



Scottish Information
Commissioner

Decision 227/2006 Bell Solicitors acting on behalf of Mr T and the Scottish Drug Enforcement Agency
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<i>Request for details of times of duty and overtime claims</i>

Applicant: Bell Solicitors on behalf of Mr T
Authority: Scottish Drug Enforcement Agency
Case No: 200600318
Decision Date: 7 December 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 227/2006 Bell Solicitors on behalf of Mr T

Request for details of overtime claims and times of duty in respect of two named officers – section 31 national security cited – section 35(1) law enforcement cited – section 38(1)(b) cited – section 39(1) health, safety and the environment cited – public interest test considered – application of section 38(1)(b) upheld

Facts

Bell Solicitors on behalf of Mr T requested details of overtime claims and details of times of duty for a specified time period in respect of two named officers. The Scottish Drug Enforcement Agency (SDEA) refused to supply this information citing a series of exemptions in justification of this, namely, section 31(1) (National Security); section 35(1) (Law Enforcement); section 38(1)(b) Personal information; section 39(1) Health, safety and the environment. The applicant was dissatisfied with this decision and requested a review. The SDEA upheld its position on review.

Following an investigation, the Commissioner found that the information was exempt by virtue of section 38(1)(b).

Appeal

Should either the SDEA or Bell Solicitors on behalf of Mr T wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. On 15 September 2005 Bell Solicitors wrote to the SDEA and requested the following information:
 - Details of the claim made for overtime by two named Officers



- Full details of the times of their duty from 20 February 2002 to 5 March 2002 inclusive
2. Bell Solicitors advised that they were acting on behalf of Mr T who had been the subject of surveillance by the SDEA. Bell Solicitors indicated that they were conducting an Appeal on Mr T's behalf. They indicated that there should be no problem in receiving this information since the Trial had long concluded and much of the information regarding the surveillance carried out by the Officers was given as evidence in open Court.
 3. The SDEA responded to this request on 13 October 2005. The SDEA indicated that it held limited information relevant to this request for information. The SDEA advised that it held "daily duty sheets" between the dates specified and that it also held "overtime and expenses claims" for the two named officers. The SDEA advised that both officers were seconded to the SDEA from Strathclyde Police and that therefore Strathclyde Police would administer the payment of their salaries. The SDEA advised that it held a 6 monthly return but that this did not have a breakdown of specific figures relating to the period requested. The SDEA referred the applicants to Strathclyde Police.
 4. The SDEA indicated that the information it held was being withheld on the basis of a series of exemptions. The SDEA set out its submissions in respect of the following exemptions:
 - a) Section 31 National Security
 - b) Section 35(1) Law Enforcement
 - c) Section 38(1)(b) Personal Information
 - d) Section 39(1) Health, Safety and the Environment
 5. The SDEA also set out its consideration of the public interest test required by section 2(1)(b) of FOISA. The SDEA concluded that having considered both elements of the public interest test, the SDEA considered that the public interest in retaining the information, that is, in maintaining the exemptions, outweighed the public interest in disclosure.
 6. Bell Solicitors were dissatisfied with this response and on 21 December 2005 sought a review of this decision. Bell Solicitors considered that due weight had not been given to the fact that all information regarding the hours worked by the Officers came out in open Court and they were not requesting any information which would disclose the methods used by the SDEA.
 7. The SDEA responded to this request for review on 19 January 2006. The SDEA confirmed its original decision and upheld the use of the exemptions cited.



8. Bell Solicitors were dissatisfied with this response and on 2 February 2006 made an application to the Scottish Information Commissioner for a decision as to whether the Police had dealt with the request for information in terms of FOISA. The case was allocated to an investigating officer and the application validated by establishing that Bell Solicitors had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to their request.

The investigation

9. The officer formally contacted the SDEA on 15 February 2006 in terms of section 49(3)(a) of FOISA asking it comment on the application as a whole. The SDEA was asked to provide supporting documentation for the purposes of the investigation.
10. In particular, the SDEA was asked to provide a copy of the information withheld from Bell Solicitors, further information about the application of the exemptions to the information withheld and further analysis on the application of the public interest test to the information withheld.
11. The SDEA was also asked to provide information about how its review was carried out and for any guidance it had relied on in deciding whether the information should be released or withheld.
12. The SDEA visited my office on 1 March 2006 and supplied the information relevant to this investigation.
13. I will consider the submissions made by the SDEA in my analysis and findings below.

Commissioner's analysis and findings

14. Bell Solicitors requested the following information:
 - Details of the claim made for overtime by two named Officers
 - Full details of the times of their duty from 20 February 2002 to 5 March 2002 inclusive



15. The SDEA has submitted that a number of exemptions apply to the information requested and that, as a result, the information should not be disclosed. There are two parts to the applicant's request and I will consider each part in turn.

Details of the claim for overtime

Application of section 38(1)(b)

16. The SDEA submitted that Scottish police forces and the SDEA must comply with data protection legislation and that, in this regard, consideration must always be given to the first principle (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 is met and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met) of the Data Protection Act 1998 (the DPA). The SDEA claimed that section 38(1)(b) of FOISA was relevant in that some of the information requested was personal data in respect of personal financial data (overtime claims submitted and paid) release of which would breach the first data protection principle.
17. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), states that information is exempt if it constitutes personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles. Therefore an authority seeking to rely on section 38(1)(b) must not only demonstrate that the information amounts to personal data but also that disclosure would breach one or more of the data protection principles.
18. Section 38(5) of FOISA states that the definition of "personal data" is that contained in section 1(1) of DPA. That section defines personal data as:

"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."
19. In considering whether details of overtime claimed constitutes personal data I have also taken into account the decision of *Durant v the Financial Services Authority [2003] EWCA Civ 1746*.



20. In that decision, the English Court of Appeal held that if information is to be viewed as personal data, the information has to be biographical in a significant sense, i.e. go beyond the recording of the individual's involvement in a matter or event that has no personal connotations. The individual also has to be the focus of the information, rather than some other person with whom that individual may have been involved. The Court of Appeal summarised these two aspects as information affecting a person's privacy whether in his personal or family life, business or professional capacity.
21. I consider that information relating to activities carried out by a public sector employee in the course of their employment can normally be released. However, I need to consider whether particular considerations apply to information about details of overtime claims and whether this information affects the privacy of an individual even when acting in a professional capacity.
22. The reasons why an individual works overtime will vary. An employee may be required to work overtime in order that a specific project is completed within a certain time period. In other cases, the circumstances of a particular project may require it to be carried out outwith normal working hours. In these two examples, the reasons for overtime are connected with specific professional functions. However, an employee may also work overtime because of personal reasons relating to the performance of their work, the quality of the work or reasons relating to annual or special leave.
23. In this particular case the applicants have requested details of overtime claims in respect of two named officers over a specified period. The information contained on the claim forms will not simply reveal additional hours worked; they could also provide financial information. With knowledge of the officer's grade, a person in receipt of this information could be able to calculate how much additional income the named officer has received over the specified time period.
24. In all the circumstances, I am content that details of overtime claims submitted in respect of a named individual will constitute that person's personal data.
25. However, even if I am satisfied that the information requested is personal data, section 38(1)(b) requires me to consider whether release of this information would breach any of the data protection principles. In reaching a decision on this issue I must consider whether disclosure can be made to a "member of the public."



26. The SDEA has cited the first data protection principle which requires processing to be fair and lawful. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (Freedom of Information Act Awareness Guidance No 1) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:
- a) would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - b) would the data subject expect that his or her information might be disclosed to others?
 - c) has the person been led to believe that his or her information would be kept secret?
27. It seems to me that generally public sector employees would not expect details of their overtime claims to be disclosed to any member of the public who requests it. In particular, a reasonable person would not expect strangers to have access to detailed, systematic knowledge of their hours of overtime particularly given that this could reveal information about their individual income. There may, of course, be circumstances where disclosure of a named individual's overtime claims is considered fair; where, for example, the recorded information reveals fraud or wrong-doing. However, even in such cases, careful consideration would need to be given to the particular circumstances of the case before this information should be made public.
28. In this particular case the applicants have argued that information about the hours worked by the officers came out in open court. I will address these submissions in more detail below as I consider this argument to be particularly pertinent to the second part of the applicant's request: that is, the request for times of duty of the two officers. I have considered carefully the information supplied to me by the applicants which provides information about the details disclosed at court. While the information does reveal some information about the times when the officers were carrying out surveillance it does not indicate whether these activities were carried out as part of normal hours of duty or on an overtime basis. Police officers, I understand, work variable hours of duty and therefore a late evening or early morning would not automatically reveal that the officers were working overtime on the date specified. As a result, disclosure of details of the officers' overtime claims for the time period specified would provide far more information than that currently possessed by the applicants.



29. I have emphasised in *Decision 52/2005* that in considering whether disclosure would be fair I cannot take account into the identity of the applicant and the purpose for which they are seeking the information. In this case, I must consider whether any member of the public is entitled to have access to the details of overtime claims relating to a named officer. I am satisfied that in all the circumstances of the case, disclosure of the details of overtime claims in this case would be unfair and in breach of the first data protection principle.

Details of times of duty

30. The applicants also requested details of the times of duty in respect of the two named officers for the period specified. I asked the SDEA to advise what they considered times of duty to comprise and whether this amounted to the usual rostered hours or whether this incorporated any hours of overtime worked. The SDEA advised that the "times of duty" were taken to be the entire time during which the officers were on duty and that comprised the rostered hours as well as the overtime they worked during that tour of duty.
31. As I understand it, the applicants are not simply seeking the contractual hours of the officers during the time period specified but their variable hours of duty incorporating, where relevant, hours of overtime. It seemed to me that this information could also amount to the officers' personal data and potentially fall within the scope of section 38(1)(b).

Application of section 38(1)(b)

32. The definition of "personal data" for the purposes of section 38(1)(b) is set out above in paragraph 18 above. As I said, I consider that information relating to activities carried out by a public sector employee in the course of their employment can normally be released. Furthermore, the contractual hours connected with a specific position would not, it seems to me, generally constitute personal data, given that they relate to the post rather than to the post holder. However, I need to consider whether specific considerations apply to variable hours worked by a named employee.
33. I have been assisted in these deliberations by the position taken by Commissioners and Courts in other jurisdictions where this kind of information has been requested under freedom of information legislation. While these decisions are clearly not binding on me they are helpful in determining the way in which this information is generally perceived.
34. In the case of *Rynne and Department of Primary Industries - Letter Decision (21 January 2002)* the Information Commissioner of Queensland found that time sheets of a third party concerned the personal affairs of that third party. He indicated that there was a relevant distinction to be drawn in respect of matters that relate to an employee as an individual rather than an employee as agent or representative of the employer. The Commissioner indicated that:



While attendance at a place of work, and performance of allocated duties, does not concern a person's personal affairs I find that a record of the variable hours worked by and the income earned by, a person comprise information concerning the personal affairs of that person.

35. In the case of *Dagg v Canada Minister of Finance [1997] 2 S.C.R 403* the Canadian Courts considered the difference between information that relates to a position and information relating to an individual. In that case the Court found that the hours an individual worked related to the position rather than to the individual. However, in the course of a dissenting judgement La Forest J cited views of the Information Commissioner who had stated that:

The information to which you seek to have access in this case does not, in my view, provide any insight into the position held by nor the functions performed by the persons whose names appear on the sign-in sheets. While it may indicate the hours during which they attended at their work premises on a given day, this is not the type of information which, in my view, Parliament intended should be publicly accessible.....The information at issue here is not at all about the nature of the work of named public officials but only about their specific whereabouts at a specific time. There is simply no indication that Parliament intended this derogation to be interpreted in away which would result in public officials being subjected to a form of physical surveillance through records disclosure.

36. The Virginia Freedom of Information Advisory Council has also considered the issue of whether employee time sheets may be properly exempted under the Virginia Freedom of Information Act as personnel records. In this case, the Advisory Council opined that timesheets include more information than just job classification and rate of pay. They may include information such as whether an employee has been out of the office frequently due to illness or has taken a holiday. In that case, the Advisory Council indicated that, in their view, employee timesheets did amount to personnel records.
37. I am of the view that the while the contractual hours would normally relate to the position rather than to the person, the variable hours worked by a named member of staff relate to that person. To draw a distinction: I consider that the contractual hours that appear in a job description or standard contract for that position would normally relate to that position. However, the time sheets completed by each member of staff to indicate their specific hours of work each week would, in my view, relate to that individual and fall within the definition of personal data.
38. In the circumstances, I am satisfied that the times of duty worked by each named officer for the time period specified constitutes their personal data.



39. However, as stated above, even where I consider that this information amounts to personal data I must go on to consider whether disclosure would breach any of the data protection principles.
40. The applicants have explained that the information requested is required for court proceedings and indicated in both their request for information and in the request for review that information about the officers' times of duty was discussed in open court. The SDEA has submitted that the officers were not asked about their specific hours or times of duty at the original Trial.
41. I therefore asked the applicants to provide information about the extent of the information disclosed in court and, as a result, known to them. In a letter of 25 August 2006 the applicants set out information disclosed about one named Officer during the court hearing. The applicants further provided me with copies of the Log Book which had been a Crown production during the trial. I have looked carefully at this information. While these documents disclose some information about the dates and times of duty of the two named officers the information is by no means complete. In fact, the specific information relates to certain activities and does not necessarily indicate the full time of duty. Further, the information relates only to certain dates.
42. I should also add a note about the Log Book. As a Crown production this information was made available to the Defence but would not, I understand, automatically be placed in the public domain. Therefore, although this information may be known to the applicants it would not be known or accessible to any member of the public who requested it. It is also not clear the extent to which this information was subsequently discussed in open Court.
43. In any event, I am not persuaded that information revealed in open court is automatically considered to be in the public domain unless the information has been published and/or there has been contemporaneous reporting of the case in the media.
44. As I have continually emphasised I must decide whether the information can be released to any member of the public who requests it. As I result I cannot base my decision in this case on information known only to the applicants by virtue of their particular involvement in this matter.
45. Having reviewed the information known to the applicants I am satisfied that it is far from complete and that disclosure of the information held by the SDEA would provide a detailed account of the officers' times of duty during the time period specified.



46. I am of the view that generally public sector employees would not expect details of their times of duty or variable hours of work to be disclosed to any member of the public who requests it. In particular, a reasonable person would not expect strangers to have access to detailed, systematic knowledge to the hours of work.
47. I recognise that due to the nature of their work police officers may be required to provide information about their times of duty where, for example, this is relevant to a criminal investigation and/or proceedings. However, I consider that disclosure of the specific times of duty worked by a named officer over a certain time period to a member of the public goes beyond this. In any event, it seems to me that if information about the times of duty of an officer is relevant to criminal proceedings then this is matter for the Court.
48. In conclusion, therefore, I am satisfied that details of times of duty of the named officers for the time specified is their personal data. I am also satisfied that, in this case, disclosure of this information by the applicant would be unfair and therefore would be in breach of the first data protection principle. I will not, therefore, go on to consider whether the release would be lawful or whether any of the conditions in schedule 2 and/or 3 to the DPA can be met.
49. Given that I accept that the information requested in this case is exempt under section 38(1)(b) I have not gone on to consider the application of the other exemptions cited by the SDEA.

Decision

I find that the Scottish Drugs Enforcement Agency complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the information requested by Bell Solicitors in that the information was exempt under section 38(1)(b).

Kevin Dunion
Scottish Information Commissioner
7 December 2006