

Decision Notice

Decision 253/2014: Mr Mark Irvine and North Lanarkshire Council

Report on job evaluation scheme

Reference No: 201402173

Decision Date: 9 December 2014



Scottish Information
Commissioner

Summary

On 20 June 2014, Mr Irvine asked North Lanarkshire Council (the Council) for a copy of a report to the Council's Corporate Management Team (CMT) concerning the Council's job evaluation scheme.

The Council withheld the information on the basis that it was exempt from disclosure in terms of sections 30(c) and 38 of FOISA. It also told the Commissioner that it did not hold some of the information sought by Mr Irvine.

The Commissioner accepted that the Council did not hold some of the information, but noted it had failed to tell Mr Irvine that this was the case. The Commissioner accepted that the Council was entitled to withhold the personal data of employees under the exemption in section 38(1)(b) of FOISA. The Commissioner found that the Council was not entitled to withhold the remainder of the information under the exemption in section 30(c) of FOISA and required it to disclose this information to Mr Irvine.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 17(1) (Notice that information is not held); 30(c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part I: the principles) (the first data protection principle) and Schedule 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 20 June 2014, Mr Irvine made a request for information to the Council. The information requested was a copy of the report (including appendices) to the CMT meeting held on 11 August 2005 concerning the Council's job evaluation scheme.
2. The Council did not respond. On 29 July 2014, Mr Irvine emailed the Council requiring a review of that failure.
3. The Council notified Mr Irvine of the outcome of its review on 27 August 2014. The Council withheld the information on the basis that it was exempt from disclosure in terms of section 30(c) of FOISA because its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
4. On 2 September 2014, Mr Irvine applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Irvine stated he was dissatisfied with the outcome of the Council's review. He did not agree that the exemption applied and believed the public

interest favoured disclosure of the information. He also noted that the Council had stated at an Employment Tribunal that some of the supporting documentation had gone missing (this is addressed in the Commissioner's analysis and findings below).

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Irvine made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
6. On 8 September 2014, the Council was notified in writing that Mr Irvine had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information on 17 September 2014. At this stage, the Council stated that it considered the information contained in appendix 6 of the report to be exempt from disclosure in terms of section 38(1)(b) (personal information) as well as section 30(c) of FOISA. Additionally, the Council stated that it had been unable to locate appendix 5 of the report and that this appendix was no longer held by it. The case was then allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
8. The investigating officer also informed Mr Irvine that the Council was now applying the exemption in section 38(1)(b) of FOISA and invited him to make submissions on the Council's application of this exemption. Mr Irvine provided submissions and subsequently confirmed that he was not seeking any information relating to non-senior Council employees.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Irvine and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 17 – Notice that information is not held

10. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
11. The Council did not inform Mr Irvine that it did not hold appendix 5 of the report. The Council subsequently informed the Commissioner on 17 September 2014 that it did not hold appendix 5.
12. The Council explained that it had discovered that the appendix was missing when it was preparing its submission to an Employment Tribunal at which the Council was currently defending equal pay claims made against it.
13. The Council stated that extensive searches had been carried out, commencing in May 2013, in order to locate this document for the Tribunal. In this respect, the Council stated that the

author of the report had checked their electronic files and manual records. Searches had also been carried out of all records relative to job evaluation, including manual records. The Council stated that it had additionally conducted searches in other directories in case the appendix had been filed incorrectly. The Council had also checked with officers who had received a copy of the report in 2005, but had been unable to find a retained copy.

14. The Council stated that it was not known whether the information was destroyed or deleted and could provide no explanation as to why this appendix was not with the report and other appendices.
15. The Commissioner has considered the Council's submissions and its explanation of why it does not hold the information in appendix 5. Having done so, she is satisfied that the Council has conducted reasonable, proportionate searches to establish whether it holds this information. The Commissioner is surprised, given the importance that the Council has placed on the report, that the appendix cannot be located. However, on the balance of probabilities, she is satisfied that it does not hold appendix 5 of the report.
16. In such circumstances, the Council ought to have informed Mr Irvine that it did not hold some of the information that fell within the scope of his request. By failing to provide notice to this effect (as required by section 17(1) of FOISA), the Commissioner finds that the Council failed to comply with Part 1 of FOISA.

Section 38(1)(b) – Personal information

17. The Council applied the exemption in section 38(1)(b) to the information contained in appendix 6 of the report. The information comprised a list of Council employees and included information such as each employee's name, department, division, job title, gender and pay grade. The Council considered that disclosure of the information would breach the first data protection of the DPA and that none of the conditions in Schedule 2 to the DPA could be met.
18. In the course of the investigation, Mr Irvine confirmed to the investigating officer that he was not seeking any information relating to non-senior members of staff, but only that relating to senior Council officials.
19. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b), exempts information from disclosure if it is "personal data" (as defined in section 1(1) of the DPA) and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA.
20. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
21. In order to rely on this exemption, the Council must show that the information being withheld is personal data for the purposes of the DPA and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.

Is the information under consideration personal data?

22. Personal data are 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.)

23. The Commissioner is satisfied that the information relating to Council employees is personal data, in line with the definition in part a) of section 1(1) of the DPA. Living individuals, i.e. those individuals who are listed in the appendix and are the subject of the information can be identified from this information. Given its nature (the names of individuals, their job titles, gender and pay grade), the Commissioner is satisfied that the information clearly relates to them.
24. The Commissioner is not satisfied that the headings in appendix 6 of the report comprise personal data. These do not relate to individual employees and reveal nothing about those employees. As such, the Commissioner does not accept that the headings in appendix 6 are exempt from disclosure in terms of section 38(1)(b) of FOISA.

Would disclosure of the personal data contravene the first data protection principle?

25. As noted above, the Council stated that making the information available would breach the first data protection principle. This 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. In the case of sensitive personal data, as defined in section 2 of the DPA, at least one of the conditions in Schedule 3 to the DPA must also be met. (The Commissioner is satisfied that none of the withheld information constitutes sensitive personal data. Therefore she is not required to consider whether any of the conditions in Schedule 3 can be met). The processing in this case would comprise making the information publicly available in response to Mr Irvine's request.
26. 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 disclosure would also be fair and lawful.

Can any of the conditions in Schedule 2 be met?

27. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*¹, 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 (i.e. the person or persons to whom the data relate).
28. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr Irvine. In any event, neither Mr Irvine nor the Council has suggested that any other condition would be relevant.
29. 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.
30. There are therefore a number of different tests which must be satisfied before condition 6 can be met. These are:

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

- (i) Does Mr Irvine have a legitimate interest in obtaining the personal data?
- (ii) If so, is the disclosure necessary for the purposes of these interests? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could the interests be met by means which interfered less with the privacy of the data subjects?
- (iii) Even if the disclosure is necessary for those purposes, would it nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects? As noted by Lord Hope in the above judgment, there is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr Irvine must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed.

Does Mr Irvine have a legitimate interest in obtaining the personal data?

- 31. The Council submitted that Mr Irvine did not have a legitimate interest in obtaining the personal data. It argued that his interest should not be considered as greater than the general public interest in withholding the information. The Council commented that any substantive learning to be derived from the report's release, or commentary which can be made in relation to the matter of equal pay generally, are matters which could be achieved without requiring disclosure of the personal information.
- 32. Mr Irvine argued that disclosure of the information (insofar as it related to senior officials) would not in any way prejudice the rights, freedoms and legitimate interests of the data subjects, but did not provide any detailed explanation of why he had a legitimate interest in obtaining the personal data.
- 33. Having considered all relevant submissions and the nature of the withheld information (the names of individuals, their job titles, gender and pay grade), the Commissioner does not consider that Mr Irvine has a legitimate interest in obtaining this personal data.
- 34. The Commissioner takes the view that while it is understandable for Mr Irvine to seek as much information as possible about a matter of considerable interest to him, he has not shown that he has a legitimate interest in the specific information (insofar as it relates to senior employees) withheld under this exemption. In the Commissioner's view, the disclosure of this personal data would add nothing in terms of understanding the Council's position regarding job evaluation and pay modelling.
- 35. The Commissioner therefore finds that none of the conditions in Schedule 2 to the DPA can be met and accordingly that the Council was entitled to withhold the personal data contained in appendix 6 under section 38(1)(b) of FOISA.
- 36. The Commissioner will now go on to consider whether the remaining information (including the headings in appendix 6) is exempt from disclosure under section 30(c) of FOISA.

Section 30(c) – Prejudice to effective conduct of public affairs

- 37. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be

expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

38. The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
39. The Council applied this exemption to all of the withheld information in this case. The information comprised the report to the CMT and appendices. As noted above, the Commissioner has already concluded that the personal information contained in appendix 6 is exempt from disclosure under section 38(1)(b) of FOISA. Therefore, she has not considered whether that information is also exempt from disclosure under section 30(c) of FOISA.
40. In its submissions to the Commissioner, the Council stated that the report was prepared in regard to its defence of equal pay claims currently being defended at Tribunal. The Council stated that the value of the sums sought from it, and related to the report, run to millions of pounds. The Council explained that it is currently involved in negotiations aimed at settling these claims and, in its view, the conduct and conclusion of these settlement negotiations represented a very considerable concern to the effective conduct of public affairs.
41. The Council submitted that the report was prepared in respect of on-going work on pay modelling. It also stated that the prospect of future litigation was uppermost in any employer's mind, particularly a large employer such as the Council.
42. The Council stated it was concerned to ensure that, insofar as information may enter the public domain, it did so in a manner that did not disrupt the context within which negotiations were taking place; in the Council's view, disclosure of the information into the public domain would be apt to have that disrupting effect. The Council argued that disclosure of the information could have the effect of undermining its negotiating position because Mr Irvine would be able to publicise the report on his blog, with the Council being restricted in its ability to respond.
43. The Council submitted that, given the financial implications for it of the proper management of the negotiations, any disruption to those negotiations would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs.
44. In Mr Irvine's view, the Council had failed to make a credible case as to what possible harm could occur by disclosing the information. In his view, the Council's position had more to do with avoiding potential embarrassment on its part than anything to do with the good conduct of public affairs.
45. Mr Irvine also considered that the ongoing proceedings at the Tribunal were a completely separate matter to his information request, not least because, in his view, disclosure would not determine the outcome of the Tribunal. He submitted that the Council had produced no argument or evidence to contradict this view.
46. The Commissioner recognises that reports such as this can be important and valuable tools that enable an organisation to evaluate its processes and policies in specific areas. The report under consideration in this case also provided an update to the CMT on the financial and human resource implications of the Council's preferred pay model. In the

Commissioner's view, any disclosure that undermined the Council's ability to conduct its affairs effectively would also be found to be likely to prejudice substantially the effective conduct of public affairs for the purposes of section 30(c).

47. Having considered the nature and content of the withheld information and the submissions of both parties, the Commissioner is unable to accept that disclosure of the information under consideration would, or would be likely to, have the prejudicial effects claimed by the Council.
48. Whilst the Council has stated that it anticipates disclosure of the information would disrupt the context within which ongoing negotiations are taking place, it has not provided any evidence to explain why disclosure would be likely to lead to such harm.
49. The Council has indicated that it believes Mr Irvine would publicise the information on his blog, but has provided no evidence to show why this would undermine its negotiating position beyond opining that this could be the case. Furthermore, the Commissioner has been provided with no explanation of why the disclosure of the withheld information would undermine the Council's negotiating position and why disclosure would lead to that outcome. The Commissioner considers the Council's submissions in this respect to be essentially hypothetical and conjectural.
50. Additionally, the Commissioner is unable to accept the Council's assertion that the report was prepared in regard to the Council's defence of equal pay claims currently being defended at Tribunal. The overwhelming majority of the withheld information comprises financial data, assumptions and implications and is essentially an update on the Council's progress on pay modelling as at August 2005.
51. The Commissioner also considers the importance placed on this report by the Council is somewhat undermined by the fact that it appears to have lost or deleted one of the appendices.
52. The Commissioner has concluded therefore that the exemption in section 30(c) of FOISA is not engaged in relation to the information under consideration. As such, she is not required to consider the public interest test in section 2(1)(b).
53. The Commissioner now requires the Council to disclose to Mr Irvine the report and appendices, with the exception of the personal data contained in appendix 6. The headings in appendix 6 should be disclosed.

Decision

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

- was entitled to withhold the personal information in appendix 6 under the exemption in section 38(1)(b) of FOISA;
- failed to give notice in terms of section 17(1) that it did not hold some of the requested information and
- was not entitled to withhold the remaining information under the exemption in section 30(c) of FOISA. In withholding this information, the Council failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to disclose all of the withheld information to Mr Irvine, with the exception of the personal data in appendix 6, by **23 January 2015**.

Appeal

Should either Mr Irvine or North Lanarkshire Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Margaret Keyse
Head of Enforcement

9 December 2014

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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

2 Effect of exemptions

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

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

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or

- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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

...

...

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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info