

Decision Notice

Decision 008/2017: Ms M and South Lanarkshire Council

Accident Report

Reference No: 201601325

Decision Date: 18 January 2017



Scottish Information
Commissioner

Summary

South Lanarkshire Council (the Council) was asked for an accident report. The Council originally withheld the information on the grounds it was legally privileged but later identified it largely as personal data, arguing that its disclosure would breach the first data protection principle. It continued to apply exemptions relating to litigation privilege and the effective conduct of public affairs.

The Commissioner accepted that the Council was entitled to withhold most of the information as personal data but she also ordered the disclosure of three pages in the report (with staff names redacted) as she did not consider the remaining exemptions applied to this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 30(b)(i) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 38(1)(b), (2)(a)(i), (2)(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 (Sensitive personal data); Schedule 1 (The data protection principles, Part 1 – the principles) (the first data protection principle); Schedule 3 (Conditions relevant for 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 15 October 2015, Ms M's MP wrote to the Council on Ms M's behalf. The letter included an information request. The request was as follows:

“Our constituent was advised that a full investigation and report would take place with regards to the incident [the subject matter of the letter]. Could you please advise if this report has been completed, and if so on what date it was concluded. We would also be obliged if you could send us a copy of this report.”

Subsequent references in this decision to communications between Ms M and the Council should be read as including communications involving Ms M's MP on her behalf.
2. The Council responded on 26 October 2015. It refused to disclose any information, on the grounds that there was an ongoing claim against the Council. In the circumstances, it considered the information requested by Ms M to be subject to a claim of confidentiality of communications, with the result that section 36(1) FOISA (Confidentiality) applied.
3. On 6 January 2016, Ms M wrote to the Council requesting a review of its decision. She disputed the Council's withholding of the report under section 36(1) of FOISA, submitting that the information did not pertain directly to the accident. She also asked again whether the

report had been completed and, if so, on what date. These points were reiterated in a letter of 1 February 2016.

4. The Council conducted a review and notified Ms M of the outcome on 1 March 2016. It addressed part of the request by confirming the report had been completed on 25 March 2014. It continued to rely on the exemption in section 36(1) of FOISA to withhold the content of the report. It gave a detailed explanation of its reasoning.
5. On 27 July 2016, Ms M wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms M stated she was dissatisfied with the outcome of the Council's review, submitting that she considered it to be in the public interest for the report to be published.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms M 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.
7. On 1 August 2016, the Council was notified in writing that Ms M had made a valid application. The Council was asked to send the Commissioner the information withheld from Ms M. The Council provided the information and the case was allocated to an investigating officer.
8. 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, focusing on its application of section 36(1) of FOISA.
9. The Council provided submissions, applying the exemptions in sections 30(b)(i) (Prejudice to effective conduct of public affairs) and 38(1)(b) (Personal information) of FOISA in addition to that in section 36(1). The investigating officer updated Ms M on the exemptions now being claimed and invited further comments (which Ms M provided).

Commissioner's analysis and findings

10. 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 Ms M and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) – personal information

11. During the investigation, the Council submitted that the report requested by Ms M (other than the contents of pages 7 and 8) comprised the personal data of the person who had the accident. It also submitted that pages 7 and 8 contained the personal data of Council staff, but at one point appeared to acknowledge that page 19 of the report did not contain any personal data.
12. The Council submitted that it was withholding the personal data in the report under section 38(1)(b) of FOISA. Section 38(1)(b) (read with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)) exempts personal data if disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.

13. This is an absolute exemption and is therefore not subject to the public interest test. Given its nature, the Commissioner believes it appropriate to consider this exemption first.
14. In order to rely on this exemption, the Council must show that the information being withheld is personal data for the purposes of the DPA and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Schedule 1.

Is the information under consideration personal data?

15. The Commissioner will firstly consider whether any of the withheld information can be defined as personal data. "Personal data" are 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 is likely to come into the possession of, the data controller. The full definition is set out in Appendix 1.
16. The Commissioner is satisfied that the majority of the information under consideration here comprises personal data, in line with the definition in part (a) of section 1(1). A living individual, who is the subject of the report, can be identified from the information. Given its nature, relating to the effects of an incident on that individual, the Commissioner is satisfied that the information can be said to relate to them.
17. The Commissioner notes that the Council has advanced two alternative arguments for the withheld information being the individual's personal data, one predicated on the report having been prepared in contemplation of litigation. The outcomes of the two scenarios differ only in degree, however, and the Commissioner does not consider it necessary (or necessarily helpful) for the status of the information as personal data to depend in this case on the report enjoying additional attributes which she may not accept. In the circumstances, the Commissioner is quite satisfied that the majority of the report comprises the personal data of the individual in question.
18. The Commissioner agrees that pages 7 and 8 of the report do not contain the personal data of the individual concerned, although they do contain the personal data of Council staff (information identifying them and, given the context in which it appears, relating to them). She considers the same can be said of the information in Appendix 5 to the report (pages 15 to 18 inclusive). Having considered Ms M's submissions, however, the Commissioner is satisfied that these items of staff personal data are not required by Ms M: she will not, therefore, consider them further in this decision.
19. Having considered the information on page 19 of the report, the Commissioner can find no basis for treating this as the personal data of any individual. It cannot, therefore, be exempt under section 38(1)(b), although the Commissioner must consider it further below, under the other exemptions claimed by the Council.
20. Information will not comprise personal data if it can be rendered anonymous. Given the extent to which the information focused on the one identifiable individual, the Council did not consider anonymisation to be practicable in the circumstances. Having considered the information in the report, to the extent that it remains the subject of this investigation, the Commissioner agrees.
21. The Council also submitted that the withheld information comprised the sensitive personal data of the individual who was the primary focus of the report, at least in part. Having considered the content of the report, insofar as it remains under consideration here, the Commissioner is content that it can all be considered that individual's sensitive personal

data, in line with the definitions in section 2 of the DPA. The Commissioner will consider the implications of this further below.

Would disclosure contravene the first data protection principle?

22. The Council submitted that disclosure of the withheld personal data 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. Where the information comprises sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The processing in this case would be making the information publicly available in response to Ms M's request.
23. Given the additional restrictions surrounding the disclosure of sensitive personal data, the Commissioner will consider first whether there are any conditions in Schedule 3 which would permit the withheld personal data to be disclosed, before considering the Schedule 2 conditions. The conditions listed in Schedule 3 have been considered by the Commissioner, as have the additional conditions for processing sensitive personal data, such as those in the Data Protection (Processing of Sensitive Personal Data) Order 2000.
24. Guidance¹ issued by the Commissioner on the application of the section 38 exemptions notes that, generally, only the first and fifth conditions in Schedule 3 are likely to be relevant when considering a request for sensitive personal data under FOISA. Condition 1 would allow disclosure where the data subject had given explicit consent, while condition 5 would apply where the data had been made public as a result of steps taken deliberately by the data subject.
25. The Council submitted that neither of these conditions could be met. It did not have the data subject's consent to disclosure of the information to the public at large, while it was not aware of the data subject having made the information publicly available. Bearing in mind that disclosure under FOISA would be disclosure to the world at large, and that any relevant consent would require to be:
 - (i) fully informed;
 - (ii) freely given;
 - (iii) specific to the circumstances, and
 - (iv) a clear indication of the data subject's wishes,the Commissioner accepts the Council's position. She agrees that there would be no other condition, within Schedule 3 or in the additional conditions referred to in paragraph 23 above, which would permit disclosure.
26. In the absence of a Schedule 3 condition permitting disclosure, the Commissioner must find that disclosure would be unlawful. In the absence of a Schedule 3 condition, it is not necessary to consider the Schedule 2 conditions. Consequently, the Commissioner finds that disclosure of the information would breach the first data protection principle and that the information is therefore exempt from disclosure (and was properly withheld) under section 38(1)(b) of FOISA.
27. As the Commissioner has found that the withheld information (the majority of the report, except pages 7, 8 and 19) has been correctly withheld under section 38(1)(b) of FOISA,

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

there is no requirement for her to consider any other exemptions considered to apply to that information.

28. The Commissioner will now go on to consider the remaining non-personal data in pages 7, 8 and 19 of the report.

Section 36(1) of FOISA – confidentiality

29. 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 all the information in the report under this exemption.
30. 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*).
31. 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.
32. 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.
33. The Council submitted that there was a real likelihood when the report was created of a claim for compensation on behalf of the person involved in the incident. The report was created when the employees of the Council who would be responsible for dealing with the claim (should one be raised) were investigating the position in order to reach a view on that potential claim's outcome. Subsequently, a claim was raised against the Council: this remained under consideration and, in the Council's view, was likely to result in court action if not resolved.
34. In these circumstances, the Council took the view that the report to have been prepared in contemplation of litigation. It did not matter that, as yet, no such litigation had been raised.
35. In its submissions, the Council referred to various court cases, in particular *More v Brown & Root Wimpey Highland Fabrications Ltd. 1983 SLT 669*. The Council gave detailed comments on these cases, in support of its understanding that, generally, reports prepared following an accident will attract litigation privilege.
36. However, the Council also acknowledged that the purpose of the report must be taken into account. It confirmed that the exemption could only apply to information regarding the circumstances of the accident and not to any part of the report purely reflecting lessons learned.

The Commissioner's conclusions

37. The Commissioner has considered the Council's submissions carefully, along with the content of pages 7, 8 and 19 of the report. Having considered that content and the circumstances under which the report was created, the Commissioner cannot accept that litigation privilege can apply to these pages.
38. As a general rule, the Commissioner acknowledges that reports prepared following an investigation of the circumstances of an accident are likely to attract litigation privilege, being prepared on the basis that litigation is likely and to inform the Council's position in the event of such litigation. She accepts that this may be the case even where, as here, a claim for compensation does not transpire until some time after the accident and the preparation of the report (and then has not developed into litigation some considerable time after being made).
39. However, as the Council has acknowledged, litigation privilege will not apply to material focusing on lessons learned from the accident rather than the circumstances under which it happened. In the Commissioner's view, the information on pages 7 and 8 was created with the purpose of addressing lessons learned rather than the circumstances of the accident. There would appear to be no reason for taking a different view in relation to the information on page 19 of the report.
40. Given the submissions she has received, therefore, the Commissioner cannot accept the application of section 36(1) of FOISA to any of the information in pages 7, 8 and 19 of the report. Having reached this conclusion, the Commissioner is not required to consider the public interest test.

Section 30(b)(i) – free and frank provision of advice

41. The Council also applied the exemption in section 30(b)(i) of FOISA to the content of the report, to the extent that the Commissioner did not consider the information otherwise exempt. Its submissions on this exemption focused in particular on pages 7 and 8 of the report.
42. In order for the Council to rely on this exemption, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. The inhibition must be substantial, in other words of real and demonstrable significance. It must also be at least likely, not simply a remote and hypothetical possibility.
43. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
44. The Council submitted that the report, if not subject to litigation privilege, should still be considered the provision of advice by someone with expertise in health and safety matters in relation to the prevention of the reoccurrence of accidents in similar circumstances. It went on to argue that disclosure would be likely to inhibit the provision of such advice in future, particularly in the context of ongoing litigation or a claim made against the Council which, if not agreed, was likely to result in litigation against the Council.
45. The Council considered it possible that anyone reading this information would be able to work out the content of the rest of the report, although it did not explain in any detail how this might be done. It submitted that this would place it at a disadvantage, particularly if significant omissions or failures were identified and the advice sought to remedy these matters. As a result, it was likely that the provision of such advice would be inhibited substantially during the period when a claim or court action was outstanding, preventing it from seeking advice on the circumstances of accidents and taking steps timeously to prevent reoccurrence.

46. Ms M submitted that when mistakes are made they should be investigated thoroughly and, if necessary, changes should then be implemented to ensure no such errors happened again. She did not know if what she considered to be the Council's mistake had since caused procedures to change, or whether the incident was the result of one single error. Ms M emphasised the Council must be accountable for its actions. This report, in her view, could show systemic failings which should be disclosed in full to the public.
47. In assessing whether the disclosure of the information in pages 7, 8 and 19 would, or would be likely to, inhibit substantially the free and frank provision of advice, the Commissioner will take account of factors such as the subject matter, the content of the information and the circumstances existing at the time of the request.
48. In the Commissioner's view, where advice is communicated or received as part of an individual's expected day to day professional activities, then the risk of substantial inhibition resulting from disclosure of that information is likely to be diminished.
49. The Commissioner has considered all of the submissions made by the Council and Ms M, along with the withheld information. She has considered the content of the information, the context in which it was created and the expectations of the individuals who provided and received the advice concerned.
50. As noted above, the issue to be considered in this case is whether the effect of disclosure would be harmful, by causing, or being likely to cause, individuals to be substantially inhibited in the free and frank provision of advice.
51. The Commissioner is satisfied that the advice in pages 7 and 8 was produced as part of the expected day to day activities of the relevant Council service and its employees. She is not persuaded that substantial inhibition to the free and frank provision of advice would be a likely consequence of disclosing the content of these two pages.
52. In reaching this conclusion, the Commissioner has considered when the information was written and the timing of Ms M's request, several months later. There is nothing particularly sensitive in this content and it is information the Commissioner would expect to be recorded as part of the professional duties of the employees concerned. Considering the content of the information, the Commissioner does not accept that professional staff would be deflected from recording it by the prospect of a claim. The Commissioner is not, therefore, convinced that the prospect of disclosure would, or would be likely to, substantially inhibit the staff in question from recording information of this particular kind, or in this particular way.
53. Having considered the Council's submissions, the Commissioner can find no basis for applying them to the content of page 19 of the report.
54. Therefore, the Commissioner is not satisfied that the exemption in section 30(b)(i) is engaged and so is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
55. The Commissioner finds that the Council incorrectly withheld information under section 30(b)(i) of FOISA and requires the Council to disclose the information in pages 7, 8 and 19 of the report to Ms M (subject to the redaction of staff personal data, which Ms M does not require and which will be indicated in a marked up copy of the report to be provided to the Council).

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 Ms M.

The Commissioner finds that the Council was correct to withhold the majority of the information in the report under section 38(1)(b) of FOISA, given it comprised personal data and (to the extent that Ms M required those personal data) disclosure would contravene the first data protection principle. In this respect, the Council complied with Part 1 of FOISA.

The Commissioner also finds that the Council was not entitled to apply the exemptions in sections 30(b)(i) or 36(1) of FOISA to the remainder of the withheld information. In these respects, she finds that the Council breached Part 1, and in particular section 1(1), of FOISA.

The Commissioner therefore requires the Council to disclose the information in pages 7, 8 and 19 of the report, subject to redaction of staff personal data, by **13 March 2017**.

Appeal

Should either Ms M or South Lanarkshire 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.

Enforcement

If South Lanarkshire Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

18 January 2017

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

...

(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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

...

(b) would, or would be likely to, inhibit substantially–

(i) the free and frank provision of advice; or

...

36 Confidentiality

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

...

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—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the **M1**Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

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 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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info