

Decision Notice



Decision 209/2011 Mr Frank French and the Scottish Legal Complaints Commission

Information relating to the departure of the former Chief Executive

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www.itspublicknowledge.info

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Summary

Mr French asked the Scottish Legal Complaints Commission (the SLCC) for correspondence relating to the departure of its former Chief Executive. The SLCC initially failed to respond but, following a review, advised Mr French that whilst it held some of the information he had requested, it was exempt from disclosure under various exemptions contained in the Freedom of Information (Scotland) Act 2002 (FOISA). The SLCC also advised Mr French that it did not hold some of the correspondence he had asked for. Mr French was dissatisfied with the response from the SLCC and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SLCC had complied with FOISA in dealing with Mr French's information request. He found that the SLCC did not hold some of the information Mr French had asked for and that the information which it did hold was all exempt from disclosure under 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).

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 17(1) (Information not held) and 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) section 1(1) (Basic interpretative provisions) (definition of personal data) and 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: condition 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.



Background

1. On 3 January 2011, Mr French asked the SLCC for correspondence concerning the resignation of its former Chief Executive (CEO) and the CEO's subsequent employment. The request specifically included all correspondence with the Scottish Public Services Ombudsman (the SPSO), the Scottish Government, the Scottish Parliament, the Scottish Parliamentary Corporate Body (the SPCB) and MSPs.
2. Mr French also wanted to know the reasons for the former CEO's departure and what the financial arrangements were.
3. On 3 February 2011, Mr French wrote to the SLCC, noting that he had not received a response to his request and asking it to carry out a review.
4. The SLCC subsequently carried out a review and notified Mr French of the outcome of the review on 3 March 2011. The SLCC informed Mr French that a statement had been released regarding the former CEO's departure and provided him with a copy of that statement. It also confirmed that it held correspondence with the Scottish Government in relation to the departure of the CEO and that it held information regarding the terms of the departure. However, with the exception of the statement which it had provided to Mr French, the SLCC stated that all of the information it held was exempt from disclosure under a number of different exemptions in FOISA, one of which was the exemption in section 38(1)(b) of FOISA.
5. The SLCC further notified Mr French, in line with section 17(1) of FOISA, that it did not hold correspondence with the SPSO, the Scottish Parliament, the SPCB or MSPs.
6. On 24 August 2011, Mr French wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SLCC's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr French 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

8. On 27 September 2011, the SLCC was notified in writing that an application had been received from Mr French. The case was subsequently allocated to an investigating officer, who, on 6 October 2011, gave the SLCC an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asked the SLCC to respond to specific questions about Mr French's application.



9. The SLCC responded, advising the investigating officer that it wished to rely on the submissions it had made in relation to *Decision 114/2011 Mr Peter Cherbi and the Scottish Legal Complaints Commission*¹, which the Commissioner issued on 9 June 2011. (The information held by the SLCC in relation to Mr French's request is a subset of the information considered by the Commissioner in *Decision 114/2011* - that decision involved a request to the SLCC for all of the information it held in relation to the resignation of the former CEO; Mr French's request focussed on *correspondence*.) In effect, therefore, the SLCC wished to apply the exemptions contained in sections 30 (Prejudice to effective conduct of public affairs), 33 (Commercial interests and the economy), 36 (Confidentiality), 38 (Personal information). This decision focuses on the section 38 exemption, for the reasons set out below.
10. At the same time, the SLCC also provided submissions in support of its position that it did not hold certain information (i.e. correspondence with the SPSO, the Scottish Parliament, the SPCB or MSPs).
11. Mr French was informed that the information held by the SLCC falling within the scope of his request had been the subject of a previous request which had resulted in *Decision 114/2011*. Mr French was advised that the Commissioner had found the information held by the SLCC to be exempt from disclosure and was asked whether, in the circumstances, he wished to withdraw his application. However, Mr French wished a decision to be issued in relation to his application and provided additional submissions as to why the information should be publicly available.
12. The relevant submissions obtained from Mr French and the SLCC 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 the submissions made to him by both Mr French and the SLCC and is satisfied that no matter of relevance has been overlooked.

Submissions by Mr French

14. Mr French submitted that, in his view, the reason the SLCC had given for the departure of the former CEO was not true and, as such, he considered it to be in the public interest to release any relevant information. He also submitted that the Scottish Government were involved in negotiations which related to the CEO's departure and that any information held in relation to this had not been considered in *Decision 114/2011*. As mentioned at paragraph 9 above, however, the information held by the SLCC which falls within the scope of Mr French's request was considered in full in that decision, so the correspondence with the Scottish Government was considered.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201100203.asp>



15. Mr French also referred to an SLCC audit report dated 30 June 2010 which referred to the departure of the former CEO and commented that the public have a right to know why the CEO left the SLCC and what the financial arrangements were. He commented that most public authorities and private companies publish the annual remuneration and pension provisions of their senior officers and that the information requested should also be made public as it was paid using money from the public purse.

Section 38(1)(b) of FOISA

16. Although the SLCC has relied on a number of exemptions in this case, the Commissioner notes that all of the information falling within the scope of Mr French's request was withheld under section 38(1)(b) of FOISA. Although, in *Decision 114/2011*, the Commissioner found that not all of the information which had been withheld was personal data for the purposes of section 1(1) of the Data Protection Act 1998, he is satisfied that all of the information falling within the scope of Mr French's request *is* personal data for the reasons set out in paragraph 17 of that decision.
17. In *Decision 114/2011*, the Commissioner concluded that disclosure of the personal data would breach the first data protection principle and that the personal data was, accordingly, exempt from disclosure under section 38(1)(b) of FOISA.
18. The Commissioner has considered whether the circumstances of this case are different, e.g. whether Mr French's legitimate interests would outweigh the rights and interests of the former CEO or whether the passage of time or events which have taken place since the decision was issued would alter his view as to the application of section 38(1)(b).
19. However, having considered Mr French's submissions, the Commissioner maintains (as concluded at paragraph 42 of *Decision 114/2011*) that the disclosure of the personal data in question would be disproportionately intrusive in terms of the limited public benefit likely to result from disclosure, and that such disclosure would therefore cause unwarranted prejudice to the rights, freedoms and legitimate interests of the former CEO. Four months have passed since *Decision 114/2011* was published, but the Commissioner considers that disclosure would still be disproportionately intrusive and he does not consider that any events have occurred in the past four months which would otherwise allow him to come to a different conclusion.
20. As such, the Commissioner considers that disclosure of the information withheld from Mr French would breach the first data protection principle. Accordingly, the Commissioner finds that the information is exempt from disclosure under section 38(1)(b) of FOISA.

Information not held

21. The SLCC has advised that it does not hold any correspondence in relation to the departure of the former CEO with the SPSO, the Scottish Parliament, the SPCB or MSPs.

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22. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the SLCC interpreted Mr French's request reasonably and took adequate steps to establish what information it held which fell within the scope of that request.
23. In its submissions to the Commissioner, the SLCC explained (with details) that it had carried out specific searches and enquiries to confirm that no further relevant information was held. The Commissioner is satisfied that these were adequate in the circumstances.
24. Having considered all relevant submissions, the Commissioner accepts that, on balance of probabilities, the SLCC does not hold correspondence with the SPSO, the Scottish Parliament, the SPCB or MSPs on the departure of the former CEO.

DECISION

The Commissioner finds that the Scottish Legal Complaints Commission (the SLCC) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr French.

Appeal

Should either Mr French or the SLCC 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
20 October 2011



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.

...

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.

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-

...

(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

...

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.

...