

Decision Notice



Decision 075/2012 Ms Carolyn Stuart and Social Care and Social Work
Improvement Scotland

Closure of a care home

Reference No: 201102070
Decision Date: 24 April 2012

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Margaret Keyse

Acting Scottish Information Commissioner

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Summary

Ms Stuart requested from Social Care and Social Work Improvement Scotland (SCSWIS) information relating to the intervention of both Falkirk Council and the Care Commission in respect of a named care home. In responding, SCSWIS withheld certain information in terms of section 38(1)(b) of FOISA, on the basis that it was personal data, the disclosure of which would breach the first data protection principle. Following a review, Ms Stuart remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SCSWIS had dealt with Ms Stuart's request for information in accordance with Part 1 of FOISA, by withholding certain information in terms of section 38(1)(b) of FOISA. She did not require SCSWIS to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (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"); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6)

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.

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. Following previous information requests and other correspondence with SCSWIS about the closure of care homes, on 21 June 2011, Ms Stuart wrote to SCSWIS requesting a copy of any and all paperwork, letters, minutes, etc., relating to the intervention of both Falkirk Council and the Care Commission resulting in the Emergency Closure of Brackensfield Care Home, Slamannan, Falkirk in 2003.
2. On 22 June 2011, SCSWIS responded and stated that there had been no Emergency Closure of this care home in 2003, or any intervention by the Care Commission or Falkirk Council. The SCSWIS provided Ms Stuart with the information it held about the cancellation of the care home's registration (which it also understood to be covered by the request), but withheld certain information (described as "the names of certain people and residents mentioned in some of the documentation") in terms of section 38(1)(b) of FOISA. It considered disclosure of the redacted information would breach the first data protection principle.
3. On 26 July 2011, Ms Stuart wrote to SCSWIS requesting a review of its decision. Ms Stuart made clear that she was aware of the involvement of two named "pertinent individuals", in addition to other circumstances leading to the closure.
4. SCSWIS wrote to Ms Stuart on 1 August 2011, asking her to clarify her request for review: that is, was Ms Stuart questioning the information already supplied or the possibility that there was other relevant information held by SCSWIS which had not been released.
5. SCSWIS notified Ms Stuart of the outcome of its review on 23 August 2011, upholding its decision that the disclosure of the information withheld in terms of section 38(1)(b) of FOISA would breach the first data protection principle.
6. Ms Stuart wrote to SCSWIS on 25 August 2011 (i.e. after the review outcome had been sent to her), confirming (in the context of SCSWIS's request for clarification) that she was seeking all correspondence pertaining to the care home from 1 March 2003 to 31 March 2004, particularly in relation to two named individuals.
7. On 31 October 2011, Ms Stuart wrote to the Commissioner, stating that she was dissatisfied with the outcome of SCSWIS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Ms Stuart 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.



Investigation

9. On 5 December 2011, SCSWIS was notified in writing that an application had been received from Ms Stuart and was asked to provide the Commissioner with any information withheld from her. SCSWIS responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted SCSWIS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it respond to specific questions. In particular, SCSWIS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the requirements of section 38(1)(b). It was also asked to describe the steps taken to identify and locate the information Ms Stuart had requested.
11. SCSWIS's response to Ms Stuart had informed her that certain of the withheld information was the personal data of the residents of the care home. During the investigation, Ms Stuart confirmed to the investigating officer that she was not seeking information about residents of the care home. Accordingly, the Commissioner will not consider the withholding of the residents' personal data further in this decision.
12. The relevant submissions received from both SCSWIS and Ms Stuart will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Ms Stuart and the SCSWIS and is satisfied that no matter of relevance has been overlooked.

Information held by SCSWIS

14. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, that held at the time the request is received.
15. To determine whether SCSWIS dealt with Ms Stuart's request correctly, the Commissioner must be satisfied as to whether, at the time it received her request, SCSWIS held any further information (other than that referred to in the outcome of the review, i.e. that provided or redacted) which would fall within the scope of that request.



16. Ms Stuart's application to the Commissioner questioned whether the SCSWIS had provided all the information it held to her. SCSWIS was asked by the Commissioner to explain how it had ensured that all the information falling within the scope of Ms Stuart's request had been identified, i.e. what searches and enquiries it carried out in this context, such as details of staff consulted, records searched, keywords used to support the searches and who had carried out those searches.
17. SCSWIS replied that it had reviewed its paper records and electronic practice management system to ensure that all information relating to Ms Stuart's request was located. SCSWIS explained that this was where all information related to registered or cancelled services was held centrally.
18. As the Commissioner has stated in previous cases, the standard of proof to apply in determining whether a public authority holds information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of any searches carried out by the public authority. She will also consider, where appropriate, any other reason offered by the public authority to explain why information is not held. Other matters may affect the Commissioner's view, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which has not been brought to light.
19. In this case, the Commissioner is satisfied that the SCSWIS conducted a reasonable assessment of whether it held any information falling within the scope of Ms Stuart's request. The searches and enquiries detailed by SCSWIS appear appropriate and adequate in the circumstances. Consequently, the Commissioner accepts, on the balance of probabilities, that the SCSWIS held no information falling within the scope of Ms Stuart's request, other than that supplied to Ms Stuart (in some cases, subject to redaction).
20. The Commissioner will now go on to decide whether the information redacted was properly withheld in terms of section 38(1)(b) of FOISA.

Section 38(1)(b) - Personal information

21. SCSWIS withheld information in terms of section 38(1)(b) of FOISA, on the basis that disclosure would breach the first data protection principle. 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 the application of this exemption, therefore, the Commissioner will firstly consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, he will go on to consider whether its disclosure would breach the first data protection principle.



Is the information under consideration personal data?

23. “Personal data” are defined in section 1(1) of the DPA as, inter alia, “data which relate to a living individual who can be identified from those data ...” (the full definition is set out in the Appendix).
24. The Commissioner has considered the withheld information and is satisfied that it comprises personal data. The withheld information is, for the most part, names of living individuals. Those individuals can be identified from the information and that information is biographical in relation to those individuals and focuses on them. The Commissioner is therefore satisfied that the information relates to those individuals.

The first data protection principle

25. The first data protection principle states that personal data shall be processed fairly and lawfully. It 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. The Commissioner is satisfied that none of the withheld information constitutes sensitive personal data; therefore, she is not required to consider whether any of the conditions in Schedule 3 can be met.
26. The processing in this case would be by way of disclosure in response to Ms Stuart’s request. When considering the conditions in Schedule 2, the Commissioner has also noted Lord Hope’s comment in the case of *Common Services Agency v Scottish Information Commissioner*¹, 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 interests of the data subject.
27. SCSWIS was asked whether any of the conditions in Schedule 2 to the DPA would allow the information to be disclosed. In particular, SCSWIS was asked if it had considered the application of condition 1, which applies where the data subject (i.e. the person to whom the data relate) has consented to the processing of their personal data. If this condition had been considered and discounted, SCSWIS was asked to explain why.
28. SCSWIS responded that it normally sought the consent of people to release their information into the public domain, but due to the time lapse in this case (approximately seven to eight years), SCSWIS did not consider itself to be in the position to contact anyone to obtain the requisite consent. The Commissioner accepts this as reasonable in the circumstances and has therefore determined that condition 1 cannot be met in this case.

¹ 2008 UKHL 47



29. The Commissioner therefore considers that only condition 6 in Schedule 2 to the DPA might be considered to apply in this case. Condition 6 allows personal data to be processed if that 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.
30. As the Commissioner has stated in previous decisions, there are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Ms Stuart have a legitimate interest in obtaining this personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?
 - Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? As noted by Lord Hope in the above judgement, there is no presumption in favour of the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Ms Stuart must outweigh the rights, freedoms or legitimate interests of the data subject before condition 6(1) will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that SCSWIS was correct to refuse to disclose the personal data to Ms Stuart.

Does Ms Stuart have a legitimate interest?

31. Ms Stuart's application to the Commissioner indicated why she considered the information should be disclosed: to increase transparency about the closure of the care home. She was concerned at the closure of the home and wanted to understand why it had been closed, within a relatively short timescale, being concerned at the effect of the closure on staff and (vulnerable) residents.
32. Ms Stuart stated she had a personal interest in the information, but declined to expand on this. She referred to potential impropriety surrounding the closure.
33. SCSWIS did not believe Ms Stuart had demonstrated a legitimate interest. In response to a question from the investigating officer, it was unsure what "scrutiny" might be effected in respect of the care home in question.
34. In the absence of any evidence on this point, the Commissioner is not in a position to consider any specific personal interest Ms Stuart may have in the information she has requested. The Commissioner accepts, however, that Ms Stuart has a legitimate interest, as a member of the general public, in understanding the circumstances surrounding the closure of a residential care home, including the involvement of the certain public authorities in that closure.



Is disclosure of the information necessary to achieve these legitimate interests?

35. The Commissioner must now consider whether disclosure of the withheld personal data is necessary for the legitimate interests identified above. In doing, so she must consider whether these interests might reasonably be met by any alternative means.
36. SCSWIS submitted that disclosure would not be necessary to have any of Ms Stuart's concerns investigated or scrutinised.
37. The Commissioner notes that SCSWIS has provided Ms Stuart with the majority of the information it holds and which falls within the scope of her request. The SCSWIS has provided correspondence and staff notes. There is nothing withheld in full – rather there are redactions (of names and other identifiers) within some documents. From the disclosed information, the Commissioner is satisfied that Ms Stuart is able to understand the process involved and the actions undertaken by the then Care Commission (as SCSWIS's predecessor) and others in respect of the care home.
38. The Commissioner is not satisfied in the circumstances that the disclosure of the redacted information is necessary to meet Ms Stuart's legitimate interest. Having considered the redacted information, together with what has been disclosed, she does not believe that disclosure of this remaining information would contribute sufficiently to the fulfilment of that legitimate interest for her to conclude that such additional disclosure would be necessary. That disclosure would only increase Ms Stuart's understanding of the situation in the very limited sense of making her aware of the identities of certain persons involved. It would say nothing, for example, about any question of impropriety, and in the circumstances the Commissioner cannot accept the extent to which disclosure would contribute to the legitimate interest as being of any real significance.
39. Having concluded that disclosure of the withheld information is not necessary for the purposes of Ms Stuart's legitimate interests, the Commissioner cannot accept that condition 6 in Schedule 2 to the DPA is capable of being met in this case. In the absence of a condition permitting disclosure, the Commissioner must also find that disclosure would not be lawful. Therefore, the Commissioner finds that disclosure would contravene the first data protection principle and that SCSWIS was correct to withhold the information under section 38(1)(b) of FOISA.



DECISION

The Commissioner finds that Social Care and Social Work Improvement Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Stuart.

Appeal

Should either Ms Stuart or Social Care and Social Work Improvement Scotland 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
Acting Scottish Information Commissioner
24 April 2012



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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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;

...

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.
...