

Decision Notice

Decision 075/2016: Mr G and West Lothian Council

Lair / interment records

Reference No: 201501955

Decision Date: 30 March 2016



Scottish Information
Commissioner

Summary

On 10 August 2015, Mr G asked West Lothian Council (the Council) for specified lair and interment records.

The Council disclosed some information and withheld the remainder under section 38(1)(b) of FOISA, on the basis that it was personal data and disclosure would breach the first data protection principle. During the investigation, the Council disclosed further information to Mr G.

The Commissioner concluded that the Council had failed to provide Mr G with all of the information he was entitled to, but accepted that the personal data was exempt from disclosure.

She required the Council to disclose non-exempt information from the interment records for which full copies had not been provided.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 12(1) (Excessive cost of compliance); 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”); Schedules 1 (The data protection principles, Part I - the principles) (the first data protection 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 10 August 2015, Mr G made a request for information to the Council. Among other information, he asked for:
 - a list of lair holders for both Whitburn Cemetery and Boghead Cemetery (part 4 of the request)
 - a photocopy of original entries for interments from the “original book” for [named] lairs (part 5 of the request)
2. The Council responded on 2 September 2015. It provided some information. It stated that it did not hold two of the records requested in part 5 of the request.
3. On 7 September 2015, Mr G wrote to the Council requesting a review of its decision on the basis that he considered some of the information he requested was missing in relation to parts 4 and 5 of his request. He was dissatisfied that the names of lair holders had been withheld from both the lair records and interment records, while other information had been omitted from some of the interment records.

4. On 7 October 2015, the Council asked Mr G if he was interested in specific records. Mr G stated that he was interested in all lair records, but as a compromise he would accept records for lairs purchased before 1980.
5. The Council notified Mr G of the outcome of its review on 15 October 2015. The Council withheld lair holders' names under section 38 of FOISA (parts 4 and 5 of the request).
6. On 23 October 2015, Mr G wrote to the Commissioner. Mr G applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr G stated he was dissatisfied with the outcome of the Council's review, and reiterated the comments made in his request for review.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr G made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 10 November 2015, the Council was notified in writing that Mr G had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was allocated to an investigating officer.
9. The investigating officer asked whether the Council would be willing to provide Mr G with complete copies of some records and un-redacted lair records from before 1950. After some discussion, the Council declined to provide such information.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on Mr G's application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested. The Council responded on 25 January 2016.
11. The investigating officer informed the Council that information had been omitted from some of the records provided to Mr G in response to part 5 of his request. The Council was asked if it would be willing to provide complete versions of these records. The Council disclosed some additional information, but some records were not disclosed in full.

Commissioner's analysis and findings

12. 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 G and the Council. She is satisfied that no matter of relevance has been overlooked.

Scope of investigation

13. Having considered the terms of Mr G's request, his request for review and application to the Commissioner, the Commissioner's decision will focus on the Council's response to parts 4 and 5 of Mr G's request.

Parts 4 and 5 of the request - Personal Data

14. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate) exempts personal data if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.
15. The Council disclosed the requested lair records to Mr G, but withheld the lair holder's name and address (where available) under section 38(1)(b) of FOISA.
16. In considering the application of this exemption, the Commissioner will first consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she will go on to consider whether disclosure of the information would breach the first and (if necessary) the second data protection principle, as claimed.
17. It must be borne in mind that this particular exemption 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 under consideration personal data?

18. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or 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."
19. The Council submitted that the names of the lair holder, together with the home address, lair address and the names of any people buried within the lair, could lead to the identification of a living individual, and was therefore personal data.
20. Mr G asked if interment records from before 1950 could be disclosed, as the individuals would likely have died. The Commissioner raised this point with the Council, pointing out that some of the lair records are more than 100 years old and it is more likely than not that the lair holder is no longer alive.
21. In response, the Council conceded that it is possible that some or all of the lair holders have died, but stated that it has no reasonable way to check the position. The Council commented that the request encompassed a large number of lairs. It would have to undertake a huge exercise to check whether each lair holder is alive. The cost of doing so is likely to be in excess of £600 (which is the limit for responding to requests under FOISA), although no sample exercise has been undertaken to verify this estimate. The Council explained that, in order to protect the rights of any living individuals concerned, it had applied the exemption contained in section 38(1)(b) of FOISA.
22. Having considered the withheld information, the Commissioner agrees with the Council that it is not possible to be certain which names are the names of living, identifiable individuals (and therefore comprise personal data) and which names are not. The request covers a large number of records and it would be exceedingly difficult to confirm, in each case, whether the lair holder named on the record has died.
23. Given that it is not possible to be certain which of the lair holders are living individuals for the purposes of section 1(1) of the DPA, the Commissioner has concluded that a cautious approach is justified, and accepts that it is safest to treat all of the names appearing on the lists as personal data. The alternative approach would be to require the Council to establish which lair holders are still living; even if this was possible, the Commissioner accepts that it

would be prohibitively time-consuming and (given the number of names) likely to incur costs well in excess of £600.

24. The Commissioner therefore accepts that living individuals would be identified from this information about the names of the lair holders. The information relates to the individuals in a biographical sense and is their personal data.

The first data protection principle

25. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and does not consider any of the withheld information to be sensitive personal data.
26. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
27. 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 made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

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

28. The Commissioner has considered all the conditions in Schedule 2 and considers that condition 6 is the only one which might be relevant in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued 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 subjects (i.e. the individuals to whom the data relate). The processing in this case would be making the data available in response to Mr G's request.
29. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Mr G pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
 - (iii) Even if the processing is necessary for Mr G's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

Is Mr G pursuing a legitimate interest or interests?

30. There is no definition within the DPA 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. In the Commissioner's published guidance¹ on section 38(1)(b) of FOISA, it 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."

31. The Council stated that it was unclear why Mr G wants the information he has requested, and therefore could not assess whether he has a legitimate interest in the information. In these circumstances, the Council considers that the interests of the data subjects must come first.
32. In his application, Mr G described his interest as "historical" and stated that he required the information for personal use.
33. Having considered the submissions from both Mr G and the Council, the Commissioner accepts that Mr G is (and was, in making his request) pursuing a legitimate interest in relation to the interment records. It is evident that Mr G is engaged in genealogical research.

Is the processing necessary for the purposes of those legitimate interests?

34. In all the circumstances of this case, the Commissioner can identify no viable means of meeting Mr G's legitimate interest which would interfere less with the privacy of the data subjects than the provision of the withheld personal data. Given that Mr G is unable to view the records in person, she is satisfied that making those personal data available is necessary to meet the legitimate interests in question.

Is the processing unwarranted in this case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?

35. The Commissioner must now consider whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the individuals concerned. This test involves a balancing exercise between the legitimate interests of Mr G and the rights, freedoms and legitimate interests of the individuals in question (the lair holders). Only if the legitimate interests of Mr G outweigh those of the individuals concerned can the information be made available without breaching the first data protection principle.
36. In the Commissioner's guidance on section 38(1)(b), she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
 - (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) the potential harm or distress that may be caused by the disclosure
 - (iii) whether the individual objected to the disclosure
 - (iv) the reasonable expectations of the individuals as to whether the information should be disclosed.
37. The Council submitted that individual lair holders would not expect details about their lair ownership to be disclosed to members of the public. Individuals are likely to consider any

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

arrangements made in connection with the death of a family member to be highly sensitive. They are likely to consider their ownership of a lair to be a private matter and are unlikely to wish such details to be shared.

38. The Council noted that it had asked Mr G if he was seeking information relating to a specific person. Mr G did not respond to this question.
39. As part of his correspondence, Mr G explained that he was seeking lair holders' names, giving him information about family members who may not be actually interred within the lair, enabling him to pursue other avenues to find out where they were interred. Mr G submitted that having the lair holder's address would enable him to check records such as the electoral registers. Mr G noted that he had been provided with complete lair records in response to previous requests.
40. The Commissioner notes Mr G's interest and purpose in obtaining the withheld information, but also notes that his request covers all lair holders for two cemeteries, without specifying any surname in which he might be particularly interested.
41. Having considered the submissions made by the Council and Mr G, the Commissioner accepts that disclosure of the withheld information in response to this information request would be likely to cause distress to the data subjects, particularly given the subject matter of the request.
42. In all the circumstances, having considered the arguments made by both Mr G and the Council, and having weighed Mr G's legitimate interest against the legitimate interests, rights and freedoms of the data subjects, the Commissioner has concluded that the legitimate interests of the data subjects outweigh those of Mr G. As a result, she has determined that disclosure would be unwarranted in this case.
43. Having drawn these conclusions, the Commissioner has concluded that condition 6 in Schedule 2 (to the DPA) is not met in this case in relation to the withheld personal data.
44. As no schedule 2 conditions can be met, the personal data cannot be disclosed without contravening the first data protection principle. The Commissioner therefore concludes that disclosure of the lair holders' names would breach the first data protection principle, and so this information was properly withheld under section 38(1)(b) of FOISA. She is not required to, and will not, go on to consider whether disclosure would also breach the second data protection principle.

Part 5 of request – interment records

45. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not relevant in this case.
46. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority does or should hold.
47. In his request for review, Mr G stated that information from the left or the right of some of the records had been omitted from the copy provided and asked if the information could be provided in landscape format.

48. In its submissions, the Council stated that it had provided the information requested in portrait form. It stated that the issue was not the cost of complying with the request, but being asked to divert resources to answering the same question for a second time. The Council asserted that providing the same information in landscape form will not provide Mr G with any additional information. The Council referred to section 14(2) of FOISA which states that “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”.
49. Having considered the information provided to Mr G, the Commissioner notes that, due to the way in which the records have been photocopied, the left and / or right side of some records has not been captured on the copy, so this information was omitted from the version provided to Mr G. Although only a small amount of information is missing, the Commissioner is satisfied that a complete copy has not been provided. She takes the view that Mr G’s request, as phrased, is a request for all information in the interment records and that he is therefore entitled to a complete copy or transcript of the information on the interment records.
50. This matter was raised with the Council and it was asked whether it would be willing to disclose complete copies of the relevant records to Mr G. The Council agreed to disclose such information and, where the lair holder is known to have been buried, for the lair holder’s name to be disclosed as well. On 9 and 23 February 2016 and 1 March 2016, the Council disclosed fuller versions of some the named interment records, but not all.
51. Having checked the list of interment records that Mr G requested, the Commissioner has concluded that not all of them have been fully disclosed to Mr G. The Commissioner requires the outstanding records to be disclosed (excluding any personal data). The Commissioner has provided the Council with a list of the eight interment records which should be disclosed.
52. The Commissioner also notes that the Council stated in its initial response that one of the requested interment records (G12) had been lost, but then provided a copy of this record during the investigation.
53. As the Council did not disclose all of the non-exempt information within the named interment records in response to Mr G’s request, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA in responding to Mr G’s request, by failing to provide the information within the statutory timescale for response.

Decision

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

The Commissioner accepts that the Council correctly withheld personal data under the exemption in section 38(1)(b) of FOISA.

The Council partly complied with section 1(1) of FOISA, by providing some of the information covered by the request. However, it failed to disclose all of the non-exempt information covered by the request, and therefore failed to comply completely with Part 1 of FOISA.

The Commissioner requires the Council to disclose full information from the remaining named interment records (as identified in the covering letter to the Council) by 16 May 2016.

Appeal

Should either Mr G or the 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

30 March 2016

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 –

- (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.

...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

...

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.

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