

Decision Notice



Decision 061/2014 Mr Peter Burke and Angus Council

Adults with learning difficulties with unmet needs

Reference No: 201301554
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Rosemary Agnew
Scottish Information Commissioner

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



Summary

On 1 March 2013, Mr Peter Burke asked Angus Council (the Council) for an anonymised list of adults with learning difficulties with unmet needs for both respite and residential care in the Carnoustie and Monifieth areas. The Council responded by withholding the information.

Following an investigation, the Commissioner found that the Council had been entitled to withhold the information: it was the personal data of other individuals and its disclosure would breach the first data protection principle.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 8(1) (Requesting information); 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”); Schedule 1 (The data protection principles, Part I: the principles) (the first data protection principle); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

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 1 March 2013, Mr Burke wrote to the Council requesting the following information:

“an ‘anonymised’ list of adults with learning difficulties with unmet needs for both respite and residential care in the Carnoustie and Monifieth areas”.

Mr Burke went on to explain that a *“spreadsheet as follows would be most helpful, but any format would be acceptable for us to establish and maintain our ‘unmet need database”*, and he listed the following:



- Client number
 - Location (DD5/DD7)
 - Unmet need Respite (in years)
 - Unmet need Residential (in years)
2. The Council responded on 21 March 2013. It explained that the information requested related to the physical or mental health of individuals, and was therefore sensitive personal data. It went on to explain that the information was exempt under section 38(1)(b) of FOISA, taken together with section 38(2)(a)(i), and that anonymising the information was not of itself sufficient to enable compliance with the data protection principles in the DPA. It also stated that none of the conditions in schedule 2 or schedule 3 to the DPA were met in this case.
 3. On 22 March 2013, Mr Burke wrote to the Council requesting a review of its decision. In particular, Mr Burke drew the Council's attention to the format in which he requested that the information be provided. Mr Burke considered that if the information was provided in this format, it would not reveal any personal data, and would reveal only the number of adults with learning difficulties in each of the two burghs, and their quantified unmet needs. Mr Burke also pointed out that his request had been made after he attended a meeting with parent carers, county councillors and one other council officer on 13 February 2013, at which he said he had been told that the Council held the requested information in a concise format.
 4. The Council notified Mr Burke of the outcome of its review on 19 April 2013. The Council confirmed its previous decision not to release the information. The Council also explained to Mr Burke that, although he was advised that a spreadsheet existed showing the requested information, i.e. the unmet respite and residential care needs of individuals in the areas, in fact the spreadsheet which was held by the Council contained details of the current support and accommodation being provided, possible future needs and possible future needs as requested by parents. The Council considered that the spreadsheet did not identify "unmet need" in the terms described by Mr Burke in his request.
 5. On 2 July 2013, Mr Burke 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.
 6. The application was validated by establishing that Mr Burke made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



Investigation

7. On 10 July 2013, the Council was notified in writing that an application had been received from Mr Burke and was asked to provide the Commissioner with the information withheld from him. The Council provided the information and the case was 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 confirm whether it accepted that the withheld information was indeed the information Mr Burke had requested, or if it wished to claim that it did not hold the requested information. If it accepted that the withheld information was the information Mr Burke had asked for, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. Further submissions were obtained from the Council during the course of the investigation.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Burke and the Council. She is satisfied that no matter of relevance has been overlooked.
11. At the outset, the Commissioner notes that, in his application to the Commissioner, Mr Burke stated that his request "was not an official FOI request", and that the Council had "turned my request into an FOI".
12. Section 1(1) provides that "[a] person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority". Section 8(1) of FOISA goes on to state: "[a]ny reference in this Act to "requesting" information is a reference to making a request which-
 - (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested".
13. Mr Burke requested information from the Council in writing, stating his name and an address for correspondence, and describing the information he was requesting. The Council was therefore correct to recognise this as a request under section 1(1) of FOISA and to deal with it under FOISA.



The requested information

14. Mr Burke also commented in his application to the Commissioner that he believed the information contained in the Council's spreadsheet of "future needs" and the list of "unmet need" which he had requested was the same information, and that the Council was using language to be economical with the truth and avoid releasing the information.
15. Mr Burke requested information about adults with learning difficulties with unmet needs for both respite and residential care who were living in the Carnoustie and Monifieth areas, clearly an issue of some concern to him.
16. The Council was asked whether the information in the withheld spreadsheet included the information that Mr Burke had asked for. The Council responded that "it may well be that this is the same information which Mr Burke is seeking", and explained that it was for this reason that the Council's Review Panel had decided to withhold the information, rather than claim that it did not hold the information.
17. The spreadsheet provided to the Commissioner was described by the Council as "Current & Possible Future Needs of Adults with Learning Disabilities in Carnoustie/Monifieth". The Commissioner has carefully considered whether the information in the spreadsheet is the information that Mr Burke requested. It is clear that Mr Burke wanted to identify actual unmet needs, not things that may (or may not) be needed in the future. Further, the information held by the Council does not include the number of years that the need has been unmet for. However, there are columns in the spreadsheet with the headings "Have they applied for housing property in the past (if so, give details)" and "Future accommodation (family/carer view)", and the information contained in those headings gives some indication of the current unmet needs of the individuals, at least in the view of the family or carer.
18. Having considered the withheld information, the Commissioner is of the view that the spreadsheet which has been withheld from Mr Burke does contain information which he requested.
19. The Council's response, "it may well be that this is the same information which Mr Burke is seeking", indicates that the Council was not certain at the time of responding to the requirement for review whether the information in the spreadsheet was the information Mr Burke had requested. The Commissioner considers that, if there was any ambiguity about whether the information in the spreadsheet was the information Mr Burke had requested, the Council should have clarified the request with Mr Burke under section 1(3) of FOISA.

Section 38(1)(b) – Personal information

20. The Council relied on the exemption in section 38(1)(b) of FOISA, taken together with section 38(2)(a)(i), to withhold the relevant information in the spreadsheet.
21. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, where relevant, section 38(2)(b)) exempts information from disclosure if it is "personal data" (as defined in



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.

22. In order to rely on this exemption, the Council must therefore show that the information being withheld is personal data for the purposes of the DPA and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles found in Schedule 1 to the DPA.

Is the information personal data?

23. 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).
24. There are two parts to this test: (i) the data must “relate to” the individual and (ii) must allow them to be identified, either from the data on its own, or from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller.
25. The Commissioner notes that Mr Burke has not requested the names or addresses of the individuals. Mr Burke made it clear that he only needed the first three characters of the individuals’ postcodes. The Commissioner has considered whether, if only the first three characters of the individuals’ postcodes was given, the individuals would still be identifiable. If providing the information in that way would prevent the identification of the individuals, the information would no longer be personal data as defined in section 1(1) of the DPA, and so would not be subject to the exemption in section 38(1)(b) of FOISA.
26. The Council argued that the numbers of people affected in each postcode was quite small and the communities involved were very small. It said that if it released the first three postcode characters (either DD5 or DD7), this would identify whether the person resided in either Carnoustie or Monifieth. The Council was also concerned that when the postcodes were read together with the information contained in the column headed “Future Care and Support Needs”, which indicated the types of support and supervision that individuals may need in the future, it was possible to identify individuals. The Council said if the first three postcode characters plus the current care arrangements were disclosed, e.g. whether they lived with their parents, or with another family member, this could allow individuals to be identified. The Council also felt that the information in the “Future accommodation (family/carer view)” column could quite easily identify individuals.
27. The Council also noted that the community of parents and carers in the Carnoustie and Monifieth area was very small, and that many of the parents and carers were known to each other and would know each other’s current accommodation arrangements. The Council argued that this group of people could therefore identify the others to whom the information related, given their background knowledge of the situations relating to other individuals and families.



28. The Council was also asked whether it would be possible to provide the withheld information without any postcode information, i.e. if it was possible to provide the information with the whole postcode redacted. The Council considered that, although there was a slightly larger pool of individuals between both postcodes, individuals could still be identified from the information if all postcode details were withheld. It noted that, geographically, Carnoustie and Monifieth were extremely close together and that parents and carers from both postcodes had met. Therefore, it considered that it could still be possible for individuals to be identified simply by the release of their current care arrangements and their future care arrangements.
29. Mr Burke stated that the format that he had requested the information in would make it impossible for any one individual to be identified. Mr Burke estimated that there were probably 50 or more adults with learning disabilities living in the Carnoustie and Monifieth areas. He thought that knowing the first three postcode characters would indicate the town and nothing else, and would not enable any one individual to be identified.
30. The Commissioner is satisfied that the withheld information is personal data as defined in section 1(1) of the DPA. The Commissioner accepts that it would be possible to identify individuals from the information, even if no postcode data was disclosed, given the relatively low numbers of individuals living in the postcode areas, and the level of detail contained in the withheld information as to their accommodation and care needs, and their current living situation (e.g. who they currently live with). As the withheld information identifies a number of individuals, including adults with learning difficulties living in the area, and their family members, and clearly relates to them, since it reveals details of their current living situation, and their current and possible future accommodation and care needs, it is the personal data of those individuals.

Would disclosure breach the first data protection principle?

31. The Council argued that if the information were to be disclosed, the first data protection principle would be breached.

Can any schedule 2 condition be met?

32. The Commissioner considers that the only Schedule 2 condition which might be met to permit disclosure of the requested information is condition 6(1), which is set out in full in the Appendix.
33. As explained in the Commissioner's published guidance on this exemption¹, there are a number of different tests which must be satisfied before condition 6(1) can be met. These are:
- (i) Is Mr Burke pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing necessary for Mr Burke's legitimate interests? In other words, is the processing proportionate as a means and fairly balanced to its ends, or could these

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



legitimate interests be achieved by means which interfere less with the privacy of the individuals?

- (iii) Even if processing is necessary for Mr Burke's legitimate interests, is it unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the individuals?

34. There is no presumption in favour of disclosure of personal data under FOISA. Accordingly, the legitimate interests of Mr Burke must outweigh the rights, freedoms and legitimate interests of the individuals whose personal data is contained in the spreadsheet before condition 6(1) will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that condition 6(1) is not met.

Is Mr Burke pursuing a legitimate interest or interests?

35. There is no definition within the DPA of what constitutes a legitimate interest. The Commissioner's published guidance on the exemption in section 38(1)(b) 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".

36. The Commissioner takes the view that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive.
37. The Council submitted that neither Mr Burke nor the wider public had a legitimate interest in the withheld information. The Council did accept that the information may be of value to the individuals and families concerned, but said it was not in the public interest that vulnerable people and details of their care needs were placed in the public domain.
38. Mr Burke has a direct personal interest in the issue and is a member of a local pressure group relating to this. The group has met with council officers and councillors to make them aware of the situation regarding unmet need in the area. Mr Burke has also indicated that he is building a database of unmet needs, and that he needs this information to be able to build the database.
39. The Commissioner has considered the comments of the Council and Mr Burke carefully and, in these circumstances, she accepts that Mr Burke has a legitimate interest in knowing the extent to which there are adults with learning difficulties living in the area who have unmet needs in relation to respite care and residential needs, particularly given his role in the pressure group and personal circumstances.



Is the processing necessary for the purpose of this interest?

40. When considering this, the Commissioner must consider whether the interests she has identified might reasonably be met by any alternative means, which would interfere less with the privacy of the individuals whose personal data has been withheld.
41. The Commissioner has considered whether there are any other means by which Mr Burke's legitimate interest could be met, but is not aware of any other viable way of meeting Mr Burke's legitimate interest which would interfere less with the privacy of the individuals than providing the requested information. The Commissioner is therefore satisfied that disclosure of the information is necessary for the purposes of Mr Burke's legitimate interests.

Would disclosure be unwarranted by reason of prejudice to the legitimate interests of the individuals?

42. Having concluded that disclosure of the personal data would be necessary to meet Mr Burke's legitimate interests, the Commissioner must consider whether the disclosure would nevertheless be unwarranted by reason of prejudice to the rights, freedoms or legitimate interests of the individuals. This involves balancing Mr Burke's legitimate interests against the rights, freedoms and legitimate interests of the individuals. Only if the legitimate interest of Mr Burke outweighs the rights, freedoms and legitimate interests of the individuals can the information be disclosed without breaching the first data protection principle.
43. In the Commissioner's published guidance on the exemption in section 38(1)(b), she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
- whether the information relates to the individuals' public life (i.e. their work as a public official or employee etc.) or their private life (i.e. their home, family, social life or finances etc.);
 - the potential harm or distress that might be caused by disclosure;
 - whether the individuals objected to the disclosure; and
 - the reasonable expectations of the individuals as to whether the information would be disclosed into the public domain.
44. The Council noted that the withheld information included details of future needs as assessed by the Council, and possible future needs as requested by parents. It did not consider that such information was information which the individuals would expect to enter the public domain. It also stated that the information contained details about vulnerable people and their care needs, and that it was not in the public interest for this information to be put into the public domain.
45. The Commissioner considers that the information clearly relates to the private lives of the individuals. She also accepts that information about the needs of the adults with learning difficulties is information which the data subjects would not reasonably expect would be put into the public domain.



46. The Commissioner has balanced the legitimate interest of Mr Burke against the rights, freedoms and legitimate interests of the individuals. Although Mr Burke's has a clear legitimate interest in disclosure of the information, the Commissioner considers that to disclose information about the care needs of vulnerable adults into the public domain would be a significant intrusion into their rights, freedoms and legitimate interests, and the rights, freedoms and legitimate interests of their families and carers. In all of the facts and circumstances of this matter, the Commissioner has determined that disclosure would be unwarranted in this case by reason of prejudice to the rights, freedoms and legitimate interests of the individuals. The Commissioner therefore finds that condition 6(1) cannot be met in this case. Further, in the absence of a condition permitting disclosure, that disclosure would also be unlawful.
47. The Commissioner therefore finds that disclosure of the withheld information would breach the first data protection principle, and so this information was properly withheld under the exemption in section 38(1)(b).

DECISION

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

Appeal

Should either Mr Burke or Angus Council 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.

Rosemary Agnew
Scottish Information Commissioner
11 March 2014



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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (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.



8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-
- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) states the name of the applicant and an address for correspondence; and
 - (c) describes the information requested.

...

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; ... and
 - (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.

...