

Decision Notice



Decision 059/2010 Mr Q and South Lanarkshire Council

Various items

Reference No: 200901474
Decision Date: 27 April 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Q requested from South Lanarkshire Council (the Council) information on specific topics which he described. The Council responded by supplying some of the information with an explanation as to why it did not hold the remainder. Following a review, as a result of which further information was provided subject to redaction of personal data under section 38(1)(b) of FOISA, Mr Q remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Q's request for information in accordance with Part 1 of FOISA, by issuing a notice in terms of section 17 of FOISA that it did not hold certain of the information requested. He also found that the Council correctly applied the exemption under section 38(1)(b) of FOISA in relation to the name of a particular individual.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 14(2) (Vexatious or repeated requests); section 17(1) (Notice that information is not held) and 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of "personal data") and Schedules 1 (The data protection principles – the first principle) and 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. Mr Q has been in correspondence with the Council over a number of years in relation to various matters including the question of Council funding. Mr Q's previous correspondence included requests for information under FOISA. Two such requests resulted in Decision Notices from the Commissioner.



2. On 25 May 2009, Mr Q wrote to the Council requesting the following information:
 - i) *Your records should show where, between 06 Sep 04 and 03 May 09, information about viability, funding and lending [in respect of a particular development] has also been sought.*
...
It would also be helpful if you could tell me who at the Council approved the lending and funding.
...
 - ii) *May I now have copies of the information which seems to me to have been held back unreasonably, including it seems to me by [specified individuals]. [In this connection, Mr Q referred to particular decisions of the Commissioner.]*
 - iii) *I would also like to see a copy of [named individual]'s letter to Councillor Smith dated on or around 20 Oct 04; including details of what she says about me, my observations and my use of my private property.*
Is there any connection between [named individual] and the Council? ...
3. The Council responded on 26 June 2009, providing information in response to Mr Q's request i). It advised that it did not hold the remaining information requested. It answered the question in request iii): as this matter was not raised by Mr Q in his request for review (see below) or his application to the Commissioner, it will not be considered further in this decision.
4. On 6 July 2009, Mr Q wrote to the Council requesting a review of its decision. He did not believe the information provided to be adequate. He also believed the Council to have made contradictory assertions as to whether it held the information specified in request ii), and that it should hold the letter referred to in request iii).
5. The Council informed Mr Q of the outcome of its review on 7 August 2009, providing further information in relation to request i) while confirming that it did not hold the letter referred to in request iii).
6. On 13 August 2009, Mr Q wrote to the Commissioner, stating that he 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. On 25 August 2009 Mr Q also contacted the Commissioner with further reasons for his dissatisfaction with the Council's handling of his requests.
7. The application was validated by establishing that Mr Q had made requests 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 those requests. The case was then allocated to an investigating officer.



Investigation

8. The investigating officer contacted the Council on 16 September 2009, 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 clarify certain aspects of its handling of Mr Q's requests and to explain the steps it had taken to establish what relevant information it held.
9. The Council responded on 8 October 2009, advising that it had withheld the name of the individual who had approved the application for funding (request i) under section 38(1)(b) of FOISA. It also provided submissions in support of its assertion that it did not hold the remainder of the requested information.
10. There followed further correspondence between the investigating officer and both the Council and Mr Q. The submissions received, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.
11. While Mr Q has raised a range of issues in the course of the investigation, the Commissioner must note that he can only comment on whether the Council dealt with Mr Q's request for information in terms of Part 1 of FOISA, in the respects identified in his application.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Q and the Council and is satisfied that no matter of relevance has been overlooked.

Request i)

13. Mr Q wished to know "who at the Council approved the lending and funding", adding that it "might be worth considering providing copies of relevant information". In the circumstances, the Commissioner does not consider the latter wording to add anything of substance to the request: the request is for the identity of the person or persons responsible for the relevant approval. In his letter to the Commissioner dated 25 August 2009, Mr Q commented that whilst the Council had provided more information in its review response (by specifying that a Section Leader approved applications in line with its Scheme of Delegation) it had failed to name this person.

Personal data – section 38(1)(b) of FOISA

14. The Council withheld the Section Leader's name under section 38(1)(b) of FOISA, arguing that it was personal data which, if disclosed, would contravene the first data protection principle.



15. 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 would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.

Is the information personal data?

16. 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).
17. The Commissioner accepts that the name of the Section Leader enables identification of a living individual, and relates to that individual, by confirming their involvement in the decision on funding. He is therefore satisfied that this information is the Section Leader's personal data.
18. The Commissioner must consider whether disclosure of this personal data would contravene the first data protection principle, as argued by the Council.

Would disclosure contravene the first data protection principle?

19. The first data protection principle states 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. The processing under consideration in this case is disclosure in response to Mr Q's information request.
20. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case does not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this case.
21. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
22. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of the Section Leader's name would be fair and lawful.



Can any of the conditions in Schedule 2 to the DPA be met?

23. In its submissions, the Council asserted that condition 6 in Schedule 2 of DPA could not be met, identifying no other relevant condition. Condition 6 allows personal data to be processed if 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 (the individual to whom the data relate). In this case, the Commissioner accepts that none of the other conditions in Schedule 2 would be relevant to disclosure.
24. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Mr Q have a legitimate interest in obtaining the personal data?
 - 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 subject?
 - Even if the processing is necessary for Mr Q's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Q must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the personal data to Mr Q.

Is there a legitimate interest?

25. Apart from the general public interest in accountability, which it believed to have been served by the information disclosed to him already, the Council did not consider Mr Q to have any particular legitimate interest in disclosure. Having considered all of Mr Q's submissions and other relative correspondence, the Commissioner has not been able to identify any more particular legitimate interest there.
26. Having looked carefully at the particular circumstances of this case, and having considered the correspondence between Mr Q and the Council which led up to the making of this particular request, the Commissioner is not persuaded that Mr Q has a legitimate interest in obtaining the withheld personal data and therefore does not consider that condition 6 can be met.
27. As condition 6 cannot be met in this case, disclosure would not be lawful. In all the circumstances, therefore, the Commissioner concludes the Council correctly withheld the Section Leader's name under section 38(1)(b) of FOISA.



Request ii)

28. In connection with his request ii), Mr Q referred to the information considered in two previous decisions by the Commissioner. In both cases, the Commissioner was satisfied that the Council did not hold the information in question. Mr Q, however, believed the Council to have made contradictory assertions on this point.
29. The Commissioner has noted Mr Q's concerns, but does not consider that he has received any information of substance which would justify revisiting the conclusions in either of the decisions cited by Mr Q. As the Council has submitted, Mr Q appears to have concluded from the fact that a certain kind of record was held in one part of the Council that it would necessarily be held in another part. The Commissioner is not persuaded that such a conclusion is warranted. He has also considered whether it would be reasonable to extend consideration of this request beyond the subject matter of the decisions cited by Mr Q, but has concluded that it would not be. From the submissions he has received, he cannot identify any reasonable, objective basis for defining what else might have been "held back unreasonably" from Mr Q.
30. In the circumstances, the Commissioner can identify no basis for reconsidering the conclusions reached in the decisions referred to by Mr Q that the Council did not hold certain information.

Request iii)

31. Mr Q's request iii) related to the information in a letter from a named individual to a Councillor dated on or around 20 October 2004. The Council indicated it did not hold this information, issuing a notice in terms of section 17 of FOISA. The Commissioner must therefore consider whether any information falling within the scope of this request was held by the Council at the time it received Mr Q's request for information.
32. From correspondence with the investigating officer, Mr Q clearly believes that the letter in question *should* be held by the Council (although it does not, of course, follow that it was, even assuming his belief was a reasonable one).
33. In both its initial response and its response to his request for review, the Council indicated it could not provide the letter Mr Q had described as it did not hold it. During the subsequent investigation, the Council described the searches it had undertaken and its reasons for concluding that the information in question was not held.



34. The Commissioner notes that the author of the letter referred to by Mr Q was not an employee of the Council. As described by Mr Q, the letter was addressed to an individual Councillor, who cannot be equated in law with the Council itself. In the circumstances, it would not appear reasonable to expect the Council to hold the letter, unless either the author or the recipient had provided it with a copy. The Commissioner is satisfied that the searches undertaken by the Council were adequate in the circumstances to locate any relevant information held. He is therefore satisfied that it was correct to notify Mr Q in terms of section 17 of FOISA that it did not hold the information.

DECISION

The Commissioner finds that, in respect of the matters specified in Mr Q's application, the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Q.

Appeal

Should either Mr Q or South Lanarkshire 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
27 April 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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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 –
 - (i) paragraphs (a), (c) and (d); and
 - (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.

...



14 Vexatious or repeated requests

...

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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.

...

Decision 059/2010
Mr Q
and South Lanarkshire Council

