

Decision Notice



Decision 151/2011 Highland News Group and the Chief Constable of Northern Constabulary and the Inverness Courier and the Chief Constable of Northern Constabulary

Photographs of convicted offenders

Reference No: 201100075 and 201100685
Decision Date: 8 August 2011

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Scottish Information Commissioner

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Summary

Highland News Group and the Inverness Courier separately requested from the Chief Constable of Northern Constabulary photographs of convicted offenders. Northern Constabulary responded to both requests by withholding the photographs under a number of exemptions in Part 2 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following reviews, both Highland News Group and the Inverness Courier remained dissatisfied and applied to the Commissioner for decisions.

Following investigations, the Commissioner found that Northern Constabulary had dealt with both requests in accordance with Part 1 of FOISA, by withholding the requested information under section 38(1)(b) of FOISA. He did not require Northern Constabulary 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)(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i) and (b) and (5) (definition of “data protection principles”, “data subject” and “personal data”) (Personal information)

Data Protection Act 1998 (the DPA) sections section 1(1) (Basic interpretative provisions) (definition of “personal data”) and 2(g) and (h) (Sensitive personal data) and Schedules 1 (The data protection principles) (the first data protection principle); 2 (Conditions relevant for purposes of the first principle: processing of any personal data: condition 6) and 3 (Conditions relevant for purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

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

Highland News Group's request

1. On 9 December 2010, Mr Paul Breen, Group Editor of Highland News Group, emailed Northern Constabulary on behalf of Highland News Group, requesting photographs of two convicted offenders (referred to as individual A and individual B in what follows).
2. Subsequent references to the applicant in this case will refer solely to Highland News Group.

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3. Northern Constabulary responded to Highland News Group on 21 December 2010. In its response, Northern Constabulary advised that it considered the photographs to be information exempt from disclosure in terms of sections 35(1)(a), (b) and (c), 38(1)(b) and 39(1) of FOISA.
4. On 17 January 2011, Highland News Group emailed Northern Constabulary requesting a review of its decision. In particular, it contended that it was in the public interest for the photographs to be published.
5. Northern Constabulary notified Highland News Group of the outcome of its review on 14 February 2011, upholding its previous decision that the information was exempt from disclosure in terms of sections 35(1)(a), (b) and (c), 38(1)(b) and 39(1) of FOISA. Additionally, in respect of individual B, Northern Constabulary contended that the information was exempt from disclosure in terms of section 25 (1) of FOISA (since a photograph of this individual was publicly available on a news provider's website).
6. On 17 February 2011, Highland News Group wrote to the Commissioner, stating that it was dissatisfied with the outcome of Northern Constabulary's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.

The Inverness Courier's request

7. On 22 December 2010, Ms Olivia Bell, News Editor at the Inverness Courier, emailed Northern Constabulary on behalf of the Inverness Courier requesting a photograph of individual B. Subsequent references to the applicant in this case will refer solely to the Inverness Courier.
8. Northern Constabulary responded on 24 January 2011, advising the Inverness Courier that it considered the photograph to be information exempt from disclosure in terms of sections 35(1)(a), (b) and (c), 38(1)(b) and 39(1) of FOISA.
9. On 9 February 2011, the Inverness Courier emailed Northern Constabulary requesting a review of its decision. In particular, it argued that the public interest would be served by the identification of individual B.
10. Northern Constabulary notified the Inverness Courier of the outcome of its review on 25 February 2011, upholding its previous decision that the information was exempt from disclosure in terms of sections 35(1)(a), (b) and (c), 38(1)(b) and 39(1) of FOISA. Additionally, Northern Constabulary contended that the information was exempt from disclosure in terms of section 25 (1) of FOISA.
11. On 8 April 2011, the Inverness Courier wrote to the Commissioner, stating that it was dissatisfied with the outcome of Northern Constabulary's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.

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- Both applications were validated by establishing that Highland News Group and the Inverness Courier had both made requests 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 their request. The cases (under reference 201100075 for Highland News Group's request, and 201100685 for the Inverness Courier's request) were then allocated to an investigating officer. As the requests under consideration and the responses from Northern Constabulary in these two cases are almost identical, the Commissioner has decided to conjoin both applications for the purposes of this decision.

Investigation

- On 14 March 2011, the investigating officer contacted Northern Constabulary, giving it an opportunity to provide comments on the application received from Highland News Group (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Northern Constabulary was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
- Northern Constabulary responded to this request, providing submissions in support of its decision to withhold the requested information on 26 April 2011. It provided further comments in response to additional questions on 12 May 2011.
- With respect to the Inverness Courier's application for decision, the investigating officer wrote to Northern Constabulary on 20 May 2011. He invited its comments on the application as required by section 49(3)(a) of FOISA, and asked whether it wished to rely upon the submissions already made in relation to Highland News Group's application. Northern Constabulary's response indicated that it wished the Commissioner to consider the submissions received on 26 April 2011 and 12 May 2011 also in relation to the second case.
- The investigating officer also contacted Highland News Group and the Inverness Courier during the investigation seeking their submissions on the matters to be considered in the case. Highland News Group's and the Inverness Courier's submissions, along with those of Northern Constabulary, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

- In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Highland News Group and the Inverness Courier and Northern Constabulary and is satisfied that no matter of relevance has been overlooked.



Section 38(1)(b) of FOISA – personal data

18. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, where appropriate, 38(2)(b)), exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA. This exemption is absolute in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
19. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
20. Northern Constabulary has withheld the photographs of individuals A and B on the basis that they comprise the sensitive personal data of the two individuals and the disclosure of the information would contravene the first data protection principle, since there are no conditions in either Schedule 2 or 3 of the DPA which would permit disclosure.

Is the information (sensitive) personal data?

21. The Commissioner will first consider whether the information withheld is personal data. "Personal data" is defined in section 1(1) of the DPA as 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 (the full definition is set out in the Appendix).
22. Section 2 of the DPA provides that certain types of personal data are also sensitive personal data, which is afforded additional protection. This includes, at sections 2(g) and (h), information as to the commission or alleged commission by a person of any offence, or any proceedings for any offence committed or alleged to have been committed by a person, the disposal of such proceedings or the sentence of any court in such proceedings.
23. Northern Constabulary argued that the withheld photographs comprised personal data on the basis that they were clearly sufficient to identify the named individuals. It also submitted that, as the information comprised photographs of convicted persons, it would identify those individuals and the fact that they had criminal records. As such, Northern Constabulary contended that the information comprised sensitive personal data for the purposes of the DPA.
24. In this case, it is clear that individuals A and B can be identified from the data itself, in line with definition (a) of personal data. The Commissioner accepts that the photographs of individuals A and B is information which identifies them and clearly relates to those individuals by confirming their identities. He is therefore satisfied that this information is the individuals' personal data, as defined in section 1(1) of the DPA.
25. Additionally, the Commissioner also accepts that the photographs constitute sensitive personal data as defined in sections 2(g) and (h) of the DPA, since they identify individuals in a context which would identify them as having been tried and convicted for certain offences.



Would disclosure breach the first data protection principle?

26. The Commissioner must now consider whether disclosure of this personal data would contravene the first data protection principle, as argued by the Northern Constabulary.
27. 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 of the photographs into the public domain in response to the information requests.
28. As noted above, the Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case does fall within the definitions contained in section 2(g) and (h) of the DPA.
29. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in Schedule 3 which permits the personal data to be disclosed, as well as a specific condition in Schedule 2, it is likely that the disclosure will also be fair and lawful.
30. The Commissioner will now go on to consider whether there are any conditions in Schedule 3 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether any of the conditions in Schedule 2 can be met and whether the disclosure of this personal data would be fair and lawful.
31. There are 10 conditions listed in Schedule 3 to the DPA. One of these conditions, condition 10, also allows sensitive personal data to be processed in circumstances specified in an order made by the Secretary of State in addition to the other conditions in Schedule 3. The Commissioner has also considered the additional conditions for processing sensitive personal data as contained in legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000¹.
32. The Commissioner's guidance on the section 38 exemption² identifies that, in practical terms, there are only two conditions in Schedule 3 that would allow sensitive personal data to be processed in relation to a request for information under FOISA, namely:
 - Condition 1 – the data subject has given explicit consent to the release of the information;
or,
 - Condition 5 – the information contained in the personal data has been made public as a result of steps taken deliberately by the data subject.

¹ http://www.legislation.gov.uk/ukxi/2000/417/pdfs/ukxi_20000417_en.pdf

² <http://www.itspubliknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&slD=133>

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33. The Commissioner is satisfied that neither of these conditions can be met in this case.
34. In their submissions to the Commissioner, both Highland News Group and the Inverness Courier contended that there was a public interest in the disclosure of the information and that similar information had been proactively disclosed by other police forces in the United Kingdom.
35. The Commissioner recognises that photographs of offenders are sometimes made available by other police forces within the UK. However, this observation does not mean that the requirement of meeting a Schedule 3 condition before the information can be processed can be overridden. As noted above, there are only very limited circumstances where the processing of sensitive personal data by disclosing it publicly in response to a request for information made under FOISA will be permitted.
36. Having noted that neither condition 1 nor condition 5 of Schedule 3 can apply here, and having considered all of the other conditions within Schedule 3 and the associated Orders, the Commissioner found none to be relevant in the circumstances of this case.
37. The Commissioner has therefore concluded that there are no conditions in Schedule 3 to the DPA which would permit the sensitive personal data to be disclosed. Because there are no conditions in Schedule 3 which can be fulfilled, the Commissioner must find that the disclosure of the information would breach the first data protection principle and, consequently, he accepts that the information is exempt from disclosure in terms of section 38(1)(b) of FOISA.
38. Having found this information to be exempt from disclosure under section 38(1)(b), the Commissioner is not required to consider any other exemptions applied by Northern Constabulary.

DECISION

The Commissioner finds that the Chief Constable of Northern Constabulary complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Highland News Group and the Inverness Courier by withholding the requested information on the grounds that it was exempt from disclosure under section 38(1)(b) of FOISA.

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Appeal

Should either Highland News Group or the Inverness Courier wish to appeal this decision insofar as the decision relates to its application, or should Northern Constabulary 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.

Margaret Keyse
Head of Enforcement
8 August 2011



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 [the data subject] of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by [the data subject], the disposal of such proceedings or the sentence of any court in such proceedings.

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 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data

1. The data subject has given his explicit consent to the processing of the personal data.
...
5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

...