

Decision Notice



Decision 069/2011 Mr Bob Duncan and Comhairle nan Eilean Siar

Overpayment of a grant

Reference No: 201001780
Decision Date: 31 March 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr Bob Duncan (Mr Duncan) requested from Comhairle nan Eilean Siar (the Council) information relating to the Council's overpayment of a grant to local charity. The Council responded by withholding the information under the exemptions in sections 33(1)(b) and 36(2) of FOISA. Following a review, during which the Council withdrew its reliance on section 36(2) but upheld its application of the exemption in section 33(1)(b), Mr Duncan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Duncan's request for information in accordance with Part 1 of FOISA, by wrongly withholding information under section 33(1)(b) of FOISA. He was not satisfied that disclosure would (or would be likely to) substantially prejudice the charity's commercial interests. He required the Council to provide Mr Duncan with the information previously withheld from him, excepting that part of the information which the Commissioner found to be exempt from disclosure under section 38(1)(a) of FOISA, on the basis that it was Mr Duncan's own personal data which he may request under the DPA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy) and 38(1)(a) and (5) (Personal information) (definitions of "data subject" and "personal data").

Data Protection Act 1998 (DPA) section 1(1) (Basic interpretative provisions) (definition of personal data).

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 4 June 2010, Mr Duncan wrote to the Council, regarding a grant overpayment made against an invoice submitted to the Council in April 2006 by a charity. Mr Duncan was project manager for the charity at the time of the overpayment, but was no longer in post at the time of making his information request.



2. Mr Duncan requested the following information, noting that the relevant invoice was prepared by him and contained his name as the representative of the payee:
 - (1) *the current status of the invoice and the overpayment and*
 - (2) *a copy of all correspondence relating to this matter between representatives of the Council and the charity or its office or representatives, since November 2009.*
3. The Council responded on 5 July 2010. It refused to supply the information on the grounds that it was exempt from disclosure under sections 33(1)(b) and 36(2) of FOISA.
4. The Council acknowledged that Mr Duncan had highlighted that the overpaid invoice contained his name as representative of the payee, and went on to consider whether any of the information was his personal data and should be disclosed to him in pursuit of his subject access rights under the DPA. It concluded that the withheld information was not Mr Duncan's personal data, noting that since the grant was made to the charity rather than Mr Duncan personally, the settlement of the grant payment was a matter for the Council and the charity.
5. On 6 August 2010, Mr Duncan wrote to the Council requesting a review of its decision, stating that he disagreed with the application of the exemptions in section 33(1)(b) and 36(2) of FOISA. He also indicated that he considered the information to be personal to him.
6. The Council notified Mr Duncan of the outcome of its review on 25 August 2010. This modified its previous decision in withdrawing its previous reliance on the exemption at section 36(2) of FOISA while upholding its application of the exemption at section 33(1)(b) of FOISA to withhold all of the requested information. The Council also reiterated that it did not consider the withheld information to be Mr Duncan's personal data.
7. On 10 September 2010, Mr Duncan wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA. He indicated that he did not consider the exemption at section 33(1)(b) of FOISA to be applicable to the withheld information and, in any case, the public interest favoured its disclosure.
8. The application was validated by establishing that Mr Duncan 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

9. On 14 September 2010, the Council was notified in writing that an application had been received from Mr Duncan and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.



10. 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.
11. The Council's response confirmed that it considered the withheld information to be entirely exempt in terms of section 33(1)(b) of FOISA, on the grounds that its disclosure would or would be likely to prejudice substantially the commercial interests of the charity.
12. In further communications, the Council was also asked by the investigating officer if had considered whether any of the withheld information could be considered to be Mr Duncan's own personal data and whether it would wish to make any submissions regarding the application of exemptions under section 38 of FOISA. However at the time of finalising this decision the Council had not provided a response on this point.
13. Mr Duncan was also contacted by the investigating officer for his submissions on the matters raised by this case. His comments were received on 10 December 2010.
14. The comments provided to the Commissioner by the Council and Mr Duncan will be considered further, where relevant, in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

15. 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 Duncan and the Council and is satisfied that no matter of relevance has been overlooked.

The withheld information

16. In response to the Commissioner's request for the information withheld in response to Mr Duncan's request, the Council provided a number of documents relating to the grant overpayment that is of interest to Mr Duncan.
17. In what follows, the Commissioner has considered the information within these documents only insofar as it falls within the scope of Mr Duncan's request for information about the status of the invoice and overpayment (that was made in 2006) and correspondence between the Council and the charity on this matter.
18. The Commissioner notes that some of the correspondence provided to him by the Council falls outwith the scope of Mr Duncan's request, because it was generated after the date when the Council received Mr Duncan's request on 7 June 2010 (since section 1(4) of FOISA limits the right to access information to that held at the time when the public authority receives a request), or because it is not correspondence *between the Council and the Charity*, as sought by Mr Duncan. The Commissioner has not considered internal communications or those generated after the date when Mr Duncan's request was received in what follows.



19. It is apparent from the various communications supplied to the Commissioner that the Council did hold, at the time when Mr Duncan's information request was received, recorded information which would have allowed it to confirm the status of the invoice and overpayment in question.
20. The withheld information that the Commissioner has considered below is the status of the invoice and overpayment at the time when Mr Duncan's request was received by the Council, plus three further pieces of correspondence between the Council and the charity.

33(1)(b) of FOISA – commercial interests and the economy

21. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.
22. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify whose commercial interests would be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Generally, if substantial prejudice is being claimed to the interests of a third party, the views of that third party will be relevant (although the final decision on disclosure must be one for the public authority itself).
23. In this case, the Council applied the exemption in section 33(1)(b) on the basis that disclosure of the withheld information would or would be likely to prejudice substantially the charity's commercial interests. The Council did not provide the Commissioner with any submissions indicating that it had sought the views of the charity on the matter.

Do commercial interests exist in relation to the information?

24. Commercial interests will generally relate to any commercial trading activity a company undertakes, such as the sale and purchase of products or services, commonly for the purpose of generating revenue. Such activity will normally take place within a competitive environment.
25. Mr Duncan submitted that the charity relevant to this case is a small local charity which has no commercial interests as such, with its core functions funded by member subscriptions supplemented by fund-raising activities such as supermarket bag packing. He submitted that this charity has received occasional grant aid to help fund particular projects but that it was not a commercial organisation.
26. In addition Mr Duncan argued that the charity does not operate in a competitive environment as it runs a number of amateur music ensembles, a function, he argued, which is not replicated by any other body in the local authority area.



27. Having conducted research into this matter the Commissioner has established that there are in fact two organisations in the Hebrides area offering the same or very similar services to those offered by the charity relevant to this case. Both of these organisations offer services to the public for which they charge, including tuition and productions for which tickets are sold to the public. Both of these organisations are registered charities which rely on attracting funding from funders but they also rely on generating income from the services which they provide and charge for.
28. The Commissioner is satisfied in this case that the charity does have commercial interests. While its trading activities may involve a low turnover and be undertaken on a relatively small scale, he is satisfied that it does undertake commercial activities in a competitive environment.

Would disclosure be likely to prejudice substantially the commercial interests of the charity

29. The Council argued that if details pertaining to the overpayment were placed in the public domain along with associated communications, this may imply poor administrative processes in place at the charity or may raise questions as to the financial status of the charity which would be likely to influence service users and/or potential funding bodies when deciding which project to engage with.
30. The Council submitted that this would be likely to result in a decline in the number of service users utilising the service provision which could impact on the charity's ability to secure ongoing funding when this information is considered by grant providers. The Council stated that the charity operates in an area which is atypical of the Scottish norm, in a very small, traditional community where any hint of maladministration would be likely to deter interested parties from purchasing the services of the charity. The Council argued that that this probability was real and significant and would cause the charity to suffer commercial prejudice.
31. Mr Duncan submitted that the overpayment in question relates to only a relatively small amount of money and that disclosure would be highly unlikely to lead to the charity being substantially prejudiced. Mr Duncan stated that if any reputational damage were to occur then it would be more likely to affect the Council and not the charity.
32. Having considered the comments received from both the Council and Mr Duncan carefully along with the withheld information, the Commissioner is not persuaded that disclosure of the withheld information would, or would be likely to prejudice substantially the commercial interests of the charity.
33. The Commissioner must be careful not to disclose the content of the information under consideration in his decision, and this limits his ability to fully explain his reasoning in this case. However, he notes that the Council's submissions are based on hypotheses about public reaction to the information under consideration. Having reviewed that information, he does not agree with the Council that the reaction it suggests would be likely to follow from the disclosure of the information concerned. As a result, he does not accept that the consequences of disclosure would have the effect on the charity's commercial interests that the Council suggests.



34. Consequently, he finds that the exemption was wrongly applied and the information is not exempt under section 33(1)(b) of FOISA. As such he is not required to consider the public interest test in this case.

38(1)(a) of FOISA – personal information

35. Having reached the conclusion set out above, the Commissioner would in usual circumstances simply require the disclosure of the withheld information which falls within the scope of Mr Duncan's request to him. However, in this case, the Commissioner noted during the investigation that one of the documents under consideration contains personal data about Mr Duncan, which if disclosed in response to Mr Duncan's information request, would be released into the public domain.
36. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
37. This exemption exists under FOISA because individuals have a separate right make a request for their own personal data (commonly known as a subject access request) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data. Therefore, section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
38. In this case, the Commissioner considered that the nature of the personal data about Mr Duncan was such that it should not be publicly disclosed in response to an information request under FOISA. While Mr Duncan may be entitled to access this information in pursuit of his subject access rights under section 7 of the DPA (though this is not a matter for the Commissioner to determine), such disclosure would be to Mr Duncan alone.
39. Given the Commissioner's concerns about requiring public disclosure the information of Mr Duncan's personal data in this case, the investigating officer wrote to the Council asking it whether it wished to apply the exemption in section 38(1)(a) to the relevant information. However, no response was received to this communication by the time of issuing this decision.
40. The Commissioner is disappointed that the Council did not take the opportunity to respond on this point. In the circumstances, however, he considers it is appropriate for him to consider the application of the exemption in section 38(1)(a) in order to make clear that the DPA as the correct route for obtaining or supplying a requester's own personal data, and to avoid the public disclosure of the information concerned.
41. 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 Appendix 1).



42. The Commissioner has concluded that two paragraphs within a letter from the charity that is under consideration in this decision constitute personal data concerning Mr Duncan. The information refers to his involvement in the matters under consideration, and so relates to him. Mr Duncan is identifiable from that information and from other information in the possession of the Council.
43. Therefore the Commissioner concludes that the information contained in the two specified paragraphs is Mr Duncan's personal data. He therefore finds the contents of these two paragraphs to be exempt from disclosure to Mr Duncan under section 38(1)(a) of FOISA. The Council was therefore entitled to withhold this information from Mr Duncan, and it acted in accordance with Part 1 of FOISA by doing so.
44. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information contained in the specified paragraphs being released or withheld.
45. However, the Commissioner would note that Mr Duncan has a separate right to seek his own personal data under the terms of the DPA.

Conclusion

46. The Commissioner therefore finds that the Council should disclose to Mr Duncan the status of the overpayment and the invoice as it stood at the time when his request for information was received by the Council, along with three further pieces of correspondence which the Commissioner will identify to the Council in the covering letter which will accompany this decision. The Commissioner does not require the Council to disclose that information within the correspondence which he has found to be Mr Duncan's own personal data.

DECISION

The Commissioner finds that Comhairle nan Eilean Siar (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Duncan. The Council applied the exemption in section 33(1)(b) of FOISA to the information requested by Mr Duncan. However, having concluded that certain content within a letter from the charity was Mr Duncan's own personal data, he has found that it was entitled to withhold this information (under section 38(1)(a) of FOISA) when responding to his request.

The Commissioner finds that the Council failed to comply with Part 1 and section 1(1) of FOISA by withholding the remaining withheld information, which is not Mr Duncan's own personal data.

The Commissioner therefore requires the Council to provide the withheld information to Mr Duncan, excluding the parts that have been found to be exempt from disclosure under section 38(1)(a) of FOISA, by 16 May 2011.

Decision 069/2011
Mr Bob Duncan
and Comhairle nan Eilean Siar



Appeal

Should either Mr Duncan or Comhairle nan Eilean Siar 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.

Kevin Dunion
Scottish Information Commissioner
31 March 2011



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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

33 Commercial interests and the economy

- (1) Information is exempt information if-
- ...
- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
-



38 Personal information

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;

...

(5) In this section-

...

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act [Data Protection Act 1998];

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;

...