

Decision Notice



Decision 050/2013 Mr Rory Cassidy and the Chief Constable of Strathclyde Police

List of suspects in murder of Mr Kevin "Gerbil" Carroll

Reference No: 201201985
Decision Date: 25 March 2013

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Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 23 July 2012, Mr Cassidy asked the Chief Constable of Strathclyde Police (Strathclyde Police) for the list of 99 suspects compiled by officers investigating the murder of Kevin “Gerbil” Carroll which had been read out during a High Court trial. Strathclyde Police withheld some information and also advised Mr Cassidy that it did not hold some of the information he had asked for.

Following an investigation, the Commissioner found that Strathclyde Police did not hold some of the information Mr Cassidy had asked for, and were entitled to withhold the information they did hold under section 38(1)(b) (personal data) of FOISA.

The Commissioner did not require any action to be taken in response to this decision.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 17(1) (Notice that information is not held); 38(1)(b) and (2)(a)(i) and (b) and (5) (definition of “the 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 2(g) (Sensitive personal data); Schedules 1 (The data protection principles) (the first data protection principle) and 3 (Conditions relevant for the purposes of the first principle: processing of sensitive personal data) (conditions 1 and 5)

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 13 January 2010, Kevin “Gerbil” Carroll was shot dead whilst seated in the rear of a car which was parked in the car park of an ASDA supermarket in the Robroyston area of Glasgow.
2. In March 2012, Ross Monaghan stood trial at the High Court in Glasgow accused of the murder of Mr Carroll. Mr Monaghan was acquitted on 3 May 2012.



3. During Mr Monaghan's trial, Mr Cassidy states that Mr Monaghan's defence QC, Derek Ogg, read out a list of 99 names that he identified as potential suspects involved in the murder of Mr Carroll.
4. On 23 July 2012, Mr Cassidy wrote to Strathclyde Police asking for the list read out by Mr Ogg. He also asked for:
 - a) the name of each person on the list (given names, surnames and nicknames);
 - b) the age of each person
 - c) the reason detectives believed they may be responsible (whether it be through intelligence received, possible sightings of the suspects near the locus, and so on);
 - d) how the police thought they were involved (in other words was Mr Z suspected of putting the money up or pulling the trigger)?
 - e) any information about a grading system used by the police – for example it is 50% likely Mr X was responsible, but only 10% likely Mr Y was behind it.
5. Strathclyde Police responded on 23 August 2012. They advised that, as the information requested by Mr Cassidy in parts a) and b) of his request is the personal information of third parties, release of which would be contrary to the first data protection principle, the information was exempt from disclosure under section 38(1)(b) of FOISA. Given that disclosure would increase the likelihood of individuals being subject to retaliation in some form, Strathclyde Police advised Mr Cassidy that they were also relying on the exemption in section 39(1) of FOISA.
6. In response to parts c) and d) of Mr Cassidy's request, Strathclyde Police advised that disclosure would, or would be likely to, prejudice substantially the prevention or detection of crime, or the apprehension or prosecution of offenders. As such, they were withholding this information under sections 35(1)(a) and (b) of FOISA. Strathclyde Police also considered that the exemption in section 34(1)(a) of FOISA applied to this information, as it forms part of information held in relation to an investigation carried out by them. Strathclyde Police explained to Mr Cassidy why they considered these exemptions applied.
7. Strathclyde Police also notified Mr Cassidy, in line with section 17 of FOISA, that they did not hold any information which would address part e) of his request.
8. On 28 August 2012, Mr Cassidy wrote to Strathclyde Police requesting a review of their decision. Mr Cassidy commented on some of the reasoning given by Strathclyde Police for seeking to withhold information from him which would address parts a) to d) of his request, and set out why he considered these explanations and reasoning to be flawed or incapable of being sustained.
9. On 25 September 2012, Strathclyde Police notified Mr Cassidy that, following a review, they were upholding their original decision without modification.



10. On 28 September 2012, Mr Cassidy 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.
11. The application was validated by establishing that Mr Cassidy 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

12. On 10 October 2012, Strathclyde Police were notified in writing that an application had been received from Mr Cassidy.
13. The investigating officer gave Strathclyde Police an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asked them to respond to specific questions. These included matters raised by Mr Cassidy in his requirement for review, which they had not previously addressed.
14. As Mr Cassidy had not requested a review of Strathclyde Police's response to part e) of his request, this was not considered during the Commissioner's investigation.
15. During the investigation, a meeting took place between the investigating officer, staff from Strathclyde Police Information Management Unit, and officers involved in the investigation of the murder of Mr Carroll to discuss the information covered by Mr Cassidy's request. Following the meeting, Strathclyde Police responded to the questions raised in the investigator's letter.
16. The relevant submissions received from both Strathclyde Police and Mr Cassidy will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered the submissions made to her by both Mr Cassidy and Strathclyde Police and is satisfied that no matter of relevance has been overlooked.

Withheld information

18. As noted above, Mr Cassidy asked for the list of 99 suspects read out by Mr Ogg during Mr Monaghan's trial.



19. Strathclyde Police advised the Commissioner that they do not hold such a list, and that the information read out by Mr Ogg during Mr Monaghan's trial was derived from information contained in the Sensitive Disclosure Schedule, which Strathclyde Police submitted to the Crown Office and Procurator Fiscal Service (COPFS) as part of the case against Mr Monaghan.
20. When the Police submit a case to the COPFS for prosecution, they must provide COPFS with all information and evidence which is necessary to prove that the accused is guilty of the offence(s) for which he/she has been charged. In submitting a case, the Police include schedules which list the information, evidence and productions which are relevant to the case. One schedule should be provided for non-sensitive material and another for material that is sensitive.
21. COPFS usually disclose the Non-Sensitive Disclosure Schedule to the defence counsel for the accused.
22. The Sensitive Disclosure Schedule contains material, the disclosure of which would create a real risk of serious prejudice to an important public interest. The Commissioner notes that this is not disclosed to the defence counsel by COPFS as a matter of course¹.
23. Strathclyde Police explained that, once a report (including all associated schedules) is passed to COPFS, it is for COPFS to decide whether to proceed with the case and what information to disclose to the defence counsel. Strathclyde Police also advised that the defence counsel is entitled to receive copies of information from COPFS which would exculpate the accused. It is for COPFS to decide whether to disclose the information in the Sensitive Disclosure Schedule.
24. However, although Strathclyde Police informed the Commissioner that they do not hold the list that Mr Cassidy refers to, they have confirmed that they do hold the names understood to have been read out by Mr Ogg, which would fulfil parts a) – d) inclusive of Mr Cassidy's request. The Commissioner is therefore satisfied that they hold this information for the purposes of FOISA.

Parts a) and b) (names and ages)

Section 38(1)(b) – Personal information

25. Strathclyde Police have applied the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) of FOISA, to information which would fulfil parts a) and b) of Mr Cassidy's request. This exempts information from disclosure if it is "personal data" as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

¹ <http://www.scotland.gov.uk/Publications/2007/09/11092728/12>



26. In order to rely on this exemption, Strathclyde Police must show that the information being withheld is personal data for the purposes of the DPA and that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles.

Is the information personal data?

27. Personal data is defined in section 1(1) of the DPA 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 likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
28. Strathclyde Police have applied the exemption in section 38(1)(b) to the name and age of each person on the list read out by Mr Ogg.
29. Having considered this information, the Commissioner is satisfied that information as to the name (including given names, surname and nicknames) and age of the persons on the list is the personal data of those individuals: it is possible to identify the individuals from the data itself, in line with definition (a) of personal data. The withheld information clearly relates to the data subjects and the Commissioner is satisfied that it is their personal data.

Would disclosure contravene the first data protection principle?

30. In their submissions, Strathclyde Police argued that disclosure of the name and age of the data subjects would contravene the first data protection principle. This states 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 of the personal data into the public domain in response to Mr Cassidy's information request.
31. In their submissions, Strathclyde Police argued that the names and ages of the individuals comprises sensitive personal data, as defined in section 2(g) (information as to the commission or alleged commission by him of any offence) of the DPA, because the information was gathered as part of an ongoing investigation into the murder of Mr Carroll.
32. Having considered the definition of sensitive personal data set out in section 2(g) of the DPA, the Commissioner agrees with Strathclyde Police that the name (including both given names, surname and nickname) and age of the data subjects comprises sensitive personal data in terms of section 2(g) of the DPA.
33. Given the additional restrictions surrounding the disclosure of sensitive personal data, it makes sense to look at whether there are any conditions in Schedule 3 which would permit the data to be disclosed, before considering the Schedule 2 conditions.



34. The conditions listed in Schedule 3 to the DPA have been considered by the Commissioner, as have the additional conditions for processing sensitive personal data as contained in legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000².
35. Guidance issued by the Commissioner regarding the exemption in section 38(1)(b)³ notes that, generally, only the first and fifth conditions are likely to be relevant when considering a request for sensitive personal data under FOISA.
36. Condition 1 would allow the personal data to be disclosed where the data subject has given explicit (and fully informed) consent to its release. Condition 5 would allow the personal data to be disclosed if it has been made public as a result of steps deliberately taken by the data subject.
37. Strathclyde Police informed the Commissioner that they have not asked the data subjects if they would consent to the disclosure of their personal information as they did not consider it appropriate to do so. As such, Strathclyde Police advised that they do not have the data subjects' consent to disclose the requested information. The Commissioner agrees that it would be inappropriate to ask the data subjects to consent and is satisfied that condition 1 is not met in this case.
38. The Commissioner is also satisfied that the information has not been made public as a result of steps deliberately taken by the data subjects, and so condition 5 is not met in this case.
39. Having reached these conclusions, and having concluded that no other condition in Schedule 3 applies in this case, the Commissioner finds that disclosure of the name and age of the data subjects would breach the first principle of the DPA and that, as a consequence, the personal data is exempt from disclosure under section 38(1)(b) of FOISA.
40. In light of the above, the Commissioner is not required to consider whether disclosure of the information would breach section 39(1) of FOISA.

Parts c) and d) (reasons and involvement)

41. In terms of section 1(4) of FOISA, the information to be provided in response to a request made under section 1(1) is, subject to limited provisions which are not relevant here, the information held at the time the request is received.
42. In parts c) and d) of his request, Mr Cassidy asked for;
 - the reason detectives believed individuals may be responsible
 - how the Police thought individuals were involved

² http://www.legislation.gov.uk/uksi/2000/417/pdfs/ukxi_20000417_en.pdf

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38.asp>



43. As noted above, Strathclyde Police notified Mr Cassidy that this information was exempt from disclosure in line with sections 34(1)(a), 35(1)(a) and 35(1)(b) of FOISA.
44. Strathclyde Police provided detailed submissions to the Commissioner explaining why they consider these exemptions apply to parts c) and d) of Mr Cassidy's request. However, it is clear from the submissions, and from other evidence obtained during this investigation, that Strathclyde Police does not (and did not at the time of receiving the request) hold recorded information which would specifically address these parts of Mr Cassidy's request.
45. As the Commissioner is satisfied that Strathclyde Police does not hold any information which would address parts c) and d) of Mr Cassidy's request, she finds that Strathclyde Police failed to give proper notice to Mr Cassidy in terms of section 17(1) of FOISA.
46. However, given that this decision makes the position clear, no purpose would be served by requiring Strathclyde Police to notify Mr Cassidy that the information is not held in order to rectify this breach.
47. Nevertheless, the Commissioner is concerned that Strathclyde Police led Mr Cassidy to believe that they did hold relevant information when, in fact, they did not hold the information requested.
48. The Commissioner would urge Strathclyde Police to ensure that, when responding to future information requests, they take proper steps to establish whether they actually hold information that has been requested before responding to an applicant, and that they give appropriate notice in cases where some or all of the requested information is not held.

DECISION

The Commissioner finds that the Chief Constable of Strathclyde Police (Strathclyde Police) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Cassidy.

The Commissioner finds that Strathclyde Police were entitled to apply the exemption in section 38(1)(b) of FOISA to parts a) and b) of Mr Cassidy's request.

However, by failing to notify Mr Cassidy in line with section 17 of FOISA that they did not hold information which would fulfil parts c) and d) of his request, Strathclyde Police failed to comply with Part 1. Given that it is clear from this decision that no information is held, the Commissioner does not require Strathclyde Police to take any action in respect of this failure.

Decision050/2013
Mr Rory Cassidy
and the Chief Constable of Strathclyde Police



Appeal

Should either Mr Cassidy 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.

Margaret Keyse
Head of Enforcement
25 March 2013



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.
...
- (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 –
 - (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.

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;

...

2 Sensitive personal data

In this Act "sensitive personal data" means personal data consisting of information as to-

...

(g) the commission or alleged commission by him of any offence,

...

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 3 – Conditions relevant for the purposes of the first principle: processing of sensitive personal data

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

...

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

...