



Scottish Information
Commissioner

**Decision 083/2005 - Mr Williams and the Scottish
Executive**

*Information relating to an investigation into a complaint made by
the applicant*

**Applicant: Mr M Williams
Authority: The Scottish Executive
Case No: 200500899
Decision Date: 19 December 2005**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 083/2005 - Mr Williams and the Scottish Executive

Information about an investigation into a complaint made by the applicant – section 38(1)(b) – personal information relating to a third party – section 17 – whether information is held by an authority

Facts

Mr Williams and the Scottish Executive have engaged in protracted correspondence over a complaint he had made following the end of his employment with the Scottish Executive. As part of this correspondence, Mr Williams made a request under section 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) for copies of all information held by the Scottish Executive regarding its investigation into the matter. The Scottish Executive responded by stating that it held information relating to him, which had been released to him already in response to a subject access request under the Data Protection Act 1998, but did not hold any further information in relation to the incident. Mr Williams responded stating his dissatisfaction with the Scottish Executive's response and this was treated as a requirement for review for the purposes of Part 1 of FOISA. The Scottish Executive wrote again to Mr Williams, upholding its response, and Mr Williams applied to the Scottish Information Commissioner for a decision as to whether the Scottish Executive had complied with Part 1 of FOISA in the manner in which it responded to the applicant.

Outcome

The Commissioner found that the Scottish Executive held information on the investigation into a complaint made against another employee by the applicant. However the Commissioner was satisfied that the information held was exempt from disclosure under section 38(1)(b) of the Freedom of information (Scotland) Act 2002. The Commissioner did not require the Scottish Executive to take any action as a result of his decision.



Appeal

Should either the Scottish Executive or Mr Williams wish to appeal against my 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 of receipt of this notice.

Background

1. On 1 January 2005, the applicant wrote to four different office holders within the Scottish Executive (the Executive) requesting all information which it held regarding an investigation into a complaint made by him about the behaviour of another employee of the authority.
2. The Executive responded to the four letters on 25 January 2005, stating that it held information about Mr Williams, which it had provided to him in response to a previous request made under section 7 of the Data Protection Act 1998 (DPA).
3. The Executive argued in its response to the applicant that it did not hold information relating to the investigation into the incident about which Mr Williams had complained, as no formal investigation had taken place. Nevertheless, it argued that if it were to hold any information regarding an investigation, the information would be exempt from disclosure as it would be information relating to other individuals the release of which would contravene data protection principles and therefore exempt 38(1)(b) of FOISA.
4. Mr Williams responded by letter to the Executive at some length on 1 February 2005, making clear that he did not accept an investigation had not occurred in response to his complaint. Therefore, Mr Williams argued, the Executive did hold information regarding the investigation. The letter of 1 February 2005 was taken by the Executive to be a request that it review the way in which it handled Mr Williams's request for information as the letter appeared to fulfil all the requirements for a valid requirement for review set out by section 20(3) of FOISA.
5. The Executive responded to Mr Williams's request for review on 25 February 2005, stating that it upheld its initial response of 25 January 2005.



6. Mr Williams was unhappy with the response from the Executive and submitted an application to me dated 28 February 2005, which I received on 8 March 2005. The case was subsequently allocated to an investigating officer.
7. Following Mr Williams's request made under section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) the Executive had refused to disclose under FOISA information provided to Mr Williams previously under the DPA as it argued that it was exempt under section 38(1)(a) of FOISA. In his application to me, Mr Williams made it clear that he understood that personal information about himself was accessible through the DPA, and that he had contacted the UK Information Commissioner to assist him in accessing information which the Executive held about him. In both his initial request to the Executive and his application to me the applicant stipulated that he was searching for information relating to an investigation into allegations of misconduct regarding an employee of the Executive.
8. I am satisfied that Mr Williams did not apply to me to investigate whether the Executive had correctly applied section 38(1)(a) of FOISA to the information which he had requested from the Executive relating to himself. Therefore I will not consider this matter further in my decision.

The Investigation

9. The applicant requested that I investigate whether the Executive held any information about the investigation into the complaint he had made about the behaviour of another employee of the Executive. He also asked me to investigate whether the Executive were correct in applying section 38(1)(b) of FOISA to information in question should it exist.
10. The investigating officer contacted the Executive on 8 April 2005, requesting the following information:
 - a) A copy of all the recorded information that it held on any investigations into the complaint made by the applicant,
 - b) A copy of any policies that it held for dealing with complaints made about the behaviour of staff members,
 - c) A copy of the file retention policies that it used for paperwork concerning grievances raised by personnel about other members of staff,
 - d) The reasoning behind its application of section 38(1)(a) and 38(1)(b) to the information requested , and
 - e) A written account of the way in which it responded to Mr Williams' request for information, in regard to its obligations under FOISA.



11. The Executive responded on 10 May 2005 with the information requested. It reiterated that no information was held by it with regard to the investigation into the complaint, as no investigation had taken place. Had any information relating to investigation and disciplinary action taken against another member of staff existed, its release would have contravened the data protection principles and therefore would have been exempt under section 38(1)(b) of FOISA. Any personal information relating to Mr Williams himself was clearly exempt under section 38(1)(a) and in any event had been provided to Mr Williams already under the DPA.
12. Following conversations with the investigating officer, on 16 June 2005 the Executive sent a copy of a record of a report into the incident following Mr Williams's complaint written by a senior member of staff.
13. During the process of the investigation, Mr Williams has been in regular contact with my office. On 19 April 2005, he made a request to my office under section 7 of the Data Protection Act 1998 for all information which I held in relation to him. This was responded to in full on 10 June 2005, with the consent of the Executive. Having examined the documents provided in response to his request, Mr Williams then submitted detailed comments on the Executive's position to this office on 11 July 2005.
14. As Mr Williams had previously been in contact with Susan Deacon, MSP regarding the matter, on 9 August 2005 I wrote to her, requesting whether she held any information that would aid me in my investigation. She responded by fax on 30 September 2005, enclosing a copy of a letter written to her by Jack McConnell, First Minister, on 31 March 2000 which outlined the steps taken by the Executive to investigate the matter.

The Commissioner's Analysis and Findings

Does the Executive hold information regarding an investigation into Mr Williams' complaint?

15. In its response of 10 May 2005, the Executive provided me with guidance on its disciplinary and grievance procedures. In addition to this, in copies of correspondence attached to his submission of 11 July 2005, Mr Williams provided me with information regarding the nature of the complaint which centred on the use of inappropriate language to the applicant.



16. The Executive's disciplinary procedures set out that the use of offensive language is considered minor misconduct by an employee. In this case, the Executive considered the complaint made against the employee by Mr Williams to be a complaint about minor misconduct, and investigated the case in line with its procedures for investigating such matters.
17. Where a complaint about minor misconduct is made, it is for the line manager to determine whether the matter should be addressed formally or informally. If formal procedures are to be followed, an interview should be conducted with the employee where information is gathered about the nature of the incident. The line manager should also check the explanation if possible. Where misconduct is judged to have taken place, an oral or written warning (as appropriate) should be given to the employee, with reasons and details of any improvement in conduct required. A record should be made of both the meeting and the warning.
18. As part of the investigation, the Executive have provided me with a copy of the record of the action taken in relation to the incident about which Mr Williams complained. Given the terms of this record, I am satisfied that it summarises all action taken in relation to the incident. While it is not a record of a formal investigation or formal disciplinary action, I am satisfied that it could be deemed to fall within the scope of Mr Williams's request for information.
19. I am also of the view that where the Executive referred to the matter having been investigated in subsequent correspondence with Mr Williams, it was alluding to this process.
20. I am satisfied that the Executive holds a record of the investigation into the allegation of misconduct (i.e. the record referred to at paragraph 12 above), which appears to have been carried out in accordance with the Executive's disciplinary procedures. I am satisfied that over the course of its protracted correspondence with Mr Williams, the Executive took all reasonable steps to locate information relevant to his request, and that it holds no further information in relation to the investigation into misconduct carried out as a result of allegations made by the applicant.

Section 38(1)(b) – Personal Information about a third party

21. As I have set out in paragraphs 13 – 16 above, I find that the Scottish Executive holds information regarding the investigation which it carried out as a result of complaints made by Mr Williams. The record comprises of a note of a meeting between a senior member of staff and the individual about whom Mr Williams complained, and a record of action taken as a result of information gathered.



22. However, I find that the information is exempt from disclosure under section 38(1)(b) of FOISA.
23. In essence, section 38(1)(b) of FOISA states that information is exempt if it constitutes personal data and disclosure of the information to a member of the public would contravene any of the data protection principles. Section 38(2) of FOISA states that the definition of “data” is that contained in section 1(1) of the Data Protection Act 1998 (the DPA). Personal data, as defined by section 1(1) of the DPA, are:

“Data which relate to a living individual who can be identified from those data... 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.”
24. The applicant is seeking information about the disciplinary proceedings taken against an employee of the Executive. In my view, this information is the personal data of the individual concerned. The definition of what amounts to “personal data” for the purposes of the DPA was recently considered in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746 Court of Appeal (Civil Division). In that case the court held that whether or not data constituted “personal data” for the purposes of the legislation depended on the relevance or proximity of the data to the data subject. The court considered that the information required to be biographical in a significant sense and that the information should have the subject as its focus. In my view, a record of a disciplinary procedure such as the one produced by the Executive falls within this definition.
25. Personal data relating to a third party can only be released under FOISA if disclosure would not breach any of the data protection principles. I am satisfied that disclosure of the personal data of the individual concerned would breach the first data protection principle in that it would be unfair.



26. The first data protection principle requires personal data to be processed fairly and lawfully. Disclosure would be unlawful, for example, if it would be a breach of confidence. The concept of “fairness” is harder to define, although in practice it may not be difficult to judge whether it would be unfair to someone to pass on their information without consent. The assessment of fairness includes looking at whether the third party would expect that his or her information might be disclosed to others and/or whether the person had been led to believe that his or her information would be kept private. The record of the action taken indicates the information is restricted from staff, meaning that the information is only disclosed to the individual, certain members of the Executive’s Human Resources Team and, on limited occasions, the individual’s manager. . Further, in my view, information held by an employer about disciplinary action taken against an individual fulfils the criteria of information which it would be unfair to disclose to third parties. Employees would not normally expect this information to appear subsequently in the public domain.
27. Schedule 2 of the DPA sets out a number of conditions, at least one of which must apply if the processing is to be fair and lawful. I have considered the conditions set out on Schedule 2 of the DPA and concluded that none of them apply to the information requested by the applicant.
28. The applicant is of the view that information about the investigation carried out by the Executive should be in the public domain. I am satisfied, however, that the Executive applied section 38(1)(b) correctly to the information it held in respect of this matter and must conclude there. The public interest in disclosure does not fall to be considered in this case.

Decision

I find that the Scottish Executive holds information on the investigation into a complaint made against another employee by Mr Williams. However I am satisfied that the information held is exempt from disclosure under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002. I do not require the Scottish Executive to take any action as a result of his decision.

Kevin Dunion
Scottish Information Commissioner
19 December 2005