

Decision Notice

Decision 147/2017: Mr Stephen Magee, BBC Scotland and the Scottish Social Services Council

Transcripts of hearing

Reference No: 201700478

Decision Date: 6 September 2017



Scottish Information
Commissioner

Summary

In August/September 2016, the SSSC held a Conduct Sub-committee to consider whether the actions of a social worker breached its Code of Practice for Social Service Workers. The BBC later asked the SSSC for transcripts of the evidence. The SSSC withheld the transcripts on the basis that they were exempt from disclosure under section 38 (Personal information) of FOISA. The Commissioner investigated. She agreed that the transcripts were exempt from disclosure.

Relevant statutory provisions

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) and (2)(b) and (5) (definitions of "the 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(e) (Sensitive personal data) and 32(1) (Journalism, literature and art); Schedules 1 (The data protection principles, Part I: the principles) (the first data protection principle); 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6); 3 (Conditions relevant for the purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Directive): recital 26

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. The Scottish Social Services Council (the SSSC) regulates the social service workforce in Scotland. It protects people who use social work services and their carers by registering and regulating social service workers. The SSSC's Fitness to Practise team investigates concerns about social service workers.
2. In August/September 2016, the SSSC held a Conduct Sub-committee to determine whether a registered social worker, Lesley Bate, who worked for Fife Council, was guilty of misconduct as defined by the Scottish Social Services Council (Conduct) Rules 2013 (the 2013 Rules). The hearing was open to the public. The hearing was the subject of a lot of media interest as Ms Bate had worked with Liam Fee for a period of time just over a year before Liam's death. Liam was killed in tragic circumstances by his mother, Rachel Fee, and her partner Nyomi Fee in March 2014.¹ Following the Conduct Sub-Committee hearing, Ms Bate was removed from the register of social workers

¹ <http://www.scotcourts.gov.uk/search-judgments/judgment?id=6e962ca7-8980-69d2-b500-ff0000d74aa7>

3. On 19 January 2017, Mr Magee, a producer with BBC Scotland, asked the SSSC for “transcripts of all the evidence heard and any other evidence submitted in the case of Lesley Bate.” Mr Magee said he appreciated that the identities of individuals would be protected through “appropriate redaction.”
4. The SSSC responded on 9 February 2017. It confirmed it held transcripts of the evidence given by witnesses. It explained what other information it held and told Mr Magee that some information about the case was already in the public domain, including the decision of the SSSC Sub-committee.
5. The SSSC withheld all of the information on the basis that it was personal data, disclosure of which would breach the first data protection principle in the DPA. This meant that it was exempt from disclosure under section 38(1)(b) of FOISA. The SSSC told Mr Magee that all of the information he had asked for was Ms Bate’s personal data: it all related to what was said at the Conduct Sub-committee about her case, or was about the documents compiled by the SSSC to prove the case against her, or was compiled by Ms Bate in her defence. Some of the data was also the personal data of service users and their families: redacting their names, as Mr Magee had suggested, would not be enough to anonymise their details.
6. On 13 February 2017, Mr Magee wrote to the SSSC requesting a review of its decision. He noted that, during the hearing, steps had been taken to protect the identities of the individuals involved. He understood that some of the information might be exempt under section 38(1)(b), but asked the SSSC to reconsider his request on the basis that the hearing had been held in public and was recorded contemporaneously. Mr Magee commented:
Therefore at the very least the transcripts of these hearings should be made available immediately as they are clearly covered by the original request and in my view none of the reasoning set out in refusing the request can possibly apply to [sic] information that has already been put into the public domain as part of the hearing process.
7. The SSSC notified Mr Magee of the outcome of its review on 7 March 2017. The SSSC confirmed its decision of 9 February 2017. The SSSC noted that:
 - 1) Mr Magee’s request for a review had focussed on the transcripts of the hearing. The SSSC explained that there were only transcripts of the witness evidence, not of the whole hearing.
 - 2) Although the hearing had been held in public, the SSSC did not consider that the evidence given by the witnesses was in the public domain. The SSSC publication’s scheme² sets out the information which the SSSC make public on a routine basis and transcripts are not included in that scheme. The SSSC also referred to its publicity policy³ which sets out the information that will be made publicly available through the hearing process. Transcripts are not included in this policy.
 - 3) The 2013 Rules (rule 28) allow the social worker who is the subject of the Sub-committee hearing and any person making a complaint against the social worker to apply for and, on payment of a reasonable sum, be given a transcript of the proceedings or of any part of the proceedings at which they were entitled to be

² <http://www.sssc.uk.com/about-the-sssc/multimedia-library/publications?task=document.viewdoc&id=771>

³ <http://www.sssc.uk.com/publicity-policy?task=document.viewdoc&id=1450>

present. The 2013 Rules do not allow for transcripts to be made available to journalists or to any other person not connected with the hearing.

- 4) On the question of identifiability, the SSSC noted that it had been made aware that some of the service users had been identified or could be identified by information given during the course of the hearing (which would also be in the transcripts) and by the press reporting at the time. The SSSC said it understood that this has been “distressing and difficult” for the service users.
 - 5) On the question of the hearing having been contemporaneously recorded, the SSSC commented that the hearing was recorded in accordance with the 2013 Rules by an officer of the SSSC for a specified purpose: the SSSC did “not expect our hearings to be recorded by journalists or other members of the public attending as observers.”
8. Later that day, Mr Magee applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He argued that he should have access to the transcripts of the hearings for the following reasons:
- 1) The hearings were held in public. Journalists were present when the evidence was given. Why, then, should the information be withheld?
 - 2) There are important matters of public concern here and these outweigh any potential risk of additional stress to the professionals who gave evidence. The Liam Fee case remains a significant and legitimate area of public interest and journalistic enquiry. The evidence about what went wrong is of itself a legitimate concern for the public.
 - 3) The exemption in section 32 of the DPA should be taken into account.
 - 4) Mr Magee questioned the SSSC’s definition of sensitive personal data.
 - 5) Even if parts of the transcripts are exempt from disclosure under section 38(1)(b) of FOISA, this does not mean that they should all be withheld in their entirety.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr Magee made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
10. On 23 March 2017, the SSSC was notified in writing that Mr Magee had made a valid application. The SSSC was asked to send the Commissioner the information withheld from Mr Magee. The SSSC provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SSSC was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
12. Mr Magee was also invited to provide further comments on the case, and did so on 24 May 2017.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Magee and the SSSC. She is satisfied that no matter of relevance has been overlooked.

The scope of the investigation

The information

14. Mr Magee's request of 19 January 2017 asked for the transcripts of the evidence heard and for any other evidence submitted in Ms Bate's case. When he subsequently made his request for review on 13 February 2017, he narrowed the scope of the request and focussed on the transcripts.
15. Accordingly, this decision can consider only the transcript information withheld by the SSSC.

Section 37 of FOISA

16. During the investigation, the SSSC referred to the exemption in section 37 of FOISA, which exempts records from disclosure where they have been created by a court or by a member of its administrative staff for the purposes of court proceedings. However, it was not clear whether the SSSC wished to argue that the exemption in section 37 applied to the transcripts. In any event, as can be seen from the remainder of the decision, it has not been necessary for the Commissioner to consider whether the exemption in section 37 applies.

Section 32 of the DPA

17. As noted above, Mr Magee argued that section 32 of the DPA was relevant to determining whether the transcripts of the evidence should be disclosed under FOISA. Section 32(1) of the DPA is set out in Appendix 1.
18. However, the Commissioner cannot agree that section 32 is otherwise relevant to her decision. Amongst other things, section 32 of the DPA allows the media not to comply with certain aspects of the DPA where it believes that publication of personal data would be in the public interest and complying with the DPA would be incompatible with journalism.
19. When deciding whether a public authority was correct to withhold personal data under FOISA, there are other tests which the Commissioner must consider: the tests relevant to this case are set out in detail below.
20. However, insofar as Mr Magee, as a journalist, has a legitimate interest in the disclosure of the personal data in question, the Commissioner has taken the public interest in freedom of expression (see section 32(1)(b)) into account.

Section 38(1)(b) - Personal information

21. The SSSC withheld the transcripts in full under section 38(1)(b) of FOISA. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate) exempts personal data if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.
22. In considering whether this exemption applies, the Commissioner will first consider whether the information in question is personal data, as defined in section 1(1) of the DPA. If it is, she will go on to consider whether disclosure of the information would breach the first data protection principle, as claimed by the SSSC. 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.

23. When considering section 38(1)(b) of FOISA, it is important to take account of the comments made by the House of Lords in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47⁴. The court said:

... there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which [FOISA] makes to provisions of [the DPA] must be understood in the light of the legislative purpose of [the DPA], which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data ...

Is the information under consideration personal data?

24. "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" (the full definition is set out in Appendix 1).
25. The SSSC categorized the data as relating to three groups of people:
- 1) Ms Bate
 - 2) the witnesses (employees of Fife Council)
 - 3) the service users and their families and carers mentioned in evidence given to the Sub-committee
26. The Commissioner will consider each group separately.

Ms Bate

27. Mr Magee sought the transcripts from a hearing into Ms Bate's conduct as a social worker. Although Ms Bate did not attend the hearing, her conduct and fitness to practise was the focus of all of the evidence given by the witnesses. The information in the transcripts clearly relates to her and she can be identified from the transcripts. The Commissioner is therefore satisfied that all of the information in the transcripts is Ms Bate's personal data.
28. The SSSC also argued that some of the information in the transcripts relating to Ms Bate is sensitive personal data.
29. The definition of sensitive personal data is contained in section 2 of the DPA. It includes information as to a data subject's physical or mental health or condition (section 2(e) – see Appendix 1).
30. Mr Magee questioned whether "inferences about [Ms Bate's] emotional state" did in fact constitute sensitive personal data. Having read the transcripts in full, the Commissioner is satisfied that some of the information does relate to Ms Bate's physical or mental health or condition and is, therefore, sensitive personal data. She cannot say more on this point without, in effect, disclosing the information.

⁴ www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2008/47.html&query=%22freedom+of+information+scotland+act+2002%22&method=boolean

The witnesses

31. The witnesses before the Sub-committee were all from Fife Council. They are named in the transcripts and the transcripts contain information about their previous experience as well as their views on the various charges made by the SSSC against Ms Bate. They can easily be identified from the transcripts and the information relates to them. It is, therefore, their personal data.
32. The Commissioner notes that, although the witnesses are named in full in the transcripts, they are not named in the report of the hearing published by the SSSC – two of them, who are singled out for giving their evidence in an open and straightforward manner, are referred to as “YY” and “ZZ”. The Sub-committee expressed disappointment that the remaining witnesses showed varying degrees of defensiveness and evasiveness when giving their evidence. If the transcript were disclosed, it would be reasonably easy for anyone to identify who “YY” and “ZZ” were or, more to the point, which of the witnesses had been defensive and evasive when giving evidence.

Service users and their family and carers

33. When the witnesses were giving evidence, they were asked to use abbreviations (“AA”, “BB” and so on) in order to reduce the likelihood of service users, family members and carers being identified by those present at the hearing. (It should be noted that, although Ms Bate’s connection to Liam Fee is one reason this hearing had such a high profile, Liam was only one of a number of children whose cases were referred to during the hearing.) Does the fact that abbreviations were used mean that service users, etc. cannot be identified?
34. Information will only constitute personal data where there is a realistic prospect of someone being identified if the information is disclosed. As noted above, if the transcripts are disclosed under FOISA, they are viewed as having been put into the public domain. The Commissioner must therefore consider whether members of the public will have a realistic prospect of identifying a child, carer or family member.
35. Recital 26 of the EU Directive on which the DPA is based (see Appendix 1) is also relevant when deciding whether an individual is identifiable: it says that account must be taken of “all the means likely reasonably to be used either by the controller or by any other person to identify the said person.”
36. The SSSC told Mr Magee that some of the service users had been identified from the information given in the course of the hearing and that this had been distressful for them (the question of distress is considered in more detail below).
37. Even where individuals are only mentioned through the use of “AA”, etc., the transcripts contain information which would certainly help a third party identify them, such as age, number of siblings, dates of involvement with Fife Council, allegations of criminal behaviour, a child’s likes/dislikes.
38. In the circumstances, the Commissioner is satisfied that service users, family members and carers can be identified, despite abbreviations being used in the transcripts. The information clearly relates to them and is, therefore, their personal data.

Summary

39. The Commissioner is satisfied that all of the information in the transcripts is personal data for the purposes of section 1(1) of the DPA. The Commissioner will therefore go on to consider whether disclosure would breach the first data protection principle in the DPA.

Would disclosure breach the first data protection principle?

40. The SSSC argued that disclosing the personal data in the transcripts would breach the first data protection principle. This states that personal data shall be processed fairly and lawfully. "Processing" here means putting the transcripts into the public domain. The 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 and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
41. There is only a small amount of sensitive personal data in the transcripts, as defined by section 2 of the DPA. The Commissioner will therefore consider the Schedule 2 conditions first.

Can any of the conditions in Schedule 2 be met?

42. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* (see paragraph 23), that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interest of the data subject (i.e. the person or persons to whom the data relate).
43. The first Schedule 2 condition which might be considered relevant in this case is condition 1. Condition 1 applies when the data subject has consented to the release of the information.
44. The SSSC's initial response of 9 February 2017 indicated that it had not obtained consent to disclose the information. The SSSC explained that it does not have the consent of Ms Bate to release her personal data into the public domain. The SSSC said that, given the volume of the data, the knowledge of Ms Bate's personal circumstances and the nature of data, it had not considered asking Ms Bate for her consent. The SSSC also commented that "it would be very unlikely that she would consent to this disclosure".
45. The SSSC was also "reasonably sure" that the witnesses would not consent to the release of their personal data. It stated that it did not have contact details for the vulnerable service users in this case, many of whom are children.
46. The Commissioner is satisfied that consent has not been given and that, in the circumstances, it would not have been appropriate for the SSSC to seek consent from the data subjects. Condition 1 of Schedule 2 cannot, therefore, be met.
47. Condition 6 in Schedule 2 is the only one which might permit disclosure to Mr Magee. 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 subjects.
48. There are a number of different tests which must be satisfied before condition 6 can be met. These are:
 - 1) Does Mr Magee have a legitimate interest or interests in obtaining the personal data?
 - 2) If so, is the disclosure necessary to achieve those legitimate 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 subjects (Ms Bate, the witnesses, service users, etc.)?

3) Even if the processing is necessary for Mr Magee's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

49. 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 Magee must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit disclosure. If the two are evenly balanced, the Commissioner must find that the SSSC was correct to refuse to disclose the information to Mr Magee.

Does Mr Magee have a legitimate interest in obtaining the personal data?

50. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's published guidance⁵ on section 38 states:

In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.

51. In its initial response to Mr Magee, the SSSC accepted that he might have a legitimate interest in the scrutiny of a public body (Fife Council) in relation to concerns about the safety of vulnerable children, and in establishing whether there were systemic failings. The SSSC did not consider that disclosure of the personal data was necessary to achieve that legitimate interest: the information it held related to the conduct of an individual and so did not focus on whether there were systemic failings. The SSSC had no remit to assess systemic failings by a social service provider. Instead, the hearing was concerned with the scrutiny of one registrant's conduct (i.e. Ms Bate) over a particular period of time.

52. The SSSC reiterated this in its submission to the Commissioner. It accepted that Mr Magee has a legitimate interest in some of the personal data, as those data relate to opinions expressed by the witnesses from Fife Council social work department about the systems and structures in place in that department between December 2011 and August 2014.

53. However, the SSSC did not accept that Mr Magee had a legitimate interest in the personal data of the service users. Although Mr Magee had referred to Liam Fee, the evidence led at the hearing was not about what went wrong in respect of Liam. There was no attempt during the hearing to consider whether the evidence was representative of the experience of the whole department: in 2015, there were 364 social workers or senior social workers (not including social work management) employed by Fife Council.

54. In his application to the Commissioner, Mr Magee said that the assertions made by the SSSC about his intentions (in making his request) were based on a conversation he had had with an SSSC officer (about the making of a television programme), and he had not anticipated this would inform the SSSC's consideration of his request. Mr Magee questioned

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

the SSSC's view that the hearings were about Lesley Bate's conduct and not any wider issues. The Liam Fee case "remained a significant and legitimate area of public interest and journalistic enquiry", and he considered that evidence about what went wrong was, of itself, a legitimate concern for the public. Mr Magee said:

...a great deal of evidence was heard about general failings in the department, failures of systems and departmental culture. This material cannot be exempted as Lesley Bate's sensitive personal data. Much of the evidence speaks directly to wider concerns about Fife Social Work, its computer systems, data recording and management culture.

55. Mr Magee later reiterated that his interest was in the evidence in the transcripts about the conduct of social workers in this case, the departmental culture and the quality of decision making. He thought this was clearly a matter of public interest as:

...it speaks directly to the performance of an important function of a public body in protecting vulnerable individuals. It clearly relates to professional conduct in a public function. A full journalistic account of the Liam Fee case requires access to this information.

56. Mr Magee is a journalist with BBC Scotland. The Commissioner considers that Mr Magee does have a legitimate interest in this information, as a journalist investigating events at Fife Council social work department. (A BBC documentary about Liam Fee (and others), produced by Mr Magee, has now been broadcast; however, this is not relevant to the Commissioner's decision.)
57. Mr Magee focused on the legitimate interest in establishing whether there were systemic failures in Fife Council social work department: he believes that the information in the transcripts would assist him in this regard. The SSSC has stressed that the hearing did not consider whether there were systematic failures, but focused on the conduct of one individual. In the circumstances of this case – and having studied the transcripts – the Commissioner finds it difficult, in practice, to identify information which relates to one issue but not the other. Much of the evidence given by the witnesses and recorded in the transcripts relates to the actions and interaction of individual social work staff. Therefore, although the purpose of the witness testimony was to enable the hearing to decide whether Lesley Bate was fit to practise as a social worker, it also provides some insight into relationships, decision-making and professional practice within the social work department. Given the public concern about events associated with Liam Fee's death, the Commissioner accepts that Mr Magee (and, indeed, the wider public) has a legitimate interest in obtaining the transcripts.

Is disclosure of the transcripts necessary for the purposes of these legitimate interests?

58. The Commissioner must now consider whether disclosure of the personal data is *necessary* for the purposes of Mr Magee's legitimate interests. In doing so, she must consider whether these interests might reasonably be met by any alternative means.
59. The SSSC did not consider that disclosure of the transcripts was necessary to meet Mr Magee's legitimate interest in the scrutiny of a public body. In summary, its view was that the information did not address that interest, because the focus of the hearing was not Fife Council social work department, but the conduct of an individual social worker.
60. The SSSC suggested that there were other routes by which Mr Magee could obtain information about social work systems and processes, without requiring disclosure of personal data. It suggested that Mr Magee could contact Fife Council social work department directly. It also suggested that he could assess the serious case review (SCR) that was then

being conducted by Fife Council. The SSSC also referred to the Care Inspectorate report⁶ (*Services for children and young people in Fife (March 2016) Report of a joint inspection*). The clear implication is that, given the other options open to Mr Magee and the other information already in the public domain, Mr Magee's legitimate interests could be met without disclosing the transcripts.

61. Mr Magee disagreed. He argued that it was necessary for him to obtain the information. He said the transcripts were a key source of information that could not be obtained elsewhere. In his opinion, SCRs published by the Council "give very little practical detail about the culture of the department or the actions taken (or not taken) to protect children in other cases". Mr Magee said that if he (and the public) were to understand the failings in the case, then "this hearing ... gives a unique insight ... into the decisions made and the potential explanation for any failings."
62. The Commissioner has considered the submissions from both parties carefully in the light of the decision by the Supreme Court in the case of *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55⁷. In that case, the Supreme Court stated (at paragraph 27 of the judgment):

... A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less.
63. However, while the alternative sources of information suggested by the SSSC would no doubt be of interest to Mr Magee, they would not provide him with the information in the transcripts or fully meet his legitimate interests, as identified above.
64. Therefore, the Commissioner can identify no other means of meeting Mr Magee's legitimate interests which would interfere less with the privacy of the data subjects than providing the transcripts. She is therefore satisfied that disclosure of the information is necessary for the purposes of Mr Magee's legitimate interests.

Would disclosure be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

65. As the Commissioner is satisfied that disclosure of the withheld personal data would be necessary to fulfil Mr Magee's legitimate interests, she is now required to consider whether that disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr Magee and those of the data subjects. Only if the legitimate interests of Mr Magee outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
66. In the Commissioner's guidance⁸ on section 38 of FOISA, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:

⁶<http://www.careinspectorate.com/images/documents/3123/Fife%20childrens%20services%20joint%20inspection%20report%20March%202016.pdf>

⁷ <https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf>

⁸ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
- the potential harm or distress that may be caused by the disclosure
- whether the individual objected to the disclosure
- the reasonable expectations of the individuals as to whether the information should be disclosed.

Submissions from Mr Magee

67. When Mr Magee made his request to the SSSC, he appeared to accept that some of the information in the transcripts should be withheld: he said he appreciated that the identities of individuals would be protected through “appropriate redaction.”
68. Mr Magee’s submissions to the Commissioner appeared to focus on Ms Bate and the witnesses. He commented that the significance of the subject matter, and the importance of reporting accurately on it, made it easy to balance disclosure of the personal data with the expectation of privacy the witnesses would have had on the day. He argued that it was clearly a matter of great importance to establish whether the services that are set up to protect our most vulnerable children are functioning properly. In his view, the evidence from the hearing potentially gives a unique insight into that matter. He submitted that the people who gave evidence at the hearing did so in a formal context, in public and in front of journalists, in full knowledge that their contributions were to be part of a public record.
69. In terms of the reasonable expectations of Ms Bate and the witnesses, Mr Magee argued that it did not make sense for testimony given in a public hearing in the presence of journalists to be withheld. He also stated that he found it strange to “retrospectively” consider the impact that disclosure would have on the witnesses, given that they had already provided their testimony in an open hearing.

Submissions from the SSSC

70. The SSSC’s arguments on prejudice differentiated between groups of individuals.
71. The SSSC submitted that the personal data of the service users and their family and carers related to their private life and, indeed, to “the most private elements of their life”. As the information was “private,” disclosure of such information into the public domain would be distressing, particularly given that the individuals involved were children and vulnerable persons.
72. In relation to the personal data of Ms Bate and the witnesses, the SSSC accepted that the information related to their public life. However, the SSSC said that none of those persons had a senior role within the Council’s social work team (as, for example, the Head of Service has a public role). The SSSC submitted that the scrutiny a social worker might expect from a SSSC hearing is from a panel which is appointed to make a decision on impairment of fitness to practise. The hearing is heard in public so the scrutiny is transparent, not so the public can carry out the scrutiny.
73. The SSSC suggested that considerable damage and distress would be experienced by Ms Bate and the witnesses if their personal data were to be disclosed permanently into the public domain. The SSSC provided additional reasons why disclosure could reasonably be expected to cause distress to the individuals involved (the Commissioner will not reproduce this part of the SSSC’s submission in the decision as to do so would only cause the distress).

74. The SSSC was clear that, while the evidence had been given in a public forum, it did not regard the information in the transcripts as being in the public domain.

The Commissioner's view

75. The Commissioner largely accepts the SSSC's reasoning in the way it has balanced the competing interests.

Service users, family members and carers

76. It is clear that the information about service users, etc. relates to their personal lives. In fact, it is difficult to think of information which could more personal to the individuals in question. It is also clear that they would not expect their information to be disclosed into the public domain in response to a request under FOISA, even although that information was discussed at a public hearing.
77. Information led at the hearing has already led to reports of distress. The Commissioner is satisfied that disclosing the transcripts under FOISA would only cause further distress and that service users, etc. would not expect that this information would be published.
78. In the circumstances, while recognising that Mr Magee has a legitimate interest in this personal data, the Commissioner has concluded that this interest is clearly outweighed by the prejudice to the rights and freedoms of the service users, family members and carers that would result from disclosure. Consequently, condition 6 of Schedule 2 cannot be met.

Ms Bate and the Fife Council witnesses

79. Information about a person's work life is more likely to be disclosed under FOISA than information about their personal life.
80. The witnesses giving evidence were doing so as employees of Fife Council. Their evidence related to their own professional activities, those of Ms Bate, and Ms Bate's conduct in terms of the appropriate rules, regulations, good practice, etc. relating to social work.
81. While some of the information in the transcripts related to Ms Bate's personal life, the majority of the information was about her professional life.
82. Given that the SSSC did not ask Ms Bate or the witnesses whether they would consent to their personal data being disclosed, it is particularly important to consider what their expectations were when they gave evidence and whether, for example, they expected that transcripts of their evidence would be published after the hearing.
83. The Commissioner considered the SSSC's Fitness to Practise Public Information Policy: Public information on SSSC fitness to practise cases. This states (at 7.2):
- Transcripts of the hearing will not be provided to anyone other than as required by the [2013] Rules.*
84. Paragraph 28 of Schedule 2 to the 2013 Rules states:
- (1) *A person shall be appointed by the Council to take a shorthand note or to make an audio recording of the proceedings before the Subcommittee.*
 - (2) *On application and on payment of a reasonable sum the Registrant and the Complainant shall be sent by the Council a transcript of the proceedings or of any part of the proceedings at which they were entitled to be present.*

85. The SSSC's Fitness to Practise Public Information Policy⁹ also states (at 6.3) that:
- other than taking notes, the public and media present cannot record and/or broadcast the hearing.*
86. Therefore, the witnesses and Ms Bate knew that the evidence given before the hearing would be transcribed and also knew that the hearing would take place in public. However, given that the transcripts would, in terms of the 2013 Rules, only be available to the registrant (Ms Bate) and to the complainant on the payment of a fee, it is reasonable to conclude that neither the witnesses nor Ms Bate expected that the transcripts would be disclosed in response to an information request made after the hearing. Oral evidence could be reported on by the media who were present at the hearing, but not through subsequent publication of the transcript produced by the SSSC.
87. The seniority of the individuals is also relevant when determining what their legitimate interests were: the more senior the individual, the more likely it is that their personal data will be disclosed. In this case, neither the individuals nor Ms Bate are senior members of staff.
88. The Commissioner must also consider the potential harm or distress that may be caused by the publication of the transcripts. It is clear that the very fact of giving evidence itself in a public forum was distressing for the witnesses (Ms Bate did not attend the hearing). It is also clear that publication of the transcripts – which would again raise interest in the evidence given – would cause further distress.
89. Mr Magee questioned the need to “retrospectively” consider the impact that disclosure would have on the witnesses, given that they had already provided their testimony in an open hearing. However, that is the role of the Commissioner in this case. She must determine what, if any, distress would be caused to the witnesses by the transcripts being put into the public domain in response to his information request. It is true that some of the evidence is already in the public domain, but public knowledge of issues may be relatively impermanent and the full contents of the transcripts are not in the public domain.
90. The openness of the hearing reflects one of the general principles that justify the administration of justice in public: that a hearing in public may be painful to parties and witnesses, but is justified because of the value of public scrutiny as a guarantor of the quality of justice (though the principle of open justice is not absolute, and has exceptions). But whilst the information may have been imparted in an open hearing as part of a public process, the Commissioner does not accept that this would necessarily lessen to a great degree the distress likely to be caused to witnesses if the transcript with their personal data were disclosed into the public domain.
91. Mr Magee's right to the information for journalistic purposes must be given the appropriate weight, and the Commissioner has done this. She has recognised the important function of the media in the scrutiny of public bodies. She has recognised that Mr Magee sought this information to allow him, as part of the BBC, to scrutinise the actions of those employed by a public body. This is a legitimate and important function.
92. The subject of his scrutiny (broadly, the care of the vulnerable through social services) is also a vitally important area of concern and the Commissioner has attributed weight to that. Still, it must be acknowledged that this is not a case where there has been no public access or

⁹ <http://www.sssc.uk.com/about-the-sssc/multimedia-library/publications?task=document.viewdoc&id=1450>

scrutiny, or any other form of scrutiny. The hearing was open, with media present. The SSSC published its detailed decision following the hearing. Fife Council has undertaken an investigation and produced an SCR report.

93. Whilst Mr Magee's legitimate interests are strong, the Commissioner finds, on balance, that they are outweighed by the prejudice to the rights and freedoms of the data subjects that would result from disclosure. The requirements of condition 6 cannot be met here. Given the tragic death of Liam Fee, it is not surprising that there has been so much media attention on this hearing. However, the Commissioner has concluded that the distress which disclosure would cause to Ms Bate and to the witnesses (and to the focus which would be placed on them by disclosing the transcripts) is such that Mr Magee's legitimate interests are outweighed.
94. Given the conclusion that the rights and freedoms of all of the data subjects outweigh Mr Magee's legitimate interests, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the information. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently the Commissioner finds that disclosure of the information 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.
95. In the circumstances, the Commissioner is not required to go on to consider whether there are any conditions in Schedule 3 to the DPA which would allow Ms Bate's sensitive personal data to be disclosed.

Decision

The Commissioner finds that the Scottish Social Services Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Magee.

Appeal

Should either Mr Magee or the SSSC 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
Acting Scottish Information Commissioner

6 September 2017

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-

...

- (e) his physical or mental health or condition,

...

32 Journalism, literature and art

- (1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if –

- (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
- (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

- (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

...

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.

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.

...

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data

- (26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person ...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info