

Decision Notice



Decision 177/2010 Ms Matilda Gifford and the Chief Constable of Strathclyde Police

Commission date of named police officer and employment of other personnel

Reference No: 200901680
Decision Date: 12 October 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Ms Gifford requested from the Chief Constable of Strathclyde Police (Strathclyde Police) information about a named officer and also about any officer/personnel working with Strathclyde Police, but employed by other agencies or police forces within the UK. Strathclyde Police responded by providing certain information, but withholding other information as personal data, the disclosure of which would breach the data protection principles. Following a review, Ms Gifford remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Strathclyde Police had dealt with Ms Gifford's request for information in accordance with Part 1 of FOISA, as described above. He did not require Strathclyde Police to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), 2(a)(i), 2(b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal Information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of "personal data") and Schedules 1 (The data protection principles – the first principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data – conditions 1 and 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 8 May 2009, Ms Gifford's solicitors wrote to Strathclyde Police on her behalf, requesting certain information. The information requested included the date of commission of a specified police officer (request 1) and confirmation of whether Strathclyde Police "have had any officers/personnel working with them but who are employed by other agencies or police forces within the UK such as the security services" (request 2).



2. Subsequent references to correspondence from and to Ms Gifford should be read as including correspondence from and to her solicitors on her behalf.
3. Strathclyde Police responded on 5 June 2009 and provided certain information: in particular, they advised in response to request 2 that “due to the nature of policing today” there would at any given time be personnel from other “agencies or police forces” working with Strathclyde Police officers and staff, going on to provide an example. They refused, however, to provide the commission date in response to request 1, stating that the information requested was exempt in terms of section 38(1)(b) of FOISA, on the basis that it was personal data, the release of which would breach the requirement to process data fairly, as laid down by the first data protection principle in Schedule 1 to the DPA.
4. On 28 July 2009, Ms Gifford wrote to Strathclyde Police requesting a review of their decision. She challenged the withholding of the commission date, submitting that any officer cross-examined in the course of a criminal or civil matter in court would be asked for the length of their service and details of their career. She also considered there to be a public interest in the issues raised by her dealings with the named officer, which supported her view that the exemption did not apply. On request 2, Ms Gifford was dissatisfied with what she described as a “general answer”. She stated that the question was asked “as at the date of request of 8 May 2009” and looked forward to receiving a response “giving the details of the information sought as at that date”.
5. Following the intervention of the Commissioner’s Office, Strathclyde Police notified Ms Gifford of the outcome of their review on 31 August 2009. They upheld their original decision without modification. With reference to request 2, they confirmed that, at the date of the request for information, there were individuals employed by other police forces or agencies working with Strathclyde Police.
6. On 24 September 2009 Ms Gifford wrote to the Commissioner, stating that she was dissatisfied with the outcome of Strathclyde Police’s review in respect of requests 1 and 2 and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Ms Gifford 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 2 October 2009, Strathclyde Police were notified in writing that an application had been received from Ms Gifford and were asked to provide the Commissioner with any information they had withheld. Strathclyde Police responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted Strathclyde Police, giving them 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 provide detailed arguments in support of their application of section 38(1)(b) of FOISA, and to provide comments on Ms Gifford's assertion that an adequate response had not been provided to request 2.
10. Along with submissions on section 38(1)(b) of FOISA, Strathclyde Police submitted that they also wished to rely on section 39(1) of FOISA in respect of the commission date. Further submissions were obtained from both Strathclyde Police and Ms Gifford in the course of the investigation. Insofar as relevant, these will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the submissions made to him by both Ms Gifford and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) of FOISA – personal information

12. The exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, where appropriate, section 38(2)(b)) exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles set out in Schedule 1 to the DPA. This exemption is absolute in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
13. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
14. Strathclyde Police applied this exemption to the date of commission of the named officer, that is, in response to request 1.

Is the information personal data?

15. As noted above, "personal data" is defined in section 1(1) of the DPA which is reproduced in the Appendix to this decision.



16. Having considered the withheld information, the Commissioner accepts that it is the personal data of a living individual, given that the officer named in the request can be identified from the information in conjunction with other information held by Strathclyde Police. The information is biographical of that individual and focuses on them, and therefore the Commissioner is satisfied that it relates to the individual.

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

17. Strathclyde Police have argued that the release of the information would breach the first data protection principle.
18. 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 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure in response to Ms Gifford's information request.
19. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case do not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this case.
20. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
21. The Commissioner will consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

Can any of the conditions in Schedule 2 to the DPA be met?

22. Strathclyde Police informed the Commissioner that the data subject (the named officer) had refused to consent to disclosure of his personal data. Consent to disclosure of the personal data by the data subject would mean that condition 1 in schedule 2 could be met. Since consent to disclosure has been refused by the data subject, condition 1 is not applicable in this case.



23. In their submissions, Strathclyde Police identified condition 6 in Schedule 2 as the only other one which might be applicable in this case, but provided arguments as to why it could not be met. The Commissioner accepts that none of the other conditions in Schedule 2 would allow processing by disclosure in this case, and condition 6 would therefore appear to be the only condition which could be relevant. Condition 6 allows personal data to be processed if 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 (the individual to whom the data relate).
24. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Ms Gifford have a legitimate interest in obtaining these personal data?
 - If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?
 - Even if the processing is necessary for the legitimate purposes of Ms Gifford, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject, in this case the named officer? This will involve a balancing exercise between the legitimate interests of Ms Gifford and those of the data subject. Only if (or to the extent that) the legitimate interests of Ms Gifford outweigh those of the data subject can the personal data be disclosed.

Does the applicant have a legitimate interest?

25. Strathclyde Police submitted that Ms Gifford did not have a legitimate interest in obtaining the requested information, nor was there an overwhelming public interest in the named officer's date of commission.
26. Strathclyde Police acknowledged a media interest¹ in the incident involving Ms Gifford and the named officer at the time, but submitted that an officer's length of service had no relevance to their capability if the force had decided the officer was best suited for the role they undertook.
27. Ms Gifford explained the situation that led to the information request, also referring to the fact that this had been the subject of media attention². She referred to what were described as "unwelcome intrusions" by the named officer with a view to recruiting her as an informant on the environmental group known as "Plane Stupid" (in whose activities she had been involved). She also referred to a degree of confusion, following approaches to Strathclyde Police, as to when the named officer had become a serving police officer of Strathclyde Police – and to the possibility that wrong information on this matter had (deliberately or otherwise) been provided to her or her solicitors.

¹ <http://www.guardian.co.uk/commentisfree/2009/apr/29/plane-stupid-campaign-police-informants>

² <http://www.guardian.co.uk/uk/2009/apr/24/strathclyde-police-plane-stupid-recruit-spy>



28. While acknowledging that Strathclyde Police had since confirmed that the data subject was one of their officers, she stated that they had not released the date on which the officer had commenced employment with the force. She therefore believed that there remained a “real and legitimate doubt” as to whether the data subject had been an officer of Strathclyde Police *at the relevant time* i.e. the time of her dealings with him. Given that she was seeking to lodge a complaint in respect of the officer’s conduct, the question she required answered was his status at that time rather than currently.
29. Additionally, Ms Gifford submitted that there was a wider interest in this information being released. She argued that officers of police forces, security services or intelligence services should be identifiable and should be held accountable for their actions. She considered the public to be entitled to transparent policing within the community.
30. Having considered the submissions of both parties, the Commissioner accepts that Ms Gifford has a legitimate interest in obtaining the requested information, at least with a view to confirming whether the data subject was an officer of Strathclyde Police at the relevant time.

Is disclosure of the information necessary to achieve those legitimate interests?

31. Having decided that the applicant has a legitimate interest, the Commissioner has to consider whether disclosure of the withheld information is necessary to achieve these legitimate aims.
32. On the question of necessity, Strathclyde Police noted that the commission date had no relevance to the officer’s skills, training, aptitude or role, and therefore could not accept any pressing social need in disclosure.
33. Ms Gifford submitted that release of the information would not be disproportionate, arguing that disclosure of the particular information was necessary to achieve her and the wider public’s legitimate interest given the uncertainty described above as to the employer of the officer at the relevant time. She did not consider that other information, such as length of service (which would presumably include all previous service in police forces throughout the United Kingdom), could meet this need.
34. Having considered the submissions of both parties, the Commissioner considers it possible to envisage alternative means of meeting the legitimate interest identified by Ms Gifford while interfering less with the privacy of the relevant data subject. It appears to the Commissioner that a straightforward confirmation of the officer’s employment status at the relevant time, which he would consider less intrusive in the circumstances, would suffice.



35. While acknowledging that there may have been aspects of earlier communications with Strathclyde Police which affected the applicant's confidence in any subsequent communications on the matter, it appears to the Commissioner (having considered all relevant submissions) that the roots of any uncertainty in this matter lie in administrative error rather than any intention to confuse or deceive. In the course of the investigation, on 25 August 2010, Strathclyde Police confirmed to Ms Gifford that the named officer "was a serving officer of Strathclyde Police, and on duty at the time of his dealings with ... Ms Gifford". While noting that Ms Gifford remains dissatisfied with this response (and while noting that it might have been provided earlier), the Commissioner finds that it meets her legitimate interest without the disclosure of any further information. On a reasonable interpretation, it provides the confirmation she requires. He does not, therefore, find disclosure of the commission date to be necessary for the purposes of Ms Gifford's legitimate interests.
36. Having decided that that disclosure of the specific information requested by Ms Gifford is not necessary to achieve her legitimate interests, the Commissioner does not consider it necessary to (and therefore will not) go on to decide whether disclosure would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject. As disclosure is not necessary in the circumstances, he must conclude that condition 6 cannot be met and, for the same reasons, that disclosure would not be fair. In the absence of a condition permitting disclosure, it would also be unlawful.
37. In all the circumstances, therefore, the Commissioner's conclusion is that the first data protection principle would be breached by disclosure of the named officer's commission date. Consequently, he is satisfied that this information was properly withheld by Strathclyde Police under section 38(1)(b) of FOISA.
38. Having decided that the information was properly withheld under section 38(1)(b) of FOISA, the Commissioner will not consider the exemption under section 39(1) of FOISA cited by Strathclyde Police.

Request 2

39. The Commissioner will now consider how Strathclyde Police dealt with request 2.
40. Request 2 was worded as follows:
Please confirm whether Strathclyde Police have had any officer/personnel working with them but who are employed by other agencies or police forces within the UK such as the security services.
Strathclyde Police responded that "due to the nature of policing today there will at any time be personnel from other 'agencies or police forces' working with Strathclyde Police officers and staff." They provided an example.



41. In her request for a review, Ms Gifford described Strathclyde Police's response to this request as a "general answer". She pointed out that the question had been asked "as at the date of the request for information on 8 May 2009" and that she awaited "a response giving the details of the information sought as at that date". In response to this, Strathclyde Police confirmed that at the date of Ms Gifford's request, there were individuals employed by other police forces or agencies working with Strathclyde Police.
42. Ms Gifford was not satisfied that request 2 had been properly answered by Strathclyde Police. Noting that she had given an example of the type of outside agency she was referring to, she considered that Strathclyde Police should have understood that she was seeking specifics on which agencies they had working with them, rather than simply a "yes" or "no" response. She did not accept that the words "confirm", "whether" and "have had" elicited such an answer, suggesting that if Strathclyde Police had wished to take that "narrow" approach to the question they should have provided assistance as to the circumstances in which they would provide the specific information she wanted.
43. Strathclyde Police, on the other hand, submitted that the applicant had not asked *what* personnel were present from other forces or agencies, but rather *whether* such personnel were present. Consequently, the response could have been a simple "yes" or "no".
44. In the circumstances, the Commissioner accepts the approach taken by Strathclyde Police: it appears to him that a simple "yes" or "no" is the only response reasonably to be expected to the question "whether". Such a response was provided in response to Ms Gifford's request for review. In this connection, the Commissioner also notes that Ms Gifford's information request and request for review were made by her solicitors on her behalf: taking account of the opinion of Court of Session in the case of *Glasgow City Council v Scottish Information Commissioner [2009] CSIH 73*³ (where the Court considered solicitors to be amongst those who could "be expected to describe precisely what it is that they wish to receive"), he does not consider that it would have been unreasonable for Strathclyde Police to have expected a more specific request if Ms Gifford had indeed been seeking further details of the arrangements in question. Given the request they received, from a solicitor acting on behalf of the applicant, the Commissioner accepts their interpretation and subsequent handling of it as appropriate in the circumstances, and therefore is satisfied that (in the respects identified in Ms Gifford's application) Strathclyde Police dealt with request 2 in accordance with Part 1 of FOISA.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made on behalf of Ms Gifford.

³ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



Appeal

Should either Ms Gifford or the Chief Constable of 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.

Margaret Keyse
Head of Enforcement
12 October 2010



Appendix

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.

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

1. The data subject has given his consent to the processing.

...

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.

...

Decision 177/2010
Ms Matilda Gifford
and the Chief Constable of Strathclyde Police

