries and Galloway Constabulary to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and 2(e)(i) (Effect of exemptions); 38(1)(a) and (5) (definitions of "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (DPA) section 1(1) (Basic interpretative provisions) (definition of personal data)

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 19 September 2011, Mr Cooney faxed Dumfries and Galloway Constabulary requesting the following information:
 - any reports, letters etc. from Dumfries and Galloway Council's legal services concerning certain events involving him in November 2000 and
 - copies of all reports, letters etc. from Her Majesty's Inspectorate of Constabulary for Scotland (HMICS) and reports, letters etc. supplied by Dumfries and Galloway Constabulary to HMICS.



2. The Commissioner understands that the second part of Mr Cooney's request was seeking correspondence and reports sent from and to HMICS also about the matters mentioned in the first part of the request.
3. Dumfries and Galloway Constabulary responded to Mr Cooney's request in a letter erroneously dated 19 September 2011, but apparently sent on 11 October 2011. They advised Mr Cooney that, as the requested reports and correspondence related to him as the data subject, they were exempt from disclosure under section 38(1)(a) of FOISA. Dumfries and Galloway Constabulary went on to comment that the withheld information may be accessible to him via a subject access request under the Data Protection Act 1998.
4. On 13 October 2011, Mr Cooney faxed Dumfries and Galloway Constabulary requesting a review of their decision. Mr Cooney drew Dumfries and Galloway Constabulary's attention to the fact that other "departments" had disclosed the same information to him.
5. Dumfries and Galloway Constabulary notified Mr Cooney of the outcome of their review on 31 October 2011. They advised Mr Cooney that they could not comment on the responses provided by other organisations and upheld the previous decision, finding the requested information exempt from disclosure under section 38(1)(a) of FOISA.
6. On 9 November 2011, Mr Cooney wrote to the Commissioner, stating that he was dissatisfied with the outcome of Dumfries and Galloway Constabulary'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 Mr Cooney 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 16 December 2011, Dumfries and Galloway Constabulary were notified in writing that an application had been received from Mr Cooney and were asked to provide the Commissioner with any information withheld from him. Dumfries and Galloway Constabulary responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted Dumfries and Galloway 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. In particular, Dumfries and Galloway Constabulary were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
10. Dumfries and Galloway Constabulary provided a submission in response, which will be considered (along with the relevant submissions provided by Mr Cooney (where relevant)) in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. 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 Cooney and Dumfries and Galloway Constabulary and is satisfied that no matter of relevance has been overlooked.

Consideration of Section 38(1)(a) – Personal Information

12. 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) of FOISA.
13. 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. The DPA will therefore usually determine whether a person has a right to their own personal data. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
14. Personal data is 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).
15. Dumfries and Galloway Constabulary have withheld all of the information requested by Mr Cooney under section 38(1)(a) of FOISA. However, when notifying Mr Cooney of the outcome of their review, while upholding the initial decision, they also gave the impression that not all of the information was Mr Cooney's personal data. They indicated that *the majority* of the information constituted personal data of which Mr Cooney was the data subject.
16. In correspondence with the Commissioner's office, Mr Cooney has highlighted this point and asked the Commissioner to consider whether parts of the information that were not his own personal data might be released.
17. During the investigation, the Commissioner asked Dumfries and Galloway Constabulary to confirm whether they considered parts of the information *not* to be Mr Cooney's own personal data (and so not exempt under section 38(1)(a) of FOISA) and whether such information could be released, or was considered exempt from disclosure on other grounds. In response, Dumfries and Galloway Constabulary submitted that, following a further review, it took the view that the withheld information was entirely Mr Cooney's own personal data and so exempt from disclosure under section 38(1)(a) of FOISA. .
18. The Commissioner has considered the withheld information in the light of the comments made by both Mr Cooney and Dumfries and Galloway Constabulary. He has noted that Mr Cooney's request clearly concerns matters in which he was directly involved, and seeks correspondence and reports relating to those events.

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19. Having considered the withheld information, the Commissioner is satisfied that it all relates to Mr Cooney as an individual and that Mr Cooney can be identified from that data. The Commissioner has therefore concluded that the information withheld by Dumfries and Galloway Constabulary is Mr Cooney's personal data. He finds that Dumfries and Galloway Constabulary were correct in its application of section 38(1)(a) of FOISA to this information.
20. 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.

DECISION

The Commissioner finds that the Chief Constable of Dumfries and Galloway Constabulary complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Cooney.

Appeal

Should either Mr Cooney or the Chief Constable of Dumfries and Galloway 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.

Margaret Keyse
Head of Enforcement
7 February 2012



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 by virtue of any provisions of Part 2, section 1 applies only to the extent that –

- (a) the provisions do not confer absolute exemption; and

...

- (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); and

...

38 Personal information

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

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

...

- (5) In this section-



...

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act [Data Protection Act 1998];

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;

...