

Decision Notice



Decision 006/2009 Mr John Cannon and Glasgow City Council

Audit on the cost-effectiveness of employing agency staff

Reference No: 200800353

Decision Date: 22 January 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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



Summary

Mr Cannon asked Glasgow City Council (the Council) to supply information relating to the outcome of an audit into the financial viability of employing agency staff within the Council's Social Work Services Hostels section instead of offering overtime to Council employees.

The Council refused Mr Cannon's request, advising that disclosure of the information would prejudice commercial interests as it concerned the commercial charges levied by providers of agency staff and was therefore exempt from disclosure under section 33(1)(b) of FOISA. The Council upheld this decision after review and Mr Cannon subsequently applied to the Commissioner for a decision.

During the Commissioner's investigation, the Council additionally cited the exemptions in section 30(b)(i) and (ii) in relation to one document. The Council also cited the exemptions in section 25(1) in relation to correspondence sent to Mr Cannon, and section 38(1)(b) in relation to the personal data within the documents.

The Commissioner found that certain information had been correctly withheld under sections 25(1), 30(b), 33(1)(b) and 38(1)(b) of FOISA, but found that much of the information withheld was not exempt information. The Commissioner also found that some of the information withheld by the Council was not covered by the terms of Mr Cannon's request and could not be considered in his decision notice.

The Commissioner required the Council to provide Mr Cannon with the information specified in Appendix 2 of this decision notice.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial Interests and the economy) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data); Schedules 1 (The data protection 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 21 November 2007, Mr Cannon submitted an information request to the Council for “all paperwork or documentation relating to the decision following an audit...which apparently deems that it is a financially viable exercise to employ agency staff within Social Work Services Hostels section, as opposed to offering overtime to trained personnel, currently employed as Hostel Assistants/Council employees. “
2. In his request, Mr Cannon explained that he had previously asked the Council for an audit on what he believed to be a misuse of public money, and had been led to believe he would receive a copy of the audit report. Instead, he had been issued with a brief response from the Council which he had not found satisfactory.
3. The Council responded to Mr Cannon’s information request on 17 December 2007. It confirmed that it held the information he had requested, but advised that the information was exempt from disclosure under section 33(1)(b) of FOISA, because it concerned the commercial charges levied by providers of agency staff. The Council stated that the information requested by Mr Cannon consisted of sensitive pricing policies, disclosure of which would allow commercial rivals to selectively undercut the provider when tendering. It also maintained that disclosure would also substantially prejudice the commercial interests of the Council by adversely affecting the Council’s ability to secure the best value for money from its own contractors.
4. Mr Cannon requested a review of this response on 24 January 2008. The Council replied on 22 February 2008. It confirmed the decision to withhold the information he had requested under section 33(1)(b) of FOISA and additionally applied the exemption in section 40 (Audit functions).
5. Mr Cannon remained dissatisfied with the Council’s response, and applied for a decision from the Commissioner on 8 March 2008. He provided his reasons for his dissatisfaction with the responses he had received from the Council in a separate letter, dated 19 March 2008.
6. The application was validated by establishing that Mr Cannon had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.

Investigation

7. On 26 March 2008, the Council was notified in writing that an application had been received from Mr Cannon and was asked to provide copies of the information which had been withheld from him. The Council provided this information on 4 April 2008. The case was then allocated to an investigating officer.



8. On 5 May 2008, the investigating officer contacted the Council to invite its comments in terms of section 49(3)(a) of FOISA, and to seek further information about the background to the case and the exemptions which had been applied.
9. The Council responded on 27 May 2008, providing a statement of case and schedule of documents. The Council advised that it no longer wished to rely upon the exemption in section 40 of FOISA.
10. Further information was provided by the Council in correspondence during the investigation, in response to questions from the investigating officer about the commercial interests associated with the information withheld and the Council's assessment of the public interest in disclosing or withholding the information.
11. During the investigation, the Council advised that it wished to cite the exemptions in section 30(b)(i) and (ii) of FOISA in relation to one document, on the basis that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
12. The Council also advised that it wished to cite the exemption in section 25(1) of FOISA in relation to correspondence sent to Mr Cannon, and the exemption in section 38(1)(b) of FOISA in relation to any personal data within the documents withheld.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the information withheld and the submissions which have been presented to him and is satisfied that no matter of relevance has been overlooked.

Information covered by Mr Cannon's request

14. The Council provided the Commissioner with 83 documents which had been withheld from Mr Cannon. On examination, the Commissioner found that the Council had interpreted Mr Cannon's request liberally and had included certain information that went beyond that specified in Mr Cannon's request.



15. The Commissioner considers that Mr Cannon's request was limited to information relating to the Council's decision to continue employing agency staff, following an audit of the comparative costs of agency staff and trained Council employees on overtime. The Commissioner is satisfied that the audit findings informed the Council's decision to continue to employ agency staff, and so he concluded in general that background papers and evidence gathered and generated during the audit investigation will therefore *relate to* that decision. However, the audit investigation also considered matters other than the comparative costs of agency and Council employees, which are not relevant to the decision referred to by Mr Cannon. The Commissioner takes the view that the following categories of information are not covered by the terms of Mr Cannon's request:
- information about other issues investigated by the auditors;
 - correspondence with Mr Cannon regarding his information request or other matters relating to his initial complaint;
 - information which postdates Mr Cannon's information request.
16. Appendix 2 indicates which documents the Commissioner considers fall entirely or partly outside the scope of Mr Cannon's request. The Commissioner is not required to consider information falling outside the scope of the request in this decision notice.

Information withheld under section 25(1)

17. Section 25(1) states that information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information.
18. Document 41 is a letter sent from the Council to Mr Cannon and document 75 is a draft of an email to Mr Cannon, the content of which is identical to the final version of the email sent to Mr Cannon. Mr Cannon has provided the Commissioner with copies of his correspondence with the Council, and the Commissioner is satisfied that the exemption in section 25(1) has been correctly applied to the information in these documents because Mr Cannon already has access to the documents. The exemption in section 25(1) is absolute and therefore the Commissioner is not required to carry out the public interest test contained in section 2(1)(b) of FOISA.
19. However, the Commissioner finds that the exemption in section 25(1) cannot apply to document 48, which is a draft of a letter to be sent to Mr Cannon. There is no evidence that the information in this draft version was ever received by Mr Cannon (Mr Cannon has provided the Commissioner with copies of his correspondence with the Council).
20. The Commissioner finds that the exemption in section 25(1) applies to documents 40, 42, 43 and 83, which consist of emails sent from Mr Cannon to the Council. As Mr Cannon has retained copies of these documents, the Commissioner is satisfied that the information is reasonably obtainable by him other than by requesting it under section 1(1) of FOISA.



21. Where the Commissioner has found that the exemption in section 25(1) should be upheld, he has not gone on to consider any other exemptions in relation to those documents.

Information withheld under section 33(1)(b)

22. 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 any Scottish public authority. A public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely to, be substantially prejudiced by disclosure of the information. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.

The Council's submission: commercial interests

23. The Council submitted that disclosure of the information sought by Mr Cannon would prejudice substantially both its own commercial interests, including those of Direct and Care Services (DACS), and the commercial interests of the agencies engaged to provide staff to work in the Social Work Services hostels.
24. DACS is a department of the Council which provides cleaning, catering and other domestic services in a range of Social Work units, homecare services to Social Work clients living at home, and cleaning and catering to other Council services and some outside bodies. The Council has advised that the services DACS provides are deemed to be a trading operation in terms of the Local Government in Scotland Act 2003 and, as such, the Council is required to demonstrate best value in the provision of these services. The Council is currently in the process of setting up a limited liability partnership for this purpose, following a decision taken by its Executive Committee on 18 April 2008 to instruct the Executive Director of DACS to prepare a detailed business plan for its formation.
25. The Council considers that disclosure of the information requested by Mr Cannon would present a real and substantial risk to the commercial prospects of the DACS limited liability partnership, which will be trading against other service providers. The Council considers that the commercial interests of DACS are the commercial interests of the Council, and ultimately the commercial interests of the council tax payers of Glasgow.
26. The Council advised that DACS participates in competitive tendering situations, not only as a procuring service, but as a tenderer in its own right, bidding for domiciliary care and cleaning contracts. As Council salary scales are publicly available, it is only the remaining financial information (such as labour costs and charge rates) which allows DACS to tender on a confidential basis. The Council explained that the audit process involved identifying the full DACS labour costs and the overhead and profit uplifts included in the client charge rate. If these other figures were disclosed under FOISA, the Council argued that competitors of DACS would be able to calculate the likely tender price which DACS would submit, to the commercial detriment of DACS and the Council.



27. In relation to the commercial interests of the agencies, the Council advised that information of a business critical nature, such as labour costs, was obtained from the invoices of suppliers of agency workers to DACS. It noted that contractors have previously expressed their concerns over the confidentiality of their charges, stating that disclosure could harm their business. The Council submitted a letter from one of the providers which stated that disclosure of its charge rates would be detrimental to its tender for similar work with the Council and would give other companies involved an unfair advantage.
28. At the time of the review of Mr Cannon's request, the Council was preparing to go out to tender for the supply of care and specialist care services (the PPQ publication date was 5 March 2008). The tendering process has been ongoing during the Commissioner's investigation. The Council took the view that to release information about the rates charged by existing suppliers would result in suppliers' charging rates being open to the public, which in turn would seriously damage the tendering process.
29. The Council also argued that the commercial interests of the external providers would be damaged because the information related to individually negotiated contracts, not services which carry a standard charge. Therefore, the price charged to one customer would not necessarily be the same as the price charged to another customer. Revealing the charges made to the Council, one of the biggest clients for these providers, would damage relations between the providers and other clients who had not been offered the service at the same cost.
30. The Council stated that there was a very real risk that disclosure of the information requested would lead to a levelling of the field of supply of the care services to the detriment of the Council, there being no incentive to a supplier to offer lower prices to one organisation should this then lead to them being pressured into lowering prices to others. The Council believe that this would lead to a curtailment of the suppliers' dealings with the Council, affecting its ability to secure best value.

Commercial interests: the Commissioner's analysis

31. The Commissioner accepts that both DACS and the agencies supplying staff for cover in the hostels have commercial interests, in that both operate in a competitive tendering environment. The Commissioner accepts that the Council has commercial interests which are engaged in this case, in relation to DACS' activities as a service provider operating in a competitive market. The Commissioner notes that at the time of Mr Cannon's request, the Council had not yet approved the decision to distance DACS from the Council by transforming it into a limited liability partnership; however, he is satisfied that DACS had already secured contracts to provide services to external bodies, and that it was participating in activities described as "trading operations".
32. The Commissioner will therefore consider whether disclosure of the information withheld would, or would be likely to, cause substantial prejudice to the commercial interests of either the Council (this includes DACS) or the agencies supplying staff.



33. The Council's arguments have focused on the harm caused by disclosing information which has the potential to provide a commercial rival with a competitive advantage. However, the Commissioner found that in the majority of documents withheld there was little or no financial or other data which might reveal charge rates, overheads, profit margins, or any other information which could be useful to a competitor.
34. Instead, the Commissioner found that much of the information withheld related to the process of carrying out the audit investigation and reporting its findings. With the exception of one document (document 69), the Council has not advanced any arguments in relation to such information, and in terms of the exemption in section 33(1)(b) the Commissioner found that most of the information in the documents withheld was, by its nature, incapable of causing prejudice to the commercial interests of the Council or its service providers.
35. Where the Commissioner has found that the information was wrongly withheld under section 33(1)(b) of FOISA, and has not been withheld under any other exemptions in FOISA, he requires the Council to provide this information to Mr Cannon. Documents to which section 38(1)(b) and section 30(b)(i) and (ii) have been applied, in whole or in part, are considered later in this decision notice.
36. Where the documents contain information about hourly charges or other detailed information about costs, the Commissioner has accepted that the exemption in section 33(1)(b) applies. The Commissioner accepts that the hourly rates charged by agencies which are likely to be involved in competitive tendering for Council contracts in future is, in this context and, given the circumstances described in paragraph 28, sensitive commercial information. Likewise, the Commissioner accepts that disclosure of the detail of costs incurred by DACS in providing staff cover in the hostels is sensitive commercial information, given that DACS will be engaged in competitive tendering with other bodies for service provision contracts in future. He is satisfied that disclosure of such information would, or would be likely, to cause substantial prejudice to commercial interests. However, this conclusion does not extend to top line figures showing the payments made to agencies, nor to the auditors' conclusions about the comparative costs of agency and Council staff.

The public interest test – section 2(1)(b) of FOISA

37. Where the Commissioner has found that information falls within the exemption in section 33(1)(b) of FOISA, he must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. Unless he finds that it does, he must order the information to be disclosed (unless one or more exemptions are found to apply to that information).
38. In weighing up the public interest in disclosure against the public interest in withholding the information, the Council considered the general public interest in information being accessible, and whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and ensuring that the public obtain value for money. In addition, the Council considered whether disclosure of the information requested would ensure fairness in relation to applications, in this case to other tenderers who may in future be interested in tendering for these services.



39. However, the Council considered that the public interest points favouring disclosure had all been addressed without the need to disclose the information requested. It found that the balance of the public interest lay in withholding the information, for the following reasons:
- it can only be in the public interest for a publicly funded body to be able to secure the best possible value for money, and it is not in the public interest for public bodies to incur unnecessary expenditure caused by the loss of a competitive tendering advantage.
 - trading activities by the Council help generate funds to support frontline service delivery without impacting adversely on the public purse. The Council considers that the public interest is served by protecting the Council's ability to do so in a competitive market place, and that there is no public interest in frustrating such moves.
40. The Commissioner accepts, as a general principle, that it is in the public interest for public authorities to secure best value for money, and that where a public authority is engaging in competitive tendering it is in the public interest that it should do so without loss of competitive advantage caused by its status as a public body. The Commissioner accepts that disclosure of the information which he finds to be exempt under section 33(1)(b) would be likely to have a detrimental effect on the ability of the agencies or DACS to compete for future contracts, by requiring them to release commercially sensitive information which would be useful to competitors.
41. On the other hand, the Commissioner considers there is a clear public interest in making available information which allows scrutiny of the expenditure of public funds, particularly where expenditure has come under question. There is a public interest in ensuring that public authorities are accountable for spending decisions and have fully considered the cost implications of providing a service by one means rather than another.
42. Mr Cannon has raised concerns about the comparative costs of providing agency staff cover in hostels rather than using Council staff on overtime rates. The Council has taken his concerns seriously and has carried out an internal audit to investigate this issue and other related issues. The Council has not provided Mr Cannon with any detailed conclusions from its audit, e.g. the comparative costs of agency cover and Council staff cover, although Mr Cannon has advised the Commissioner that he was originally led to believe that a copy of the audit findings would be made available to him. Perhaps unsurprisingly, this has led him to question how the auditors reached the conclusion that the use of agency staff is cost-effective.



43. The Commissioner finds there is a public interest in the disclosure of information which would show the extent of the audit investigation, including the type of evidence which was gathered and considered. He also finds there is a public interest in disclosure of the conclusions of the auditors, in that these provide reasons for the decision that employment of agency staff was cost-effective and should continue. However, the Commissioner finds that this can be largely achieved through disclosure of the information which he considers to have been wrongly withheld under section 33(1)(b) of FOISA, without requiring disclosure of the financial and other data which (he finds) would, or would be likely to, cause substantial prejudice to commercial interests if disclosed. After weighing up the competing interests in this case, the Commissioner finds that the balance of public interest lies in withholding such information, in order to avoid prejudice to Council or the agencies involved when tendering for contracts in future.
44. The Commissioner therefore upholds the Council's decision to withhold certain information under section 33(1)(b) of FOISA.

Section 30(b)(i) and (ii)

45. The Council applied the exemptions in section 30(b)(i) and section 30(b)(ii) of FOISA to one document, i.e. document 69.
46. Section 30(b)(i) and (ii) of FOISA allow information to be withheld if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively. In applying these exemptions the chief consideration should not be whether the information constitutes advice or opinion, but whether the release of the information would or would be likely to have the effect set out in the statute – i.e. to inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
47. Document 69 contains frank comments and advice relating to the progress of the audit investigation. The Council has argued that disclosure of the views and advice contained in the document would inhibit officers from providing similar advice or views in future, given the context of Mr Cannon's request and the ongoing commercial matters.
48. In relation to the information which falls within the scope of the request, the Commissioner has considered carefully the Council's arguments in support of the exemptions in section 30(b)(i) and (ii).



49. The advice and views provided in document 69 relate to the conduct of an internal audit, a process which may require information to be treated confidentially and which may require sensitive questions to be raised. Document 69 is a working document rather than a formal communication and contains discussion of the direction of the ongoing audit investigation. It does not contain financial data or other information which, if disclosed, would provide an obvious advantage in a competitive tendering situation. However, the Commissioner accepts that the potential inhibition caused by disclosure of the information contained within this document would be increased as a result of the context of the commercial issues discussed previously in this decision notice. Within this context, the Commissioner accepts that disclosure of much of the information in the document which falls within the scope of Mr Cannon's request would, or would be likely to, have a substantially inhibiting effect on the provision of advice and views in future audit investigations.
50. The Commissioner therefore finds that the exemptions in section 30(b)(i) and (ii) apply to much of document 69 falling within the scope of the request.
51. The exemptions in section 30(b)(i) and (ii) of FOISA are subject to the public interest test. This means that, even where the exemptions are found to apply, the information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information.
52. The Council relied upon the same public interest arguments as it had advanced in relation to section 33(1)(b), which have been discussed previously in this decision notice.
53. The Commissioner considered whether disclosure of the information which he considers to be exempt under section 30(b)(i) and (ii) would be in the public interest, in terms of increasing scrutiny of a decision about public spending or by increasing public understanding and confidence in the audit process through which the Council scrutinised its own practices, or whether the public interest would lie in maintaining the exemptions. However, the Commissioner found that there would be no great benefit, in this regard, to be gained by the disclosure of the exempt information in document 69, given the importance of the internal audit process to public authorities. He found that the public interest in disclosure was outweighed by the public interest in maintaining the exemptions.

Section 38(1)(b) – personal information

54. The Council applied the exemption in section 38(1)(b) of FOISA to personal data within the documents withheld from Mr Cannon. Section 38(1)(b), read in conjunction with either section 38(2)(a)(i) or (b), exempts personal data from disclosure if the release of the information would contravene any of the data protection principles set out in Schedule 1 to the DPA.



55. The Council argued that disclosure of the personal information to a member of the public and therefore into the public domain would contravene the first data protection principle, which states that personal data shall be processed fairly and lawfully, and, in particular, shall not be processed unless one of the conditions in Schedule 2 (and, in the case of sensitive personal data, one of the conditions in Schedule 3) to the DPA is met. The Council argued that disclosure of the information would cause unnecessary or unjustified distress to the data subjects and that the data subjects would have no expectation that this information might be disclosed into the public domain: disclosure would therefore be unjust and unfair. However, the Council did not explain why it considered that disclosure would cause unnecessary or unjustified distress or why the individuals in question would have no expectation that this information might be disclosed.
56. Similarly, the Council did not limit application of this exemption to particular instances of personal data within the documents, or explain what information in the documents it considered to fall within the definition of personal data, so the Commissioner must consider the exemption in relation to all information withheld which, in his view, meets the definition of “personal data” in section 1(1) of the DPA. (Personal data means 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, i.e. the Council. The full definition is set out in Appendix 1.)
57. The Commissioner found that there were several distinct groups of individuals whose personal data is included in the documents withheld from Mr Cannon. These can be summarised as:
- a) individuals employed by the agencies or by the Council to work in the Social Work hostels or in another capacity on a relief basis;
 - b) Council employees or agency staff whose names and in some cases their job title and/or place of work appear on documents submitted to the auditor, but who were not actively involved in the audit investigation;
 - c) the Council officials and agency staff involved in dealing with Mr Cannon’s whistleblowing complaint and/or actively involved in the subsequent audit investigation.
58. The Commissioner is satisfied that none of this personal data falls within the definition of sensitive personal data as set out in section 2 of the DPA. As a result he is not required to consider whether any of the conditions in Schedule 3 to the DPA can be met in deciding whether the disclosure of the data would, as the Council has argued, breach the first data protection principle.
59. The Commissioner will now go on to consider whether the disclosure of this personal data would be fair, lawful and whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed.



Fairness

60. Given the type of personal data contained in the documents, the Commissioner has considered guidance from the (UK) Information Commissioner, who is responsible for the enforcement and regulation of the DPA throughout the UK, including specific guidance on the disclosure of names.¹ from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK.
61. The guidance suggests that factors to consider when looking at fairness include whether the information requested relates primarily to a person's public function rather than to their private life and whether that individual should expect their role to be subject to public scrutiny. In coming to a decision on this point, the Information Commissioner suggests that the following should be considered: how senior that person is; whether they have a public profile; whether their role requires a significant level of personal judgement and individual responsibility and whether there a likelihood of unwarranted damage or distress to the individual.
62. The guidance also goes on to state:
- “The presumption is in favour of protecting privacy, so the release of personal information will only be fair if there is a genuine reason to disclose.”
63. The Commissioner found that it would be unfair to disclose the names of the individuals in the first two groups identified in paragraph 57 above, in relation to Mr Cannon's request. Although the names (which in some cases are the signatures) of the individuals concerned appear on documents falling within the scope of Mr Cannon's request, the individuals are named in those documents for business reasons not directly connected with the audit investigation or the decision to employ agency staff in place of Council staff on overtime rates. The Commissioner has not identified a genuine reason why this personal data should be disclosed (i.e. a legitimate interest in its disclosure) and is satisfied that in this case the individuals would have no expectation that the information might be disclosed into the public domain.
64. Given that the Commissioner has found that disclosure of the personal data in relation to the names of the individuals in groups (a) and (b) identified in paragraph 57 would be unfair, he is not required to go on to consider whether disclosure would otherwise be lawful or permitted by the first data protection principle.
65. The Commissioner does, therefore, find that the personal data of these individuals is exempt from disclosure under section 38(1)(b) of FOISA, in conjunction with section 38(2)(a)(i) or (b). In these circumstances, section 38(1)(b) is an absolute exemption and the Commissioner is not required to go on to consider the public interest in disclosing this information.

¹ Freedom of Information Act / Environmental Information Regulations Practical Guidance “When should names be disclosed?” which can be viewed at:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/whenshouldnamesbedisclosed.pdf



66. However, the Commissioner reached a different view in relation to the third group of individuals (category (c)); that is, the Council officials who were directly involved in handling Mr Cannon's complaint and in carrying out the audit. As noted above, the Council has argued that the disclosure of this personal data would be unjust and unfair on the basis that the disclosure would cause unnecessary or unjustified distress to the data subjects and that the data subjects would have no expectation that this information might be disclosed into the public domain. Again, the Council did not explain why it considered that disclosure would cause unnecessary or unjustified distress or why the individuals in question would have no expectation that this information might be disclosed.
67. The Commissioner found that, for the most part, there were genuine reasons why disclosure of these individuals' personal information was required. He found that disclosure was required in order to improve understanding of the process used in the audit investigation and to show the extent of the inquiries undertaken. Disclosure of the identities of staff involved was necessary in order to fully understand the exchange of correspondence forming part of the audit investigation process; this correspondence shows the extent of the audit enquiries relating to Mr Cannon's concerns and who in the Council was involved in the enquiries. This provides some understanding of whether Mr Cannon's concerns were treated seriously and how the Council responded to his concerns.
68. The Commissioner accepted that Mr Cannon has a legitimate interest in information which would permit a full understanding of these matters (his legitimate interests are looked at again below, when considering whether there are any conditions in Schedule 2 to the DPA which would permit the information to be disclosed). Mr Cannon was responsible for drawing the Council's attention to the issues which were later investigated, and provided details of rates of pay to inform the audit inquiry. He was advised of the outcome of the audit investigation, but was given no detail to explain or support the conclusion reached by the auditors, and remains concerned about the basis upon which the Council has decided that the use of agency staff in its Social Work Hostels represents value for money.
69. The Commissioner accepts that there is a legitimate interest in information which promotes accountability and which allows better understanding of the decisions taken by a public authority; in this case, a decision about the best use of public money.
70. The Council argued that the data subjects would have no expectation that this information might be disclosed into the public domain, and that disclosure of the information would cause unnecessary or unjustified distress to them.



71. The Commissioner accepts that the individuals concerned may not have had any specific expectation that their part in the investigation or related matters would be made public, although he takes the view that public authority staff should now be aware that any information held by a Scottish public authority is potentially the subject of an information request under FOISA or the Environmental Information (Scotland) Regulations 2004. He also finds it hard to believe that the specific roles played by certain individuals would not have suggested to them that it was likely that their involvement in certain matters would become known. In any event, the question of the individuals' expectations is only one of the matters to be considered. The Commissioner does not accept that disclosure of the personal data relating to these Council officials would cause them significant distress or damage. The documents withheld contain a record of actions or views relating to the normal areas of work responsibility for the individuals concerned, and the information is unlikely by its nature to put those individuals at any personal risk if disclosed. While one of the employees who played a key role in investigating the issues raised by Mr Cannon appears to have been a relatively junior member of staff, that person played a very important role, albeit under the guidance and support of a more senior member of staff. In any event, the Commissioner notes that the Council did not provide him with any evidence as to the likelihood of there being damage or distress to the individuals or how this was likely to arise.
72. After considering the tests outlined above in relation to "fairness", the Commissioner finds that it would be fair to disclose the personal data of key officials named in the documents withheld.
73. However, the Commissioner makes an exception for personal data comprising the home email address of one official, accepting that it would be unfair to disclose this information to the public at large in response to Mr Cannon's information request, and that it is therefore information which is exempt from disclosure under section 38(1)(b) in conjunction with section 38(2)(a)(i) or 38(2)(b) of FOISA.

Schedule 2 conditions: condition 6

74. Having concluded that it would be fair to disclose the other personal data relating to the Council officials described above, the Commissioner has gone on to consider whether any of the conditions set out in Schedule 2 of the DPA might be met in this case.
75. It is the Commissioner's view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in line with an information request made under section 1(1) of FOISA) 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 subject.



76. The Commissioner has considered the following questions in relation to Condition 6.
- (i) Does Mr Cannon have legitimate interests in obtaining this personal data?
 - (ii) If he does, is disclosure of this personal data necessary to achieve those legitimate aims? 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?
 - (iii) Even if the processing is necessary for these legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if the legitimate interests of the applicant outweigh those of the data subjects can the personal data be disclosed.
77. As noted above in paragraphs 67 and 68, the Commissioner accepts that Mr Cannon has demonstrated a legitimate interest in information which would add to his understanding of the process by which the auditors reached their conclusions on what he believed to be a matter of public concern, and which he had brought to the Council's attention through its whistleblowing procedure. In terms of accountability, there is a legitimate interest in disclosure of information which would enable full understanding of the process by which the Council took forward his concerns and scrutinised its spending on a particular service area.
78. Given that he has found that Mr Cannon has legitimate interests, the Commissioner is required to go on to consider whether the disclosure of the personal data is necessary to achieve these legitimate aims – 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?
79. In considering this second test, the Commissioner found that the disclosure of the direct phone numbers or email addresses of the Council officials or their signatures was not necessary to achieve these legitimate aims. The Commissioner therefore found that this information was exempt under section 38(1)(b) on the basis that disclosure would breach the first data protection principle.
80. However, for the reasons outlined above in paragraphs 69-71, the Commissioner was satisfied that there was a legitimate interest in the disclosure of other personal data relating to key officials.



81. The Commissioner must therefore consider the third and final test for condition 6, i.e. whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. The Commissioner has carried out such a balancing exercise and does not consider that disclosure would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. The Commissioner took into account that the personal data in question relates solely to the data subjects' official or work capacity. He found that this lessened any potential for harm or distress, particularly given the type of information which had been withheld from Mr Cannon and noted that, in any event, the Council had not provided him with any evidence as to the likelihood of there being harm or distress to the people involved. Accordingly, the Commissioner accepts that Condition 6 has been met.

Lawfulness

82. The final test for the Commissioner to consider is whether the disclosure of the information would be unlawful. The Council has not argued that disclosure would be unlawful otherwise than resulting from a breach of the first data protection principle. As the Commissioner has found that disclosure of the personal data in question (i.e. the personal data in category (c), with home email addresses, signatures and direct contacts redacted) would not breach the first data protection principle, he finds that disclosure would be lawful.
83. The Commissioner therefore finds that much of the personal data contained within the documents withheld from Mr Cannon is not exempt under section 38(1)(b) of FOISA.



DECISION

The Commissioner finds that Glasgow City Council (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 John Cannon.

The Commissioner found that the Council was not justified in withholding some information under the exemptions in section 30(b)(i) and (ii) and section 33(1)(b), although the exemptions were correctly applied to other information. The Commissioner found that the Council was correct to withhold some information under section 25(1), and correct to withhold some information under section 38(1)(b) of FOISA.

Where the Commissioner has found that the Council did not apply an exemption correctly, he has found that the Council failed to comply with section 1(1) of FOISA.

The Commissioner requires the Council to provide Mr Cannon with the information specified in Appendix 2 of this decision notice. This information must be provided no later than 45 calendar days after the date of intimation of this decision notice, that is by 5 March 2009.

Appeal

Should either Mr Cannon or the Council 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
22 January 2009



Appendix 1

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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

(...)

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

(...)

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act -

(...)



(b) would, or would be likely to, inhibit substantially -

- (i) the free and frank provision of advice; or
- (ii) the free and frank exchange of views for the purposes of deliberation

(...)

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.

(...)



Data Protection Act 1998

1 Basic interpretative provisions

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.



Appendix 2

Information withheld / Commissioner's decision

Document	Description	Exemption(s) applied	Decision
1	Terms of reference of audit	s.33(1)(b)	s.33(1)(b) not upheld – disclose with exception of points c and d (outside scope of request)
2	Risk matrix 1	s.33(1)(b)	s.33(1)(b) not upheld – disclose
3	Risk matrix 2	s.33(1)(b)	s.33(1)(b) not upheld – disclose
4	Risk matrix 3	s.33(1)(b)	s.33(1)(b) not upheld – disclose
5	Risk matrix 4	s.33(1)(b)	s.33(1)(b) not upheld – disclose
6	Risk matrix 5	s.33(1)(b)	Subject matter falls outside the scope of Mr Cannon's request - withhold
7	Audit test screen print 1	s.33(1)(b)	s.33(1)(b) not upheld – disclose
8	Attachment to doc. 7	s.33(1)(b) s.38(1)(b)	s.33(1)(b) generally not upheld – disclose, with exception of information indicated (some personal data and some information covered by s.33(1)(b)). Marked up copy provided to Council.
9	Batch header for agency invoices	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose after redacting signatures of Council employees (s.38(1)(b) upheld in relation to this information).
10 - 12	Invoices from agency	s.33(1)(b) s.38(1)(b)	s.33(1)(b) upheld in relation to rates of pay – withhold hourly rate and number of hours worked. Name of worker, name of Council official to whom invoice was addressed and signatures to be withheld under s.38(1)(b). Other parts of documents should be disclosed.
13	Batch listing for invoices in docs 10 -12	s.33(1)(b)	s.33(1)(b) not upheld - disclose
14	Batch header for agency invoices	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose after redacting signatures of Council employees (s.38(1)(b) upheld in relation to this information).
15 - 18	Invoices from agencies	s.33(1)(b) s.38(1)(b)	s.33(1)(b) upheld in relation to rates of pay – withhold hourly rate and number of hours worked. Name of worker, name of Council official to whom invoice was addressed and signatures to be withheld under s.38(1)(b). Other parts of documents should be disclosed.
19 & 20	Batch listing for invoices in docs 15 - 18	s.33(1)(b)	s.33(1)(b) not upheld - disclose
21	Agency banking details	s.33(1)(b)	Subject matter falls outside the scope of Mr Cannon's request - withhold
22	Invoice from agency	s.33(1)(b) s.38(1)(b)	s.33(1)(b) upheld in relation to rates of pay – withhold hourly rate and number of hours worked. Name of worker, name of Council official to whom invoice was addressed and signature to be withheld under s.38(1)(b). Other parts of documents should be disclosed.
23	Timesheet from agency	s.33(1)(b) s.38(1)(b)	s.33(1)(b) and s.38(1)(b) upheld - withhold

Decision 006/2009
Mr John Cannon
and Glasgow City Council



24 - 29	Agency invoices	s.33(1)(b) s.38(1)(b)	s.33(1)(b) and s.38(1)(b) upheld - withhold.
30	Audit test screen print 2	s.33(1)(b)	Exemption not upheld – disclose
31	Attachment to document 30	s.33(1)(b)	s.33(1)(b) upheld in relation to details of rates. Not upheld in relation to headings (although where heading includes basis for calculation of overheads, the basis for calculation should be withheld) and totals. Marked up copy of document supplied to Council to show what should be disclosed/withheld.
32	Attachment to document 30	s.33(1)(b)	s.33(1)(b) not upheld - disclose
33	Attachment to doc 30	s.33(1)(b)	s.33(1)(b) upheld - withhold
34	Audit test screen print 3	s.33(1)(b)	s.33(1)(b) not upheld – disclose
35	Attachment to document 34	s.33(1)(b)	s.33(1)(b) upheld in relation to financial data; not upheld in relation to headings and descriptors which should be released (although where heading includes basis for calculation of overheads, the basis for calculation should be withheld). Marked up copy provided.
36	Letter to Mr Cannon (21/12/07)	s.33(1)(b) s.25(1)	Postdates Mr Cannon's FOI request – outside scope of request - withhold.
37	Letter to Mr Cannon re. his FOI request (17/12/07)	s.33(1)(b) s.25(1)	Postdates Mr Cannon's FOI request – outside scope of request - withhold.
38	Email from Mr Cannon (11/12/07)	s.33(1)(b)	Postdates Mr Cannon's FOI request – outside scope of request - withhold.
39	Letter to Mr Cannon (30/11/07)	s.33(1)(b) s.25(1)	Postdates Mr Cannon's FOI request – outside scope of request - withhold
40	Memo from Mr Cannon	s.33(1)(b)	Exempt under s.25(1) – withhold.
41	Letter (13/11/07) to Mr Cannon with summary of audit outcome	s.33(1)(b) s.25(1)	Exemption in s.25(1) upheld – withhold.
42	Email from Mr Cannon (12/11/07)	s.33(1)(b)	Exempt under s.25(1) - withhold
43	Email (19/10/07) concerning attached email from Mr Cannon (19/10/07)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) and s.38(1)(b) not upheld for email from Council official or for header details from Mr Cannon's email - disclose. s.25(1) upheld for Mr Cannon's email – withhold.
44	Audit report	s.33(1)(b)	s.33(1)(b) not upheld - disclose
45	Covering email (31/10/07) for draft of audit report (doc 46)	s.33(1)(b)	s.33(1)(b) not upheld – disclose
46	Draft of audit report with minor amendments marked	s.33(1)(b)	s.33(1)(b) not upheld – disclose
47	Covering email (25/10/07) for docs 48 & 49	s.33(1)(b)	s.33(1)(b) not upheld – disclose
48	Draft letter to Mr Cannon, attached to doc 47	s.33(1)(b) s.25(1)	s.25(1) not upheld; s.33(1)(b) not upheld – disclose.
49	Draft message to DACS re. another issue raised by whistleblower (attached to doc 47)	s.33(1)(b)	Information in document falls outside scope of request - withhold

Decision 006/2009
Mr John Cannon
and Glasgow City Council



50	Covering email (19/10/07) for draft of audit report (doc 51)	s.33(1)(b)	s.33(1)(b) not upheld – disclose
51	Draft of audit report	s.33(1)(b)	s.33(1)(b) not upheld – disclose
52	Covering email (16/10/07) enclosing draft of report (doc 53)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of email address and phone/fax numbers, withheld under s.38(1)(b).
53	Draft of audit report	s.33(1)(b)	Exemption in section 33(1)(b) upheld for hourly rates paid by two agencies. Appendix 1 is outside scope of request and should be withheld. Marked up copy of document provided to Council.
54	Draft of audit report	s.33(1)(b)	Exemption in section 33(1)(b) upheld for hourly rates paid by two agencies. Appendix 1 is outside scope of request and should be withheld.
55 (numbered 53 in docs sent)	Covering email (15/10/07) for draft of audit report (doc 54)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
56	Covering email (14/10/07) attaching note (doc 57)	s.33(1)(b)	s.33(1)(b) not upheld – disclose
57	Note about final report presentation	s.33(1)(b)	s.33(1)(b) not upheld – disclose
58	Email (12/10/07) attaching report on another matter	s.33(1)(b)	Outside scope of request - withhold
59	Email (9/10/07) re agency rates	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
60	Covering email (08/10/07) for draft report (doc 61)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
61	Draft of audit report	s.33(1)(b)	Some information falls outside the scope of the request and should be withheld. Exemption in section 33(1)(b) upheld for hourly rates paid by two agencies. Appendix 1 is outside scope of request and should not be disclosed. Marked up copy of document provided to the Council.
62	Email 05/10/07	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose with exception of email address and phone/fax numbers, withheld under s.38(1)(b).
63	Covering email (03/10/07) for draft of audit report (doc 64)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
64	Early draft of audit report	s.33(1)(b) s.38(1)(b)	Partly outwith scope of request. Exemption in section 33(1)(b) upheld for hourly rates paid by two agencies. S.38(1)(b) upheld for personal data of identifiable Agency workers. Marked up copy of the document provided to the Council.
65 - 67	Emails from auditor	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
68	Email (30/09/07) explaining attachment (doc 69)	s.33(1)(b)	s.33(1)(b) not upheld – disclose

Decision 006/2009
Mr John Cannon
and Glasgow City Council



69	Notes on draft audit report	s.33(1)(b) s.30(b)(i) and (ii)	Some information outside scope of request. Exemption in 33(1)(b) not upheld for information within scope of request. Exemption in 30(b)(i) & (ii) partially upheld. Marked up copy of the document provided to the Council.
70	Emails (4/08/07 to 04/09/07) requesting / providing information for audit	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of email address and phone/fax numbers, withheld under s.38(1)(b).
71	Email 22/08/07	s.33(1)(b)	s.33(1)(b) not upheld - disclose
72	Emails (07/08/07 to 17/08/07) requesting / providing information for audit. Some duplicated from doc 70.	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld, with exception of financial data in email 15/08/07 from David Kerr. Remainder of documents should be disclosed with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
73	Email 17/08/07	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose with exception of direct email address and phone numbers, withheld under s.38(1)(b).
74	Email 07/08/07 (duplicated from doc 70)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
75	Draft email 07/08/07 to Mr Cannon	s.33(1)(b) s.25(1)	s.25(1) upheld - withhold
76	Emails (11/07/07 to 31/07/07) on conduct of audit enquiry	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
77	Email 11/07/07	s.33(1)(b) s.38(1)(b)	Subject matter outside scope of request - withhold
78	Email 11/07/07 (duplicate of email in doc 76)	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
79	Emails 27/06/07 relating to audit enquiry	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
80	Covering email (27/06/07) for document 81, attached.	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of direct email address and phone/fax numbers, withheld under s.38(1)(b).
81	Notes from enquiries into whistleblowing allegation	s.33(1)(b)	Some information outside scope of request. s.33(1)(b) not upheld in relation to information within scope – disclose. Marked up copy provided.
82	Emails 25/06/07 relating to audit enquiry	s.33(1)(b) s.38(1)(b)	s.33(1)(b) not upheld – disclose, with exception of email address and phone/fax numbers, withheld under s.38(1)(b).
83	Email from Mr Cannon (25/10/07) re. enclosed letter from Homeless Partnership (19/10/07)	s.33(1)(b) s.38(1)(b)	Exempt under s.25(1) - withhold