



Scottish Information
Commissioner

Decision 161/2007 Mr Michael McParlane and Strathclyde Fire Board

Complaints / reports of vehicles parked at an address in Hamilton

Applicant: Mr Michael McParlane
Authority: Strathclyde Fire Board
Case No: 200700012
Decision Date: 12 September 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 161/2007 Mr Michael McParlane and Strathclyde Fire Board

Request for all information in connection with complaints / reports of vehicles parked at an address – information not held – prohibitions on disclosure – personal information – Commissioner required release of information

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 17 (Information not held); 26(a) (Prohibitions on disclosure); 38(1)(b) (Personal information).

Data Protection Act 1998 (the DPA) sections 1 (Basic interpretative provisions) and 2 (Sensitive personal data); schedules 1 (The data protection principles: the first principle) and 2 (Conditions relevant for the purposes of the first principle: processing of any personal data).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr McParlane requested from Strathclyde Fire Board (the Board) all information it held in connection with complaints / reports of vehicles parked at an address in Hamilton. The Board responded by stating that it did not hold the information. Following a review which upheld the original decision, Mr McParlane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Board had not dealt with Mr McParlane's request for information fully in accordance with Part 1 of FOISA. He requires the Board to release an unredacted copy of a memo and a report to Mr McParlane.



Background

1. On 20 November 2006, Mr McParlane wrote to the Board requesting all of the information it held in connection with complaints / reports of caravans / vehicles parked at a certain address in Hamilton between and including Oct 04 and Jun 05 but not limited to that period. He asked who had made the complaints / reports and to whom, what the Board had done and whom it contacted. In particular, he wanted to know who was in a specified vehicle at the location at a specified time, what that person was doing there, why he was looking at a caravan parked there, who had asked him to do so and why.
2. On 6 December 2006, the Board wrote to Mr McParlane in response to his request for information. In that response the Board stated that Strathclyde Fire and Rescue (SFR) (the Fire Brigade for which the Board is responsible) had not attended any incidents at the stated address between 1 October 2004 and 30 November 2006. Neither were there any complaints registered for the address. The Board concluded that it could not provide any information in relation to Mr McParlane's request.
3. On 9 December 2006, Mr McParlane wrote to the Board requesting a review of its decision. In particular, Mr McParlane stated that he and others had seen a Fire Officer at the location and was convinced that information must be held and so requested a review.
4. In that same letter, Mr McParlane added that he had called SFR's East Command, on 10 February 2005 and returned a call about a visit to his premises on 21 February 2005, and questioned whether this information was also held. This was taken by the Board to be a fresh request for information.
5. On 27 December 2006, the Board wrote to notify Mr McParlane of the outcome of its review of his first request. The board upheld the original decision, confirming that, having interrogated its information system, it did not hold any information falling within the scope of his request.
6. On 8 January 2007, Mr McParlane wrote to my Office, stating that he was dissatisfied with the outcome of the Board's review in relation to his first request and applying to me for a decision in terms of section 47(1) of FOISA.
7. On 9 January 2007 the Board responded to Mr McParlane's second request (contained within the request for review dated 9 December 2006) stating that it did not hold the information Mr McParlane had requested.
8. On 15 January 2007 Mr McParlane sought a review of the Board's decision in relation to his second request, once again expressing surprise that the information he had requested was not held.



9. On 16 February 2007 the Board responded to Mr McParlane's request for review in relation to his second request. The outcome of that review was to provide Mr McParlane with a copy of a redacted memo and report and advise him that this was extracted from an inspection file. The Board advised Mr McParlane that it would not provide him with a copy of the remainder of the file as it was considered exempt under section 26(a) of FOISA (disclosure being prohibited under section 21 of the Fire Precautions Act 1971).
10. Mr McParlane remained dissatisfied with the Board's response to his request for review of his second request and on 2 March 2007 applied to my office for a decision in terms of section 47(1) of FOISA in relation to that second request. In particular Mr McParlane queried whether the names of public servants and an elected member should have been redacted from the report.
11. Both applications were validated by establishing that Mr McParlane had made requests for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its responses to those requests. The two applications were conjoined for the purposes of investigation.

The Investigation

12. The Board was notified in writing that an application had been received from Mr McParlane and was asked to provide my Office with its comments and specified items of information required for the purposes of the investigation, all as required by section 49(3)(a) of FOISA. The Board responded with the information requested and the case was then allocated to an investigating officer. During the investigation, the investigating officer obtained further information in relation to the case from the Board.

Submissions from the Board

13. In submissions to this Office, the Board stated that a comprehensive search of SFR's Management Information System (MIS) had been carried out in an attempt to identify and supply information relevant to both of Mr McParlane's requests. SFR's complaints officer had also checked the separate electronic complaints database, back to its inception in November 2004, while the brigade's data analysts had checked all databases, systems and logs where Mr McParlane's call might have been recorded.
14. The Board provided copies of email correspondence in relation to those searches which confirmed its contention that it did not hold the information Mr McParlane had requested.



15. However, the Board also stated in its submissions that the Community Safety Section at Hamilton had an inspection file relating to the property specified by Mr McParlane. The Board provided Mr McParlane with redacted copies of a memo and a report relating to an inspection but the remainder of the file was claimed to be exempt from disclosure under section 26(a) of FOISA on the basis that section 21 of the Fire Precautions Act 1971 prohibited its disclosure. The investigating officer examined this file during the investigation.

Submissions from Mr McParlane

16. Mr McParlane stated that he was puzzled as he was sure that information should be held by the Board and this should at least include his complaint of 10 February 2005.
17. Mr McParlane also stated, given that the Board maintained that it did not hold information and it could not produce his own complaint, he was concerned that information being concealed or destroyed.
18. Mr McParlane further stated that he did not agree that the names of elected members and public service employees should have been redacted from the memo and report.

The Commissioner's Analysis and Findings

19. As both Mr McParlane's applications were closely related it was decided to conjoin them into one investigation.
20. Accordingly, this investigation will concern itself with:
 - the Board's assertion that it did not hold the information requested in Mr McParlane's first request;
 - the Board's assertion that the remainder of the inspection file, identified in response to Mr McParlane's second request, was exempt from release under section 26(a) of FOISA, due to a statutory prohibition on disclosure; and
 - The Board's redaction of the names of an elected member and SFR staff.



Section 17 (information not held)

21. It falls to me to determine whether the Board was correct to issue a notice to Mr McParlane under section 17(1) of FOISA, stating that it did not hold the information which he requested in his first request.
22. The Investigating officer asked the Board detailed questions about the information stored on its MIS and complaints handling system as well as specific questions about how it had searched for information in relation to Mr McParlane's requests. These included questions as to why Mr McParlane's own complaint of 10 February 2005 did not appear to be held by the Board.
23. The Board provided details of the MIS and complaints handling system as well as correspondence relating to the searches carried out by its data analysts in trying to locate information relevant to Mr McParlane's requests.
24. The result of these searches was that no complaint or incident was logged on the MIS or the complaints handling system in relation to the address at Auchingramont Road. Further, a check of the registration numbers of the Board's fleet of vehicles had found none, then or subsequently, matching the vehicle registration number provided by Mr McParlane (it acknowledged that it should have made specific reference to this in responding to Mr McParlane's initial request). As such the Board considered that, other than the memo and report within the fire inspection file (dealt with later in this Decision Notice), it did not hold any of the information Mr McParlane had requested.
25. The Board offered no explanation as to why neither the call made to SFR's East Command on 10 February 2005 nor the return call of 21 February 2005 were recorded. However, it pointed out that SFR had undergone a restructuring since 2005 and that the former East Command area had been divided into two: both of the new area headquarters had been contacted, however, and they held no record of those calls.
26. On the basis of the submissions and evidence presented to me I am satisfied that the Board has made a thorough search of all the relevant systems. I am therefore also satisfied that the Board did not hold the information requested by Mr McParlane (with the exception of the inspection file identified when dealing with the second request) at the time of his requests and so was correct to issue him with notice to this effect under section 17(1) of FOISA.



Section 26 (prohibition on disclosure)

27. As mentioned above, when responding to Mr McParlane's second request the Board identified a file which contained a memo and report which it considered to be relevant to the request. The memo and follow-up report were released to Mr McParlane. However, the Board refused to release the remainder of the information within the file, claiming it to be exempt under section 26(a) of FOISA.
28. Section 26(a) of FOISA makes information exempt from release under FOISA where disclosure by a public authority is prohibited by any legislation or statutory provision.
29. The Board submitted that section 21 of the Fire Precautions Act 1971 (FPA) prohibited the release of this information. When asked to comment on the application of this exemption the Board submitted extracts of correspondence among fire authorities and guidance from the (UK Government) Department for Constitutional Affairs. In the correspondence, mention is made of section 44 of the Freedom of Information Act 2000 (FOIA), the equivalent of section 26 of FOISA.
30. I note that this correspondence is dated around October/November 2005. However, one of the effects of The Fire (Scotland) Act 2005 (Consequential Modifications and Savings) Order 2006 (SSI 2006 No. 475) was the repeal of the FPA, including section 21. As of 1 October 2006, section 21 of the FPA could no longer be claimed as a prohibition on disclosure for the purposes of 26(a) of FOISA because it had been repealed. Therefore, although the advice received by the Board may have been germane in November 2005, by the time of Mr McParlane's request on 20 November 2006 and the Board's consideration of the information, the advice was no longer relevant.
31. The Board also submitted that it considered the repeal of section 21 of the FPA might apply only as of the introduction of the new legislation. It contended that situation was not straightforward as it was not clear whether the repeal removed the prohibition with regard to the information previously held by the Board.
32. In my view the situation is straightforward – on 1 October 2006, SSI 2006 No. 475 came into force. The effect of this was to repeal the FPA: that Act simply ceased to have effect after that date, subject to certain savings which are not relevant here. This removed the prohibition on disclosure under section 21 of the FPA. Consequently, section 21 of the FPA could no longer be deployed as the basis for a statutory prohibition on disclosure under section 26(a) of FOISA. Given that Mr McParlane applied for information on 20 November 2006, some seven weeks *after the prohibition ceased to apply*, it is apparent to me that the Board could not claim exemption under section 26 of FOISA.



33. Having taken due consideration of the Board's submissions I am satisfied that by virtue of the repeal of the FPA by SSI 2006 No. 475 the Board could not claim exemption for the information in the inspection file under section 26(a) of FOISA
34. Be that as it may, Mr McParlane's request was for all information held "in connection with complaints / reports of caravans / vehicles parked..." The remainder of the inspection file relates to past fire-safety inspection visits to the property and a visit made when the building was converted. As such I am satisfied, having viewed the inspection file in its entirety, that the only information relevant to Mr McParlane's request is, in fact, the memo and report which the Board disclosed subject to redaction.
35. I am therefore satisfied that, although the Board could not have applied section 26(a) of FOISA to the remainder of the inspection file, the information already supplied to Mr McFarlane (i.e. the memo and report) is all the information within that file relevant to Mr McParlane's request.

Section 38 (personal information)

36. As mentioned above, the Board redacted the names and other details of individuals from the memo and a follow-up report it released to Mr McParlane in its review response.
37. Mr McParlane stated that he did not see why public service workers and elected members (Councillors) of the local authority should have names or other details redacted.
38. The Board submitted that this had been done under section 38(1)(b) of FOISA as the information was personal information.
39. 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 constitutes personal data, the disclosure of which to a member of the public would contravene any of the data protection principles. This particular exemption is also an absolute exemption and therefore a public authority is not required to consider the public interest if it considers that the information falls within the scope of the exemption.
40. In order to rely on this exemption, the Board would have to show that the information which had been requested was personal data for the purposes of the DPA, and that disclosure of the information to a member of the public would contravene any of the data protection principles (found in Schedule 1 to the DPA).



41. “Personal data” is 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.”
42. I am satisfied that the names of the individuals in question constitute those individuals’ personal data. I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Mr McParlane and redacted by the Board falls into this category.
43. I must now consider whether the release of this information to Mr McParlane would breach any of the data protection principles.

Would release of the information breach the first data protection principle?

44. The Board did not stipulate which of the data protection principles disclosure of the redacted names would breach. However, I have considered it appropriate in this case to determine whether disclosure of the redacted names would breach the first data protection principle, which states (for data other than sensitive personal data) 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 of the DPA is met.
45. With regard to the conditions in Schedule 2 of the DPA, it is my view that condition 6 is the only one which might be considered to apply. Condition 6 covers processing (for example, by disclosure) which is necessary for the purposes of legitimate interests pursued by the third party to whom information is 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.
46. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether the processing (in this case by disclosure to a member of the public) of the personal data to which the request relates can be said to be necessary in pursuit of the legitimate interests of the applicant. The second is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Finally, the competing interests must be balanced.



47. In considering the first test, I accept that Mr McParlane, whose own property is bounded by the property he has specified in his request and who has concerns about the site, has a legitimate interest in knowing the names of the Fire Officers who have a significant role in making decisions on issues relating to public safety as it affects the site. I also accept that Mr McParlane has a legitimate interest in knowing the name of a councillor acting (in their capacity as a councillor) on behalf of another party. I accept, therefore, that he requires the information for those purposes, and for that matter that there is a wider public interest in knowing who is discharging these significant roles.
48. I must now consider the rights, freedoms and legitimate interests of the data subjects (i.e. the named individuals) in relation to the information withheld.
49. The Fire Officer's visit to the premises and subsequent report was prompted by a call from a councillor. My understanding is that the Officer was acting in pursuance of his duties as a Fire Safety Officer and of the powers conferred (at the time of the inspection) by the FPA and that this was a uniformed role.
50. In the circumstances, I do not see how a person holding that post could or should expect that their name would not be available to members of the public especially in relation to any professional duty in which they had played a role. Similarly, I am not persuaded that there is a case for the names of the other, more senior, Fire Officers also named in the memo and report to be redacted.
51. On balance, therefore, I am satisfied that the rights and legitimate interests of the Fire Officers named in the memo and report do not outweigh the legitimate interests of the applicant.
52. With reference to the named councillor, I am similarly unconvinced that an elected representative should have the expectation that their name will not be released into the public domain upon request. Undertaking a public role entails accepting a certain level of scrutiny. While I understand that the councillor was acting on behalf of a constituent I do not consider that to be sufficient in and of itself to outweigh the legitimate interest of Mr McParlane. On balance, therefore, I am satisfied that the councillor's rights and legitimate interests do not outweigh those of the applicant.
53. I consider that, in this case overall, the rights and legitimate interests of the data subjects do not outweigh the countervailing legitimate interests of the applicant. As I have set out above, it is my view that the specific roles and function performed by the Fire Officers and the councillor in this case ensures that a substantial legitimate interest exists in terms of ensuring that the applicant, and the public in general, are confident that those providing professional advice on issues of public safety; or undertaking public duties as elected representatives, can be named.



54. The final issue to be addressed is that of whether the processing of the information through release under FOISA would otherwise be fair and lawful.
55. With regard to the lawfulness of the processing, it should be noted that the Board have advanced no argument which would suggest that processing would be unlawful, beyond those arguments made in relation to the application of section 38(1)(b). I can certainly see no argument that the information should be regarded as confidential.
56. According to guidance from the Information Commissioner, the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
57. It seems to me that the “cut off point” between public and private information is highly dependent upon the individual’s position within a public authority. 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. In the case of the Councillor I am satisfied that the role occupies sufficient public prominence to justify increased accountability.
58. I have considered the nature of the Fire Officer’s role in the Fire Service. The Board, SFR and the owners of the premises to which these reports relate make decisions on public safety matters, based on the opinions and recommendations of the Officer and his senior colleagues. Therefore, it is my view that the specific nature and responsibilities of this particular post give rise to expectations of transparency and accountability.
59. In relation to the effect of disclosure on the data subject, guidance from the Information Commissioner states that:

“While it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on damage or distress to an individual acting in a personal or private capacity.”
60. I am not satisfied that any distress arising from the release of the information in these circumstances would affect an individual acting in a personal or private capacity, in that this information clearly relates to those individuals in their professional capacities and their ability to perform their duties in those capacities.



61. I am satisfied generally that the processing of the information in question (i.e. by disclosure) should not be considered to be unfair, for the reasons outlined in the previous paragraphs. In reaching this view I consider that the specific role and responsibilities which are undertaken by the Fire Officers and the Councillor in this case are such that it would seem to lead to a reasonable expectation on the part of those individuals that their names might be released into the public domain.
62. It is therefore my view, having considered fully the information in question, that the exemption in section 38(1)(b) has been wrongly applied by the Board and that the names redacted from the memo and the report should be disclosed.

Decision

I find that Strathclyde Fire Board (the Board) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McParlane.

I find that the Board acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in concluding that certain of the information requested by Mr McParlane was not held by it and therefore was subject to section 17 of FOISA.

I find, given that section 21 of the Fire Precautions Act 1971 had ceased to have effect at the time of Mr McParlane's request, that the Board did not correctly apply section 26(a) of FOISA to the information it did hold in the inspection file and therefore failed to comply with Part 1 (and in particular section 1(1)) of FOISA in that respect. However, I am satisfied that Strathclyde Fire Board provided Mr McParlane with all the information from the inspection file which was relevant to his request for information and, therefore do not require further information from that file to be released.

I further find that the Board wrongly applied section 38(1)(b) (and consequently failed to comply with section 1(1)) of FOISA in seeking to redact the names of Fire Officers and a Local Authority elected representative acting in their professional or public capacities. I therefore require the Board to release the unredacted memo and follow-up report to Mr McParlane within 45 days of receipt of this notice.



Appeal

Should either Mr McParlane or Strathclyde Fire Board 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.

Kevin Dunion
Scottish Information Commissioner
12 September 2007



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.

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;

17 Notice that information is not held

- (1) Where-
 - (b) the authority does not hold that information,
it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and

(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 relates to manual data held) were disregarded.

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

(a) the racial or ethnic origin of the data subject,



- (b) his political opinions,
 - (c) his religious beliefs or other beliefs of a similar nature,
 - (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
 - (e) his physical or mental health or condition,
 - (f) his sexual life,
 - (g) the commission or alleged commission by him of any offence, or
 - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.
- ...

Schedule 1 The Data Protection Principles

Part 1 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 the 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.