

Decision Notice



Decision 062/2008 Mr Allan McLeod and the Chief Constable of Northern Constabulary

Names of all police officers stationed at Wick Police Station between January and March 1997

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Summary

Mr Allan McLeod requested the names of all police officers stationed at Wick Police Station between January and March 1997 from the Chief Constable of Northern Constabulary (Northern Constabulary). Northern Constabulary responded by advising Mr McLeod that it considered the information to be exempt from disclosure under Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr McLeod remained dissatisfied and applied to the Commissioner for a decision.

In June 2008, the Commissioner issued a decision ordering Northern Constabulary to disclose the names of the officers involved to Mr McLeod. Northern Constabulary appealed that decision to the Court of Session. In the light of new information which had not been available to him at the time of the investigation, the Commissioner conceded the appeal and the Court subsequently quashed the decision and remitted it back to the Commissioner for reconsideration de novo.

Following further investigation, the Commissioner found that Northern Constabulary had been entitled to withhold the names of the officers from Mr McLeod on the basis that the information was exempt from disclosure under section 38(1)(b) of FOISA.

This decision replaces the decision issued in June 2008.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and 2(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i), (2)(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(1))

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 31 May 2007, Mr McLeod wrote to Northern Constabulary requesting the following information:

“The names of all 29 police officers, regardless of their rank, who were stationed at Wick Police Station, Caithness in 1997”
2. Northern Constabulary replied to Mr McLeod on 31 May 2007, asking him to clarify or narrow his request. Northern Constabulary explained that members of staff are moved on a regular basis and that it would be helpful if he could specify a particular date or period between two specific dates in his request.
3. In response, Mr McLeod narrowed the terms of his initial request to seek the names only of those officers based at Wick Police Station between January and March 1997.
4. On 13 June 2007, Northern Constabulary wrote to Mr McLeod and advised him that it considered the sought information exempt from disclosure in terms of sections 26(a) and 38(1)(b) of FOISA.
5. Mr McLeod wrote to Northern Constabulary requesting a review of its decision to withhold the information from him on the basis of sections 26(a) and 38(1)(b) of FOISA on 15 June 2007. In particular, Mr McLeod stated that he did not accept that the information he requested was exempt from disclosure under FOISA.
6. On 5 July 2007, Northern Constabulary responded to Mr McLeod's request for review and upheld its original decision to withhold the information under sections 26(a) and 38(1)(b) of FOISA.
7. On 9 July 2007, Mr McLeod wrote to the Commissioner, stating that he was dissatisfied with the outcome of Northern Constabulary's review and applying to him for a decision in terms of section 47(1) of FOISA.
8. 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

9. On 16 July 2007, Northern Constabulary was notified in writing that an application had been received from Mr McLeod and was asked to provide the Commissioner with specified items of information required for the purposes of the investigation. Northern Constabulary responded with the information requested and the case was then allocated to an investigating officer.



10. The investigating officer subsequently contacted Northern Constabulary, 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.
11. Northern Constabulary replied on 18 September 2007. It advised that it had written to Mr McLeod providing the names of senior police officers who were based at Wick station between January and March 1997, in line with the approach set out with a previous decision made by the Commissioner on a related matter. However, Northern Constabulary confirmed that it still wished to withhold the names of less senior officers. Northern Constabulary provided reasons for its application of the exemptions contained in section 26(a) and section 38(1)(b) of FOISA to the names that it was continuing to withhold. It submitted that it also considered the withheld information to be exempt in terms of section 35(1)(a) and 39(1) of FOISA, and it supplied arguments in support of the application of these two additional exemptions.
12. Following this investigation, the Commissioner found that Northern Constabulary had failed to act in accordance with Part 1 of FOISA, on the basis that it had incorrectly withheld the sought information under the exemptions in sections 26(a), 35(1)(a), 38(1)(b) and 39(1) of FOISA. That decision (issued on 5 June 2008) required Northern Constabulary to disclose the information under consideration to Mr McLeod.
13. Northern Constabulary subsequently appealed this decision to the Court of Session on the basis that the Commissioner had erred in law by concluding that the information was not exempt from disclosure under section 38(1)(b) of FOISA.
14. The Commissioner reconsidered his decision in the light of the appeal, and in view of additional information supplied by Northern Constabulary which had not previously been made available to him. The Commissioner conceded the appeal and the Court remitted it back to the Commissioner for reconsideration de novo. As a result, this decision now replaces the decision previously issued on 5 June 2008.
15. Northern Constabulary subsequently provided additional information and submissions to the Commissioner, as did Mr McLeod. These are summarised and considered in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

16. 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.



17. Mr McLeod is seeking a list of the names of police officers (of every rank) who were based at Wick Police Station between January and March 1997. Northern Constabulary has provided the Commissioner with a list of those officers and confirmed that it considers the names that it has not already disclosed to be exempt under the exemptions in sections 26(a), 35(1)(a), 38(1)(b) and 39(1) of FOISA.

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

18. 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 one or more 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.
19. Northern Constabulary has withheld all of the information under section 38(1)(b) of FOISA, arguing that it is personal data, the disclosure of which would contravene the first and sixth data protection principles.

Is the information personal data?

20. 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).
21. In this case, the Commissioner is satisfied that the officers can be identified either from their name alone or from their name and other information held by Northern Constabulary. He is also satisfied that this information relates to the officers. In the circumstances, he is therefore satisfied that the officers' names constitute personal data under the terms of the DPA.
22. 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 has argued that disclosure would breach the first and sixth data protection principle.

The first data protection principle

23. 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.
24. 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 in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.



25. 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.
26. When considering the conditions in Schedule 2 of the DPA, the Commissioner has noted Lord Hope's comment in the case of the Common Services Agency v Scottish Information Commissioner¹ (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.
27. 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(s) 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.
28. There are, therefore, a number of different tests which must be considered before condition 6 can be met. These are:
 - a. Does Mr McLeod have a legitimate interest in obtaining the withheld personal data?
 - b. 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 individuals in question?
 - c. Even if the processing is necessary for Mr McLeod's legitimate purpose, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individuals? 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 individuals 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 was 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?

29. In considering the legitimate interests of Mr McLeod, the Commissioner is aware that Mr McLeod has a particular interest in understanding the circumstances surrounding the death of his nephew Kevin McLeod in 1997 and the investigations subsequently undertaken by Northern Constabulary. A number of investigations have been undertaken concerning these events and a considerable amount of information about these has been placed in the public domain.
30. In his submissions to the Commissioner, Mr McLeod argued that providing the names of police officers working in the public sector in a public-facing role would simply provide him and the public with a record of their employment at the specified time and disclosing the names would assure both him and the public that the police are both transparent and accountable.
31. Mr McLeod also stated that allegations had been made to his solicitor that certain police officers based in Wick during the period in question may possibly have had some involvement in his nephew's death. Mr McLeod argued that disclosure of the information would clarify whether the officers who were the subject of these allegations were indeed based in Wick at the time.
32. Mr McLeod also submitted that disclosure of the information would assist his family, and investigators hired by his family, to properly investigate the circumstances surrounding the death of his nephew and subsequent enquiries conducted by Northern Constabulary and would hopefully ensure that those whom the family suspect were involved in Kevin's death would be brought to justice.
33. In its submissions to the Commissioner, Northern Constabulary stated that Mr McLeod has never made clear what his legitimate interest is in obtaining the requested information. Northern Constabulary argued that his legitimate interest cannot simply be in knowing the identities of those employed at Wick police station as this would evade the question as to what his interest is, and whether it is legitimate. Northern Constabulary submitted that there is substantial reason to suggest that the interest he is in truth pursuing is harassment which, in its opinion, cannot be a legitimate interest.
34. 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 all the circumstances, the Commissioner is satisfied that Mr McLeod does have a legitimate interest in obtaining the withheld information.

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

35. The Commissioner must next consider whether disclosure is necessary for those legitimate interests.



36. In their submissions, Northern Constabulary argued that, if Mr McLeod's interest is in advancing his understanding of the circumstances surrounding his nephew's death, no reason has ever been put forward for holding, or even surmising, that this disclosure would advance such an interest at all, let alone be necessary to it. Northern Constabulary argued that the request was for all names of individuals without reference to whether they had any involvement in these matters and consequently, such names could not be necessary as they could not be separated from those that are said to be necessary.
37. Having considered (and accepted) the arguments presented by Mr McLeod as to why he has a legitimate interest in obtaining the information, the Commissioner accepts that disclosure would be necessary to fulfil those legitimate interests. He can identify no reasonable means of achieving those legitimate interests in the absence of disclosure.

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

38. As the Commissioner is satisfied that disclosure of the personal data would be necessary to fulfil Mr McLeod's legitimate interests, the Commissioner is now required to consider whether that disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individual data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr McLeod and the individuals in question. Only if the legitimate interests of Mr McLeod outweigh those of the individuals in question can the information be disclosed without breaching the first data protection principle.
39. In their submissions to the Commissioner, Northern Constabulary stated that there has been, over a period of many years and with no indication that it is drawing to an end, a pattern of abusive language, repeated and offensive communications, threatening behaviour and actual violence against a number of individuals in connection with the death of Kevin McLeod. Northern Constabulary provided the Commissioner with evidence and examples of incidences of such behaviour.
40. Northern Constabulary contended that the individuals who are the subject of the information request have a right not only to be free of actual harassment, but also to be free of the fear of possible harassment. It argued that these fears are well-founded, but in any event, it can be assumed that they are sincerely held and the right to be free from fear is an important right.
41. Northern Constabulary submitted that these incidents and allegations demonstrated that the disclosure of the information would be unwarranted in each case by reason of prejudice to the rights and freedoms and legitimate interests of the police officers concerned.
42. In his submissions to the Commissioner, Mr McLeod argued that his legitimate interests in disclosure of the information outweighed the privacy rights of the police officers as disclosure would provide further understanding of the policing of Wick at the time of his nephew's death in 1997 and consequently would help both him and Kevin's parents to understand why basic police procedures were ignored by officers during the investigation. Mr McLeod also submitted that disclosure would allow a proper investigation of the true circumstances surrounding his nephew's unexplained death.



43. The Commissioner has balanced the legitimate interests of the data subjects against the legitimate interests identified by Mr McLeod. Having done so, the Commissioner finds that the legitimate interests served by disclosure to Mr McLeod would not outweigh the unwarranted prejudice that would be caused to the rights, freedoms or legitimate interests of the data subjects. The Commissioner is therefore satisfied that condition 6 of schedule 2 of the DPA is not met in this case.
44. In reaching this conclusion, the Commissioner is satisfied, on the basis of the information and examples provided by Northern Constabulary that there is evidence of ongoing harassment against individuals involved in the investigation into the death of Kevin McLeod. The Commissioner is also persuaded that the fears of the police officers of possible harassment are genuine and well-founded.
45. Having accepted that disclosure of the withheld personal data would lead to unwarranted prejudice to the rights, freedoms and legitimate interest of the data subjects as described above, the Commissioner must also conclude that disclosure would be unfair. As condition 6 is not met, he would also regard disclosure as unlawful. In all the circumstances, therefore, the Commissioner's conclusion is that the first data protection principle would be breached by disclosure of the information and therefore that the withheld personal data of the police officers was properly withheld under section 38(1)(b) of FOISA.
46. As the Commissioner has upheld the withholding of the information in its entirety under this exemption, he is not required to go on to consider whether the disclosure of the names would breach the sixth data protection principle or whether any of the other exemptions cited by Northern Constabulary should be upheld.

DECISION

The Commissioner finds that the Chief Constable of 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 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
23 August 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

...

- (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

...

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.

...

Decision 062/2008
Mr Allan McLeod and the
Chief Constable of Northern Constabulary

