

Decision Notice



Decision 050/2010 Mrs E and Highland Council

Salary gradings

Reference No: 200901625
Decision Date: 22 March 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mrs E requested from Highland Council (the Council) the salary gradings of named staff. The Council responded by withholding the information under the exemption in section 38(1)(b) of FOISA, which relates to personal data. Following a review, Mrs E remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mrs E's request for information in accordance with Part 1 of FOISA, by correctly applying the exemption in section 38(1)(b) to the withheld information, which constituted personal data the disclosure of which would breach the first data protection principle. He did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (b) and (5) (definition of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (definition of "personal data") (Basic interpretative provisions); Part 1 of Schedule 1 (The data protection principles – the first data protection principle) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data – condition 6)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 29 June 2009, Mrs E wrote to the Council in relation to its recent "Harmonisation" process, as it was her understanding that this had led to Council employees having their posts re-graded. She enclosed a list of named staff and requested that the Council "confirm exactly which salary grading these staff are currently on".



2. The Council responded on 6 August 2009, withholding the information requested under section 38(1)(b) of FOISA as it considered the information to be the personal data of the named staff. However, it released the job evaluation scores for the types of posts which the employees in question held, along with its pay and grading structure, to enable Mrs E to establish the grades for the posts.
3. On 11 August 2009, Mrs E wrote to the Council requesting a review of its decision.
4. The Council notified Mrs E of the outcome of its review on 28 August 2009, upholding its original decision to withhold the information under section 38(1)(b) of FOISA. It submitted that it had provided as much information as it could without infringing the rights of the staff involved.
5. On 10 September 2010, Mrs E wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mrs E had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 1 October 2009, the Council was notified in writing that an application had been received from Mrs E and was asked to provide the Commissioner with further details of the information withheld from her. The Council responded with details as requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to its reasons for applying the exemption in section 38(1)(b) of FOISA to the withheld information.
9. The relevant submissions obtained from the Council and Mrs E will be considered fully in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered the nature of the withheld information and the submissions made to him by both Mrs E and the Council and is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) – personal information

11. The Council withheld the information under section 38(1)(b) of FOISA, believing it to be the personal data of the named staff, the disclosure of which would contravene the first data protection principle.
12. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, where appropriate, 38(2)(b)), exempts information from disclosure if it is personal data (as defined by section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles set out in Schedule 1 to the DPA. The exemption is absolute and therefore is not subject to the public interest test in section 2(1)(b) of FOISA.

Is any of the withheld information personal data?

13. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
14. Having considered the nature of the withheld information, the Commissioner accepts that it is the personal data of specific living individuals. The individuals can be identified from the information, either by itself or read in conjunction with other information in the possession of (or likely to come into the possession of) the data controller. It clearly focuses on those individuals and is biographical of them in a significant sense, and consequently the Commissioner is satisfied that it relates to them.

Would disclosure of the information breach the first data protection principle?

15. In this case, the Council argued that disclosure of the information would breach the first data protection principle. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (to the DPA) is also met. In this case, processing would be by disclosure in response to Mrs E's information request.
16. Having considered the withheld information, the Commissioner is satisfied that it does not fall into any of the categories of sensitive personal data listed in section 2 of the DPA.



17. In the circumstances of this case, the Commissioner has first considered the application of the conditions in Schedule 2. Condition 6 would appear to be the only one which might permit disclosure in the circumstances of this case. Condition 6 is met where:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

18. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:

- i) Does Mrs E have a legitimate interest in obtaining these personal data?
- ii) If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
- iii) Even if the processing is necessary for the legitimate purposes of Mrs E, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject(s) in this case the named staff? This will involve a balancing exercise between the legitimate interests of the Mrs E and those of the data subjects. Only if (or to the extent that) the legitimate interests of the Mrs E outweigh those of the data subject(s) can the personal data be disclosed.

Legitimate interests of the applicant

19. In her application to the Commissioner and in subsequent communications with the investigating officer, Mrs E set out her reasons for requiring the withheld information. While these are highly personal and cannot be reproduced here, in the circumstances the Commissioner accepts that Mrs E has demonstrated that she has a legitimate interest in obtaining the information.

Necessity

20. Moving on to the second test, the Commissioner has considered whether disclosure of the withheld information is actually required to achieve the legitimate aims he has identified. He notes that in its response to Mrs E, the Council released some information relating to the posts held by the named staff which was not specific to the individuals concerned, including the job evaluation scores for the posts and its pay and grading structure.
21. Having acknowledged Mrs E's legitimate interests in access to information on re-grading of the specific named staff, however, the Commissioner cannot regard this existing disclosure as meeting those interests completely. Clearly, she is seeking specific salary information in respect of the individuals concerned. In the circumstances, he can identify no viable means of meeting her legitimate interests which would interfere less with the privacy of the relevant data subject(s) than obtaining all of the information requested.



Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the named staff whose personal data is being sought?

22. The Council accepted that the salary grade of a post would not be exempt from disclosure and believed it had supplied this information to Mrs E. However, it also highlighted the lack of seniority of the staff Mrs E had named. It further explained that these staff were given no indication that such specific disclosure about their salary gradings would take place either at the time of their recruitment or during the job evaluation process, and consequently there could be no expectation of this detailed information being released.
23. Mrs E did not agree with the Council's reasons for protecting the privacy of the staff concerned, as in her view these staff were in a public-facing role with no expectation of privacy.
24. The Commissioner has already considered requests for details of an individual's remuneration in previous decisions, including *Decision 027/2009 Highland News Group and Highlands and Islands Enterprise*. In particular, here and in other cases, he has referred to the guidance note produced by the Information Commissioner (who is responsible for the enforcement of the DPA) entitled *When should salaries be disclosed?*¹
25. This guidance asks authorities to consider the individual's expectations as to public scrutiny in relation to their role and disclosure of their salary (taking account, for example, of whether salaries for that type of post are generally made public and legitimate public interests in relation to disclosure), and also the level of intrusion that would follow from disclosure (which may be less, for example, where the scale in question is relatively narrow, but which should also take account of any particular intrusion deriving from the salary in question or the individual's own circumstances). It identifies exceptional circumstances in which disclosure might be justified, for example where there are legitimate concerns about corruption or mismanagement or where the individuals concerned have significant control over setting their own or others' salaries, but generally it would appear from the guidance that disclosure of more detailed information on the salaries of junior staff will be considered unfair.
26. In this case, having considered the Council's submissions, the Commissioner accepts that (at the time the Council dealt with Mrs E's information request and request for review) there was no reasonable expectation that information of this kind in respect of staff at the relatively junior grades of those named in the request would be made known in circumstances such as this, even if their roles could be described as "public-facing". Although the staff may have dealt with the public routinely within the limits of their own respective responsibilities, the Commissioner does not consider it to follow that they would have expected their salaries to be made known to the public. They were all quite junior and did not have responsibility for major decisions on, for example, questions of policy or the expenditure of public funds. In light of the Information Commissioner's guidance note cited above, and taking account of what it says about exceptional circumstances, overall the Commissioner accepts the arguments made by the Council as to intrusion into the privacy of the individuals concerned.

¹ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salaries_v1.pdf



27. Having considered all of the arguments submitted by Mrs E in support of her legitimate interests in the information, the Commissioner is not satisfied that these sufficiently outweigh the intrusion he accepts would follow from disclosure. Therefore, on balance, the Commissioner must conclude that disclosure of the information requested would in this case be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. He must therefore conclude that condition 6 is not met.
28. Having accepted that disclosure of the information requested would lead to unwarranted intrusion into the privacy of the data subjects, the Commissioner must also conclude that disclosure would be unfair. As condition 6 is not met, he would also regard disclosure as unlawful. In all the circumstances, therefore, the Commissioner's conclusion is that the first data protection principle would be breached by disclosure and therefore that the withheld information was properly withheld under section 38(1)(b) of FOISA.

DECISION

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

Appeal

Should either Mrs E or Highland Council wish to appeal against this 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 after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
22 March 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;



...

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

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;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.