



Scottish Information
Commissioner
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Decision Notice 288/2024

Salary of the Chair of Carmont Rolling Stock Recommendations Steering Group

Authority: Scottish Rail Holdings Ltd
Case Ref: 202301457

Summary

The Applicant asked the Authority for the salary of the Chair of Carmont Rolling Stock Recommendations Steering Group (the Steering Group). The Authority withheld the information requested because it considered it was third party personal data. The Commissioner investigated and found that the Authority was entitled to withhold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2A), (5) (definitions of “the data protection principles”, “data subject”, “personal data” and “processing”, “the UK GDPR”) and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) Articles 4(1) (definition of “personal data”) (Definitions); 5(1)(a) (Principles relating to processing of personal data); 6(1)(f) (Lawfulness of processing)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5), (10), (14)(a), (c) and (d) (Terms relating to the processing of personal data)

Background

1. The Authority's [website](#)¹ states that the Steering Group was "created to inform and review the response in Scotland to the specific, train-based, recommendations identified in the Rail Accident Investigation Branch's report into the accident at Carmont on 12 August 2020".
2. On 8 August 2023, the Applicant made a request for information to the Authority. He asked for information relating to the Steering Group, including, among other things, "the total administrative costs and the payments/expenses made to each separate member including the Chair".
3. The Authority responded on 5 September 2023. The Authority provided some information, but withheld information on the salary of the Chair under section 38(1)(b) of FOISA, on the basis that it was personal data and disclosure would breach data protection principles.
4. On 13 October 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision to withhold the salary of the Chair under section 38(1)(b) of FOISA as it was a "public position", paid by "public money" and it was important that the use of public funds was "transparent and open".
5. The Authority notified the Applicant of the outcome of its review on 9 November 2023, which fully upheld its original decision.
6. On 17 November 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review for the reasons set out in his requirement for review.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 12 January 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
9. The Authority was also asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 38(1)(b) – Personal information

11. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the UK GDPR.

¹ <https://railholdings.scot/latest/srh-appoints-chair-of-new-carmont-steering-group/>

12. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information personal data?

13. The first question the Commissioner must address is whether the information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable individual. "Identified living individual" is defined in section 3(3) of the DPA 2018. (This definition reflects the definition of personal data in Article 4(1) of the UK GDPR.)
14. Information will "relate to" a person if it is about them, is linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
15. The Commissioner is satisfied that the information being withheld under section 38(1)(b) of FOISA is personal data: the information identifies a living individual (the Chair) and clearly relates to that individual (it is their salary).

Would disclosure contravene one of the data protection principles?

16. The Authority argued that disclosure would breach the data protection principle in Article 5(1)(a) of the UK GDPR. Article 5(1)(a) states that personal data shall be processed "lawfully, fairly and in a transparent manner in relation to the data subject".
17. "Processing" of personal data is defined in section 3(4) of the DPA 2018. It includes (section 3(4)(d)) disclosure by transmission, dissemination or otherwise making available personal data. The definition therefore covers disclosing information into the public domain in response to a FOISA request.
18. The Commissioner must consider whether disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the UK GDPR would allow the data to be disclosed.
19. The Commissioner considers that condition (f) in Article 6(1) is the only condition which could potentially apply in the circumstances of this case.

Condition (f): legitimate interests

20. Condition (f) states that processing shall be lawful if it:
"is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data ..."
21. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in performance of its tasks, section 38(5A) of FOISA makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
22. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - (i) Would the Applicant have a legitimate interest in obtaining personal data?
 - (ii) If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?

- (iii) Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental rights and freedoms of the data subject?

Does the Applicant have a legitimate interest in obtaining the personal data?

23. There is no definition within the DPA 2018 of what constitutes a “legitimate interest”, but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. [His published guidance on section 38\(1\)\(b\) of FOISA](#)² states:
- “In some cases, the legitimate interest might be personal to the applicant, e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.”
24. The Applicant submitted that he had a legitimate interest in the disclosure of the salary paid to the Chair as it was a “public position”, paid by “public money” and it was important that the use of public funds was “transparent and open”.
25. The Authority accepted that the Applicant had a legitimate interest in obtaining the personal data. The Commissioner agrees.

Would disclosure of the personal data be necessary?

26. Having accepted that the Applicant has a legitimate interest in the personal data, the Commissioner must consider whether disclosure would be necessary to achieve the legitimate interest in the information.
27. Here, “necessary” means “reasonably” rather than “absolutely” or “strictly” necessary. When considering whether disclosure would be necessary, public authorities must consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the Applicant’s legitimate interest could reasonably be met by means which interfered less with the privacy of the data subject.
28. To satisfy the legitimate interest in its use of public funds, the Authority explained that it publishes the names, job titles and salary details of its senior management team. However, it submitted that the level of remuneration received by the Chair was “in no way” comparable to these individuals. While it accepted that the Chair performs a public role paid for by public funds, it stated that the Steering Group is not a policy or decision-making body and instead performs an advisory role only. It submitted that the Chair would not have a reasonable expectation that her salary would be published.
29. The Authority noted that the sums involved were “very low” in the context of its overall spending and in the context of what might generally be perceived as “high” pay deserving of enhanced public scrutiny. It also submitted that there was no suggestion of “impropriety” in relation to the Chair’s salary (or the process by which it was determined) that might justify an enhanced level of public scrutiny.
30. The Authority stated that normal processes were followed in the process of negotiating the Chair’s salary, including the application of appropriate internal and external financial controls

² <https://www.foi.scot/sites/default/files/2022-04/BriefingSection38PersonalInformationGDPR.pdf>

to ensure the proper scrutiny and allocation of public funds, and that its accounts were published and audited in line with ordinary procedures.

31. In summary, while the Authority acknowledged the Applicant's legitimate interest in holding it accountable for its use of public funds, it argued that disclosure of the salary of the Chair was not "reasonably necessary" to meet that interest.
32. The Applicant submitted that disclosure of the Chair's salary was necessary to meet his legitimate interest to ensure that the Scottish taxpayer was getting "value for money" and that pay rates are fair and reasonable, in the same way that is expected of other parts of the Scottish rail industry.
33. Having fully considered the submissions provided, the Commissioner can identify no viable means of fully meeting the Applicant's legitimate interest which would interfere less with the privacy of the data subject than disclosing the withheld information. In all the circumstances, therefore, he is satisfied that disclosure of the information is necessary for the purposes of the Applicant's legitimate interest.
34. The Commissioner will now consider whether the Applicant's legitimate interest in obtaining the withheld information outweighs the rights and freedoms of the data subject.

The data subject's interests or fundamental rights and freedoms (and balancing exercise)

35. The Commissioner has concluded that the disclosure of the information would be necessary to achieve the Applicant's legitimate interests. However, this must be balanced against the fundamental rights and freedoms of the data subjects. Only if the legitimate interests of the Applicant outweighed those of the data subject could the information be disclosed without breaching the first data protection principle.
36. The Commissioner's guidance on section 38 of FOISA notes factors that should be taken into account in balancing the interests of parties. He notes that Recital (47) of the General Data Protection Regulation states that much will depend on the reasonable expectations of the data subjects. These are some of the factors public authorities should consider:
 - (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - (ii) whether the individual objected to the disclosure
 - (iii) the potential harm or distress that may be caused by disclosure.
37. The Commissioner acknowledges that the withheld information relates to the data subject's public life, in that it identifies her as the Chair of the Steering Group (and relates to the salary she receives for that role). He also acknowledges that, by association, the information relates to the Chair's private life.
38. In the circumstances, the Commissioner concludes that the withheld information relates to both the private and public life of the data subject.
39. The Authority consulted the Chair and was provided with detailed reasoning why she strongly objected to her personal data being disclosed. The Commissioner cannot include all the specific comments made by the Chair but he has taken all relevant ones into account.
40. The Commissioner has also considered the harm or distress that might be caused by disclosure of the information. Disclosure, under FOISA, is a public disclosure. He has taken this into account when reaching his decision.

41. The Authority explained that the Chair strongly considered her salary was both personal and confidential information. She further submitted that her salary had been determined through negotiation and that disclosure would therefore disadvantage her position in salary negotiations for future rules as her salary would be interpreted by others as her standard rate for such work.
42. The Commissioner recognises that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse. He also recognises that not all staff should be subject to such a level of scrutiny and draws a distinction between what information should be released about senior staff compared to what should be disclosed about less senior staff.
43. The Commissioner recognises that the data subject in this case might reasonably be viewed as occupying a senior position, being Chair of the Steering Group. However, he accepts that the Steering Group performs an advisory role only and that the data subject's position as Chair is therefore distinguishable from senior positions on other bodies that have decision-making functions.
44. The Commissioner therefore considers that the data subject would have no realistic expectation that her salary as Chair of the Steering Group would be disclosed, under FOISA, to the world at large (unlike, for example, members of the Authority's senior management team whose names, job titles and salary details are all published).
45. The Commissioner also recognises the Authority's argument that the Chair's salary was "very low" in the context of its overall spending and that there was no suggestion of "impropriety" in relation to her salary, meaning there was no justification for an enhanced level of public scrutiny.
46. In this respect, the Commissioner considers that this case can be distinguished from his finding in [Decision 048/2023](#)³, where he required disclosure of the monies paid to the Chair of Edinburgh Trams Inquiry that had been withheld under section 38(1)(b) of FOISA.
47. In that case, the Commissioner found that the legitimate interest in the use of public funds would not be outweighed by any unwarranted prejudice that would result to the rights and freedoms and legitimate interests of the data subject.
48. The Commissioner considers that there is a material difference in the monies paid to the Chair of the Inquiry in that case and the salary of the Chair of the Steering Group in this case. Despite sharing the same title, the positions of Chair of Edinburgh Trams Inquiry and Chair of the Steering Group are materially different in almost all respects, particularly in terms of seniority, responsibility and expectations in relation to public scrutiny and information that might be publicly disclosed to satisfy that scrutiny.
49. After carefully balancing the legitimate interest of the Applicant against the interests or fundamental rights or freedoms of the data subject, the Commissioner finds that the legitimate interest served by disclosure of any information held would be outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the data subject.
50. Having found that the legitimate interest served by disclosure of the personal data are outweighed by the unwarranted prejudice that would result to the rights and freedoms or legitimate interests of the data subject, the Commissioner finds that condition (f) in Article

³ <https://www.foi.scot/decision-0482023>

6(1) of the GDPR cannot be met and that disclosure of the information in question would be unlawful.

51. Given that the Commissioner has concluded that the processing of the personal data would be unlawful, he is not required to go on to consider whether disclosure of the personal data would otherwise be fair and transparent in relation to the data subject.
52. The Commissioner is satisfied, in the absence of a condition in Article 6 of the UK GDPR which would allow the data to be disclosed, that disclosure would be unlawful. The personal data is therefore exempt from disclosure under section 38(1)(b) of FOISA.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

9 December 2024