



Scottish Information
Commissioner

**Decision 68/2005 Mr James Duff and Dumfries & Galloway
Constabulary**

Request for reports of criminal complaints

Applicant: Mr James Duff

**Authority: The Chief Constable of Dumfries and
Galloway Constabulary**

Case No: 200502087

Decision Date: 6 December 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Request for reports of criminal complaints – information supplied – names of police officers redacted – withheld under section 38(1)(b) – whether personal data – whether disclosure would breach data protection principles

Facts

Mr James Duff requested from Dumfries & Galloway Constabulary all reports of the criminal complaints he had made between 1979 and 2004. Dumfries & Galloway Constabulary supplied the information under the Freedom of Information (Scotland) Act (FOISA) but redacted the names of the police officers who were the authors of the reports and other named police officers on the grounds that the information constituted personal data and was therefore exempt under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002. Mr Duff was dissatisfied with the redactions that had been made and requested a review. Dumfries & Galloway Constabulary upheld its original decision. Mr Duff applied to the Scottish Information Commissioner for a decision.

Outcome

I find that the Chief Constable of Dumfries and Galloway Constabulary failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by withholding the identities of the reporting officers and other officers in the supply of copies of the reports of complaints made by Mr Duff.

I require the Chief Constable to release this information to Mr Duff within two months from the date of receipt of this decision notice.



Appeal

Should either the Chief Constable of Dumfries & Galloway Constabulary or Mr Duff wish to appeal against this decision, there is a right to 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.

Background

1. On 24 January 2005 Mr Duff wrote to the Chief Constable of Dumfries & Galloway Constabulary (the Constabulary) requesting the following information:
 - All the reports of criminal complaints I have made from 1979 to 2004
2. The Constabulary responded to Mr Duff's request on 17 February 2004. The Constabulary indicated that it had decided to grant his request and the information was supplied. However, the Constabulary advised that where the information could identify another person it might have been redacted. The Constabulary advised that the applicable exemption was section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) because the information constituted personal data.
3. On 18 April 2005 Mr Duff requested a review of this decision. He referred to earlier correspondence in which he had asked whether the blanking out of the police officers' names was lawful. He asked to be supplied with fresh copies of the reports disclosing the blanked out parts of the reports.
4. The Constabulary responded to the request for review on 18 May 2005. The Constabulary upheld its original decision. It advised that it was satisfied that consideration was given to the requirement for the force to safeguard personal information of third parties and considered reporting officers and correspondents fell into this category.
5. The Constabulary advised that it had also considered the impact disclosing this type of information would have on the individuals concerned. It concluded that the redacted information was personal information and that the exemption claimed was appropriate in these circumstances.



6. The Constabulary indicated that having considered all the information provided, the retention of the requested information outweighed the potential benefits in disclosure.
7. On 17 June 2005 Mr Duff applied to me for a decision. He complained about the blanking out of the names of the reporting officers.
8. The case was allocated to an investigating officer.

The investigation

9. Mr Duff's appeal was validated by establishing that he had made a request for information to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
10. The investigating officer contacted the Constabulary on 11 July 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Constabulary was asked to comment on the issues raised by Mr Duff's case and to provide supporting documentation for the purposes of the investigation.
11. In particular, the Constabulary was asked to provide a copy of the information supplied to Mr Duff and a copy of the information in an unedited form. It was also asked to provide a detailed analysis of the application of section 38(1)(b) to the information withheld, further information about how the authority's review was carried out, any internal correspondence relating to the consideration of the request and any guidance relied on by the Constabulary in deciding whether the information requested should be disclosed or withheld.

Submissions from the Constabulary

12. The Constabulary responded to this letter on 26 July 2005. It supplied the investigating officer with a copy of the information relevant to this request both in a redacted and unedited form. It also supplied a review log relating to this request which set out the steps taken and considerations made when the request was received.
13. The Constabulary also supplied the investigating officer with copies of correspondence in relation to other requests for information Mr Duff had made.



14. The Constabulary advised that the redaction was minimal and the vast majority had been left open to Mr Duff which, it argued, demonstrated the openness afforded to him by the Force. The Constabulary advised that the identities of the reporting officers and other correspondents were considered to be third party personal information and as such were not disclosed.
15. At that stage, the Constabulary did not expand on its application of section 38(1)(b) to the information withheld and why it considered this information to be personal information.
16. In the Constabulary's decision making record the notes record that section 38(1)(b) applies to the identity of the reporting officers and where appropriate, any other third party information not to be already known to the requester.
17. The record also notes that in line with the Sixth Principle of the Data Protection Act 1998 and specifically Part Section 7(5) all other information which cannot identify an individual will be disclosed to the requestor.

The Commissioner's analysis and findings

18. I consider it helpful to explain the nature of the information withheld in this case before considering the application of section 38(1)(b).
19. Mr Duff has made a series of complaints to the police about a range of individuals over a number of years. In each case, an officer has produced a report into the complaint (sometimes with the complaint attached). Generally, the report sets out the nature of the complaint, provides background information on Mr Duff's complaint (including earlier complaints), refers to any documents relevant to the complaint, outlines any research and investigation carried out by the officer into the complaint and recommends the next steps. In some cases the author suggests that the report be submitted to the Procurator Fiscal.
20. In many cases the author comments on the complaint and its validity and, in some cases, on the complainant himself. In each case the name of the author of the report, that is the police officer who investigated the complaint made by Mr Duff, has been deleted. Where a later report of a complaint refers to an earlier report the name of the earlier reporting police officer is again deleted.



21. In one case, the names of several police officers who are not exclusively authors of earlier reports have been redacted from the body of a report (page 7, Report no. 16). These are police officers against whom the applicant has made certain allegations.
22. The Constabulary is relying on section 38(1)(b) of FOISA to withhold the identities of the reporting officers and other correspondents. In its correspondence the Constabulary has not clarified who the “other correspondents” are. From the information supplied, however, it seems clear that this term is intended to refer to other officers involved in investigating the complaints.
23. Section 38(1)(b) states that information is exempt if it constitutes personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.
24. Section 38(5) of FOISA states that the definition of “personal data” is that contained in section 1(1) of DPA. That section defines personal data 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,

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.”
25. Interestingly, the Constabulary’s concerns about protecting third party data have not led it to redact the identities of any other individuals mentioned in the reports, including those against whom Mr Duff has complained. Further, any opinions expressed about Mr Duff by those individuals have also been included. Only the identities of the reporting officers and the other police officers named have been redacted (and even those not wholly consistently – the names of some police officers remain).
26. The Constabulary states in its decision log that section 38(1)(b) applies to the reporting officers and “any other third party information considered not to be already known to the requester.” Presumably it felt comfortable releasing the names of those persons against whom Mr Duff had made allegations because their identities were known to Mr Duff.
27. If disclosure depended on whether the identity of the individuals were already known to Mr Duff then the names of the police officers who were the subject of his allegations should also have been released. This point could arguably apply to certain reporting officers too.



28. It is not within my remit to comment on the information already released. However, it is clear that the Constabulary dealt with Mr Duff's request under FOISA rather than DPA. Therefore, on concluding that the third party data was personal data the Constabulary should have considered whether the information could be disclosed to "a member of the public" (see paragraph 23 above) rather than whether the information could be released to Mr Duff.
29. Further, although requests for third party data should be considered under FOISA, requests for Mr Duff's own data (which is the majority of the information) should have been dealt with under DPA.
30. However, I must consider the information that the Constabulary has actually withheld in this case and the application of section 38(1)(b).
31. The Constabulary argued that the identities of the reporting officers and other correspondents constituted personal data. However, the Constabulary did not indicate why it considered this information to be personal data.
32. Therefore the investigating officer contacted the Constabulary to ask it to expand on its analysis of the application of section 38(1)(b) to the information withheld. The investigating officer pointed out that reliance on section 38(1)(b) requires an authority to demonstrate that the information withheld is personal data and that disclosure of this information to a member of the public would breach one of the data protection principles.
33. Given that the police officers in question were authors of reports of complaints made by Mr Duff (or otherwise involved in the Constabulary's dealings with Mr Duff) and therefore acting in a professional capacity, the investigating officer asked for the Constabulary's reasoning on why this information constituted personal data. The investigating officer also asked the Constabulary to indicate which data protection principles would be breached and why if this information were to be released.
34. In response to the investigating officer's enquiries the Constabulary re-asserted that the identities of the individuals in question constituted personal data. The Constabulary advised that while it appreciated that third party information could legitimately be provided without the consent of the other parties, it had determined in this instance that it was information the requestor could not reasonably be expected to know.
35. The Constabulary submitted that the reports provided to Mr Duff ranged from 1979 to 1998 and that while the respective officers had been acting in a professional capacity, the Chief Constable had ultimate responsibility. It submitted that in some cases the reports expressed the personal views and opinions of the authors, a practice which could be inhibited if officers thought that their identity could be disclosed at a later date.



36. The Constabulary advised that the personal details of the officers involved had been withheld in line with the sixth principle of the Data Protection Act 1998 (DPA). The Constabulary advised that it had complied with section 7(5) of the DPA in “communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.”
37. The Constabulary advised that any further correspondence or action that Mr Duff might wish to take should be with or relate to the Chief Constable as data controller and not the individual officers, some of whom had obviously now retired from service.
38. The first step in this process is to consider whether the information withheld in this case actually constitutes personal data. Only if I consider this to be the case will I be obliged to consider whether any data protection principles would be breached in the event of disclosure.
39. In *Decision 022/2005 – Mr T and Glasgow City Council* I noted that in most instances, the identities of individual staff members conducting work on behalf of public authorities will not constitute personal data under the terms of the DPA. This is in line with the interpretation in the decision in *Durant v the Financial Services Authority* [2003] EWCA Civ 1746.
40. In this decision, the Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual’s involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person’s privacy whether in his personal or family life, business or professional capacity.
41. I am not satisfied that the information withheld in this case amounts to the personal data of the reporting officers or other officers involved in the investigation of Mr Duff’s complaints. In each case, the police officer is acting in a professional capacity. The information reveals no more about these individuals than that they are employed as police officers and that they have produced a report on a complaint received from Mr Duff. In some cases, the officers express opinion about the complaint and, on occasion, about the complainant. In such cases, however, they are expressing an opinion as a professional and not as a private individual.
42. I am unable to see how disclosure of this information would affect an individual’s privacy. The officers are acting in a professional capacity and where they express views or an opinion are making these purely in a professional capacity.



43. The information contained in the reports demonstrates that Mr Duff has made a series of allegations against individuals in the past. I accept, therefore, a real possibility that if the identities of the police officers were to become known then they might become themselves the object of allegations and perhaps media attention.
44. As I pointed out in the decision of Mr T and Glasgow City Council I do not consider media interest as constituting sufficient reason for withholding the information requested.
45. The Constabulary has argued that officers could be inhibited from expressing views or opinions if they thought that their identity could be disclosed at a later date. This argument is not relevant, however, when considering whether the information constitutes the personal data of the reporting officers (or, for that matter, whether the data protection principles have been complied with) – and in any event must be of questionable value given that police officers are regularly required to justify their professional views and opinions in court.
46. The Constabulary has also argued that any further correspondence Mr Duff wishes to enter into with the police should be with the Chief Constable. Indeed the main thrust of the Constabulary's submissions appears to be that the identities of the police officers should be withheld so that any further complaints made by Mr Duff are addressed to the Chief Constable rather than the individual officers. This, in itself, is not a recognised ground under FOISA to justify withholding information.
48. In all the circumstances, therefore, I am not satisfied that the identities of the reporting officers and other correspondents constitute personal data. As a result, I am not obliged to consider the data protection principles.
49. I consider that slightly different considerations apply to the names of those officers against whom Mr Duff has made allegations (that is, the names that appear on page 7 in Report 16). Clearly the implications of allegations of this nature could extend beyond the purely professional sphere and I consider that the allegations made amount to the police officers' personal data. I am therefore obliged to consider whether disclosure of their identities in such circumstances would breach any of the data protection principles.
50. In its correspondence with my office the Constabulary notes that disclosure of the information would constitute a breach of the sixth data protection principle. This principle cites that personal data should be processed in accordance with the rights of the data subjects under DPA. I am not sure that I can see the relevance of the sixth data protection principle to the issue of disclosure in this case. It seems to me that the first data protection principle is more pertinent.



51. The first data protection principle requires processing to be fair and lawful. I have noted that the Constabulary has felt able, presumably fairly and lawfully, to disclose the names of other individuals the subject of allegations made by Mr Duff. These include the names of solicitors, accountants, a judge, a procurator fiscal and various others with whom Mr Duff had dealings. It is difficult to see, therefore, why the names of the police officers should be withheld in similar circumstances.
52. However, I consider that the release of the identities of third parties by the Constabulary in this case might have been questionable. I have already stated that in considering the application of section 38(1)(b) an authority (and I) must consider whether disclosure can be made to “a member of the public”. I consider that the allegations made by Mr Duff against certain police officers amounts to their personal data. Mr Duff presumably knows the subjects of those allegations but it does not follow that this information should be released to “a member of the public.”
53. In considering whether disclosure of the names of the police officers would be fair and lawful I have taken into account the context of these allegations in that Mr Duff has made a series of allegations against a whole range of individuals, the nature of the allegations and the timing of the allegations which were made in 1987.
54. In addition, as far as I can tell, no further action was taken in relation to the allegations.
54. I have accepted that in some cases allegations against police officers should not be disclosed (see my *Decision 054/2005 Paul Hutcheon and the Scottish Executive*). However, I consider that given the timing and nature of these allegations and the context within which the allegations were made, disclosure would not be in breach of the data protection principles.
55. In summary , therefore I am not satisfied that the information withheld from Mr Duff constitutes the personal information of the reporting officers or other officers involved in the investigation of Mr Duff’s complaints. I am satisfied that although the identities of the police officers who are the subject of allegations amounts to their personal data, disclosure of this information would not be in breach of the data protection principles.



Decision

I find that the Chief Constable of Dumfries and Galloway Constabulary failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 by withholding the identities of the reporting officers and other officers in the supply of copies of the reports of complaints made by Mr Duff.

I require the Chief Constable to release this information to Mr Duff within two months from the date of receipt of this decision notice.

Kevin Dunion
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6 December 2005