

Decision Notice

Decision 204/2017: Mr Andy Shipley and Edinburgh International Conference Centre

Legal costs

Reference No: 201701279

Decision Date: 20 December 2017



Summary

EICC was asked for the legal costs incurred in reaching an employment settlement agreement.

EICC withheld the information, considering it to be personal data and claiming disclosure would prejudice its commercial interests.

The Commissioner investigated and found that EICC had wrongly withheld the information. He required it to be disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy), 38(1)(b), (2)(a)(i), (2)(b) and (5) (definition of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the 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. The Appendix forms part of this decision.

Background

1. On 10 May 2017, Mr Shipley made a request for information to Edinburgh International Conference Centre (EICC). The information requested was the total costs incurred by EICC in settling an unfair dismissal tribunal brought by a former employee, to include both legal fees and settlement.
2. EICC responded on 15 May 2017. It withheld the amount of the settlement payment under section 38(1)(b) (Personal information) of FOISA as it considered the amount of the settlement payment to be personal data, disclosure of which would be a breach of the data protection principles and would be likely to cause damage or distress. For the legal fees, EICC withheld this information under section 33(1)(b) (Commercial interests and the economy) of FOISA, as it considered disclosure would be likely to prejudice substantially commercial interests.
3. On 17 May 2017, Mr Shipley wrote to EICC requesting a review of its decision, on the basis that the public interest in disclosing costs incurred by a public body in settling a tribunal for the unfair dismissal of a senior member of staff outweighed commercial interests.
4. EICC notified Mr Shipley of the outcome of its review on 12 June 2017. It upheld its decision in full, expanding on its reasoning.
5. On 23 July 2017, Mr Shipley wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Shipley stated he was dissatisfied with the outcome of EICC's review because, in his view, the public interest in disclosing costs incurred by a public body in settling a tribunal for the unfair dismissal of a senior member of staff outweighed commercial interests.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Shipley made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 6 September 2017, EICC was notified in writing that Mr Shipley had made a valid application. EICC was asked to send the Commissioner the information withheld from Mr Shipley. EICC provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. EICC was invited to comment on this application and answer specific questions, with particular reference to its application of section 33(1)(b) of FOISA.
9. Both parties were informed that, as Mr Shipley had not sought a review of EICC's decision to withhold the settlement figure under section 38(1)(b) of FOISA, this matter would not form part of the investigation.
10. As EICC was withholding some information under an exemption in FOISA which was subject to the public interest test (section 33(1)(b)), Mr Shipley was also invited to comment on why he believed it was in the public interest for the information to be disclosed: he provided submissions in response.
11. EICC provided submissions in support of its position. During the investigation, EICC informed the Commissioner that it wished to modify its position. In addition to withholding the legal costs under section 33(1)(b), EICC now also wished to withhold that information under the exemption in section 38(1)(b) of FOISA.

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 relevant submissions, or parts of submissions, made to him by both Mr Shipley and EICC. He is satisfied that no matter of relevance has been overlooked.
13. As rehearsed above, during the investigation, in addition to withholding the legal fees under section 33(1)(b) of FOISA, EICC informed the Commissioner it also wished to claim section 38(1)(b) to withhold that information. The Commissioner will firstly consider the application of section 38(1)(b).

Section 38(1)(b) – Personal information

14. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, as appropriate, 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.
15. EICC submitted that the information comprised personal data for the purposes of the DPA and that its disclosure would contravene the first data protection principle. It therefore argued that the information was exempt from disclosure under section 38(1)(b) of FOISA.

Is the information under consideration personal data?

16. "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" (the full definition is set out in Appendix 1).
17. EICC submitted that the information under consideration in this case comprised the personal data of the former employee, as defined by section 1(1) of the DPA. In EICC's view, the information enabled the individual to be identified and related to that individual.
18. EICC noted that, in his information request, Mr Shipley had identified the data subject as the subject of the tribunal to which the legal fees related. Disclosure of the legal fees, EICC argued, would allow him to match the costs to the claim, knowing (from information already in the public domain) that the claim related to unfair dismissal and had been settled privately.
19. EICC submitted that the information related to the data subject in terms of their profession, and was linked to the data subject in that it provided information about them. EICC considered disclosure would allow Mr Shipley to obtain further information, which he could piece together with information he already held.
20. In EICC's view, disclosure of the legal fees would reveal the amount it was willing to spend on defending the claim and achieving settlement. This, it believed, was indicative of the strength of the data subject's claim and would provide commentary on the data subject's individual performance and their value to EICC. Combined with the data subject's name and the nature of their claim, information already in the public domain, EICC argued that disclosure gave further insight into the circumstances of their departure.
21. EICC made reference to the UK Information Commissioner's guidance on "Determining what is personal data"¹, which states that data may be personal data if it is clearly linked to the data subject because it is about their activities and is processed with the purpose of determining or influencing the way in which that person is treated. In EICC's view, the information, if disclosed, could be used to influence actions or decisions about the data subject, or to shape any media article about their departure, allowing additional information about them to enter the public domain. This, in turn, could allow inferences to be drawn about the strength of the tribunal claim, the data subject's value to EICC and circumstances of their departure. The likely strength of the claim, in particular, had personal connotations for the data subject.
22. In conclusion, EICC believed that the legal fees, when combined with information already in the public domain (and in Mr Shipley's possession) would be personal data relating to the former employee.
23. EICC confirmed that it did not consider any of the information to be sensitive personal data.
24. The Commissioner has considered the submissions received from EICC on this point, along with the withheld information. While recognising that disclosure of the information would allow the legal fees to be linked to the former employee and their tribunal claim, the Commissioner notes that it is already in the public domain that the individual in question was involved in an employment tribunal claim for unfair dismissal, which was settled. Further, by applying an exemption in Part 2 of FOISA, EICC has confirmed that the information is held.

¹ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

In the Commissioner's view, disclosure of the actual figure does not enhance the information already available about the data subject in any way.

25. While the information may be linked to the tribunal claim in that it identifies the fees incurred by EICC in settling the claim, the Commissioner is not satisfied that it has anything of significance to say about the individual making the claim. While it is always possible that attempts might be made to draw inferences of some kind from information such as this, the Commissioner does not accept that any reasonable inference could be drawn from this information as to the nature of the individual's conduct or performance while employed by EICC, the circumstances of their departure or the strength of their claim against their former employer.
26. The information is a sum EICC agreed to pay for the provision of legal services in connection with the settlement of a particular employment tribunal claim, and the fact that it relates to that particular claim is the only nexus it has with the claimant. If the sum paid was particularly high or particularly low, the reasons for that cannot reasonably be inferred from the sum itself, or from that sum read with other information already in the public domain. There may be all sorts of reasons for the level of the fee, which might equally well be to do with either party. Essentially, the sum tells us nothing more about the individual in question than is known already and, if anything, is about EICC's activities rather than those of the former employee.
27. In conclusion, therefore, the Commissioner is not satisfied that the information withheld under this exemption (i.e. the legal fees) comprises personal data. Therefore, the Commissioner finds that EICC was not entitled to apply section 38(1)(b) of FOISA to this information.
28. As EICC is also withholding this information under section 33(1)(b) of FOISA, the Commissioner will now go on to consider it under that exemption.

Section 33(1)(b) - Commercial interests and the economy

29. In its submissions to the Commissioner, EICC confirmed it was maintaining its reliance on section 33(1)(b) of FOISA to withhold the legal fees. It informed the Commissioner that in addition to the submissions now provided, it wished to rely on the arguments set out in its review outcome.
30. Section 33(1)(b) provides 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 a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
31. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
32. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on

disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

Commercial interests

33. EICC submitted that disclosure of the information requested would damage its own commercial interests. In this instance, the “commercial interests” it highlighted related to the amount of the legal fees it had incurred in settling a claim for unfair dismissal. EICC claimed that disclosure of this information, which pertained to a specific piece of work, would give other legal firms knowledge of how much it was willing to pay for legal advice of this nature.
34. Having considered EICC’s submissions on this point, the Commissioner is satisfied that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. He recognises that EICC must be able to freely enter into financial arrangements when engaging legal advisers and procuring legal services, to secure best value for the required services.
35. The Commissioner must now go on to consider whether the commercial interests identified by EICC would, or would be likely to, be prejudiced substantially by disclosure of the withheld information.

How would disclosure prejudice these commercial interests?

36. EICC argued that disclosure of the legal fees could enable rival firms to attempt to undercut its legal advisers by offering flat rate services. Such rates, EICC explained, would not take into account the complexity of the issues (if a flat rate) or EICC’s working relationship with its external advisers, which allows the work in question to be carried out at particular rates. In EICC’s view, this could in turn lead to competitors offering poor quality services in order to complete the work within a strict fee limit, without the benefit of an established working relationship. EICC believed this could hinder its ability to secure such favourable terms in the future with its legal advisers, with other legal firms it employs, or with other firms that wished to compete for the work.
37. EICC submitted that disclosure of the legal costs, whether or not combined with the settlement figure, could give an indication of the settlement sum agreed and/or allow inferences to be drawn about the circumstances of the former employee’s departure. This, EICC argued, could potentially nullify the settlement agreement reached and undermine its ability to rely on similar settlement agreements in the future.
38. In EICC’s view, the terms of the settlement agreement extended to cover the amount of the legal fees incurred. To support its position on this point, EICC provided the Commissioner with a copy of the settlement agreement. It submitted that disclosure of the legal fees would breach the settlement agreement, due to the inferences that could be drawn about the circumstances of the case, including the negotiations that led to the settlement, the former employee’s value to EICC and the likelihood (or otherwise) of the claim being successful.
39. EICC believed that if the former employee were to disclose the amount they had paid in legal fees, it would consider this to be a similar breach of the settlement agreement, for the same reasons.
40. EICC took the view that, as disclosure of the legal costs would breach the terms of the settlement agreement, thereby nullifying that agreement, this would expose it to the prospect of renewed litigation on the same matter, or even a claim for breach of confidence. Even if the ex-employee were to take no further legal action of this nature, EICC remained concerned that they would believe they were entitled to disclose information about the case.

Therefore, EICC was of the firm view that any disclosure, no matter how peripheral it might seem, would undermine the confidentiality of the settlement agreement.

The Commissioner's views

41. The Commissioner has carefully considered all the arguments put forward, along with the withheld information.
42. He notes that EICC's arguments for withholding the legal fees under the exemption in section 33(1)(b) appear to focus on the following points:
 - (i) Disclosure would give competitors knowledge of what EICC had paid for advice of this nature, allowing them to undercut its external advisers for similar pieces of work, thereby adversely impacting on its ability to secure best value for legal services in future.
 - (ii) Disclosure could give an indication of the settlement sum and allow inferences to be drawn about the terms of the former employee's departure, the negotiations that led to settlement, the former employee's value to the organisation and the likelihood (or otherwise) of the claim's success.
 - (iii) Disclosure could nullify the settlement agreement, which could expose EICC to further litigation and expense, and might prejudice its ability to reach settlement agreements in the future.
43. The Commissioner has considered each of these arguments in turn:
 - (i) In the Commissioner's view, it would be extremely difficult (from disclosure of this particular figure) for competitors to estimate, with any reasonable level of accuracy, the complexity of the case in question or the level of EICC's legal advisers' involvement in the case. It appears from EICC's submissions that its external advisers do not work on a "flat rate" basis, but rather provide legal services (for work such as this, at least) on the basis of a more complex feeing structure. The Commissioner presumes a similarly refined feeing structure will be expected for similar work in future, when EICC next procures legal services, along with robust proposals on the quality of the service to be offered. There would appear to be no reason why EICC should be susceptible to an impromptu offer of legal services, outwith a structured procurement cycle. For the purposes of future procurement, given that each case is likely to be unique and the withheld information offers nothing of substance about the scale or complexity of the work involved in this case (either by itself or with other available information – see below), the Commissioner is not satisfied that the withheld information would be of value in working out the rates or feeing structure EICC has agreed with its legal advisers for cases of this nature. As such, the Commissioner is not convinced that disclosure of the information would allow rival firms to undercut an established provider when competing for similar work in future, or would be capable of harming EICC's ability to secure best value when procuring legal services in future.
 - (ii) The Commissioner fails to see how disclosure of the legal fees would allow anything meaningful to be inferred about the settlement or the former employee, in addition to what is already in the public domain. He has already considered this, to some extent, in the context of section 38(1)(b). The information does not offer anything of substance about the details of the settlement, the corresponding negotiations or EICC's relationship with its former employee: it is merely a figure representing the legal costs incurred and, as discussed above, there may be any number of reasons

(which cannot be divined from available information) why the fee was set at a particular level. It is a matter of fact that legal advice was taken in settling the claim, as confirmed by EICC in applying an exemption in Part 2 of FOISA to the information. In the Commissioner's view, EICC's arguments on this point are hypothetical and lacking in genuine substance.

- (iii) The Commissioner does not concur with EICC's view that the settlement agreement extends to the amount of the legal fees. The agreement prohibits disclosure of its terms or the details of any negotiations leading to it, but that cannot reasonably be interpreted as extending to the amount of any legal fees incurred. The fees are not an element of the agreement or the negotiations, but rather a cost incurred by one party (which the other party could not reasonably be expected to know, in the absence of disclosure in circumstances such as this) as a result of those negotiations and the agreement. The Commissioner can see no basis for any concern that disclosure of the fees would undermine the agreement.
44. For these reasons, the Commissioner is not satisfied that disclosing the requested information would damage EICC's commercial interests in the manner claimed.
45. In all the circumstances of the case, therefore, it is the Commissioner's view that the harm claimed by EICC is not likely to occur as a result of disclosure of the information in question. He is not satisfied that disclosure of the withheld information would, or would be likely to, prejudice substantially the commercial interests of EICC, as has been claimed. He cannot, therefore, accept that the information is exempt from disclosure under section 33(1)(b) of FOISA.
46. As the Commissioner has found that the exemption in section 33(1)(b) was wrongly applied to the withheld information, he is not required to go on to consider the public interest in disclosing the information or maintaining the exemption. He must require that the information be disclosed.

Decision

The Commissioner finds that Edinburgh International Conference Centre (EICC) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Shipley. It was not entitled to withhold the information requested under either section 33(1)(b) (Commercial interests and the economy) or section 38(1)(b) (Personal information) of FOISA, and in so doing failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires EICC to disclose the withheld information to Mr Shipley by **5 February 2018**.

Appeal

Should either Mr Shipley or Edinburgh International Conference Centre 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 Edinburgh International Conference Centre (EICC) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that EICC has failed to comply. The Court has the right to inquire into the matter and may deal with EICC as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

20 December 2017

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 –

...

- (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.

...

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-

...

- (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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info