

The Court of Session widens the interpretation of what is 'held' data for the purposes of the Freedom of information (Scotland) Act 2002

Sinead Riach considers the decision of the Court of Session in the first appeal against a decision by the Scottish Information Commissioner where the effect of the court's decision significantly widens what information is 'held' for the purposes of FOISA, which will have significant implications for public authorities. It also examines whether "barnardised" data is "personal data".

The background to the appeal is that an applicant, Mr Michael Collie, acting on behalf of Chris Ballance MSP, requested recorded incidents of childhood leukaemia by census ward in Dumfries and Galloway, held by the Common Services Agency of the NHS (National Services Scotland) (the "CSA"). The request was for data held from 1990 to 2003.

The CSA advised the applicant that it only held such data for the period 1990 to 2001 and further explained that the years for which the data was available involved very small numbers. The CSA submitted that its release would therefore give rise to a significant risk of indirect identification of living individuals. It therefore withheld the data under section 38(1)(b) of the Freedom of Information (Scotland) Act ("FOISA"), the exemption applied where information constitutes the personal data of third parties and its disclosure would breach the data protection principles. After requesting a review and the CSA upholding its decision, the applicant appealed to the Scottish Information Commissioner ("the Commissioner").

The Commissioner agreed with the CSA that disclosure of the requested information would identify the children, but ordered disclosure of the data in "barnardised" form. This is a statistical technique where figures are randomly modified within a small range of numbers, the purpose of which is to conceal the identity of individuals.

The CSA appealed the Commissioner's decision to the Court of Session. It contended that barnardised data was different data from the data held by the CSA and that the exercise of barnardisation involved the creation of new data. It submitted that under FOISA, Scottish public authorities are not obliged to create new or different data to the data held by them for the purposes of responding to an information request. It also argued that, in any event, barnardised data was "personal data" and its disclosure would breach the data protection principles.

The Lord President, Lord Nimmo Smith and Lord Marnoch considered section 1(1) of FOISA, which provides applicants with the right to be provided with information held by a Scottish public authority at the time the request was received. The issue before them was what constituted information "held" by a public authority for the purposes of this subsection.

The court disagreed with the submissions of the CSA, and concluded that the CSA should have provided the applicant with the barnardised data. The court was of the view that the purpose of barnardised data is not to create new data but to present it in a form which protects the confidentiality of the individual. The Lord President stated,

"The policy of [FOISA] was to promote the giving of information by public authorities. It would defeat the statutory purpose if a narrow view were to be taken of what information

fell to be given. The effect of barnardising the data was not fundamentally to change but rather to alter the focus of the data”.

The Lord President clarified that the duty of each public authority to give advice and assistance under section 15 of FOISA, as read with the section 60 Code of Practice, involved the need for public authorities to be diligent in seeking ways which may satisfy the requirements of an applicant. The court considered that the CSA could create the barnardised data without undue trouble or expense.

The court then considered whether the barnardised data would constitute the personal data of the children and whether the exemption in section 38(1)(b) applied. In determining whether it was personal data, the court considered the definition of personal data set out in section 1 of the Data Protection Act 1998. The definition can be summarised as being any information which relates to a living individual who can be identified from those data.

The court also considered the decision in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746 where the Court of Appeal considered that data would be personal data if the information was significantly biographical and had the individual as the focus of the information. In other words, it had to affect the individual's privacy. This decision significantly narrows what can constitute an individual's personal data.

The court held that barnardised data did not have the children as the focus of the information. Instead, the focus was on the incidence of disease. It held that the barnardised data was not biographical and did not affect the children's privacy. Rather, the court was of the view that its purpose was to draw attention away from the children. The court concluded that the barnardised data was not the personal data of the children.

The Court dismissed the appeal and upheld the decision of the Commissioner.

Finally, it is interesting to note the comments by Lord Marnoch in the court's judgement. He described his interpretation of FOISA as even more liberal. He was of the view that it was not necessary to attach any very technical meaning to what information is “held” for the purposes of section 1(1) of FOISA. Whilst information must be “recorded” in terms of section 73 of FOISA, he stated that information will take many forms and that an applicant has a right to request either a digest or a summary or whatever information is available, even if it is described as being different in kind from the original data. He stated,

“I am of the opinion that [FOISA], whose whole purpose is to secure the release of information, should be construed in as liberal a manner as possible and...I do not myself see any reason why the Commissioner should not be accorded the widest discretion in deciding the form and type of information which should be released in furtherance of its objectives”.

The full Opinion can be read at *Common Services Agency v Scottish Information Commissioner* [2006] CSIH 58 XA89/05.

The CSA is appealing the court's decision to the House of Lords. It will be the first time that the House of Lords considers what constitutes “personal data”, and it will be interesting to see whether the House of Lords comes to the same conclusions as the Court of Appeal in the *Durant* decision.



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