

Decision Notice



Decision 183/2013 Montrose Pictures Limited and the Chief Constable of the
Police Service of Scotland

Incident on Menie estate

Reference No: 201300767
Decision Date: 22 August 2013

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Rosemary Agnew
Scottish Information Commissioner

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Montrose Pictures Limited
and the Chief Constable of Police Service of Scotland



Summary

On 23 November 2012, Montrose Pictures Limited (MPL) asked the Chief Constable of Grampian Police (the Police) for information relative to a specific incident. The Police provided some information to MPL, but withheld other information on the basis that it was exempt under FOISA.

Following an investigation, during which further information was disclosed, the Commissioner found that the Police were entitled to withhold the remaining information under section 38(1)(b) of FOISA as it comprised personal data, and disclosure would breach the first data protection principle.

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); 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”); 2(g) (Sensitive personal data); Schedule 1 (The data protection principles, Part I: the principles) (the first data protection principle) and Schedule 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.

Note: MPL’s information request was made to the Chief Constable of Grampian Police. However, the decision has been issued in the name of the Chief Constable of the Police Service of Scotland as the statutory successor to the Chief Constable of Grampian Police under the Police and Fire Reform (Scotland) Act 2012. For convenience, both chief constables are referred to in this decision as “the Police”).



Background

1. On 23 November 2012, MPL wrote to the Police, requesting information, which included the following:
... any documents and emails relating to an incident on the Menie Estate on August 3rd 2010, when officers were present when property was removed from land that the Trump Organisation claimed belonged to them.
2. The Police responded on 28 December 2012. MPL was provided with some information and informed that other information was withheld under section 30(c) and 38(1)(b) of FOISA, with explanations as to why these exemptions were considered to apply.
3. On 27 January 2013, MPL wrote to the Police requesting a review of their decision. MPL did not accept that the exemptions applied, or that the public interest favoured maintaining them.
4. The Police notified MPL of the outcome of their review on 25 February 2013, upholding their original decision without modification.
5. On 22 March 2013, MPL wrote to the Commissioner, stating that they were dissatisfied with the outcome of the Police'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 MPL made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. By virtue of the Police and Fire Reform (Scotland) Act 2012, on 1 April 2013 the Chief Constable of the Police Service of Scotland became the statutory successor of the Chief Constables of the previous eight Scottish police forces. This included the statutory responsibilities laid down in FOISA.
8. The Police were notified in writing that an application had been received from MPL and asked to provide the Commissioner with the information withheld from them. Police Scotland responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted the Police, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Police were asked to justify their reliance on sections 30(c) and 38(1)(b) of FOISA.
10. The Police responded, stating that, having reconsidered their position, they wished to withdraw their reliance upon section 30(c) of FOISA. During the investigation, they provided MPL with some of the information previously withheld, with certain personal data redacted on the basis that disclosure would breach the first data protection principle (section 38(1)(b)).

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both MPL and the Police. She is satisfied that no matter of relevance has been overlooked
12. As mentioned above, during the investigation, the Police withdrew their earlier reliance on section 30(c) of FOISA and disclosed further information. The Police made no submissions as to why this information had been withheld at the response and review stage.
13. The Commissioner can only conclude, therefore, that the Police incorrectly withheld information in terms of section 30(c) of FOISA in responding to MPL's request.
14. The Commissioner will now consider whether the Police correctly withheld the remaining information in terms of section 38(1)(b) of FOISA.

Section 38(1)(b) - Personal Information

15. The Police submitted that the withheld information was personal data for the purposes of the DPA and that disclosure of this information would contravene the first data protection principle.
16. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts information from disclosure where that information is personal data and its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles in Schedule 1 to the DPA.
17. In considering the application of this exemption, the Commissioner must first determine whether the information in question is personal data as defined in section 1(1) of the DPA and then, if it is, whether any of it is sensitive personal data as defined in section 2 of the DPA. If she is satisfied that the information is personal data, she will go on to consider whether its disclosure would breach any of the data protection principles, considering the implications of its status as sensitive personal data as and where appropriate.
18. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.



Is the information under consideration personal data?

19. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or 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."
20. The Commissioner has considered the submissions received from the Police on this point, along with the withheld information. In the circumstances, she is satisfied that the information relates to living individuals who could be identified from those data. The information is biographical in relation to, and focuses on, these individuals. The Commissioner therefore accepts that the information would be those individuals' personal data, as defined by section 1(1) of the DPA.

Sensitive personal data

21. The Police submitted that some of the withheld information was also sensitive personal data, in terms of section 2(g) of the DPA, because it related to investigations.
22. Section 2 of the DPA provides that certain types of personal data are to be considered as sensitive personal data, which is afforded additional protection under the DPA. This includes, at section 2(g), personal data consisting of information as to the commission or alleged commission of any offence. The Commissioner is satisfied that the some of the information under consideration here clearly relates to such matters and is therefore sensitive personal data.
23. The Commissioner will now consider whether disclosure of the information would breach the data protection principles as submitted by the Police.

Would disclosure breach the first data protection principle?

24. The first data protection principle requires 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 MPL's information request.
25. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA which would permit the withheld personal data to be disclosed. If any of these conditions can be met, she must then consider whether the disclosure of the personal data would be fair and lawful. As required, she will consider the status of some of the information as sensitive personal data.



26. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.

Can any of the conditions in Schedule 2 be met?

Condition 6

27. In the circumstances, the Commissioner considers that condition 6 in Schedule 2 to the DPA would appear to be the only condition which might permit disclosure to MPL. In any event, neither MPL nor the Police have argued that any other condition would be relevant. Condition 6 allows personal data to be processed if 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 (the individual(s) to whom the data relate).
28. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Is MPL pursuing a legitimate interest or interests?
 - If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
 - Even if the processing is necessary for MPL's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
29. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of MPL must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Police were correct to refuse to disclose the personal data to MPL.

Is the applicant pursuing a legitimate interest or interests?

30. The Police acknowledged a legitimate public interest in the relationship between public authorities, including themselves, and the stakeholders in the Menie estate development, given the high profile and the controversial nature of the development. They accepted that MPL had demonstrated their interest in the matter, notably in the production of their documentary. Although asked for submissions on its legitimate interests, MPL failed to provide any.

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31. Having considered all relevant submissions she has received on this point, the Commissioner accepts that MPL – as a documentary production company – has a legitimate interest in the withheld information, and that this interest extends to the wider public.

Is the processing involved necessary for the purposes of those interests?

32. The Commissioner must now consider whether disclosure of the requested information is necessary for the purposes of the legitimate interests she has identified, and if necessary, she must consider whether these interests might reasonably be met by any alternative means. Police Scotland submitted the processing of the data in this case was not necessary for the purposes of any legitimate interest.
33. Police Scotland submitted that any legitimate interest in the understanding of police action in regard to this particular incident, and through that incident, the attitude of Grampian Police towards the Menie Estate development could be met by the release of the other information requested by and provided to MPL. In the circumstances, they did not consider disclosure of the remaining information to be necessary for the purposes of those legitimate interests. As indicated above, no submissions on this point were provided by MPL.
34. The Commissioner has considered the content of the withheld information. Having done this, she does not consider that the release of the information withheld would further the legitimate interests of either MPL or the public as a whole. Consequently, the Commissioner does not accept that disclosure is necessary for the purposes of the legitimate interests pursued by MPL.
35. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data (including the sensitive personal data) under consideration. Having reached that conclusion, she does not find it necessary to consider whether there is an applicable Schedule 3 condition in respect of the sensitive personal data. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.

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DECISION

The Commissioner finds that the Chief Constable of the Police Service of Scotland (the Police) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Montrose Pictures Limited. She finds that by initially withholding the information disclosed during the investigation, under section 30(c) of FOISA, the Police failed to comply with section 1(1) of FOISA. She further finds that the Police were entitled to withhold the remaining information under section 38(1)(b) of FOISA. She does not require the Police to take any action.

Appeal

Should either Montrose Pictures Limited or the Chief Constable of the Police Service of Scotland wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement
22 August 2013



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;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

...

(g) the commission or alleged commission by him of any offence, or

...

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.

...