

Decision Notice

Decision 207/2016: Mrs X and South Lanarkshire Council

Accident report and notes

Reference No: 201600663

Decision Date: 3 October 2016



Scottish Information
Commissioner

Summary

On 27 October 2015, Mrs X asked South Lanarkshire Council (the Council) for information relating to an accident. The Council withheld information which it considered to be the personal data of Mrs X's child, and supplied this information in redacted form under the Data Protection Act 1998. It withheld some information under section 36(1) of FOISA (Confidentiality). Following a review, Mrs X remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mrs X's request for information in accordance with Part 1 of FOISA. The Commissioner found that the Council did not actually hold some of the information it had withheld at the time of the request – this meant that it was not covered by the request. She found that the Council was correct to withhold information under section 36(1) of FOISA. The Commissioner did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 20(1) and (3) (Requirement for review of refusal etc.); 21(1) and (3) (Review by Scottish public authority); 36(1) (Confidentiality)

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

1. On 27 October 2015, Mrs X made a request for information to the Council, for copies of all information relating to a specified accident (i.e. accident report, letters and all emails).
2. The Council responded by letter dated 26 November 2015. It identified the following information as falling within Mrs X's request:
 - Document 1 – Accident Record
 - Document 2 – Accident Report (Part 1)
 - Document 3 – Accident Report (Part 2)
 - Document 4 – Notes regarding accident
3. The Council withheld the Accident Record and Part 1 of the Accident Report (documents 1 and 2) under section 38(1) of FOISA (Personal information) on the basis that the accident had involved Mrs X's child, who could be identified from the information. It supplied redacted versions of these documents under the Data Protection Act 1998. The signatures of those signing the accident book (that is, document 1) were withheld under section 38(1)(b) of FOISA.
4. The Council withheld Part 2 of the Accident report (document 3) and the accident notes (document 4) under section 36(1) of FOISA (Confidentiality). The Council referred to this information as being covered by litigation privilege.

5. On 27 January 2016, Mrs X asked the Council for the full Accident report. She had been told that the accident was reported fully to the Council's Health and Safety Department, but the information she had received only provided limited details of the accident. She wanted to see a full report and asked the Council to confirm if this could be done only "through a lawyer".
6. The Council conducted a review and notified Mrs X of the outcome on 24 February 2016. The Council considered only documents 3 and 4, stating that Mrs X had complained only about the withholding of information in these documents. It upheld its initial decision to withhold the information under section 36(1) of FOISA, because the information was prepared with litigation in mind, and the public interest favoured withholding the information.
7. On 11 May 2016, Mrs X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mrs X was dissatisfied with the outcome of the Council's review because she wanted to be sure the accident had been reported fully to the Council's Health and Safety department, and she also thought the accident should have been reported to the Health and Safety Executive. She was also dissatisfied that the Council had conducted a review of its response to her request, on the basis of her email of 27 January 2016. Mrs X challenged the Council's decision to withhold documents 3 and 4 (email of 11 May 2016).

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mrs X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 13 May 2016, the Council was notified in writing that Mrs X had made a valid application. The Council was asked to send the Commissioner the information withheld from Mrs X. The Council provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

Commissioner's analysis and findings

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 her by both Mrs X and the Council. She is satisfied that no matter of relevance has been overlooked.
12. Mrs X made clear to the Commissioner that she wished to obtain the information in documents 3 and 4 to check that the incident had been reported correctly. Her concern was to prevent a similar incident happening in the future. She said she did not wish to obtain personal data of any third parties or have personal data put into the public domain. Accordingly, the Commissioner has excluded from consideration any personal data of third parties, in what follows.

Information covered by the request

13. The Council confirmed that document 4 (the accident notes) existed at the time Mrs X's request was received, but document 3 (Part 2 of the Accident Report) did not. This was due

to an error: in line with Council procedures, Part 2 of the report should have been completed at the same time as Part 1.

14. The Council is aware that a request for information is for the information held by an authority on the date of receipt of the request. It stated that it should have given Mrs X notice, in terms of section 17 of FOISA, that it did not hold the information in Part 2 of the Accident Report at the date of her request, while explaining that Mrs X could resubmit her request as the position had changed. The Council had seen no practical purpose in doing this, given that it would have refused to provide the information covered by the resubmitted request, considering it to be exempt from disclosure in terms of section 36(1) of FOISA. Instead, the Council had refused to provide the information on the grounds that it was exempt from disclosure under section 36(1).
15. Section 1(4) of FOISA states that the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. Although the Council may have taken a practical approach in relation to the information which had not been created at the time of Mrs X's request, it was not an approach which complied with FOISA. As the Council did not hold Part 2 of the Accident Report (document 3) at the time it received Mrs X's request, the Council should not have applied an exemption to this information, but rather should have advised Mrs X that she should submit a new request for the information. The Council was therefore wrong to identify document 3 as information which it held at the time of the request, and failed to give Mrs X notice that it did not hold this information, as required by section 17(1) of FOISA.

Was all information located?

16. The Commissioner will now consider whether all information covered by Mrs X's request has been located by the Council. As her request was widely framed ("all information relating to a specified accident"), the Commissioner asked the Council whether any further recorded information was held – for example, whether there were any emails or communications that fell within the request.
17. The Council confirmed that it did not hold any further information. The member of staff within the Council who was responsible for information relating to the accident had confirmed that no further information was held, other than that identified.
18. The Commissioner accepts that the Council took adequate, proportionate steps in the circumstances to establish what information it held that fell within the scope of the request. The Commissioner is satisfied that the Council identified all information held by it as of the date of the request.

Section 36(1) - Confidentiality

19. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council withheld the notes regarding the accident under this exemption (document 4).
20. Among the types of communication which fall within this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
21. Communications *post litem motam* are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as

possible, without the risk that their opponent/s, or prospective opponent/s, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.

22. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
23. Mrs X made clear to the Commissioner that she was seeking confirmation that the incident had been reported fully. She emphasised that she had no intention to bring a claim or to seek any financial gain, and made clear in her application to the Commissioner that her concern was to prevent a similar incident happening in the future.
24. The Council responded that it was aware of Mrs X's stated intention not to raise a claim for the incident, but took the view that this was irrelevant in determining whether privilege applied to the withheld information. Rather, the important issue was the purpose for which the information had been created, and the privilege arising as a result of that purpose. Only the Council could decide to waive privilege, not Mrs X.
25. The Council submitted that the courts have recognised that an accident, such as an incident at work, is likely to result in some sort of claim and, therefore, reports prepared at the time are prepared with that likelihood in mind. The Council cited *More v Brown and Root Wimpey Highland Fabricators Ltd* 1983 SLT 669 as authority for this proposition, and quoted from that case (at 671):

"It is perfectly true that the general rule has always been understood to apply to reports and records prepared by or on behalf of one side or the other after a real likelihood of a claim and a disputed question of liability has emerged. The particular form of the general rule which has been adopted since 1957 has simply reflected recognition by the courts that in modern conditions there are few, if any, accidents, and especially industrial accidents, which do not immediately give rise to a real likelihood of a dispute about liability, and that in the interests of certainty it must now be recognised that confidentiality ought to attach to all records and reports of investigations made after an accident has occurred."
26. Although it had not received any claim in relation to the incident, the Council was of the view that such absence of claim was not a bar to the exemption applying. It submitted that there does not need to be an actual claim, merely likelihood of a claim occurring. It accepted that privilege does not apply to reports prepared for another purpose, such as the Council's duties under the Health and Safety at Work Act etc. 1974 (the 1974 Act), but argued this was not the case for the Accident notes. It had disclosed the statutory reports in connection with the accident prepared in compliance with the 1974 Act.
27. The Council explained that those responsible for undertaking any investigation into an accident would be aware that the purpose of any interviews was in contemplation of litigation by the Council. It supplied the Commissioner with its Guidance (*Management Arrangements on Accident Reporting and Investigation*) in relation to the completion of accident reports.
28. The Council's Guidance on the completion of accident report does not appear to indicate whether such notes should be created, but it does give guidance (at paragraph 8.3 and

onwards) about the need to ensure that the sequence of events is identified and evidence collected. Such information (i.e. the sequence of events, evidence collected, etc.) is likely to be information found in such notes.

29. The Commissioner's guidance¹ on section 36(1) of FOISA notes:

Litigation privilege applies to documents created by the party contemplating the potential litigation, to expert reports prepared on their behalf and to legal advice given in relation to potential litigation. (Note, however, that there is a specific exception which relates to routine accident reports prepared as a matter of course at the time of, or shortly after, an accident.)

30. The Council correctly pointed out that the timing of creation of the information is important. The Council explained the dates within which the notes were made. The Commissioner cannot reveal the information within the notes, but it suggests the notes were compiled (or at least completed) over a longer timescale. She accepts that the information in the accident notes would not fall within the specific exception to litigation privilege referred to in her guidance, which relates to routine accident reports prepared as a matter of course at the time of, or shortly after, an accident.
31. The Commissioner accepts the Council's argument that the information in the accident notes was reported in the context of possible litigation. The Commissioner does not doubt that Mrs X's main concern is to understand fully how her child's accident happened and to be sure that it had been correctly and fully reported, with the aim that a similar action should not happen again. However, the Commissioner must recognise that the Council may have viewed the accident as possibly leading to litigation. While a number of purposes may have been served by the notes, the Commissioner is satisfied that the notes were prepared in contemplation of litigation.
32. Information cannot be privileged unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed. For this to be the case, the information must possess the quality of confidence at that time, i.e. at least up to the point at which the authority carries out a review of its response to the information request and communicates the outcome to the requester.
33. The Commissioner is satisfied that the content of the notes (document 4) has not been disclosed by the Council in such a way as to result in the loss of the quality of confidence, and that the withheld information has not been made public, either in full or in summary. The notes contain personal data, including some sensitive personal data, and, as would be expected for such information, this still retains its confidentiality.
34. The Commissioner is therefore satisfied that the notes are subject to legal professional privilege and that they fall within the scope of section 36(1) of FOISA.
35. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx>

Public interest test

36. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds: see, e.g., the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*² (2004) UKHL 482.
37. The Council acknowledged a general public interest in authorities being open and transparent, but believed there was a greater public interest in ensuring the Council's right to prepare fully for potential litigation. It commented that, although Mrs X may believe that she has a legitimate interest in ascertaining the Council's actions in respect of the incident, this should not be taken into consideration when looking at the public interest test. The Council submitted that her objective in obtaining the information (i.e. to ensure other children were treated properly in the future and a full risk assessment put in place to prevent any future incident) would not be served by disclosing the information.
38. The Commissioner has no reason to doubt that Mrs X's purpose in requesting the information from the accident notes is scrutiny of the Council's actions with the aim of preventing similar accidents in future, and that she has no intent in terms of litigation. The Commissioner disagrees with the Council that this purpose would not be served by providing the notes. Whilst the Commissioner cannot reveal the content of the withheld information, in general terms she considers that the content of notes on an accident would reveal information which may be relevant to others in a similar work situation within the Council. Simply put, others may read the notes and reflect on whether such an accident would be likely in their surrounds. This would have the effect Mrs X suggests.
39. The Commissioner accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. She acknowledges that disclosure of the withheld information would contribute to transparency and accountability in this context. However, on balance, the Commissioner has concluded that in this case there is a greater public interest in allowing the Council to prepare fully for potential litigation, without these preparations being open to examination by the other party.
40. The Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1) of FOISA and that the Council was correct in withholding the information.

Section 20 - Requirement for review of refusal etc.

41. Mrs X complained that the Council had conducted a review on the basis of her email of 27 January 2016, without this being her intention when she sent the email. The Council argued that, in terms of FOISA, it was obliged to address the concerns expressed in that email by reviewing its response to her request. Only if Mrs X had withdrawn her requirement of review, would the Council not have been obliged to conduct the review. The Council apologised to Mrs X (4 March 2016) that it omitted to acknowledge her email of 27 January 2016: it acknowledged that this would have informed Mrs X that her email was being treated as seeking a review, and would have given her the opportunity to say that she did not require a review.

² <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

42. Section 20(1) of FOISA provides that an applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request may require the authority to review its actions and decisions in relation to that request. This is referred to in FOISA as a "requirement for review". Section 20(3), which is quoted in full in Appendix 1, provides what is required for a requirement for review.
43. Although Mrs X did not intend her email to be a requirement for review, the Commissioner accepts the Council's submission that her email does meet the technical requirements to constitute a requirement for review within the terms of section 20(3), and that the Council was obliged to conduct a review.
44. Given the wording of Mrs X's email, it might have been helpful if the Council had contacted her to make sure that she did intend to seek a review. However, the Council was not required to do so in order to comply with FOISA, and the Commissioner has found no breach of Part 1 of FOISA in this respect.

Decision

The Commissioner finds that South Lanarkshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs X.

The Commissioner finds that the Council correctly withheld the information in document 4 under section 36(1) of FOISA. She also found that the Council correctly accepted an email from Mrs X as a request for review, in compliance with section 20(3) of FOISA.

However, the Council failed to notify Mrs X that it did not hold the information in document 3 at the time it received her request, as required by section 17(1) of FOISA.

The Commissioner does not require the Council to take any action in respect of this failure in response to Mrs X's application.

Appeal

Should either Mrs X or the Council 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.

Head of Enforcement

3 October 2016

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 –

...

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

...

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.

...

20 Requirement for review of refusal etc.

(1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

...

(3) A requirement for review must-

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify-
 - (i) the request for information to which the requirement for review relates; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

(3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on the requirement.

...

36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

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