

Decision Notice



Decision 022/2010 Mr David Sharpe and the Chief Constable of Strathclyde
Police

Witness statements

Reference No: 200901900
Decision Date: 15 February 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
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Summary

Mr David Sharpe (Mr Sharpe) requested from the Chief Constable of Strathclyde Police (Strathclyde Police) witness statements relating to a court hearing in 2003, made by him and by two named individuals. Strathclyde Police responded by providing notice that they did not hold this information. Following a review, the outcome of which was to uphold the initial decision, Mr Sharpe remained dissatisfied and applied to the Commissioner for a decision.

During subsequent investigations Strathclyde Police uncovered one witness statement made by Mr Sharpe.

The Commissioner found that Strathclyde Police had partially dealt with Mr Sharpe's request for information in accordance with Part 1 of FOISA. He found that they were correct to notify Mr Sharpe that they did not hold witness statements from the two named individuals. However, he concluded that they were wrong to inform him that they did not hold his own witness statement.

Since the Commissioner concluded that the witness statement identified during the investigation was exempt from disclosure (because it was Mr Sharpe's own personal data), he did not require Strathclyde Police to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 38(1)(a) (Personal information)

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions) (definition of "personal data")

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 17 August 2009, Mr Sharpe wrote to Strathclyde Police requesting information relating to a trial in September 2003. The part of his request that is under consideration in this decision sought statements made by Mr Sharpe and two other named individuals.
2. Strathclyde Police responded on 16 September 2009, stating that they did not hold statements from Mr Sharpe or the two other named individuals.
3. On 18 September 2009, Mr Sharpe wrote to Strathclyde Police requesting a review of their decision.
4. Strathclyde Police notified Mr Sharpe of the outcome of their review on 23 October 2009. They upheld their original decision that the statements requested by Mr Sharpe were not held.
5. On 29 October 2009, Mr Sharpe wrote to the Commissioner, stating that he was dissatisfied with the outcome of Strathclyde Police's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The case was then passed to an investigating officer.
6. The application was validated by establishing that Mr Sharpe 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. The case was then allocated to an investigating officer.

Investigation

7. On 22 December 2009, Strathclyde Police were notified in writing by the investigating officer that a valid application had been received from Mr Sharpe in relation to his request for his own statement and those of two other named individuals.
8. They were given the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions. In particular, Strathclyde Police were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested and were asked for detailed information on the searches they had carried out to locate any information that may have been held.
9. As a result of further searches undertaken in response to the investigating officer's enquiries, Strathclyde Police identified one witness statement made by Mr Sharpe. They indicated that this statement was exempt from disclosure in terms of section 38(1)(a) of FOISA.
10. The investigating officer also contacted Mr Sharpe for his views and recollections in relation to the course of events and he duly provided these.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr Sharpe and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Section 17 – notice that information is not held

12. Section 17(1) of FOISA requires that, where an authority receives a request for information that it does not hold, then it must give the applicant notice in writing that it does not hold it.
13. Strathclyde Police gave notice that they did not hold any witness statements by Mr Sharpe or the two other named individuals.
14. In order to determine whether the Strathclyde Police dealt with Mr Sharpe's request correctly, the Commissioner must be satisfied as to whether, at the time they received Mr Sharpe's request, Strathclyde Police held any information which would fall within the scope of that request.
15. Mr Sharpe submitted that he could recollect his giving a witness statement to Strathclyde Police in Greenock Police Station on the same day as witness statements were given by both of the other named individuals.

Initial searches conducted by Strathclyde Police

16. The investigating officer asked Strathclyde Police for details of any searches they had carried out to determine whether any relevant information was held and whether there were any further searches that could be carried out.
17. Strathclyde Police submitted that at the time of Mr Sharpe's request and review request they had searched the electronic Crime Management system both under the names of the individuals concerned and under the relevant Police Crime reference number. They had also searched the electronic Registry system under the same reference number. These searches identified a copy of a police report and copies of two other witness statements relating to the allegation that prompted the 2003 trial, but not any statements by Mr Sharpe or the individuals to whom his request related.
18. Strathclyde Police explained that they had also contacted the police officers involved in the relevant case, asking them to produce the requested statements if they held them. They stated that the response from the police reporting officer was that, to the best of his knowledge, no statements had been taken by them from these persons.



Further searches undertaken during the investigation

19. Further enquiries were made by Strathclyde Police in response to the investigating officer's questions. Consideration of information held by their professional standards department led to the identification of two relevant files held there which had not been reviewed during the initial searches.
20. Within these files, Strathclyde Police identified a memo written by the Inspector assigned to address matters raised by Mr Sharpe, and a statement taken by this Inspector from Mr Sharpe. The memo also indicated that the Inspector had also taken statements from the two other individuals named in Mr Sharpe's request on the same day, and that these had subsequently been sent to the Crown Office and Procurator Fiscal Service (COPFS) along with a report.
21. Strathclyde Police confirmed that further searches had been undertaken, but the statements taken from the two other individuals had not been located.
22. These further searches included checking additional confidential files, and checking the files of the police office at which the statements were taken. It was established that all correspondence from the relevant police office dating from 2003 had been destroyed in line with Strathclyde Police's retention policy.
23. The police office did still hold a copy of the file and productions relating to the 2003 trial referred to in Mr Sharpe's request. However, it was confirmed that this file did not hold the statements taken from Mr Sharpe and the two other individuals named in his request.
24. In trying to identify the two further statements, Strathclyde Police contacted COPFS to establish whether any relevant information was held by them. They were advised that no information was held by COPFS for the period in question. COPFS' document retention policy states that in summary cases it is normal practice (subject to some exemptions) to retain case papers for a period of two years or until the expiry of a given sentence. Mr Sharpe made his initial information request to Strathclyde Police almost 6 years after the relevant case had been disposed of and so outwith the routine retention period for the type of information he had requested.
25. Further work was undertaken by Strathclyde Police to establish whether the information could be retrieved from computer tapes that were identified as containing information encompassing the period in 2003 pertinent to Mr Sharpe's information request. Some of this data was copied onto a DVD to allow searching. However one tape was found to be corrupted and no information from it could be recovered.
26. Strathclyde Police searched this data (which comprised 41,047 documents) under several pertinent terms, but no further relevant information was identified.



Conclusions regarding section 17

27. The Commissioner notes that the evidence located by Strathclyde Police in this case strongly suggests that statements were taken from the two named individuals and that these statements were sent to COPFS by the Inspector concerned. Given these findings, the Commissioner is of the view that statements from all three people named in Mr Sharpe's information request were held by Strathclyde Police at one time.
28. Having considered all the submissions before him, and particularly taking into consideration the additional and thorough searches undertaken during the investigation, the Commissioner is satisfied that adequate steps have been taken by Strathclyde Police to determine whether they still held the statements made by the two named individuals.
29. These searches allowed the identification of Mr Sharpe's own statement, and the evidence that statements were taken from the two other individuals. On balance of probabilities, the Commissioner is satisfied that the other two statements are no longer held, and were not held at the time when Mr Sharpe's information request was received.
30. In the light of this, the Commissioner has found that Strathclyde Police were incorrect in their assertion that they did not hold any statements made by Mr Sharpe himself and that they were wrong to give notice to Mr Sharpe in terms section 17(1) of FOISA that they did not hold any witness statement made by him.
31. However the Commissioner is satisfied that Strathclyde Police were correct to give Mr Sharpe notice in terms of section 17(1) of FOISA that they did not hold witness statements from the two other named individuals.
32. The Commissioner will now go on to consider the application of section 38(1)(a) of FOISA in relation to the witness statement made by Mr Sharpe.

Section 38(1)(a) – personal information of the applicant

33. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. This means that it is not subject to the public interest test set out in section 2(1) of FOISA.
34. This exemption exists under FOISA because individuals have a separate right make a request for their own personal information (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to information about themselves. Therefore, the effect of the exemption in section 38(1)(a) of FOISA is not to deny individuals a right of access to information about themselves, but to ensure that the right is exercised under the DPA and not under FOISA.
35. "Personal data" is defined in section 1(1) of the DPA, which is reproduced in the Appendix.

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36. The Commissioner has reviewed the witness statement made by Mr Sharpe and he is satisfied that it comprises the personal data of Mr Sharpe. The data within the statement relate to him, being provided by him, and stating his recollections of events in which he was involved. Mr Sharpe is identifiable from the statement either alone and in conjunction with other information held by Strathclyde Police.
37. As the Commissioner has concluded that this statement is entirely the personal data of Mr Sharpe, he therefore finds that Strathclyde Police were correct in their application of section 38(1)(a) of FOISA to this information.
38. The Commissioner notes that at the time of reaching this decision Strathclyde Police were in the process of writing to Mr Sharpe advising him of his right to request the information contained in his witness statement via a subject access request under the DPA.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sharpe.

While the Commissioner finds that Strathclyde Police were entitled to notify Mr Sharpe that they did not hold witness statements made by two named individuals, he finds that they did hold a witness statement made by Mr Sharpe, and that, as a consequence, they were wrong to advise Mr Sharpe, in terms of section 17(1) of FOISA, that they did not hold this information..

However, the Commissioner finds that Mr Sharpe's witness statement is exempt from disclosure in terms of section 38(1)(a) of FOISA, and so Strathclyde Police were entitled to withhold this information from Mr Sharpe. The Commissioner therefore does not require Strathclyde Police to take any action.

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Appeal

Should either Mr Sharpe or Strathclyde Police 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
15 February 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.

...

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 –

- (i) paragraphs (a), (c) and (d); and

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).



17 Notice that information is not held

(1) Where-

- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(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.

...

38 Personal information

(1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;

...

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;

...