Thank you for your letter of 23 February [see Annexe] about the Criminal Cases (Punishment and Review) (Scotland) Bill and the data protection issues which emerged during the course of the Committee’s evidence-taking. I am sorry I was unable to reply in time for the Committee’s consideration earlier this month, but I hope the following will be useful in setting out the position.

The central issue in your letter is whether a condition exists under Schedule 3 to the Data Protection Act 1998 (DPA) which could provide for disclosure of sensitive personal data by the Scottish Criminal Cases Review Commission (SCCRC) in the case of Abdelbaset al Megrahi. My officials have considered the matter in detail with the SCCRC, the Scottish Government and the Information Commissioner’s Office. Following these discussions, there is a general agreement that disclosure of sensitive personal data by the SCCRC could satisfy the existing Schedule 3 condition that provides for processing where it is necessary for the administration of justice. To that extent, the DPA does not appear to be a barrier to disclosure of this information by the SCCRC.

However, I would stress that this is a matter for the SCCRC itself to decide, based on the facts of the case and subject to any other legal obligations or restrictions which may apply (for example, its legal vires and the Convention Rights).

I am copying this letter to the Foreign Secretary, Secretary of State for Scotland, the Home Secretary, the Attorney General, the Advocate General for Scotland, Sir Jeremy Heywood and Sir Bob Kerslake.

Rt Hon Kenneth Clarke QC MP
20 March 2012
Annexe

Letter from the Convener to the Lord Chancellor and Secretary of State for Justice

Criminal Cases (Punishment and Review) (Scotland) Bill, Part 2: data protection issues

The Justice Committee has recently completed evidence-taking at Stage 1 of the above Bill. As you may be aware, Part 2 of the Bill, although expressed in general terms, relates to the case of Abdelbaset al Megrahi, the man convicted of the bombing of Pan Am flight 103 over Lockerbie, and provides a framework to enable the Scottish Criminal Cases Review Commission to release information it holds about his case, referred to the High Court for reconsideration in 2007, but abandoned at an early stage of the appeal process.

Data protection has emerged as the key issue during Stage 1 scrutiny, with a number of witnesses, including representatives of the SCCRC itself, expressing concerns that the Data Protection Act 1998 may effectively block the disclosure of information relating to the Megrahi case held by the SCCRC, even if the Bill were agreed to. (This is on the assumption that the majority of interested parties would not consent to the disclosure of sensitive personal data, as proved to be the case on the last occasion that the SCCRC sought to make information about the case public in 2009.)

At its last evidence-taking session on the Bill on Tuesday,¹ the Committee heard from the Cabinet Secretary for Justice, Mr MacAskill. He noted that he had written to you requesting his assistance in removing “data protection obstacles” when the Bill was introduced, and that in your reply you indicated that you would be happy for officials in your department to speak to relevant officials in Scotland so as to get more clarity on what was being requested. I now understand that contact has been initiated between Justice Department and SCCRC officials and that there will be a meeting in early March. Again, my understanding is that discussion is likely to focus on whether an order by you under schedule 3, paragraph 10 of the Data Protection Act 1998 is likely to be necessary so as to provide the SCCRC with a relevant condition to make its decision about disclosure against all the data protection principles (alongside their other obligations).

Given the concerns that have been expressed about the impact of data protection law on the efficacy of Part 2 of the Bill, you will appreciate that the Committee considers it an important element of its scrutiny of Part 2 to ascertain whether a schedule 3 order is likely to be forthcoming. Accordingly, I would be very grateful if you could reply to me indicating whether you are minded to make such an order, and to state your reasons for being or, as the case may be, not being so minded. It would also be helpful to have an indication of when any order might be made.

I appreciate that you may not be in a position to reply until the conclusion of discussions between Justice Department and SCCRC officials. If so, it would be helpful to receive a response as soon as possible after that. I am also aware that if you propose to make a schedule 3 order, you would be required to consult the Information Commissioner before doing so.

With thanks in anticipation

Christine Grahame MSP
Convener
23 February 2012