OUTER HOUSE, COURT OF SESSION

[2022] CSOH 55

P578/21

OPINION OF LORD CLARK

In the petition of

ROBERT BARTOSIK

Petitioner

for orders under sections 167 and 169 of the Data Protection Act 2018

Petitioner: Party Litigant
Respondent Fraser, Ledingham Chalmers LLP

16 August 2022

Introduction

[1] The petitioner seeks orders under the Data Protection Act 2018 ("the 2018 Act") for erasure of personal data retained by the respondent (Police Scotland) and compensation for distress caused by the failure, thus far, to erase it. The respondent contends that the data should not be erased and that there is no right to compensation.

[2] The background is set out more fully below. By way of overview, it can be summarised as follows. The petitioner reported alleged crimes to the police. There was no response and so he complained about the matter not having been taken forward. His complaint was investigated. Part of that investigation involved taking a statement from a person who worked in the police office. Her statement included information about his

report of the alleged crimes and it also included other information about him which was of no direct relevance to the investigation. He received a letter which referred to her statement, including the other information, and which acknowledged that the police had not properly responded to his report of the alleged crimes. The petitioner was concerned about the other information, which was inaccurate. He requested that it be erased. It was later confirmed to be inaccurate. Accordingly, the request for erasure is in respect of certain information given in a letter from the respondent dealing with the petitioner's complaint about failure by the police to investigate alleged crimes reported by him. The respondent has refused to erase it on the ground that a record of the information must be maintained for a period of time, albeit for restricted purposes.

Background

[3] The petitioner is a taxi driver. On 5 May 2020 he went to Gorbals Police Office in Glasgow and handed in a "Victim Statement" prepared by him, which reported and sought investigation of eight instances in which individuals had, after taxi journeys, allegedly made off without paying him ("taxi frauds"). On 13 July 2020 the petitioner submitted a complaint to Police Scotland, stating that they had failed to record and investigate the taxi frauds and had not responded to his report. An investigation into his complaint, which was given the reference CO/01933/20, was carried out. Chief Inspector MacIntyre was appointed to investigate. As part of that investigation a statement was obtained from a Public Enquiry Support Assistant ("PESA") at Gorbals Police Office.

[4] Chief Inspector MacIntyre wrote to the petitioner on 16 December 2020. Broadly speaking, the content of the letter was to set out the petitioner's complaint, then to set out what the PESA had said in her statement and then to give the Chief Inspector's decision on

the complaint. The reference in the letter to the statement of the PESA included things said by her about the petitioner which had no direct bearing on the complaint made by the petitioner about the taxi frauds. It is this part of the letter, which I shall refer to as "the challenged information", that has given rise to this petition. I do not regard it as necessary or appropriate to set out in full the challenged information. It suffices to say that in the challenged information the PESA referred to seeing the petitioner, on a police CCTV camera, standing outside the police office for some time, she went out to see him and he made certain comments about his partner and custody of his child. The letter from the Chief Inspector went on to set out further parts of the statement of the PESA, about the taxi frauds, not challenged in this petition. The letter then stated that the petitioner's complaint about failure to investigate the taxi frauds reported by him was upheld and it gave an apology to him.

[5] The petitioner replied on 29 December 2020, seeking erasure of the challenged information in the letter. By letter dated 6 January 2021, Chief Inspector MacIntyre advised the petitioner about the means of making a formal request to have the data erased. That letter also contained the challenged information. On 24 March 2021 the petitioner sent his formal request to the respondent. He sought erasure under the 2018 Act of the challenged information on the basis that he had not entered Gorbals Police Office on that occasion or shared information with the PESA.

[6] The respondent says that its Information Assurance Officer sent a letter dated 1 April 2021, by email, to the petitioner, stating that his request was refused. The grounds for refusal, set out in the letter, included that the statement of the PESA was processed for the purposes of law enforcement. Further, it formed part of the official record of the petitioner's complaint against the police and had accordingly been archived. In terms of the Police

Scotland Record Retention Standard Operating Procedure the statement would not qualify for weeding out until January 2026.

[7] The petitioner states that he did not receive the email dated 1 April 2021, attaching the letter, and so was not made aware of the refusal of his request for erasure. The petition was lodged on 29 July 2021. The petitioner described the challenged information in the PESA's statement as fake and in particular that he did not have an ex-partner or a child. The petitioner seeks an order for erasure of the challenged information from the respondent's record. It was, the petitioner claims, only on 6 October 2021, when the respondent lodged the letter of 1 April 2021 in process, that he was made aware of that letter.

[8] At a by-order hearing on 20 January 2022, the court was advised by counsel for the respondent that another statement had been taken from the PESA. The PESA stated that she now believes that she mistook the petitioner for another man and that in fact she has never actually met the petitioner. By letter dated 27 January 2022, the respondent' solicitors explained to the petitioner that the respondent would make a decision as to how to deal with the erasure request in light of this new information. On 15 February 2022, the Information Assurance Officer of the respondent wrote to the petitioner, by email, stating that the PESA's further statement corroborated the petitioner's position that the challenged information was incorrect. The letter then explained that the data would not be erased but would be restricted in its use. It refers to the petitioner's complaint against the police in July 2020 as a "CAP" and states:

> "The new PESA statement provides information which may affect the outcome of the CAP resolution and, accordingly, this has been presented to Professional Standards Department (West) for them to determine whether or not the CAP should be subject to re-investigation.
>
> The statement you requested be deleted forms part of the official record of CAP CO/01933/20, as will the new statement received from the PESA.

However, the original (incorrect statement) is now of only very specific worth (should the CAP be re-investigated, for example) and meets the criteria for personal information which should be subject to restrictions in processing detailed in DPA 2018 s47 (2). Accordingly, the original PESA statement, dated 14 December 2020, will be subject to restrictions in processing, meaning that it can only be used as evidence in the re-investigation of CAP/01933/20 (should that be implemented).

I have applied the guidance within the Record Retention SOP (Section PST-001, Pg 117), which states that records of this type are subject to retention for the current year, plus six years, whereupon the records will be destroyed. Accordingly, this record, including the statements made by the PESA, will not qualify for weeding from the PSD (West) archive until January 2026 at the earliest. It should be noted that reinvestigation of the CAP will re-open the case file and move this date into the future.

Accordingly, your request for deletion of the PESA statement dated 14 December 2020 is denied.

Examination of the guidance in respect of the criteria for the application of alternative retention and/or weeding rules indicates that no other rules apply…"

[9] At a continued by-order hearing on 24 February 2022, the petitioner advised that he had not received the email with this letter attached. He was then given a copy of the letter. Adjustments were made to the petition and answers and a substantive hearing was fixed.

Relevant provisions of the Data Protection Act 2018

[10] The key sections of the 2018 Act for present purposes are:

"37 The third data protection principle

The third data protection principle is that personal data processed for any of the law enforcement purposes must be adequate, relevant and not excessive in relation to the purpose for which it is processed.

38 The fourth data protection principle

(1) The fourth data protection principle is that—

(a) personal data processed for any of the law enforcement purposes must be accurate and, where necessary, kept up to date, and

> (b) every reasonable step must be taken to ensure that personal data that is inaccurate, having regard to the law enforcement purpose for which it is processed, is erased or rectified without delay.
>
> (2) In processing personal data for any of the law enforcement purposes, personal data based on facts must, so far as possible, be distinguished from personal data based on personal assessments.
>
> …
>
> (4) All reasonable steps must be taken to ensure that personal data which is inaccurate, incomplete or no longer up to date is not transmitted or made available for any of the law enforcement purposes.
>
> …"

Submissions

Submissions for the petitioner

[11] The email allegedly sent on 1 April 2021, attaching the letter of that date, had not been received. As the respondent did not reply to the pursuer's request for erasure within one month, as required by sections 48(2)(b) and 54(2) of the 2018 Act, those provisions were breached. In any event, the decision to refuse the request for erasure, in that letter, was in breach of sections 37 and 38 of the 2018 Act as the data was not adequate, accurate and relevant to the petitioner. The information did not concern his person. It interfered with his private life. If disclosed to someone it could, for example, result in an employer saying he did not trust the petitioner any more. There was no reason why the fake information must be kept. That decision should be revoked.

[12] In relation to the decision in the letter dated 15 February 2022, the 2018 Act did not allow the data controller to review the earlier decision of 1 April 2021 and so that second decision was invalid. It was also reached well beyond the one month period. If the second decision dated 15 February 2022 was held to be valid then the decision dated of 1 April 2022 was invalid and should be revoked in terms of section 167 of the 2018 Act. The part of the

statement of the PESA that he complained about did not concern his complaint regarding taxi fraud and there was no reason to keep it. It concerned another person.

[13] In terms of section 169 of the 2018 Act, an award of compensation should be granted because the petitioner has suffered "distress" as the data controller had taken much longer than the one month period allowed to deal with the request for data erasure and had refused the request.

Submissions for the respondent

[14] The petition should be dismissed. The witness statement of the PESA forms part of the record of the respondent's complaint against the respondent. It is evidence of the way in which the complaint was dealt with. As such it should not be deleted. Its retention protects the rights of the petitioner. Witness statements are by their nature subjective and are not subject to the requirement of accuracy contained in section 38 of the 2018 Act. In terms of section 38(1)(a) personal data requires to be kept up to date where "necessary". In terms of section 38(1)(b) every "reasonable" step must be taken to ensure that personal data, which is inaccurate, having regard to the law enforcement purpose for which it is processed, is erased or rectified without delay. If the statement is personal data; it would not be necessary to keep it up to date in the way it would be necessary to keep, for example, a credit file up to date.

[15] Further it would not be reasonable to expect the respondent to investigate the content of statements. The respondent has already restricted the use which can be made of the statement and no order should be made under section 167. There having been no breach of the petitioner's data protection rights, the petitioner should not be awarded damages. If there was any breach, any harm caused was *de minimis*. The content of the statement was

innocuous and no prejudice flowed from it. The letter of 1 April 2021 was sent by email to the petitioner. The email address it was sent to was the email address he had used when contacting the respondent. There was nothing to suggest that the email did not reach him and there were no further emails from him asking for a response.

Response for the petitioner

[16] There was no clear basis for describing the statement as a witness statement. It was not, for example, a signed affidavit. It was not referred to in the letter of 6 January 2021 as being a witness statement. It was simply inaccurate information which should be erased. It was a lie. He had suffered distress, had special treatment for insomnia and had difficulties preparing for the hearing.

Decision and reasons

Preliminary points

[17] The petitioner founds his claim for erasure upon provisions in Part 3 of the 2018 Act. Part 3 deals with processing of data for "law enforcement purposes", defined thus in section 31:

> "the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security."

The decisions issued by the respondent to refuse his requests for erasure were expressly founded upon the data being processed for law enforcement purposes, under Part 3. Accordingly, each party proceeds upon the basis that the processing of data in the investigation of a complaint to the police about failing to record and investigate an alleged criminal offence falls within the definition of law enforcement purposes. The arguments for

each side having been presented solely on that basis, I will not embark upon an analysis of whether that approach is correct.

[18] Section 48(1)(b) of the 2018 Act required the respondent to "inform the [petitioner] in writing" that his request had been refused. Section 54(2) gives the period of one month for that to be done. Parties did not refer to any of the authorities dealing with, for example, presumptions about receipt of a letter posted to the correct address. In any event, the present issue concerns the sending of an email. In his complaint submitted to the respondent on 13 July 2020, the same email addresses for home and work were stated by him. He also said "Please contact me via email only please". His formal complaint on 24 March 2021 was sent from that same email address. In the section of the form dealing with "Contact details", he inserted that email address. The letter dated 1 April 2021 (eight days after his formal complaint) refers to it being sent by email and states the email address used and referred to by the petitioner. The email itself was not produced but counsel for the respondent advised the court that she had seen the email and it was indeed to that same address. The petitioner's position, recorded in an email sent to the respondent' solicitors on 24 February 2022, is that he had changed his email address at some point in 2021 because his previous email account had been hacked. He notified Information Assurance on 10 September 2021 that the only email address for service was his new email address or postal address.

[19] I conclude that the email sent on 1 April 2021 attaching the letter refusing the petitioner's request for erasure was sent to the email address he had used eight days before and that he stated should be the means of informing him. If the position is that in that eight day period he changed his email address, there is no suggestion that he told the respondent he had done so during that time. Indeed, the only evidence is that it was several months

later that he told them. Nor was there any suggestion that the email, had, as it were, bounced back to the respondent as undelivered. In all of these circumstances, I am satisfied that sending an email to the petitioner's email address, stipulated by him as the means by which he was to be contacted, complied with the statutory requirement to inform him. I therefore reject the petitioner's contention that there was a breach of sections 48(1)(b) and 54(2).

The decision in the letter of 1 April 2021

[20] The petitioner's formal request for erasure was made on 24 March 2021. The respondent was correct to refuse that request. While the court was not given a copy of the "witness statement" from the PESA, I do not consider that the formality of that document is of any substance for present purposes. There is clear evidence that she gave a statement, recorded in the letters sent by the respondent. Section 38(2) of the 2018 Act, noted above, refers to the need to distinguish, so far as possible, personal data based on facts from personal data based on personal assessments. The wording of the statute does not explain in any real detail the effect of making that distinction, but assistance can be found in paragraph 187 of the explanatory notes issued in relation to the 2018 Act:

> "Section 38: The fourth data protection principle
>
> 187 The fourth principle (section 38) requires personal data held by a controller to be accurate and kept up to date. In the law enforcement context, the principle of accuracy of data must take account of the circumstances in which data is being processed. It is accepted that, for example, statements by victims and witnesses containing personal data will be based on the subjective perceptions of the person making the statement. Such statements are not always verifiable and are subject to challenge during the legal process. In such cases, the requirement for accuracy would not apply to the content of the statement but to the fact that a specific statement has been made. Section 38(2) recognises the distinction between personal data based on facts (for example, the details relating to an individual's conviction for an offence) and data based on personal assessments, such as a witness statement.

> The requirement to keep personal data up to date must also be viewed in this context. If an individual's conviction is overturned on appeal, police records must be amended to reflect that fact. However, this principle would not require the retrospective alteration of a witness statement which the appellate court found to be unreliable."

[21] In *R (on the application of O (a minor, by her litigation friend AO))* v *SSHD* [2022] UKSC 3 Lord Hodge (with whom Lord Briggs, Lord Stephens and Lady Rose agreed) held (at [29] and [30]) that the court is seeking the meaning of the words Parliament used, viewed in context and that external aids to interpretation therefore must play a secondary role. Lord Hodge stated that while explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions none of these external aids displace the meanings conveyed by the words of a statute. Here, the explanatory notes do not displace the meaning and indeed they make the rather obvious point that the police should not erase or rectify the content of inaccurate witness statements used for law enforcement purposes. This is supported by the Guide to Law Enforcement Processing issued by the Information Commissioner in January 2021. In the chapter dealing with Categorisation of Individuals, it explains that the duty to distinguish under section 38(2) results in the requirement for accuracy not applying to the actual content of the statement but simply that a specific statement has been made. The police will not retrospectively alter a witness statement even if the court has found it to be unreliable. Accordingly, as the challenged information formed part of statement by a witness there is no basis for the petitioner's contention that it required to be erased because it was inaccurate. The decision was also based upon the information available at that time which did not include that the challenged information from the PESA's statement was accepted as inaccurate.

[22] However, if that conclusion is incorrect, either because the PESA's comments should not be viewed as being in a witness statement, or that the requirement for accuracy of the data should nonetheless be applied, the data still required to be maintained for the purposes of evidence in relation to the petitioner's complaint about the investigation of taxi frauds. It is open to argument that in those circumstances processing of the data would require to have been restricted (sections 46(4) and 47(2) of the 2018 Act). This is, however, academic for present purposes. The petitioner does not base his case on a failure to restrict processing.

The decision in the letter dated 15 February 2022

[23] On 15 February 2022, many months after the petition was raised, the respondent decided to restrict the processing of the information because they had now been told that the relevant passage in the statement of the PESA was incorrect. The petitioner contends that they had no right to "review" the earlier decision. I see no force in that submission. New data about the petitioner, to the effect that earlier comments about him were incorrect, had been obtained. A decision had to be reached about that and its effect on the earlier data. Doing nothing about it would make no sense. Section 46(1) deals with rectifying inaccurate personal data and section 47(1) deals with erasing or restricting data where it would infringe particular provisions in the Act. It was necessary under these provisions for the matter to be re-considered.

[24] However, even if there was a duty to rectify or erase the data complained about by the petitioner, where the data must be maintained for the purposes of evidence the controller must restrict its processing (sections 46(4) and 47(2)). The duty requires this to be done "without undue delay". On the information available to the court, there was no undue delay in restricting the processing of the data, as that decision was reached shortly after the

further information from the PESA was made available. It took some time to identify the specific PESA who had made the statement and to raise the issue of accuracy with her.

[25] For the reasons given, the decision of 15 February 2022 did not breach any of the provisions in the legislation.

[26] In passing, I note that the new statement from the PESA was placed before the Professional Standards Department of Police Scotland. The reason for doing so is its relevance to the investigation into the petitioner's complaint about his report of taxi frauds not being taken forward, reference CO/01933/20. It was explained by counsel for the respondent in submissions that Professional Standards do not intend to review complaint CO/01933/20 as the misunderstanding of the PESA did not alter the investigation process or, outcome. Further, no disciplinary proceedings have been taken against the PESA. Nonetheless, the data, in its restricted processing, forms part of the true official record of how the petitioner's complaint against the police was handled and determined. Deleting it would affect the record. The data will come to be removed in due course, as explained in the letter dated 15 February 2022.

Compensation under section 169

[27] As a result of the decisions I have reached, no right to compensation under section 169 arises. If there had been such a right, I would have had some difficulty in concluding that the sum sought (£10,000) was a fair and reasonable amount of compensation. The part of the PESA's statement that is incorrect (the challenged information) contains no particular negative connotations about the petitioner and indeed is innocuous. It is hard to see why it would cause distress to the petitioner. He relied upon the possibility of it being disclosed to, for example, an employer but given the restrictions on

processing that cannot occur and indeed it is difficult to see if it ever could have occurred. The data can now be viewed only in relation to the complaint against the police. Moreover, it is not possible to see how someone could draw, as the petitioner suggests, some conclusion about lack of trust in the petitioner from the data. However, if I had found in his favour about breaches I would have given consideration to continuing the case to allow evidence to be provided about his distress.

Conclusion

[28] It is perhaps worth observing that the petitioner achieved a somewhat limited degree of success by bringing this petition in that, as a consequence, the respondent's decision of 1 April 2021 was reviewed after obtaining a further statement from the PESA and on 15 February 2022 the processing of the petitioner's personal data was restricted. However, his claims are for erasure and compensation and those have not succeeded.

Disposal

[29] I shall sustain the fourth and fifth pleas-in-law for the respondent and refuse the petition, reserving in the meantime all questions of expenses.