

Decision 035/2007 Mr James Cruickshank and the Chief Constable of Strathclyde Police
<i>Exclusion from the services of Strathclyde Police Communications Department</i>

Applicant: Mr James Cruickshank
Authority: The Chief Constable of Strathclyde Police
Case No: 200601231
Decision Date: 2 March 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 035/2007 Mr James Cruickshank and the Chief Constable of Strathclyde Police

Request for correspondence relating to a decision in respect of the services of Strathclyde Police Communications Department - information withheld under section 38(1)(a) of FOISA - personal data of which the applicant is the data subject - upheld by Commissioner.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 section 1(1) (General entitlement); section 2(1) and (2)(e) (Effect of exemptions); section 17(1) (Notice that information is not held) and section 38(1)(a) (Personal information).

Data Protection Act 1998 section 1(1) (Basic interpretative provisions) (definition of “personal data”) and section 7(1)(c)(i) (Rights of access to personal data).

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

Facts

Mr Cruickshank requested from the Chief Constable of Strathclyde Police (the Police) all correspondence relating to a decision to exclude him and employees of “The Digger” publication from the services of Strathclyde Police Communications Department.

The Police issued a refusal notice under section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA) stating that they did not hold this information. Mr Cruickshank was not satisfied with this response and asked the Police to review their decision. The Police carried out a review and, as a result, notified Mr Cruickshank that they held information which came within the terms of his request but that it was exempt in terms of section 38(1)(a) (Personal information) of FOISA. Mr Cruickshank remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Police had dealt with Mr Cruickshank’s request for information in accordance with Part 1 of FOISA.

Background

1. On 18 April 2006, Mr Cruickshank wrote to the Police requesting the following information: all correspondence, including internal memos and emails, relating to a decision to exclude him and employees of "The Digger" from the services of Strathclyde Police Communications Department.
2. On 19 May 2006, the Police wrote to Mr Cruickshank in response to his request for information. The Police issued a refusal notice under section 17 of FOISA stating that the requested information was not held.
3. On 30 May 2006, Mr Cruickshank wrote to the Police requesting a review of their decision. In particular, Mr Cruickshank drew the Police's attention to the statement that the decision to exclude "The Digger" from Police press facilities had been reached "after a number of discussions" and for this reason he sought review of the notice that no information was held.
4. On 29 June 2006, the Police wrote to notify Mr Cruickshank of the outcome of their review. In terms of section 21(4)(b) of FOISA, the Police's Review Panel overturned the initial decision and substituted a new decision. The Review Panel interpreted the initial request in a less restrictive manner and wrote again on 14 July 2006, with its final decision, informing Mr Cruickshank that it considered the information requested to be exempt under sections 38(1)(a) and (b) (personal information) of FOISA. The Review Panel explained that Mr Cruickshank may be entitled to some of the information, as his personal data, by making a subject access request under the Data Protection Act 1998 ("the DPA") and that such documents as he would be entitled to under the DPA would be provided with redaction of any personal data of third parties.
5. On 21 July 2006, Mr Cruickshank wrote to my Office stating that he was dissatisfied with the outcome of the Police's review and applying to me for a decision in terms of section 47(1) of FOISA. Mr Cruickshank stated (by letters of 27 August 2006 and 4 September 2006) that he did not believe that a subject access request under the DPA would enable him to obtain the information he wanted i.e. correspondence relating to the decision to exclude employees of "The Digger" from the services of the Police Communications Department.
6. The application was validated by establishing that Mr Cruickshank had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

7. A letter was sent to the Police on 6 September 2006, in terms of section 49(3)(a) of FOISA, giving notice that an application had been received and that an investigation into the matter had begun. The Police were invited to comment on the matters raised by Mr Cruickshank and on the application as a whole.
8. The Police responded on 3 October 2006 with the information requested and the case was then allocated to an investigating officer.
9. During the investigation, the investigating officer advised Mr Cruickshank that the information withheld was his personal data in terms of the DPA and that he should make a subject access request to gain access this information. Mr Cruickshank stated that this would not enable him to gain access to information about employees of “The Digger”, and reasons for their exclusion from the services of the Police Communications Department.
10. Having discussed the matter with the Police, the investigating officer also advised Mr Cruickshank that the information which had been withheld from him did not contain the personal data of any employee of “The Digger”, other than Mr Cruickshank.
11. Mr Cruickshank explained that for him the issue was not that this was a personal data but related to the ability of “The Digger”, and its staff, to gain access to information to allow the publication to report within the law, and that continued refusal of access to the Police’s Press Department prevented this.

The Commissioner’s Analysis and Findings

12. The Police withheld 14 documents from Mr Cruickshank. Firstly, I shall consider the claim by the Police that documents 18, 20 and 22 do not come within the terms of Mr Cruickshank’s request and therefore do not require to be disclosed. I shall then consider whether the information withheld is the personal data of which Mr Cruickshank is the data subject. The Documents supplied to my Office by the Police are numbered 9 – 22, but referred to in their Review Decision Log as documents 1 -13. In this Decision Notice I shall refer to the documents in accordance with the numbering supplied to my Office i.e. 9 – 22.

13. The Police stated that they did not regard all of the information withheld as falling within the terms of the request i.e. in particular as relating to the decision to exclude.
14. Having read documents 20 and 22 I accept that they fall outwith the scope of the request since they do not relate to the decision to exclude: although they are the personal data of Mr Cruickshank, they are not within the terms of his request. Document 18 falls within the scope of the request, but I accept that one of the emails contained in document 18 is outwith the terms of the request [email of 23 December 2005 [13:31:03]].

Application of Section 38(1)(a)

15. The Police provided the Decision Log of its Review Panel to explain their reasoning in respect of the withholding of the information, i.e. that the information amounted to the personal data of Mr Cruickshank and was exempt in terms of section 38(1)(a) of FOISA and that the information would be provided to him if he were to make a subject access request under the DPA.
16. Section 38(1)(a) of FOISA exempts information if it constitutes personal data of which the applicant (i.e. Mr Cruickshank) is the data subject. In order to determine whether the correspondence contains personal data, I have referred to the definition of personal data contained in section 1(1) of the DPA (the definition is contained in the Appendix to this decision).
17. In their submissions to my Office, the Police stated that they relied on the exemption in section 38(1)(a) of FOISA on the basis that the correspondence contains the personal data of Mr Cruickshank, with Mr Cruickshank being the main focus of the documents. Strathclyde Police also commented that they consider the majority of the information retrievable by him by means of a subject access request under section 7 of the DPA.
18. In looking at the information which has been withheld from Mr Cruickshank, it is clear that the information is correspondence which has information concerning Mr Cruickshank at its focus. The correspondence relates to Mr Cruickshank in his business or professional life (in respect of his involvement with the "The Digger" publication). The correspondence has Mr Cruickshank as the subject and I am satisfied that the correspondence constitutes personal data of which Mr Cruickshank is the data subject, although a part of document 18 is outwith the scope of the request as are the whole of documents 20 and 22.

19. The exemption in section 38(1)(a) is absolute, in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. I am not therefore required to go on to consider whether the public interest lies in the information being released or withheld.
20. It is clear that Mr Cruickshank is keen to access this information under FOISA and not under the DPA. Mr Cruickshank referred to a reported instance of the requirement to disclose personal data under the Freedom of Information Act 2000 i.e. the expenses of MPs [the Corporate Officer of the House of Commons and the Information Commissioner and Mr Norman Baker MP (Appeal Number: EA/0006/0015 and 0016)]. I would only comment that this decision deals with the disclosure of third party personal data and not to the disclosure of the personal data of the applicant.
21. Having found that the information which has been withheld from Mr Cruickshank is entirely exempt in the terms of section 38(1)(a) of FOISA, I am not required to consider section 38(1)(b) of FOISA. In any event, I note that the information withheld from Mr Cruickshank does not contain the personal information of employees of The Digger or reasons for their exclusion from the services of the Police Communications Department.
22. Since the question of Mr Cruickshank's' right to access this personal data is governed by the DPA, it is the Information Commissioner responsible for data protection matters throughout the UK who will have the authority to deal with any matter Mr Cruickshank wishes to raise in relation to any future subject access request.

Decision

I find that the Chief Constable of Strathclyde Police (the Police) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cruickshank.

Appeal

Should either Mr Cruickshank or the 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
2 March 2007

APPENDIX

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
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (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

...

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
 - ...

7 Rights of access to personal data

- (1) Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled –
 - ...
 - (c) to have communicated to him in an intelligible form -
 - (i) the information constituting any personal data of which that individual is the data subject ...