

Decision Notice



Decision 125/2008 Mr Begley and the Chief Constable of Strathclyde Police

Information relating to the death of a named individual

Reference No: 200800109

Decision Date: 25 September 2008

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Summary

Mr Michael Begley (Mr Begley) requested information pertaining to the sudden death of a named individual from the Chief Constable of Strathclyde Police (Strathclyde Police). Strathclyde Police responded by stating that some of the information he sought was not held and the remainder was exempt under FOISA. Following a review, Mr Begley remained dissatisfied and applied to the Commissioner for a decision.

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

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1), (2)(e)(ii) (Effect of exemptions); 17 (Notice that information is not held); 18 (Further provisions as respects responses to request); 34(2)(b)(ii) (Investigations by Scottish public authorities and proceedings arising out of such investigations); 35(1)(a) (Law enforcement) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); 2 (Sensitive personal data) and Schedule 1 (The data protection principles - the first and second data protection principles)

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 31 August 2007, Mr Begley wrote to Strathclyde Police requesting the following information (the lettering is slightly different from that used by Mr Begley):
 - a. The time and date on which Strathclyde Police were notified of a named individual's death;
 - b. Who notified the police authorities about the death and how the notification took place;



- c. A copy of the statements collated by the Strathclyde Police about the death;
 - d. Whether Strathclyde Police contacted another, named police force regarding the death, and, if so, how the contact took place and details of who received the communications and when;
 - e. Whether the other, named police force contacted Strathclyde Police and, if so, how the contact took place and details of who made the contact and when;
 - f. How did Strathclyde Police have possession of the named individual's medical history
 - g. Whether Strathclyde Police were informed by the named police force that the named individual was under criminal investigation;
 - h. The time and date of when the deceased's remains were released to the next of kin;
 - i. Verification that Strathclyde Police witnessed the remains;
 - j. The name of any person in Ireland or the United Kingdom making representations to Strathclyde Police regarding the death;
 - k. Copy of the report by Strathclyde Police on the death or other information relevant that may be available.
2. Strathclyde Police responded on 8 October 2007 to part of Mr Begley's request. They refused to release the information relating to parts (a), (b), (h), (i) and (k) on the basis that the exemptions in sections 38 and 34(2)(b)(ii) of FOISA applied to it. On 25 October 2007, Strathclyde Police responded to the remaining parts of Mr Begley's request. In response to part (c) of his request, Strathclyde Police applied sections 38(1)(b), 34(2)(b)(ii) and 39(1) of FOISA. In response to parts (d), (e) and (j) of his request, Strathclyde Police stated that they did not hold the information in terms of section 17 of FOISA. In response to part (f) of Mr Begley's request, Strathclyde Police informed him that in all cases of a Sudden Death, it is the normal process for the Police to contact the deceased's General Practitioner to establish the medical history of the deceased. In response to part (g) of Mr Begley's request, Strathclyde Police applied section 18 of FOISA, read in conjunction with section 35.
 3. On 8 November 2007, Mr Begley wrote to Strathclyde Police requesting a review of their decision. Mr Begley was not satisfied that Strathclyde Police had adequately addressed each of his requests and was not satisfied with Strathclyde Police's statement that they did not hold some of the information which fell within the scope of his request.
 4. Strathclyde Police notified Mr Begley of the outcome of their review on 11 December 2007. They upheld their original response with respect to their response to parts (a), (b), (c), (d), (e), (h), (i), (j) and (k) of his request. With respect to part (g) of Mr Begley's request, Strathclyde Police stated that they now wished to rely on section 18, read in conjunction with both section 34 and 35 of FOISA.



5. On 22 January 2008, Mr Begley 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.
6. The application was validated by establishing that Mr Begley 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

7. On 20 February 2008, Strathclyde Police were notified in writing that an application had been received from Mr Begley and were asked to provide the Commissioner with any information withheld from the applicant. Strathclyde Police responded with the information requested and copies of their decision logs which detailed how it handled Mr Begley's request. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted Strathclyde Police, providing them with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them 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.
9. In response to this letter, Strathclyde Police informed the investigating officer that they had re-examined the information contained within the Decision and Review Logs and stated that they wished the investigating officer to rely on the reasoning set out therein.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the information and submissions that have been presented to him by both Mr Begley and Strathclyde Police and he is satisfied that no matter of relevance has been overlooked.
11. Within their submissions to the Commissioner, Strathclyde Police explained that it had tried to provide assistance to Mr Begley with regard to the investigation of sudden deaths and the role of the Procurator Fiscal in this process without disclosing information which would breach the DPA or which was relevant to the investigation carried out to ascertain the circumstances of this death.



Parts (d), (e) and (j) of Mr Begley's request – Information not held

12. In response to parts (d), (e) and (j) of Mr Begley's request, Strathclyde Police stated that they did not hold the information sought in terms of section 17 of FOISA. In their response to Mr Begley, Strathclyde Police explained that they held no record of having contacted another police force with respect to the named individual's death. Strathclyde Police explain that it was more likely that the other police force would have contacted them by telephone. The Commissioner notes that Strathclyde Police's current call monitoring system was not implemented until August 2005; prior to this, only 999 calls were recorded.
13. Strathclyde Police also explained that, given the passage of time between the incident in question and the request made by Mr Begley, the officers concerned had moved to different duties. Strathclyde Police contacted these officers to ascertain if they personally held any recorded information in their own personal notebooks relating to this request. It was established that no further information was available from these sources.
14. Strathclyde Police supplied the investigating officer with details of the searches undertaken to establish that the information sought by Mr Begley was not held. The Commissioner is satisfied that adequate searches have been undertaken by Strathclyde Police to establish that the information sought by Mr Begley was not held. The Commissioner is therefore satisfied that Strathclyde Police were correct in their application of section 17 of FOISA in response to parts (d), (e) and (j) of Mr Begley's request.

Parts (b), (c) and (h) of Mr Begley's request – Personal information

15. Strathclyde Police submitted that the information held by them in relation to parts (b), (c) and (h) of Mr Begley's request is exempt under section 38(1)(b) of FOISA as it contains personal data relating to living individuals and that the release of this information to a third party would breach the requirement to process personal data fairly, as laid down by the first data protection principle in Schedule 1 of the DPA. (Strathclyde Police also considered that the information they held in relation to parts (a) and (k) is also exempt under section 38(1)(b). However, the Commissioner has considered it more appropriate to consider (a) and (k) in relation to the exemption in section 34(2)(b)(i) – see below.) Strathclyde Police explained that the data was gathered for the purpose of the investigation into a sudden death and to process it for another purpose would be unlawful. This suggests that Strathclyde Police considered also that disclosure of the information would breach the second data protection principle. This was not made clear in the Strathclyde Police's submissions, but, in any event, the Commissioner has not had to consider the second data protection principle separately.
16. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), allows an authority to withhold personal data if disclosure would contravene any of the data protection principles laid down in Schedule 1 to the DPA.



17. The first consideration in respect of section 38(1)(b) is whether the information constitutes personal data for the purposes of the DPA. "Personal data" is 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 (see the full definition in the Appendix).
18. Having considered the information withheld, which forms part of a wider report surrounding this death, the Commissioner is satisfied that the information is intrinsically linked to the personal information of the officers involved, witnesses and surviving relatives. The Commissioner is therefore satisfied that the information is personal data.

Would disclosure of the information breach the first data protection principle?

19. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (of the DPA) is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
20. Having considered the definition of "sensitive personal data" in section 2 of the DPA (see definition contained in the Appendix), the Commissioner does not consider that the information encompassed by parts (b), (c) and (h) to fall into this category.
21. Having considered the nature of this information and the circumstances in which it was furnished to Strathclyde Police, the Commissioner is satisfied that the parties involved would not have had an expectation that this information would be released. Given the sensitivity of the subject matter, the Commissioner has also taken into account the likelihood of distress being caused to surviving family members of the deceased should this information be disclosed. The Commissioner concludes that it would be unfair to disclose this information in these circumstances.
22. The first principle requires the processing to be both fair and lawful. Consequently, having found the disclosure of the information to be unfair, the Commissioner is satisfied that Strathclyde Police was correct in its application of section 38(1)(b) of FOISA to parts (b), (c) and (h) of Mr Begley's request.

Parts (a),(k) and (i) of Mr Begley's request – Investigations by Scottish public authorities and proceedings arising out of such investigations

23. In response to parts (a) and (k) of Mr Begley's request, Strathclyde Police stated that the information was exempt in terms of section 34(2)(b)(ii) of FOISA. Section 34(2)(b)(ii) of FOISA exempts information held at any time by a Scottish public authority for the purposes of an investigation being carried out for the purpose of making a report to the procurator fiscal as respects the cause of death of a person. (Section 34(2)(a) deals separately with information held for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 which has not been concluded.)



24. The information held in relation to part (i) of Mr Begley's request is intrinsic to the information contained with the Sudden Death Report and withheld in relation to part (k) of Mr Begley's request.
25. Section 34(2)(b)(ii) of FOISA is subject to the public interest test required by section 2(1)(b) of FOISA. This means that, although the information may be exempt, it should still be released unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
26. Strathclyde Police submitted that the information was held for an investigation carried out for the purpose of making a report to the Procurator Fiscal as respects the cause of death of a person. The Commissioner is satisfied that this is the case and, accordingly, that the report falls within the class of information considered exempt under section 34(2)(b)(ii) of FOISA.
27. As noted above, although the information in the report is exempt, it should still be released unless, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. The Commissioner will therefore go on to consider the public interest test in line with section 2(1)(b) of FOISA.
28. While Strathclyde Police noted that Mr Begley may have an interest in knowing this information, they also commented that the report contains personal details of third parties, their recollection of events and observations and that disclosure of this information would deter witnesses from coming forward to the police in future and thus would ultimately hamper police investigations. Strathclyde Police also submit that the information would cause distress to the family members if the report was released into the public domain.
29. Strathclyde Police acknowledged that there is a public interest in transparency which would facilitate a sense of justice to the individual. They highlight that the provision of further information may provide "closure" in this particular instance. However, Strathclyde Police also believe that in the course of an investigation such as this, there is an acceptance that the information gathered will not be disclosed to a third party other than in the course of criminal proceedings or other proceedings concerning the death. Strathclyde Police submit that to disclose this information may undermine the expectation and may deter victims or witnesses from assisting the police in future. They submit that this would impact upon the future investigation of such complaints and would result in the Force being unable to investigate them effectively.
30. In conclusion, Strathclyde Police submitted that on balance the public interest favours the retention of the information as it would not be in the public interest to release information which could impact on the flow of information to the Police service or Force.
31. Having carefully considered the particular circumstances of this case, the Commissioner is not satisfied that the public interest in disclosure is significant enough to outweigh that in withholding the report and specific details contained therein. The Commissioner therefore concludes that Strathclyde Police was correct in its application of section 34(2)(b)(ii) of FOISA to parts (a) and (i) of Mr Begley's request.



32. Strathclyde Police also applied sections 39(1) and 38(1)(b) to parts (a), (i) and (k) of Mr Begley's request. As the Commissioner is satisfied that Strathclyde Police have correctly withheld the information under section 34(2)(b)(ii) of FOISA, he is not required to go on and consider these further exemptions.

Part (g) of Mr Begley's request – Further provision as respects responses to request

33. Strathclyde Police applied section 18 of FOISA to this part of Mr Begley's request. Section 18 of FOISA gives public authorities the right to refuse to confirm or deny whether information is held by them in limited circumstances. Those circumstances are as follows:
- a. a request has been made to the authority for information which may or may not be held by it;
 - b. if the information were held by the authority (and it need not be), the information would be exempt under one of the exemptions contained in sections 28 to 35, 39(1) or 41 of FOISA; and
 - c. the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
34. Strathclyde Police submitted that if it did hold the information sought by Mr Begley that it would be exempt under sections 34 and 35(1)(a) and (b) of FOISA.
35. Where a public authority has chosen to rely on section 18(1) of FOISA, the Commissioner must establish whether the authority is justified in issuing a refusal notice on the basis that to reveal whether the information exists or is held would be contrary to the public interest; and also to establish that if the information existed and was held, the authority would be justified in refusing to disclose the information by virtue of any of the exemptions provided for by sections 28 to 35, 39(1) or 41 of FOISA.
36. In so doing, the Commissioner must ensure that this decision notice does not confirm one way or the other whether the information requested actually exists or is held by the public authority. This means that he will be unable to comment in any depth on the reliance by the public authority on one of the exemptions listed in section 18(1), as to do so could have the effect of indicating whether the information exists or is held by the public authority.
37. In general, the application of section 18 can be explained as a "Neither Confirm Nor Deny" (NCND) policy where the public interest would be harmed if the authority were to confirm or deny that certain information was held.
38. The Commissioner has taken into consideration Mr Begley's arguments in respect of his case, and his arguments that the information requested should be supplied to him. However, on the basis of the information that has been submitted to the Commissioner by Strathclyde Police, he is satisfied that it would be contrary to the public interest for Strathclyde Police to reveal whether the information requested by Mr Begley exists or is held by it.

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39. Section 35(1)(a) of FOISA was one of the exemptions put forward by Strathclyde Police in conjunction with the use of section 18 of FOISA. Section 35(1)(a) of FOISA provides that information is exempt information if its disclosure, would or would be likely to, prejudice substantially the prevention or detection of crime.
40. The Commissioner is satisfied that, if it existed and was held by Strathclyde Police, the information requested by Mr Begley would fall within the scope of this exemption. The Commissioner is also satisfied that if the information existed and was held, the public interest in maintaining this exemption would outweigh the public interest in the disclosure of the information.
41. On the basis of the above, the Commissioner is satisfied that Strathclyde Police acted in accordance with Part 1 of FOISA by refusing to confirm whether the information requested by part (g) of Mr Begley's request, exists or is held by it.

DECISION

The Commissioner finds that Strathclyde 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 Begley.

Appeal

Should either Mr Begley 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.

Kevin Dunion
Scottish Information Commissioner
25 September 2008



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.

...

- (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
- (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 –

...

- (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.

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.

- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

34 Investigations by Scottish public authorities and proceedings arising out of such investigations

...

- (2) Information is exempt information if-

...

- (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-

...

- (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.

...



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
- (a) the prevention or detection of crime;
 - ...

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.

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-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

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.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or purposes.