

Decision Notice



Decision 073/2014 Mr Derek Cooney and the Scottish Court Service

Names of vexatious litigants

Reference No: 201400170
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Scottish Information Commissioner

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Summary

On 27 November 2013, Mr Cooney asked the Scottish Court Service (the SCS) for the number and identity of individuals who had been granted permission to raise actions in terms of section 1 of the Vexatious Actions (Scotland) Act 1898. The SCS withheld information on the basis that it was personal data, disclosure of which would breach the first data protection principle. The Commissioner accepted this following an investigation.

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”); 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) (conditions 1 and 6)

Vexatious Actions (Scotland) Act 1898 (VAS) section 1 (Power of Court of Session to prohibit institution of action without leave)

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 27 November 2013, Mr Cooney wrote to the SCS, requesting information which included the following:
... how many persons have been granted permission to proceed to raise actions in terms of section 1 of [VAS] and who they were.



2. The SCS responded on 19 December 2013. Mr Cooney was provided with the number of applicants who had been granted permission to raise actions, but was informed that the disclosure of their names would be in conflict with the data protection principles. It therefore refused the request under section 38(1)(b) of FOISA.
3. On 21 December 2013, Mr Cooney wrote to the SCS requesting a review of its decision. He submitted that, if permission had been granted, an action would have been lodged in court and the name would therefore be in a public document.
4. The SCS notified Mr Cooney of the outcome of its review on 10 January 2014, upholding its original decision without modification. It did not accept that the information would be available in any public document, stating that it was subject to statutory obligations which varied according to the type of court record: these determined whether information could be made available.
5. On 23 January 2014, Mr Cooney wrote to the Commissioner's office, stating that he was dissatisfied with the outcome of the SCS'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 Cooney 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. The case was then allocated to an investigating officer.

Investigation

7. On 13 February 2014, the investigating officer notified the SCS in writing that an application had been received from Mr Cooney, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The investigating officer's questions focused on the SCS's application of section 38(1)(b) of FOISA and the SCS responded with full submissions on these points.
8. Mr Cooney provided submissions on the legitimate interest he believed he was pursuing.
9. Mr Cooney also raised other matters, which do not fall within the Commissioner's remit.

Commissioner's analysis and findings

10. 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 Mr Cooney and the SCS. She is satisfied that no matter of relevance has been overlooked.



Section 38(1)(b) - Personal Information

11. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts personal data from release if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.
12. The SCS submitted that the withheld information was personal data for the purposes of the DPA and that its disclosure would contravene the first data protection principle. Therefore, it argued that the information was exempt under section 38(1)(b) of FOISA.
13. In considering the application of this exemption, the Commissioner must first consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she must go on to consider whether disclosure of the information would breach the first data protection principle as claimed.
14. 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?

15. "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."
16. The Commissioner has considered the submissions received from the SCS and Mr Cooney on this point, along with the withheld information. Mr Cooney is seeking the names of individuals applying to the court under specific legislation. Clearly, this information identifies the individuals concerned. In the context in which the information is held, the Commissioner is also satisfied that it relates to those individuals. She therefore accepts that the information should be considered to be the individuals' personal data, as defined by section 1(1) of the DPA.

The first data protection principle

17. The first data protection principle states that personal data shall be processed fairly and lawfully. The processing in this case would be disclosure of the information into the public domain, in response to Mr Cooney's request. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met (the full text of the principle is set out in the Appendix). If the data were sensitive personal data (which is not the case here), at least one of the conditions in Schedule 3 to the DPA would also need to be met.
18. The Commissioner will now consider whether there are any conditions in Schedule 2 which would permit the withheld personal data to be disclosed. If any of these conditions can be met, she must then consider whether disclosure of the personal data would be fair and lawful.



19. 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?

20. Condition 1 in Schedule 2 permits personal data to be processed if the data subject (the individual to whom the data relate) consents to that processing. The SCS explained that applications under section 1 of VAS were considered in private and not in open court. The application, and anything that followed from it, were considered private matters for the applicant. There would be no expectation on the part of the applicant that their details would be released into the public domain.
21. Given the private nature of the proceedings, the SCS further submitted that it did not consider it had an obligation to contact the relevant data subject to obtain consent for disclosure. In the circumstances, the Commissioner accepts this as reasonable. She therefore finds that condition 1 in Schedule 2 cannot be met in this case.
22. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr Cooney. 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.
23. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Is Mr Cooney pursuing a legitimate interest or interests?
 - If yes, is the processing involved necessary for the purposes of these 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 Mr Cooney'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?
24. 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 Mr Cooney must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the SCS was correct to refuse to disclose the personal data to Mr Cooney.



Is the applicant pursuing a legitimate interest or interests?

25. The SCS did not consider Mr Cooney to be pursuing a legitimate interest in relation to his request.
26. Mr Cooney submitted that it was in the public interest to know that a party could get permission to raise court actions. He further argued that anyone looking at the published list of vexatious litigants would believe that none of those named had been given permission to raise actions. He did not consider it would be in the public interest to withhold the names of those who had been given such permission, and submitted that there would be no prejudice to anyone in stating that a party had been given permission to raise actions.
27. Having considered all relevant submissions she has received on this point, the Commissioner accepts that there is a legitimate interest in the public knowing that individuals, while named as vexatious litigants, can be granted permission to raise court actions. However, that is apparent from section 1 of VAS. In any event, the SCS has confirmed, in response to Mr Cooney's request, that such permission has been given by the court.
28. In all the circumstances, the Commissioner does not accept that Mr Cooney can reasonably be said to be pursuing the legitimate interest discussed above in seeking the names of those given permission to raise court actions under section 1 of VAS. While there is a legitimate interest in knowing that people who have been named as vexatious litigants have been given permission to raise court action, this does not equate to a legitimate interest in knowing the names of those who have been given such permission. Consequently, the Commissioner does not accept that condition 6 can be met in this case.
29. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data under consideration. 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.

DECISION

The Commissioner finds that the Scottish Court Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Cooney.



Appeal

Should either Mr Cooney or the Scottish Court Service 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
26 March 2014



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;

...

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

1 The data subject has given his consent to the processing.

...

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.

...



Vexatious Actions (Scotland) Act 1898

1 Power of Court of Session to prohibit institution of action without leave

It shall be lawful for the Lord Advocate to apply to either Division of the Inner House of the Court of Session for an order under this Act, and if he satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the Court of Session or in any inferior court, and whether against the same person or against different persons, the Court may order that no legal proceedings shall be instituted by that person in the Court of Session or any other court unless he obtains the leave of a judge sitting in the Outer House on the Bills in the Court of Session, having satisfied the judge that such legal proceeding is not vexatious, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the Edinburgh Gazette.