

Decision Notice



Decision 002/2012 Mr Graham Devine and South Lanarkshire Council

Incident involving property

Reference No: 201101095
Decision Date: 5 January 2012

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr Devine requested from South Lanarkshire Council (the Council) information relating to an incident that had affected his property. The Council responded by providing some information, but withholding other information in terms of section 36(1) of FOISA (as information to which a claim of confidentiality could be maintained in legal proceedings). The Council also gave notice that it did not hold any information in respect of part of Mr Devine's request. Following a review, as a result of which the Council disclosed some more information, but also relied upon section 38(1)(b) of FOISA for withholding certain personal information, Mr Devine remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which Mr Devine confirmed that he was not interested in certain of the withheld personal data, the Commissioner found that the Council had been correct in withholding the remainder of the information under either section 36(1) or section 38(1)(b) of FOISA. He did not require any action by the Council.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 36(1) (Confidentiality), and 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

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

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



Background

1. On 4 March 2011, Mr Devine wrote to the Council requesting all records relating to a specified incident affecting his property. These were to include all correspondence with external agencies and also internal correspondence, including correspondence to and from the Chief Executive. He also requested copies of all operating procedures relating to the gaining of access to private properties by Council tradesmen.
2. The Council responded on 15 March 2011. It provided some information relating to the specified incident while withholding the remainder in terms of section 36(1) of FOISA, as information to which a claim of confidentiality could be maintained in legal proceedings. The Council also advised that it did not hold the operating procedures Mr Devine had requested and therefore could not provide this information.
3. On 17 March 2011, Mr Devine wrote to the Council requesting a review of its decision. Noting that he had made no mention of litigation on the Council, he did not consider it acceptable for the Council to use section 36(1) as a “blanket exemption”.
4. The Council notified Mr Devine of the outcome of its review on 12 April 2011, upholding its decision in respect of section 36(1) in respect of certain information while releasing other information. It also decided that the remaining information was exempt under section 38(1)(b) of FOISA, as the personal data of third parties the release of which would breach the first data protection principle.
5. On 14 June 2011, Mr Devine wrote to the Commissioner’s office, stating that he was dissatisfied with the outcome of the Council’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 Devine 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 17 June 2011, the Council was notified in writing that an application had been received from Mr Devine and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was allocated to an investigating officer.



8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. With particular reference to the requirements of the exemptions it had cited earlier, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. Its submissions in response, insofar as relevant, are considered fully in the Commissioner's analysis and findings below.
9. During the investigation, Mr Devine was informed that the information withheld included contact details of Council employees. He was asked if he required the decision to consider this information. Mr Devine responded that he did not wish to receive contact details, but did wish to receive any information that referred to him or his pursuit of this matter. In what follows, the Commissioner has considered the application of section 38(1)(b) on this basis.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the submissions made to him by both Mr Devine and the Council and is satisfied that no matter of relevance has been overlooked.

Section 36(1) - Confidentiality

11. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall within this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
12. Communications *post litem motam* are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
13. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time. At review, the Council decided that some of the information had been recorded for a different purpose, rather than in contemplation of litigation, and disclosed that information to Mr Devine.



14. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
15. The Council was asked to confirm the date when it was aware that litigation was contemplated. It responded that there was no conclusive date, but it was clear from an email of 10 January 2011 that that Mr Devine intended to intimate a claim upon the Council. From that point, the Council suggested, it had been reasonable in assuming that litigation was likely from Mr Devine.
16. From the information supplied by the Council, the Commissioner accepts that the Council was reasonable in anticipating litigation (in the sense of a claim against it) as early as 10 January 2011.
17. Before the Commissioner can accept that the information is exempt under section 36(1), however, he must also consider whether it retained the quality of confidence at the time the Council dealt with Mr Devine's information request and his request for review. In the circumstances, he accepts that it did.
18. The Commissioner is satisfied that the information withheld by the Council in terms of section 36(1) of FOISA was prepared in contemplation of litigation and therefore falls (and fell, at the time the Council dealt with the information request and request for review) within the scope of section 36(1) of FOISA.
19. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

Public interest test

20. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications on administration of justice grounds: see, e.g., the House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*¹. Consequently, while he will consider each case on an individual basis, the Commissioner is likely to order the release of such communications in highly compelling cases only.
21. The Council submitted that the public interest lay in withholding the information, since there was a strong public interest in ensuring that parties who were potentially involved in litigation, either as pursuer or defender, should be able to prepare their case without intrusion.

¹ (2004) UKHL 48



22. Mr Devine's application to the Commissioner, and his communications with the Council, underline his view that there is a public interest in the scrutiny of the Council's actions with respect to this particular incident and in particular whether the Council's actions have been "reasonable, competent and lawful". The Commissioner acknowledges Mr Devine's personal reasons for requiring disclosure.
23. The Commissioner has considered the public interest arguments and he accepts that there is a general public interest in authorities being open to scrutiny and being accountable for their actions. He considers that this extends to knowing whether the Council has been correctly discharging any duties it has in respect of the incident in question. He acknowledges that disclosure of the withheld information would contribute to transparency and accountability in this context. However, on balance, the Commissioner has concluded that in this case there is a greater public interest in allowing the Council to prepare fully for litigation, without these preparations being open to examination by the other party.
24. The Commissioner is therefore satisfied, in all the circumstances of this case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1) of FOISA (and therefore that the Council was correct in withholding the information under that exemption).

Section 38(1)(b) - Personal information

25. The Council withheld other information in terms of section 38(1)(b) of FOISA, on the basis that disclosure would breach the first data protection principle. As indicated above (see paragraph 9), the Commissioner is not considering the application of this exemption to employee contact details: the information which remains to be considered relates primarily to third parties involved in the incident which prompted Mr Devine's request.
26. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (2)(b)(as appropriate), exempts personal data if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.
27. In considering the application of this exemption, therefore, the Commissioner will first consider whether the information in question is personal data as defined in section 1(1) of the DPA and, if it is, whether disclosure of the information would breach the first data protection principle.

Is the information under consideration personal data?

28. "Personal data" is defined in section 1(1) of the DPA as, *inter alia*, "data which relate to a living individual who can be identified from those data ..." (the full definition is set out in the Appendix).
29. The Commissioner has considered the withheld information, together with the relative submissions provided by the Council, and in the circumstances is satisfied that it comprises personal data. Living individuals can be identified from the information and that information is biographical in relation to those individuals and focuses on them. The Commissioner is therefore satisfied that the information relates to those individuals.



30. The Commissioner will now go on to consider whether disclosure of the information would breach the first data protection principle.

The first data protection principle

31. The first data protection principle states that personal data shall be processed fairly and lawfully. It also states that personal data 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 of the DPA is also met. The Commissioner is satisfied that none of the information constitutes sensitive personal data and therefore is not required to consider whether any of the conditions in Schedule 3 can be met.
32. When considering the conditions in Schedule 2, the Commissioner has also noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner 2008 UKHL 47*², that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject.
33. The Commissioner considers (and the Council appears to acknowledge) that only condition 6 in Schedule 2 to the DPA might be considered to apply in this case. Condition 6 allows personal data to be processed (which in this case, would be by disclosure into the public domain in response to Mr Devine's information request) if that 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.
34. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Mr Devine have a legitimate interest in obtaining this personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is 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 subject?

² <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



- Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the individual(s) to whom the data relate)? As noted by Lord Hope in the above judgement, there is no presumption in favour of the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr Devine must outweigh the rights, freedoms or legitimate interests of the data subject before condition 6(1) will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the personal data to Mr Devine.

Does Mr Devine have a legitimate interest?

35. As indicated above, Mr Devine's stated interest in the withheld information was to increase scrutiny of the Council's actions in respect of the incident, i.e. whether the Council's actions were "reasonable, competent and lawful". The Council did not consider that any legitimate interest he might have in this matter would be advanced by disclosure. However, the Commissioner must acknowledge that the incident affected Mr Devine's property, in which he has an obvious interest. Insofar as the information (including the withheld personal data) relates to the incident, and to the Council's handling of the incident in terms of addressing Mr Devine's concerns about aspects of it, it is reasonable to conclude that Mr Devine had a legitimate interest in obtaining the information.

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

36. The Commissioner must now consider whether disclosure of the withheld personal data is necessary for the legitimate interests identified above and in doing so he must consider whether these interests might reasonably be met by any alternative means.
37. The Council submitted that disclosure would not be necessary, taking account of the terms and context of Mr Devine's request.
38. In this case, while having noted the Council's views, the Commissioner can identify no viable means of meeting Mr Devine's legitimate interests (as specified above) which would interfere less with the privacy of the relevant data subjects than the provision of the personal data in question.
39. In the circumstances, he is satisfied that disclosure of those personal data is necessary to meet the legitimate interests in question.



Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

40. In considering the rights, freedoms and legitimate interests of the data subjects, the Council advanced certain arguments as to those individuals' expectations of privacy. They did not consider there to be any reasonable expectation of disclosure into the public domain, given the purposes for which the information was held. The Commissioner has considered these arguments carefully. He has also taken into account the guidance on this point in his own briefing on the section 38 exemptions³, which identifies relevant factors as including:
- whether the information relates to the individual's public or private life
 - the potential harm or distress that may be caused by disclosure
 - whether the individual has objected to disclosure
 - the reasonable expectations of the individual as to whether their information would be disclosed.
41. Having considered the relevant factors listed above, the Commissioner acknowledges that:
- the information relates to the individuals' private lives
 - the reasonable expectations of the all individuals in question would be such that the information should not be disclosed.
42. The Commissioner must find, therefore, that condition 6 in Schedule 2 to the DPA could not be met in this case. For the same reasons, he must also conclude that its disclosure would be unfair. As a condition in Schedule 2 to the DPA could not be 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 of the personal data remaining under consideration and that this information was properly withheld under section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that (in the respects raised by Mr Devine's application) South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Devine.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



Appeal

Should either Mr Devine or South Lanarkshire 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.

Margaret Keyse
Head of Enforcement
5 January 2012



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
- (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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...



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.

...