

# Decision Notice

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## **Decision 088/2018: Mr Hugh Watson and the Scottish Public Services Ombudsman**

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### **Information contained in complaint file**

Reference No: 201800062

Decision Date: 21 June 2018



Scottish Information  
Commissioner

## Summary

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The SPSO was asked for information contained in a complaint file.

The SPSO withheld the information on the basis that disclosure was prohibited by other legislation (the Scottish Public Services Ombudsman Act 2002) and also notified the applicant that much of the information was his own personal data: some information was disclosed under the Data Protection Act 1998.

The Commissioner investigated and found that the SPSO was entitled to withhold the information, on the basis that disclosure was prohibited by other legislation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure)

Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19 (Confidentiality of information)

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.

## Background

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1. On 6 September 2017, Mr Watson made a request for information to the Scottish Public Services Ombudsman (the SPSO). The request was for information contained in a case file for a complaint made by Mr Watson to the SPSO. He made specific reference to explanations obtained from the public authority against which the complaint was directed.
2. The SPSO responded on 5 October 2017. In its response, the SPSO notified Mr Watson that section 19 of the SPSO Act prohibited it from disclosing information obtained in respect of a complaint, except for specified purposes (which did not include disclosure under FOISA). The SPSO cited section 26(a) of FOISA, on the basis that disclosure was prohibited by or under an enactment.
3. The SPSO also informed Mr Watson that it considered much of the information to be Mr Watson's own personal data. It withheld all his personal data under section 38(1)(a) of FOISA, clarifying that it intended to respond to the request (to the extent that it related to his own personal data) under the Data Protection Act 1998 (the DPA). The SPSO went on to disclose information to Mr Watson on this basis.
4. In two emails on 28 November 2017, Mr Watson asked the SPSO to review its decision to withhold all the information he described in his request under FOISA. He did not appear to be satisfied that he had been provided with information falling within the scope of his request.
5. The SPSO notified Mr Watson of the outcome of its review on 22 December 2017, upholding its application of sections 26(a) and 38(1)(a) of FOISA. The SPSO also provided additional comments on the information disclosed under the DPA.

6. On 8 January 2018, Mr Watson wrote to the Commissioner and applied for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the SPSO's review because, in his view, he should have been provided with certain evidence he understood the SPSO to have obtained as part of its investigation.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Watson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 12 February 2018, the SPSO was notified in writing that Mr Watson had made a valid application. The SPSO was asked to send the Commissioner the information withheld from disclosure to Mr Watson under FOISA. The SPSO provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPSO was invited to comment on this application, with particular reference to the exemptions applied in its responses to Mr Watson.
10. Submissions were received from both the SPSO and Mr Watson.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Watson and the SPSO. He is satisfied that no matter of relevance has been overlooked.

### **Section 26(a) - Prohibitions on disclosure**

12. The Commissioner will firstly consider the SPSO's application of section 26(a) of FOISA.
13. Section 26(a) of FOISA exempts information from disclosure under FOISA, where disclosure of the information is prohibited by, or under, any enactment. This is an absolute exemption, in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA. In this case, the SPSO argued that such a prohibition was created by section 19(1) of the SPSO Act (which is reproduced in Appendix 1).
14. Section 19(1) of the SPSO Act provides that information obtained by the Ombudsman, or any of the Ombudsman's advisers, in connection with any matter in respect of which a complaint or a request has been made, must not be disclosed except for a limited range of purposes specified elsewhere in section 19 (see Appendix 1 for details). These purposes do not include disclosure of information under FOISA.
15. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on the disclosure of information that engages section 26(a) of FOISA. Section 19(1) clearly states that the prohibition relates to information "obtained" by the Ombudsman or any of his advisers in connection with any matter in respect of which a complaint or a request has been made.
16. Having considered the information withheld from disclosure under FOISA in this case, the Commissioner is satisfied that the information under consideration was obtained by the

SPSO during its investigation of a complaint and is information to which the prohibition in section 19(1) applies. Given the terms of Mr Watson's request, he is clearly seeking information obtained from the public authority which was the subject of his complaint. The Commissioner therefore accepts that the SPSO was entitled to apply the exemption in section 26(a) of FOISA to the information requested by Mr Watson.

17. As the Commissioner has found that the withheld information was correctly withheld under section 26(a) of FOISA, there is no requirement for him to consider the application of section 38(1)(a) of FOISA in this case.

### **Information held by the SPSO**

18. While the Commissioner notes that Mr Watson appears to be dissatisfied with what has been disclosed to him under the DPA, that is not a matter he can consider in this decision: his remit here extends only to considering whether the SPSO has complied with FOISA (and not the DPA) in dealing with Mr Watson's request. He can, however, consider whether the SPSO identified and located all of the information it held and which fell within the scope of Mr Watson's request.
19. The Commissioner obtained comments on this point from the SPSO. Having considered the SPSO's submissions on the steps it took to review the relevant complaint file, he is satisfied that these were adequate and proportionate in the circumstances, and should have located any relevant information held by the SPSO. The fact remains, however, that – even if any such information had been held by the SPSO – it could not have been required to disclose it to Mr Watson under FOISA

## **Decision**

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

## **Appeal**

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Should either Mr Watson or the SPSO 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**  
**Head of Enforcement**

**21 June 2018**

### 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 –

...

(b) section 26;

...

#### 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act) —

(a) is prohibited by or under an enactment;

...

## Scottish Public Services Ombudsman Act 2002

### 19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are –
  - (a) the purposes of –
    - (i) any consideration of the complaint or request (including any statement under section 11),
    - (ii) any investigation of the matter (including any report of such an investigation),
  - (b) the purposes of any proceedings for –
    - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
    - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
  - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
  - (d) the purposes of any proceedings under section 14,
  - (e) where subsection (2A) applies, the purposes of a welfare fund review.
- (2A) This subsection applies if –
  - (a) the matter in respect of which the complaint or request has been made relates to an exercise of a function by a local authority on an application to receive assistance in pursuance of section 2 of the 2015 Act, and
  - (b) the welfare fund review relates to the decision made by the authority on that application.
- (2B) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with a welfare fund review must not be disclosed except for any of the purposes specified in subsection (2C) or as permitted by subsection (3).
- (2C) Those purposes are –
  - (a) the purposes of the review,
  - (b) the purposes of any proceedings for –
    - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,

- (ii) an offence of perjury alleged to have been committed in the course of the review,
  - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
  - (d) where subsection (2D) applies, the purposes of any consideration of a complaint or request in respect of a matter, or the investigation of the matter.
- (2D) This subsection applies if –
- (a) the matter in respect of which the complaint or request has been made relates to an exercise of a function by a local authority on an application to receive assistance in pursuance of section 2 of the 2015 Act, and
  - (b) the welfare fund review relates to the decision made by the authority on that application.
- (3) Where information referred to in subsection (1) or (2B) is to the effect that any person is likely to constitute a threat to the health or safety of individuals (in particular or in general), the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health or safety of the particular individuals or, as the case may be, individuals in general.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must–
- (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
  - (b) inform the person from whom the information was obtained of the disclosure.
- (4A) The duty under subsection (4)(a) to inform a person about the identity of a person to whom information has been disclosed does not apply where informing the former person is likely to constitute a threat to the health and safety of the latter person.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.
- (5A) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2C)) of matters coming to the knowledge of the Ombudsman or advisers in connection with a welfare fund review.
- (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to –
- (a) any document or information specified in the notice, or
  - (b) any class of document or information so specified,

that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.

- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from -
  - (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
  - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13), is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.
- (9) In relation to such information, subsection (2)(a) has effect as if-
  - (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
  - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.
- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.



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