



Scottish Information
Commissioner

**Decision 068/2006 Mr Colin Higgins and the Chief Constable of
Tayside Police**

Request for information relating to the applicant

**Applicant: Mr Colin Higgins
Authority: Chief Constable of Tayside Police
Case No: 200503164
Decision Date: 28 April 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 068/2006 Mr Colin Higgins and the Chief Constable of Tayside Police

Request for information held by Tayside Police relating to the applicant – information withheld on basis of section 38(1)(a) of the Freedom of Information (Scotland) Act 2002 – personal data of the applicant – upheld by Commissioner

Facts

Mr Higgins made a subject access request to Tayside Police under section 7 of the Data Protection Act 1998 (the DPA). Tayside Police dealt with his subject access request, but found some of his personal data to be exempt from release under the DPA. Mr Higgins's solicitors then asked Tayside Police to provide them with the information which had been withheld, this time under the Freedom of Information (Scotland) Act 2002 (FOISA). Tayside Police responded with a refusal notice under section 16 of FOISA, on the basis that the information was exempt from disclosure under either section 38(1)(a) of FOISA (if Mr Higgins himself was regarded as the applicant) or section 38(1)(b) of FOISA (if his solicitors were regarded as the applicants). Tayside Police carried out a review at the request of the solicitors and upheld its original decision. Mr Higgins was dissatisfied with Tayside Police's response and applied to the Scottish Information Commissioner for a decision.

Outcome

The Commissioner found that the Chief Constable of Tayside Police had complied with Part 1 of FOISA in dealing with Mr Higgins's request and in particular that he had applied the exemption in section 38(1)(a) correctly to the information withheld.

Appeal

Should Mr Higgins or the Chief Constable of Tayside Police 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.



Background

1. On 11 July 2005, Mr Higgins's solicitors, Messrs Bruce Short, sent a written request for information to the Chief Constable of Tayside Police (Tayside Police). In their letter, Messrs Bruce Short requested the additional information currently held by Tayside Police relating to Mr Higgins, being information not disclosed under the provisions of the Data Protection Act 1998 (the DPA).
2. Tayside Police responded on 5 August 2005 with a refusal notice under section 16 of FOISA. The notice stated that the information requested was held by Tayside Police but was exempt from disclosure as personal data of which Mr Higgins was the data subject. Accordingly, it was exempt from disclosure under section 38(1)(a) of FOISA if Messrs Bruce Short were requesting the information on Mr Higgins's behalf. If Messrs Bruce Short were regarded as requestors in their own right, the information was exempt under section 38(1)(b) of FOISA, on the basis that the information was exempt from section 7(1)(c) of the DPA (data subject's right of access to personal data) and therefore the second condition in that subsection was satisfied. Tayside Police considered the public interest test, as required in connection with the second condition, and concluded that the public interest lay in maintaining the exemption.
3. Messrs Bruce Short wrote to Tayside Police on 27 October 2005, requesting a review.
4. Tayside Police responded to the request for review on 15 November 2005. The response upheld the earlier decision and stated in addition that the information was also exempt from disclosure on the basis that the first condition in section 38(1)(b) was satisfied, as disclosure would contravene the data protection principles contained in schedule 1 to the DPA.
5. Messrs Bruce Short wrote to me on 23 November 2005, requesting an investigation into the matter. There followed some correspondence with Messrs Bruce Short on the basis that the terms of the information request appeared to restrict it to information which would, by definition, fall within the terms of section 38(1)(a): Messrs Bruce Short continued to maintain their client's desire to proceed with the application.
6. The case was then allocated to an investigating officer.



The Investigation

7. Mr Higgins'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 requesting that the authority review its response to his request. I was satisfied from correspondence with his solicitors that they had acted on his behalf throughout their dealings with this matter and were continuing to do so.
8. The investigating officer contacted Tayside Police on 7 February 2006, giving notice that an appeal had been received and that an investigation into the matter had begun. Tayside Police were asked to comment on the issues raised by Mr Higgins's case and to provide supporting documentation for the purposes of the investigation, including the information withheld.
9. Tayside Police responded in full on 27 February 2005. The response described the nature of the information held and the systems on which it was held, in addition to providing the information itself.

The Commissioner's Analysis and Findings

10. As I am satisfied that Messrs Bruce Short pursued this matter on Mr Higgins's behalf rather than their own, I will not consider further the arguments provided by Tayside Police on the basis that Messrs Bruce Short be deemed to be the applicants. I regard Mr Higgins as the applicant.
11. I am satisfied that from the response submitted by them that Tayside Police have taken all reasonable steps to identify the information held by them and falling within the scope of Mr Higgins's request. In any event, I am satisfied that the request for information submitted on Mr Higgins's behalf could not be interpreted as encompassing anything other than his own personal data.
12. Where a request is made for information held by a public authority relating to the applicant, this will in most cases be a request for personal information about the applicant which should be considered under the provisions of the DPA. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject.



13. 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:

 - a) from those data, or
 - b) from those data and from other information which is in the possession of or is likely to come into the possession of the data controller...”
14. The definition is subject to the interpretation contained in *Durant v Financial Services Authority* [2003] EWCA Civ 1746. 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. going 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.
15. In my view, Messrs Bruce Short’s original request appeared to constitute a request for personal information relating to Mr Higgins and Tayside Police were correct to consider it exempt by virtue of section 38(1)(a) of FOISA. Having read the information withheld, I am reinforced in that view.
16. The exemption in section 38(1)(a) is an absolute one and there is no need to consider either the data protection principles or the public interest. Its purpose is to ensure that personal data is, on the whole, accessible to the individuals whom it concerns only and not to the world at large. FOISA exists to promote public access to information and consequently must contain provisions to exempt information which relates to the private lives of particular individuals and is properly the preserve of those individuals alone. That kind of information should (subject to certain exemptions) still be accessible to those individuals and their representatives under the DPA. It cannot, however, follow from information about the applicant being exempt from disclosure under the DPA (as Tayside Police appear to maintain in relation to the information withheld from Mr Higgins) that it will be accessible under some other regime (such as FOISA).
17. It follows from my analysis as set out above that I accept that Tayside Police were correct to apply the exemption in section 38(1)(a) to the information withheld. Indeed the request for information is so self evidently a subject access request and thus exempt that I am surprised that the applicant, who was legally advised throughout, should have continued to require a full investigation and formal decision from me, with all of the resource implications for the authority and my Office that this entails.



Decision

I find that the Chief Constable of Tayside Police complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Higgins's request and in particular that he applied the exemption in section 38(1)(a) of FOISA correctly to the information withheld.

Kevin Dunion
Scottish Information Commissioner
28 April 2006