

Decision Notice



Decision 128/2010 Mr Gregor Hamilton and the Scottish Public Services
Ombudsman

Information relating to casework decision complaints

Reference No: 201000679
Decision Date: 16 July 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Gregor Hamilton requested from the Scottish Public Services Ombudsman (the SPSO) details of casework decision complaints during the period 1 October 2009 to 30 November 2009. The SPSO responded by providing some information concerning the number and outcome of complaints and by advising Mr Hamilton that it intended publishing redacted complaint correspondence for the period in question on its website. Following a review, Mr Hamilton remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPSO had dealt with Mr Hamilton's request for information in accordance with Part 1 of FOISA. He found that the information was properly withheld under sections 26(a) (on the basis that other legislation prohibited disclosure) and 38(1)(b) (on the basis that the information was personal data the disclosure of which would breach the data protection principles).

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)(b) and (e)(ii) (Effect of exemptions); 26(a) (Prohibitions on disclosure) and 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of data protection principles, data subject and personal data) (Personal information)

Scottish Public Services Ombudsman Act 2002 (the SPSO Act): sections 2(1) and (2) (Power of investigation) and 19 (Confidentiality of information)

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions) (definition of personal data); Schedule 1 (The data protection principles) (the first data protection principle)

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.

Decision 080/2008 Mr Frank French and the Scottish Public Services Ombudsman



Background

1. On 16 January 2010, Mr Hamilton emailed the SPSO requesting details of casework decision complaints made to the SPSO for the period 1 October 2009 to 30 November 2009.
2. The SPSO responded on 29 January 2010. In its response, the SPSO provided some information in tabular form concerning numbers and outcome of complaints. The SPSO also advised Mr Hamilton that it intended publishing redacted casework challenge decision correspondence for the period October to December 2009 on its website by 11 February 2010 and advised him that it therefore considered this information to be exempt from disclosure under section 27(1) of FOISA (Information intended for future publication).
3. On 15 February 2010, Mr Hamilton emailed the SPSO requesting a review of its decision. Having viewed the correspondence that the SPSO had published on its website, Mr Hamilton considered that the amount and extent of redactions was excessive and rendered the sense of the correspondence almost meaningless.
4. The SPSO notified Mr Hamilton of the outcome of its review on 15 March 2010. The SPSO advised Mr Hamilton that certain information had been redacted as it was considered exempt from disclosure under sections 26(a) and 38(1)(b) of FOISA.
5. On 26 March 2010, Mr Hamilton wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPSO'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 Hamilton 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. The case was then allocated to an investigating officer.

Investigation

7. On 27 April 2010, the SPSO was notified in writing by the investigating officer that an application had been received from Mr Hamilton and was asked to provide the Commissioner with a sample of the information withheld from him. The investigating officer also gave the SPSO an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked the SPSO to respond to specific questions. In particular, the SPSO was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The SPSO responded on 18 May 2010 providing submissions on its application of the exemptions in sections 26(a) and 38(1)(b) of FOISA and also supplying a sample of unredacted casework challenge decision letters.



9. The investigating officer also contacted Mr Hamilton during the investigation seeking his submissions on the matters to be considered in the case. Mr Hamilton responded with his submissions on 31 May 2010.

Commissioner's analysis and findings

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

Section 26(a) (Prohibitions on disclosure)

11. Section 26(a) of FOISA exempts information from disclosure under FOISA where disclosure is prohibited by or under any other enactment. This is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
12. The SPSO argued that the disclosure of certain of the information requested by Mr Hamilton was prohibited by section 19(1) of the SPSO Act and was therefore exempt in terms of section 26(a) of FOISA.
13. Section 19(1) of the SPSO Act states that information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made (to the Ombudsman) must not be disclosed except for any of the purposes specified in section 19(2) or as permitted by section 19(3). The full text of section 19 is set out in the Appendix to this decision.
14. Section 19(2) and (3), therefore, set out specific conditions under which information obtained by the SPSO can be disclosed.
15. The exemption under section 26(a) of FOISA was previously considered in relation to section 19 of the SPSO Act in *Decision 080/2008 Mr Frank French and the Scottish Public Services Ombudsman*, where the Commissioner drew a distinction between the types of matters which the SPSO is entitled to investigate (under section 2 of the SPSO Act) and service complaints made to the SPSO about matters such as the way in which it carried out those investigations.
16. The Commissioner concluded that whilst section 19(1) of the SPSO Act prohibited the disclosure of information obtained by the SPSO when carrying out the Ombudsman's investigative functions under the SPSO Act, it did not prohibit the disclosure of information obtained or held in relation to complaints made to the SPSO about the service provided in carrying out these functions. That said, he accepted that where responses to subsequent complaints about that service contained information obtained by the SPSO when carrying out those investigative functions, then section 19 of the SPSO still prohibited disclosure.



17. In its submissions to the Commissioner, the SPSO argued that documents that are generated by the SPSO or his staff (such as challenge decision letters) will in many cases be constituted by, discuss or pertain to information that has been obtained by the SPSO as part of the conduct of an investigation into a complaint or request.
18. Having viewed a sample of the redactions made by the SPSO on the grounds that the exemption in section 26(a) of FOISA applies, the Commissioner is satisfied that the SPSO has redacted only information that was obtained during the original investigation. The redacted information comprises personal information relating to the complainant(s), information such as the name and sector of public authorities, the subject matter of the complaint and other information obtained from the original complainant.
19. The Commissioner is satisfied that this is entirely information obtained during an investigation under section 2 of the SPSO Act and so, in line with *Decision 080/2008*, he is satisfied that disclosure of that information is prohibited by section 19(1). Consequently, he accepts that this information is exempt from disclosure under section 26(a) of FOISA.
20. As noted above, the exemption in section 26(a) is absolute and therefore the Commissioner is not required to consider the public interest test in relation to this information.
21. He is, however, required to consider section 38(1)(b) in relation to the remaining withheld information, which comprises SPSO staff members' details.

Section 38(1)(b) (Personal information)

22. The SPSO applied the exemption in section 38(1)(b) to the personal information of junior members of the SPSO's staff.
23. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA.
24. In relation to the redaction of SPSO staff details, the SPSO drew attention to *Decision 080/2008*, in which the Commissioner considered the relevant tests in section 1(1) of the DPA and concluded that the names of staff of the SPSO constituted personal data as defined by section 1(1) the DPA. The details of SPSO staff withheld in this case are of the same character and the Commissioner is satisfied, bearing in mind the conclusions reached in that earlier decision, that the information in question identifies the individuals concerned and relates to them. He is satisfied, therefore, that it is their personal data.
25. The Commissioner considered the application of the exemption in section 38(1)(b) to information relating to junior SPSO staff in full within *Decision 080/2008* and the arguments made there are equally applicable here. He does not intend to repeat them in full in this decision.



26. The consideration in that decision focussed on the first data protection principle, which requires that 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. The processing under consideration in this case is disclosure in response to Mr Hamilton's information request
27. In *Decision 080/2008*, having concluded that staff member details did constitute personal data, the Commissioner stated in relation to the disclosure of those data (at paragraph 47): "... it will normally be the case that the higher the position and the greater the authority of an individual, the greater is the argument for openness, transparency and accountability and the more likely it is that disclosure of their names, etc. would be fair. In this case, the correspondence makes reference to more junior SPSO staff (such as investigative officers and personal assistants), senior SPSO staff (such as the Service Quality Manager) and officeholders including the Ombudsman herself and the (then) Deputy Ombudsmen." He went on to conclude that disclosure of the personal data of the more junior staff would be unfair and therefore in breach of the first data protection principle.
28. In this case, the Commissioner notes that the names of senior members of staff have been released within the redacted documents and that only the names of the more junior staff have been redacted, in line with the Commissioner's decision in the above case.
29. Each case must be considered on its merits. The Commissioner has therefore considered whether in the particular circumstances of this case disclosure would be fair. However, he is satisfied in all the circumstances that there is no reason for him taking a different approach to the withheld personal data of the more junior SPSO staff from that taken in *Decision 080/2008*. Consequently, he has concluded that it would be unfair in this case to disclose the withheld details of those junior members of SPSO staff, as they would have no expectation that they would be identified in relation to the type of correspondence in question. Therefore, he considers that disclosure of the personal data pertaining to those junior staff members would breach the first data protection principle.
30. Accordingly, the Commissioner concludes that the personal data of SPSO staff redacted from the information published is exempt in terms of section 38(1)(b) of FOISA. This is an absolute exemption and therefore is not subject to the public interest test set down in section 2(1)(b) of FOISA.

DECISION

The Commissioner finds that the Scottish Public Services Ombudsman (the SPSO) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Hamilton.



Appeal

Should either Mr Hamilton or the SPSO 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
16 July 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 –

...

- (b) section 26;

...

- (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.



26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

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;

...



Scottish Public Services Ombudsman Act 2002

2 Power of investigation

- (1) The Ombudsman may investigate any matter, whenever arising, if –
 - (a) the matter consists of action taken by or on behalf of a person liable to investigation under this Act;
 - (b) the matter is one which the Ombudsman is entitled to investigate, and
 - (c) a complaint in respect of the matter has been duly made to the Ombudsman.
- (2) The Ombudsman may investigate any matter, whenever arising, if –
 - (a) paragraphs (a) and (b) of subsection (1) are satisfied, and
 - (b) the person liable to investigation has requested the Ombudsman to investigate the matter.

...

19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are—
 - (a) the purposes of—
 - (i) any consideration of the complaint or request (including any statement under section 11),
 - (ii) any investigation of the matter (including any report of such an investigation),
 - (b) the purposes of any proceedings for—
 - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
 - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,



- (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
 - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of patients, the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health and safety of patients.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must—
- (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
 - (b) inform the person from whom the information was obtained of the disclosure.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.
- (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to—
- (a) any document or information specified in the notice, or
 - (b) any class of document or information so specified,
- that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.
- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from-
- (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c. 36)
 - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),



is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.

- (9) In relation to such information, subsection (2)(a) has effect as if—
- (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
 - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.
- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.

Data Protection Act 1998

1 Basic interpretative provisions

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.

...