

Decision Notice



Decision 197/2010 John Connor and the Scottish Public Services
Ombudsman

Information relating to a complaint

Reference No: 201001546
Decision Date: 29 November 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr John Connor requested from the Scottish Public Services Ombudsman (the SPSO) information relating to a complaint. The SPSO responded by withholding all of the information in accordance with section 26(a) of the Freedom of Information (Scotland) Act 2002 (FOISA) as it maintained that it was the subject of a prohibition on disclosure. The SPSO did, however, provide Mr Connor with some information in accordance with his subject access rights under the Data Protection Act 1998 (the DPA). Following a review, Mr Connor remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPSO had correctly applied the exemption in section 26(a) to the information under consideration, and so had complied with Part 1 of FOISA by withholding this information. He did not require the SPSO to take any action.

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) (Effect of exemptions) and 26(a) (Prohibitions on disclosure)

The Scottish Public Services Ombudsman Act 2002 (SPSO Act) section 19 (Confidentiality of Information)

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 9 June 2010, Mr Connor wrote to the SPSO, requesting all correspondence that had passed between the SPSO and a named local authority in relation to a complaint against the authority made by Mr Connor on behalf of a number of local residents.
2. The SPSO responded on 14 June 2010, providing copies of two letters and indicating that it held further documents on file. The SPSO indicated that if Mr Connor required copies of any further documents, he should apply in writing and his request would be considered in accordance with FOISA and the Data Protection Act 1998 (the DPA).



3. On 15 June 2010, Mr Connor responded to the SPSO requesting that it send him the further documents “under FOI”.
4. The SPSO responded later on the same day, indicating that it considered the information to be exempt from disclosure under section 26(a) of FOISA, read in conjunction with statutory prohibitions on disclosure contained in sections 12 and 19 of the SPSO Act 2002. It also indicated that the information requested may fully or in part constitute Mr Connor’s personal data and was exempt from disclosure in accordance with section 38(1)(a) of FOISA. The SPSO also informed Mr Connor that it would consider his request, to the extent that the information might constitute his personal data, as a subject access request under section 7 of the DPA and respond further to him in accordance with the timescale relevant to the DPA.
5. On 2 July 2010, the SPSO provided Mr Connor with some further information in response to his request, having considered it as a subject access request in terms of the DPA. The information provided included copies of two emails from which eight lines of information had been redacted as that information constituted the personal information of third parties.
6. On 5 July 2010, Mr Connor wrote to the SPSO, under a heading “FOI/Data Protection”, and asked that it review “the eight lines in black”.
7. The SPSO notified Mr Connor of the outcome of its review, conducted in terms of Mr Connor’s subject access rights under the DPA, on 13 July 2010. It confirmed that it was satisfied that the redacted information did constitute third party personal data and had been correctly withheld. The SPSO provided Mr Connor with details of how to appeal this decision (in terms of the DPA) to the (UK, rather than Scottish) Information Commissioner.
8. Mr Connor wrote to the SPSO on 16 July 2010, indicating that he remained unhappy with the outcome of the request he had made under FOISA and requested a review. In particular he clarified that he wished to know the content of the redacted parts of the emails disclosed on 2 July 2010.
9. The SPSO responded to Mr Connor on the same day, directing him to its earlier response of 13 July and indicating that if he remained dissatisfied he may wish to appeal to the Information Commissioner.
10. On 4 August 2010, Mr Connor 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. In particular Mr Connor asked the Commissioner to investigate and have the redacted content of the emails disclosed on 2 July released to him.
11. The application was validated by establishing that Mr Connor 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.



12. During the validation process in this case, it was made clear to Mr Connor that, although his request had been considered by the SPSO in terms of his rights under both FOISA and the DPA, the Commissioner was able to consider his request for information only in terms of FOISA.

Investigation

13. On 20 August 2010, the SPSO was notified in writing that an application had been received from Mr Connor and was asked to provide the Commissioner with any information withheld from him. The SPSO responded with the information requested and the case was then allocated to an investigating officer.
14. The investigating officer subsequently contacted the SPSO, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it 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.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Connor and the SPSO and is satisfied that no matter of relevance has been overlooked.
16. The information which is the subject of Mr Connor's application for decision amounts to information contained in eight lines of typescript contained in two single page email messages that have been in whole or in part redacted from the information provided to Mr Connor by the SPSO.
17. In correspondence with the Commissioner, the SPSO confirmed that it provided the information contained in the two email messages (subject to the redaction of the eight lines) in accordance with its obligations as a data controller under the DPA. It confirmed that no part of the emails under consideration in this decision had been released to Mr Connor in response to his request, insofar as it was made in terms of FOISA.
18. The SPSO further clarified that the two email messages were obtained by the SPSO from a local authority during the course of its investigation of a complaint against that local authority. Accordingly, the SPSO considered that all of the information contained in the two email messages was exempt from disclosure under the exemption in section 26(a).



Consideration of section 26(a)

19. Section 26(a) of FOISA states that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. Section 26(a) is an absolute exemption, and therefore is not subject to the public interest test. In this case, the SPSO identified that such a prohibition is created by section 19 and also section 12 of the SPSO Act.
20. Section 19(1) of the SPSO Act indicates 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 must not be disclosed except for a limited range of purposes specified elsewhere in that section of the SPSO Act. These purposes do not include disclosure of information under FOISA.
21. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on disclosure of information that engages section 26(a) of FOISA. Section 19(1) of the SPSO Act clearly identifies that the prohibition on disclosure relates to information "obtained" by the Ombudsman or any of his advisers in connection with any matter in respect of which a complaint or a request has been made.
22. The Commissioner has examined the information contained in un-redacted versions of the two emails and is satisfied that both emails amount to information obtained by the SPSO during its investigation of a complaint and are, therefore, subject to the prohibition on disclosure contained in section 19 of the SPSO Act.
23. The Commissioner therefore considers that the SPSO was correct in applying the exemption in section 26(a) of FOISA to withhold all of the information contained in the two emails from Mr Connor.
24. Having found that the SPSO correctly identified the information to fall under the prohibition on disclosure contained in section 19 of the SPSO Act, he is not required, nor does he intend, to consider the effect of section 12 of that Act on the information.

DECISION

The Commissioner finds that by applying the exemption in section 26(a) of FOISA and withholding the information requested by Mr Connor and under consideration in this decision, the Scottish Public Services Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002.



Appeal

Should either Mr Connor 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
29 November 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;

...

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;

...



Scottish Public Services Ombudsman Act 2002

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.