

Decision Notice



Decision 170/2011 Mr Nick Rowden and Highland Council

Antisocial behaviour investigation

Reference No: 201100343

Decision Date: 17 August 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
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Summary

Mr Rowden requested from Highland Council (the Council) reports and related information on investigations carried out by the Council into the behaviour of named individuals. The Council responded by withholding the information under a number of exemptions in FOISA. Following a review, as a result of which the Council also relied on additional exemptions, Mr Rowden remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Rowden's request for information in accordance with Part 1 of FOISA, by withholding the information. In this case, he was satisfied that the information was subject to legal professional privilege, or that it was personal data (some being Mr Rowden's own personal data and some being the personal data of others, the disclosure of which would breach the data protection principles). He did not require the Council to take any action.

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) (Effect of exemptions); 36(1) (Confidentiality) and 38(1)(a), (1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the 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 - Part I: The principles) (the first data protection 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 8 July 2010, Mr Rowden wrote to the Council. He referred to the numerous complaints he had made to the Council about “the anti-social/criminal activities” of certain named individuals and what he perceived to be the Council’s failure to address these issues effectively. Mr Rowden asked the Council to supply him with all the information it held relating to these matters including:
 - a. all reports of the alleged investigations carried out by the Housing Department into the conduct of the named individuals
 - b. any “allegedly independent” report or review carried out by a Council official from outwith the Ross-shire area
 - c. all information and reports in the possession of the Council’s Anti-Social Behaviour Investigation Team
 - d. all details of the advice given by the Council’s Legal Services Department, including that relating to the application for an antisocial behaviour order (ASBO) against a named individual
 - e. all records and minutes relating to the meetings held between the Council, Northern Constabulary and other bodies under the terms of a relevant protocol.
2. The Council responded on 5 August 2010 and stated that the information Mr Rowden had requested was exempt under sections 34(1), 34(4) and 38(1)(b) of FOISA. The Council explained that it could provide Mr Rowden with his earlier correspondence, and the Council’s replies, in relation to his complaints regarding alleged antisocial behaviour, and also a report by the Scottish Public Services Ombudsman (SPSO) which fell within the terms of his request: it asked him to confirm whether he wished this information.
3. On 15 September 2010, Mr Rowden wrote to the Council requesting a review of its decision. He disagreed with the Council withholding all the information he had requested, arguing that he should be provided with his own personal data and that certain of the information held in relation to other individuals would already be in the public domain. He suggested that any details the Council considered confidential could simply be redacted and the remainder disclosed. Mr Rowden considered disclosure of the information would permit scrutiny of how the Council had carried out its investigations.
4. The Council notified Mr Rowden of the outcome of its review on 13 October 2010. The Council explained the background to its use of personal data in respect of ASBOs, including the sharing of those data with Northern Constabulary, all in accordance with the requirements of the DPA. The Council believed that it had been correct to withhold the requested information under the exemptions it had claimed previously, adding that it also considered certain of the information to be exempt under section 36(1) of FOISA, being information to which a claim to confidentiality could be maintained in legal proceedings. It also highlighted Mr Rowden’s right to access his own personal data in terms of section 7 of the DPA.



5. On 23 February 2011, Mr Rowden wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council'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 Rowden 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 4 March 2011, the Council was notified in writing that an application had been received from Mr Rowden and was asked to provide the Commissioner with the information withheld from him. The Council responded and the case was allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to those exemptions cited in earlier correspondence.
9. The submissions received from the Council and Mr Rowden, insofar as relevant, will be considered further in the Commissioner's analysis and findings.

Commissioner's analysis and findings

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

Section 36(1) – Confidentiality

11. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, which includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Council argued applied to certain of the withheld information.
12. For legal advice privilege to apply, certain conditions must be fulfilled: the information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate, and this may include an in-house legal adviser; the legal adviser must be acting in his/her professional capacity, and the communications must occur in the context of the legal adviser's professional relationship with his/her client.



13. The information withheld under section 36(1) was a memorial by an in-house solicitor seeking the opinion of Counsel; the Counsel's opinion, and communication between the Council's in-house solicitor and certain Council employees in respect of Counsel's opinion and the matters to which it related. All of the legal advice was given within relationships where the legal advisors (the in-house solicitor and Counsel respectively) provided advice in a professional capacity to the client (the Council).
14. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption applies in this case. Information cannot be privileged unless it is also confidential. The claim of confidentiality must be capable of being sustained at the time the exemption is claimed.
15. A claim of confidentiality will not be capable of being maintained where the information has (prior to the conclusion of the public authority's review) been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where confidentiality has thus been lost in respect of part or all of the information under consideration, any privilege associated with that information will also effectively be lost. Having considered the Council's submissions on this point, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full or in summary.
16. The Commissioner is therefore satisfied that the withheld information includes information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that the information withheld by the Council under section 36(1) of FOISA is exempt from disclosure.
17. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

18. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*¹, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.

¹ (2004) UKHL 48



19. The Council acknowledged that there was a public interest in ensuring that a public authority with statutory responsibilities for tackling antisocial behaviour was discharging its functions adequately, and that that public interest could be met by disclosure. It recognised that the issues covered in the opinion were of concern to the public. The Council also highlighted a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and client, however, noting the need (in the interests of the proper administration of justice) for complex issues to be considered thoroughly and options and advice expressed freely. On balance, taking account of what it considered to have been a thorough investigation of Mr Rowden's complaints by the SPSO, and noting that it considered the legal advice to be of greater interest to the applicant than to the wider public, the Council took the view that such public interest benefits as there were in disclosure did not outweigh those in maintaining the exemption.
20. Mr Rowden's application to the Commissioner, and his communications with the Council, underline his view that there is a public interest in the scrutiny of the Council's actions with respect to this particular instance of the investigation of alleged antisocial behaviour. The Commissioner acknowledges Mr Rowden's personal reasons for requiring disclosure.
21. The Commissioner has considered the public interest arguments and he accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. He considers that this extends to knowing whether the Council has been correctly discharging its duties on key statutory responsibilities such as tackling antisocial behaviour. He acknowledges that disclosure of the legal advice would contribute to transparency and accountability in this context.
22. As he has stated above, however, there is a long-recognised and strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, and in his instance the Commissioner accepts the Council's argument that there is a greater public interest in allowing the Council to obtain and consider legal advice in confidence. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosing the information in this case is outweighed by the public interest in maintaining the exemption in section 36(1).
23. Consequently, the Commissioner accepts that the Council was entitled to withhold this information under the exemption in section 36(1) of FOISA.

Personal Information

24. The Council also withheld information under sections 38(1)(a) and (b) of FOISA.
25. Some of the information withheld under section 36(1) of FOISA could fall within the ambit of section 38(1)(a) and (b). However, having accepted that the Council was correct to withhold that information under section 36(1) of FOISA, the Commissioner does not find it necessary to (and consequently will not) consider whether the information could also have been withheld under the cited exemptions in section 38.



Consideration of section 38(1)(a)

26. 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)(b) of FOISA.
27. 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. This ensures that such information is disclosed to the data subject (rather than to the world at large, which is the effect of disclosure under FOISA) under a regime designed for such purposes.
28. 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). Having considered the withheld information and the submissions received from the Council, the Commissioner is satisfied that elements of the information fall within this definition, the individual to whom they relate being Mr Rowden.
29. The Council explained that Mr Rowden had been informed of his right to access this information under section 7 of the DPA. This appears to have been alluded to in the Council's initial response to Mr Rowden, but was certainly made clear in the response to his request for review.
30. In the circumstances, the Commissioner is satisfied that the Council was correct to withhold those elements of the requested information comprising Mr Rowden's personal data under section 38(1)(a) of FOISA. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required (or entitled) to go on to consider whether the public interest lies in the information being disclosed or withheld.
31. Mr Rowden has, of course, the right to request, and (insofar as that legislation permits) to obtain, his personal data from the Council under section 7 of the DPA.

Consideration of section 38(1)(b)

32. The Council withheld information in terms of section 38(1)(b) of FOISA on the basis that it was the personal data of individuals other than Mr Rowden, and that its disclosure would breach the first data protection principle.
33. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts personal data if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.
34. In considering the application of this exemption, therefore, the Commissioner will first consider whether the information in question is personal data as defined in section 1(1) of the DPA and, if it is, whether disclosure of the information would breach the first data protection principle.



Is the information under consideration personal data?

35. The definition of "personal data" is set out in paragraph 28 above and in the Appendix.
36. The Commissioner has considered the information withheld under this exemption, and in the circumstances is satisfied that it falls within the definition of personal data. Living individuals can be identified from the information, which is biographical in relation to those individuals and focuses on them. The Commissioner is therefore satisfied that the information relates to those individuals.
37. Mr Rowden suggested that any details the Council considered confidential could be redacted and the remainder disclosed. In certain cases, it may be possible to do this, with the result that individuals are no longer identifiable and consequently the information disclosed is no longer personal data. In this case, however, noting Mr Rowden's familiarity with the situations to which the data relate, the Commissioner does not believe it would be possible to redact the information in such a way as to provide information from which the individuals concerned would no longer be identifiable.
38. The Commissioner will now go on to consider whether disclosure of the information would breach the first data protection principle.

The first data protection principle

39. The first data protection principle states that personal data shall be processed fairly and lawfully. It also states 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 of the DPA is also met.
40. The Council did not submit that the information included sensitive personal data as defined by section 2 of the DPA. In the circumstances, the Commissioner has not found it necessary to consider whether any of the conditions in Schedule 3 could be met.
41. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*² 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.

² <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



42. The Commissioner considers that only condition 6 in Schedule 2 to the DPA might be considered to apply in this case. Condition 6 allows personal data to be processed (in this case, disclosed in response to Mr Rowden's information request) if that 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.
43. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Mr Rowden have a legitimate interest in obtaining these personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is 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 data subject(s) (i.e. the individual(s) to whom the data relate)?
 - Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject(s)? As noted by Lord Hope in the above quoted judgement, there is no presumption in favour of the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr Rowden must outweigh the rights, freedoms or legitimate interests of the data subject(s) before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the personal data to Mr Rowden.

Does Mr Rowden have a legitimate interest?

44. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In his published guidance on section 38 of FOISA³, the Commissioner states:
- In some cases, the legitimate interest might be personal to the applicant – e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.*
45. Mr Rowden's views on his legitimate interest are apparent from his correspondence with the Council and with the Commissioner: namely, an interest in being able to assess fully, by means of viewing the information held by the Council which shows how and why it made certain decisions, the Council's actions in respect of an issue about which he complained.

³<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



46. The Commissioner accepts that Mr Rowden as an individual has a legitimate interest in understanding the actions of the Council in respect of a complaint which was instigated by him, in order that he can assess whether the Council has complied with its statutory duties in this regard.

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

47. The Commissioner must now consider whether disclosure of the withheld personal data is necessary for the legitimate interests identified above and in doing so he must consider whether these interests might reasonably be met by any alternative means.
48. The Commissioner acknowledges the Council's comment that thorough and independent investigations of the Council's handling of Mr Rowden's case had been conducted by the SPSO. The Council highlighted (and the Commissioner acknowledges) that the SPSO had upheld none of Mr Rowden's complaints against it.
49. The Commissioner agrees with the Council that it is relevant in this context to highlight that there has been an independent investigation which addresses how the Council has dealt with Mr Rowden's complaints. He also notes, however, the SPSO's remit in relation to these matters, that is, to consider the Council's administrative handling of Mr Rowden's complaints, as opposed to the substance of the incidents of alleged antisocial behaviour he had complained about. Mr Rowden's concerns, which remain unresolved, appear to be with all aspects of the Council's handling of the case.
50. In all the circumstances of this case, the Commissioner can identify no viable means of meeting Mr Rowden's legitimate interests which would interfere less with the privacy of the relevant data subjects than the provision of the withheld personal data. In the circumstances, he is satisfied that disclosure of those personal data is necessary to meet the legitimate interests in question.

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

51. The Council referred to the need for antisocial behaviour investigations to be carried out in private to ensure that witnesses would come forward, and for members of the public not to feel afraid to complain for fear that their information and identities would put into the public domain. Similarly, the Council submitted that those accused of antisocial behaviour also deserved privacy until their case was taken to court, which was the appropriate forum for deciding what information about such individuals should be made public.
52. The Commissioner has considered these arguments carefully. He has also taken into account the guidance on this point in his own briefing on the section 38 exemption, which identifies relevant factors as including:
- whether the information relates to the individual's public or private life
 - the potential harm or distress that may be caused by disclosure
 - whether the individual has objected to disclosure



- the reasonable expectations of the individual as to whether their information would be disclosed.
53. In this instance there is a considerable volume of withheld information. Where it is not the personal data of Mr Rowden, the information is the personal data of the individuals he complained about. All of these personal data clearly relate to individuals' private lives. The Commissioner considers that although there are no absolute rules in this regard, where information relates to an individual's private life (i.e. their home, family, social life or finances), it will generally deserve more protection than information about them acting in an official or work capacity (i.e. their public life). In this instance, given the nature of the information, he is satisfied that such additional protection is merited. Having considered the information, together with the submissions received from both the Council and Mr Rowden, he is also satisfied that the data subjects would not have reasonably expected the information to be disclosed.
54. In this particular case, therefore, having balanced the legitimate interests of the data subjects against those identified by Mr Rowden, the Commissioner finds that any legitimate interests served by disclosure would not outweigh the unwarranted prejudice that would be caused in this case to the rights and freedoms or legitimate interests of the data subjects. The Commissioner therefore concludes that condition 6 in Schedule 2 to the DPA cannot be met here.
55. Having accepted that disclosure of the withheld personal data would lead to unwarranted prejudice to the rights and freedoms or legitimate interest of the data subjects as described above, the Commissioner must also conclude that its disclosure would be unfair. As no condition in Schedule 2 to the DPA can be 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 that this information was properly withheld under section 38(1)(b) of FOISA
56. As the Commissioner has found that the Council was correct to rely on the exemptions in sections 36(1) and 38(1)(b) of FOISA for withholding all of the information requested by Mr Rowden, he is not required to (and consequently will not) go on to consider the application of the exemption in section 34(4) of FOISA (which was also cited by the Council in its submissions).



DECISION

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

Appeal

Should either Mr Rowden or Highland Council 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
17 August 2011



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 –
 - (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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...



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.
- ...
- (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.

...