

Decision Notice



Decision 216/2010 Mr Peter Cherbi and the University of Glasgow

Salary details of a named employee

Reference No: 201001685

Decision Date: 20 December 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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



Summary

Mr Peter Cherbi requested from the University of Glasgow (the University), information relating to the salary and expenses of a named employee. The University responded by providing details of the expenses but withheld information relating to the employee's salary. It indicated that it considered this information exempt from disclosure under section 38(1)(b) of FOISA, on the grounds that it was personal data, the disclosure of which would breach the first data protection principle. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the University had dealt with Mr Cherbi's request for information in accordance with Part 1 of FOISA, by correctly withholding the salary related information in accordance with section 38(1)(b). He did not require the University to take any action.

Relevant statutory provisions and other sources

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

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of "personal data") and Schedules 1 (The data protection principles) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data – condition 6)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 2 August 2010, Mr Cherbi wrote to the University requesting the annual salary of a named University employee (the employee) and the information contained in the employee's expenses claims submitted since their appointment.



2. The University responded on 19 August 2010. It provided the relevant information contained in the expenses claims but withheld details of the employee's salary on the grounds that it was exempt from disclosure under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i). The University explained that it considered the salary information to be employee's personal data, disclosure of which would breach the first, sixth, seventh and eighth data protection principles.
3. On 20 August 2010, Mr Cherbi wrote to the University requesting a review of its decision.
4. The University notified Mr Cherbi of the outcome of its review on 24 August 2010 upholding its original decision to withhold the information relating to the employee's salary without modification.
5. On 26 August 2010, Mr Cherbi wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University'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 Cherbi 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

7. On 27 August 2010, the University was notified in writing that an application had been received from Mr Cherbi and was asked to provide the Commissioner with any information withheld from him. The University responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the University, 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 University was asked to justify its reliance on section 38(1)(b) or any other provisions in FOISA to withhold the information requested by Mr Cherbi.
9. The University responded on 27 September 2010 confirming it considered that the information was exempt from disclosure in terms of section 38(1)(b) and additionally submitting that the information was also exempt in terms of section 33(1)(b) of FOISA.
10. The University provided detailed reasons in support of these views. Mr Cherbi also submitted arguments in support of his view that the information should be disclosed. All submissions from the University and Mr Cherbi, insofar as relevant, are summarised below.



Commissioner's analysis and findings

11. 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 Cherbi and the University and is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) of FOISA – personal information

12. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, where appropriate, section 38(2)(b)) exempts information from disclosure if it is "personal data", as defined by section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA. This particular exemption is an absolute exemption (see section 2(2)(e)(ii) of FOISA), and so is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
13. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
14. The University has submitted that the information withheld from Mr Cherbi is personal data, disclosure of which would contravene the first, sixth, seventh and eighth data protection principles.

Is the information personal data?

15. 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).
16. The Commissioner accepts that the information requested by Mr Cherbi (concerning the salary details of a named employee) clearly relates to a living individual who can be identified from that information either alone or in conjunction with other information in possession of the University. He is therefore satisfied that the information under consideration is personal data.



17. The Commissioner must now go on to consider whether disclosure of this personal data would contravene any of the data protection principles cited by the University. In doing so the Commissioner has taken into consideration guidance¹ issued by the Information Commissioner that indicates for the purposes of disclosure under the FOIA [FOISA], it is only the first principle – that data should be processed fairly and lawfully – that is likely to be relevant. Accordingly the Commissioner will firstly consider the University's submissions relating to the first data protection principle before going on to consider, if necessary, submissions relating to any of the other data protection principles.

Would disclosure contravene the first data protection principle?

18. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure of the personal data into the public domain in response to Mr Cherbi's information request.
19. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA and is satisfied in this case that none of the personal data which has been withheld constitutes sensitive personal data. As a consequence, no Schedule 3 condition requires to be met in this case.
20. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.

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

21. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he will then go on to consider whether the disclosure of this personal data would otherwise be fair and lawful.
22. In its submissions, in responses to questions asked by the investigating officer, the University indicated that it did not consider that any of the conditions set out in Schedule 2 to the DPA could be met in this case.
23. The University was asked by the investigating officer whether consent to disclosure of the information had been sought or received from the employee, since such consent would mean that condition 1 of Schedule 2 could be met. The University's response indicated that as it did not consider the position had the requisite level of seniority to warrant such scrutiny of the salary it had not sought the employee's consent, either in relation to the initial request or the request for review.

¹ http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx



24. The Commissioner has therefore determined that condition 1 cannot be met in the circumstances of this case.
25. Condition 6 would appear to be the only condition which would permit disclosure to Mr Cherbi in all the circumstances of this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. the individuals to whom the data relate).
26. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - Does Mr Cherbi have a legitimate interest in obtaining the personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for Mr Cherbi's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the employee?
 - There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Cherbi must outweigh the rights and freedoms or legitimate interests of the employee before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the University was correct to refuse to disclose the personal data to Mr Cherbi.

Does Mr Cherbi have a legitimate interest?

27. Mr Cherbi submitted that the employee was a high profile public figure who regularly appeared in newspapers and television and had previously held positions on public consultations funded from the public purse. Mr Cherbi provided the Commissioner with references or links to a number of press articles in which the employee was interviewed or quoted. The Commissioner notes that only one of the press articles relates to the employee in his current role with the University and all others pre-date his appointment.
28. Mr Cherbi also indicated that the employee was employed in a taxpayer funded position at a university which was facing severe cuts due to the current financial crisis. He provided the Commissioner with current press reports indicating that the University faced a £35 million budget shortfall by financial year 2014/15, arguing that it was in the public interest to provide accurate salary information relating to the employees of a university that finds itself in such a financial crisis.



29. Mr Cherbi also highlighted what he perceived to be inconsistency in the University's approach to answering his request as it had provided the employees expenses claims while withholding details of his salary. Mr Cherbi questioned the consistency of the University's claim that it was protecting the privacy of the employee by withholding details of their salary while providing details of their expenses claims. He also emphasised that both the salary and the expenses were paid for by UK taxpayers.
30. The University indicated that it had not asked Mr Cherbi what he considered to be his legitimate interest in obtaining the information, but it argued that he did not. It expressed the opinion that the public interest in the salaries of staff whose role is academic in nature, rather than relating to the running of the University overall, was slight. It expressed the view that Mr Cherbi's comments with respect to the public profile of the employee lacked merit, since his role within the university was in an academic capacity only.
31. The Commissioner considers that there is a general public interest in knowing how public funds are spent and allowing scrutiny of remuneration of employees of public authorities. The Commissioner recognised in *Decision 155/2010: Mr Y and the University of Glasgow*², that the applicant had a legitimate interest (which he shared with the general public) in accessing the salaries of all academic staff at the University. While Mr Cherbi's interest is focused in this instance on a particular employee, the Commissioner considers that the same legitimate interest would apply to the remuneration of all employees of the University, either collectively or individually, and whether or not their role involves a public profile.
32. Having considered all of the comments from the University and Mr Cherbi, the Commissioner has concluded that Mr Cherbi does have a legitimate interest in obtaining details of the employee's salary.

Is disclosure of the information necessary to achieve those legitimate interests?

33. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so he must consider whether these interests might reasonably be met by any alternative means.
34. The University publishes certain information relating to the salaries of employees earning between £70,000 and £250,000 per annum as well as the specific salary of the Principal. The Commissioner has examined the published information and notes that it provides only the number of employees receiving a salary falling within each of 18 bandings. The information indicates that in total over 300 of the University's 4800+ employees received salaries within these bandings but it is not possible to ascertain the identity of any individual employee, with the exception of the Principal, from the published information.
35. In this case, the Commissioner can identify no viable means of meeting Mr Cherbi's legitimate interests which would interfere less with the privacy of the employee other than by obtaining the information requested. Therefore, he is satisfied that disclosure of the information is necessary for the purposes of the legitimate interest identified by Mr Cherbi.

² <http://www.itspublicknowledge.info/UploadedFiles/Decision155-2010.pdf>



Would disclosure cause unwarranted prejudice to the legitimate interests of the employee?

36. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the employee. As noted above, this involves a balancing exercise between the legitimate interests of Mr Cherbi and those of the employee. Only if the legitimate interests of Mr Cherbi outweigh those of the employee can the information be disclosed without breaching the first data protection principle.
37. In considering this matter, the Commissioner has referred to the guidance from the Information Commissioner (who is responsible for the enforcement of the DPA throughout the United Kingdom) entitled "Public sector salaries: how and when to disclose"³.
38. This guidance makes it clear that those who are paid from the public purse should expect some information about their salaries to be made public. However, it also notes that salary information relates to individuals' personal financial circumstances and so deserves some protection.
39. This guidance asks authorities to consider the individual's expectations as to public scrutiny in relation to their role and disclosure of their salary (taking account, for example, of whether salaries for that type of post are generally made public and legitimate public interests in relation to disclosure), and also the level of intrusion that would follow from disclosure, but which should also take account of any particular intrusion deriving from the salary in question or the individual's own circumstances). It identifies exceptional circumstances in which disclosure might be justified, for example where there are legitimate concerns about wrongdoing or where there are current controversies or credible allegations, but generally it would appear from the guidance that disclosure of precise or detailed information on the salaries of junior staff will be considered unfair.
40. Although the Commissioner recognises that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse, he also recognises that not all staff should be subject to such a level of scrutiny and draws a distinction between what information should be released about senior staff compared to what should be disclosed about less senior staff.
41. The Commissioner's own guidance on the exemptions in section 38 identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
 - 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);
 - the potential harm or distress that may be caused by the disclosure;
 - whether the individual has objected to the disclosure;

³ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf



- the reasonable expectations of the individual as to whether the information would be disclosed.
42. The University has argued that disclosure of the information under consideration is unwarranted, and that as a member of academic staff below senior managerial level, the employee would have no expectation that the information relating to their salary should be released into the public domain. In support of its assertion that the employee did not fulfill a senior management role, the University provided the Commissioner with copies of the job description and person specification for the post.
43. Additionally the University provided the Commissioner with an oversight of the policy and financial responsibilities of its Senior Management Group, which operated at a strategic level concerning the entire institution, and contrasted these with the management responsibilities of the employee that were much narrower in scope, relating to a single department.
44. On the basis of the information provided by the University, the Commissioner accepts that the employee does not hold a senior management role. However the role performed by an individual employee is not the only factor to be considered when assessing legitimate expectations. Two further relevant factors are whether the individual has a public profile or a public facing role, and whether salaries for the particular type of post are generally made public.
45. Mr Cherbi indicated that he considered the employee to have a high public profile however all but one of the references provided to the Commissioner related to the employee's activities and employment prior to taking up the appointment with the University. As the Commissioner must consider Mr Cherbi's request and the employee's expectations in the context of their current role with the University, he does not consider the historical references to be relevant in his considerations.
46. However, the Commissioner does note that the employee has been quoted in the press in relation to matters directly related to their role with the University and therefore accepts that they do have a public profile in the context of their current role.
47. The University submitted that there is little public interest in the disclosure of academic salaries and added that the practice in the Higher Education sector was not to release details of individual academic salaries and only to publish the number of higher paid individuals receiving a salary within defined salary bands. Research undertaken by the investigating officer confirmed that all Scottish universities follow this practice.
48. The Commissioner concludes that, given the current approach to the disclosure of salary related information by all Scottish universities, the employee would have no realistic expectation that such details would be disclosed by the University. The expectations of disclosure of the salaries of academic staff was also examined by the Commissioner in *Decision 155/2010*, his comments in that case are relevant here also.



49. The Commissioner has also taken into account the fact that Mr Cherbi's request related to a single named individual rather than, for example, all employees in a specific department or all employees receiving a salary in excess of a specific amount. The Commissioner considers that such a focused request, amplifies considerations of fairness and unwarranted prejudice to the rights and freedoms of the employee.
50. Having taken account of the submissions of both parties along with relevant decisions and guidance, overall he accepts the arguments made by the University as to intrusion into the privacy of the employee. While noting the arguments put forward by Mr Cherbi, he is not satisfied in the circumstances that any of these are sufficient to outweigh that intrusion, or that there are exceptional circumstances of the type referred to by the information Commissioner that would justify disclosure in this case. Therefore, on balance the Commissioner concludes that disclosure of the information requested would in this case be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the employee. He must therefore conclude that condition 6 is not met.
51. Accordingly, having accepted that disclosure of the information requested would lead to unwarranted intrusion into the privacy of the employee, the Commissioner must also conclude that disclosure would be unfair. As condition 6 is not met, he would also regard disclosure as unlawful. In all the circumstances, therefore, the Commissioner's conclusion is that the first data protection principle would be breached by disclosure and therefore that the information relating to the employee's salary was properly withheld under section 38(1)(b) of FOISA.
52. As the Commissioner is satisfied that the first data protection principle would be breached by disclosure of the information, he has not gone on to consider whether any of the other data protection principles cited by the University would also be breached by disclosure.
53. Additionally, as the Commissioner has found that the information was correctly withheld under section 38(1)(b) of FOISA, he is not required, nor does he intend, to consider the exemption in section 33(1)(b).

DECISION

The Commissioner finds that the University of Glasgow complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Peter Cherbi.



Appeal

Should either Mr Cherbi or the University wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
20 December 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (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.

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.

...