

Decision Notice

Decision 112/2017: Mr Kevin Keane and Aberdeen City Council

Hazlehead Crematorium – management investigation report

Reference No: 201601724

Decision Date: 18 July 2017



Scottish Information
Commissioner

Summary

The Council was asked for a copy of an independent report into the management of Hazlehead Crematorium. It refused the request, considering the report to be exempt under section 30(c) (Prejudice to effective conduct of public affairs) of FOISA.

During the Commissioner's investigation, the Council changed its position. It considered some of the information could be disclosed, but wished to withhold other information under the exemptions in sections 30(c), 38(1)(b) (Personal information) and 25(1) (Information otherwise accessible) of FOISA.

The Commissioner found that the Council was not entitled to withhold some of this information. She required the Council to disclose this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1), (2)(a) and (2)(e)(ii) (Effect of exemptions); 15 (Duty to provide advice and assistance); 25(1) (Information otherwise accessible); 30(c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definition of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 16 August 2016, Mr Keane made a request for information to Aberdeen City Council (the Council). The information requested was "... a copy of the independent report done for the Chief Executive on baby ashes". This was a reference to the report of an independent management investigation into the operational and strategic management of Hazlehead Crematorium (Hazlehead), carried out following publication of the report of the National Cremation Investigation (the NCI Report) in June 2016¹.
2. The Council did not respond within the 20 working days required by FOISA.
3. On 16 September 2016, Mr Keane wrote to the Council, requesting a review in respect of its failure to respond.

¹ <http://www.gov.scot/Publications/2016/07/6426/6>

4. The Council notified Mr Keane of the outcome of its review on 20 September 2016 and apologised for failing to respond to his original request. The Council informed Mr Keane it was withholding the information in the report under section 30(c) (Prejudice to effective conduct of public affairs) of FOISA. The Council explained that the report was intended to form the basis of further internal investigations. As it contained statements from Council employees which had been gathered as part of a confidential process, to ensure that issues could be investigated fairly and objectively, the Council considered disclosure of the report would prejudice those further investigations. The Council acknowledged the public interest in openness and transparency, but considered it to be outweighed in this case by the public interest in ensuring effective investigations.
5. On 20 September 2016, Mr Keane wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Keane was dissatisfied with the outcome of the Council's review and disagreed that section 30(c) applied. He also believed disclosure was very much in the public interest, particularly as the report concerned the Council's most senior staff whose posts, by their nature, carried the expectation of a high degree of scrutiny. Referring to Council practices described in a negative light in the NCI Report, Mr Keane believed the public must be confident that those responsible for any mismanagement were held responsible.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Keane 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.
7. On 28 September 2016, the Council was notified in writing that Mr Keane had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Keane. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, referring in particular to the requirements of section 30(c) of FOISA.
9. On 30 November 2016, the Council responded and provided submissions to the effect that, in addition to the application of section 30(c), the report contained a large amount of personal data which the Council considered exempt under section 38(1)(b) (Personal information) of FOISA.
10. Given the lack of detail in its submissions on section 38(1)(b), the Council was asked to clearly identify all those parts to which it considered this exemption applied, and to provide full submissions to support its reliance on section 38(1)(b) for that information.
11. It also appeared that the Council had applied section 30(c) to the entire report in a "blanket" fashion, including information that appeared to be either factual in nature or already in the public domain. The Council was asked to clearly identify those parts of the report which were either factual, or were in the public domain, and to explain why it considered section 30(c) applied to that information.
12. The Council was also asked whether it wished to rely on section 25(1) (Information otherwise accessible) of FOISA for any information already in the public domain. If so, it was asked to

explain how this information could be accessed by Mr Keane and why it was considered reasonably accessible to him, with precise details of where that information could be accessed.

13. On 16 December 2016, the Council responded, modifying its position. It identified two small sections of text as being exempt from disclosure under section 38(1)(b) and provided submissions to support its position in this regard. The Council stated it wished to rely on section 30(c) for the remainder of the report, including any information that was factual in nature. In respect of any information that was already available in the public domain, the Council confirmed that it did not wish to rely on section 25(1), choosing to solely rely on section 30(c) instead.
14. As it had failed to do so, the Council was again asked to specifically and separately identify the information in the report which comprised:
 - (i) information which was in the public domain
 - (ii) information which was factual in nature and
 - (iii) any remaining informationand to explain why it considered section 30(c) applied in each case. It was asked whether it wished to reconsider its position in relation to publicly available information.
15. On 15 February 2017, the Council responded, again modifying its position. The Council identified the information it considered to be available in the public domain, and provided links to online publications where, it claimed, that information could be accessed. Confirming it now wished to rely on section 25(1) for this publicly available information, the Council maintained it could also be covered by section 30(c), in the circumstances and context of the report.
16. The Council identified other information it was withholding under section 30(c), in addition to the information to which it was now applying section 25(1). For the most part, it also applied section 38(1)(b) to the same information. It provided additional reasons in relation to both exemptions.
17. This left a quantity of information for which no exemption was claimed. The Council subsequently confirmed that it no longer considered this remaining information to be exempt from disclosure under any exemption in FOISA, with the result that it could be disclosed. It did not, however, make any attempt to disclose the information to Mr Keane.
18. The Council was then asked whether it would consider simply disclosing to Mr Keane the information to which it was applying section 25(1), rather than having to redact the information and provide Mr Keane with links to precisely where it could be found. It was suggested to the Council that this would not only assist Mr Keane in obtaining the information, but might also remove the need for the Commissioner to fully explore the Council's application of section 25(1) within this decision.
19. The Council declined this suggestion, but confirmed it was willing to provide Mr Keane with a link to the NCI report, if requested.
20. It was explained to the Council that it would not be usual for the Commissioner to accept that the same information could be both readily accessible to an applicant (as would generally be required for section 25(1) to apply) and, at the same time, exempt under other exemptions in

FOISA. The Council was asked to clarify its position in, apparently, relying on section 25(1) in concurrence with section 30(c).

21. The Council subsequently confirmed it did not wish to rely on any other exemption for the information to which it was applying section 25(1).
22. Mr Keane was also invited to comment on why he considered disclosure of the information was in the public interest, and why he considered he had a legitimate interest in the personal data. Mr Keane did not provide any further submissions.

Commissioner's analysis and findings

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

Information held – no exemption applied

24. As explained above, during the investigation the Council provided submissions to the effect that some of the information, originally withheld, was no longer being withheld under any exemption and could be disclosed.
25. The Council provided no submissions, however, explaining why it considered this information was correctly withheld at the time it dealt with Mr Keane's request and requirement for review. Consequently, the Commissioner has no option but to conclude that the Council was not entitled to withhold the information at that time.
26. As the Council is no longer seeking to withhold this information, the Commissioner requires the Council to disclose it to Mr Keane. She would also remind the Council that the time to disclose such information is generally when the public authority acknowledges that it no longer considers the information exempt – after all, in making that acknowledgement, it is accepting that the applicant is entitled to the information.
27. The Commissioner will now consider whether the Council was entitled to rely on section 25(1) in respect of that information which it now considers to be publicly available.

Section 25(1) – Information otherwise accessible

28. Under section 25(1) of FOISA, information which an applicant can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest set out in section 2(1)(b) of FOISA.
29. As summarised above, the Council's position with regard to its application of section 25(1) changed at various points during the investigation. To begin with, the Council did not wish to rely on section 25(1) for information that was otherwise accessible, choosing to continue to rely solely on section 30(c) instead. The Council subsequently decided it wished to rely on section 25(1) alongside section 30(c) for that information. The Commissioner will explore and comment on the Council's actions in this regard later in this decision.
30. The Council's final position was to rely on section 25(1) in isolation for information that was already available in the public domain, withdrawing its reliance on section 30(c).
31. In respect of this information, the Council was asked to provide submissions showing how it would be accessed by Mr Keane, and why it was considered to be reasonably accessible to

him. The Council was asked to specifically identify the information in the report which was in the public domain, and to provide precise details of where that information could be accessed, including any relevant links to where the information was available online.

32. In response, the Council provided the Commissioner with details of the corresponding numbered sections of the Hazlehead report which, in its view, were available in the public domain, contained in the following publications:
- (i) Report of the National Cremation Investigation by Rt Hon Dame Elish Angiolini DBE QC (Section 6 – Aberdeen (Hazlehead) Crematorium)²
 - (ii) Mortonhall Investigation Report by Rt Hon Dame Elish Angiolini DBE QC (Commissioned by Edinburgh City Council)
 - (iii) Report of the Infant Cremation Commission³
 - (iv) Aberdeen City Council – Hazlehead Crematorium: Restricted Scope Internal Audit – 10 July 2013 (PriceWaterhouseCoopers Audit Report)⁴
33. In order to determine whether the Council was entitled to rely on section 25(1) for any of this information, the Commissioner must be satisfied as to whether, at the time it responded to Mr Keane’s request, the information held by the Council (and which fell within the scope of the request) was reasonably obtainable by Mr Keane, otherwise than requesting it under section 1(1) of FOISA.
34. Using the links provided by the Council, the investigating officer conducted research in the corresponding online publications to verify whether the information could be reasonably obtained therefrom. Given the size of some of these publications, and the lack of specific detail provided by the Council (for example, the corresponding section numbers within these online publications), this proved to be a challenging and time-consuming task.
35. In respect of the information claimed, by the Council, to be publicly available (and therefore exempt from disclosure under section 25(1) of FOISA), the results of the investigating officer’s research were as follows:
- (i) In some instances, the information could be located via the links provided.
 - (ii) In some instances, while the information could not be located via the links provided, it was available either in a different section of the report (accessible via a different URL), or in a different version of the report (likewise accessible via a different URL).
 - (iii) In some instances, the information could not be located via the links provided.
36. Given these results, the Council was asked if it would consider disclosing this information to Mr Keane, as opposed to being allowed (assuming section 25(1) were found to apply) to redact the information from the report and required to provide Mr Keane with the appropriate links to precisely where the information could be found.

²<http://www.gov.scot/Publications/2016/07/6426/6>

³<http://www.gov.scot/Publications/2014/06/8342/0>

⁴https://www.aberdeencity.gov.uk/web/files/Bereavement/Hazlehead_Crematorium_Internal_Audit_Report.pdf

37. It was explained to the Council that this would not only assist Mr Keane in not having to locate the information elsewhere, but might also avoid the Commissioner having to fully explore the Council's application of section 25(1) within any decision issued.
38. In response, the Council confirmed it wished to continue with its application of section 25(1), but would provide Mr Keane with a link to the National Cremation Investigation (NCI) report, if requested.

Commissioner's views – section 25(1)

39. In the absence of any further submissions from the Council to support its reliance on section 25(1), the Commissioner must also consider the research carried out by the investigating officer with a view to locating the information claimed to be reasonably obtainable.
40. In this case, the Commissioner would consider the size of the reports to be a relevant factor. In the absence of more specific information as to where the relevant information could be found, where it was indeed accessible in these reports, finding the information proved to be a cumbersome and time-consuming task. The task was compounded where the information proved to be accessible elsewhere than via the links provided, and rendered impossible where the information could not be located at all.
41. The Commissioner must question whether providing links to sizeable reports, without specifying where in these reports the relevant information is to be found, is consistent with the spirit, or even the letter, of FOISA. In the Commissioner's view, section 25(1) is not intended to prevent or inhibit access to information, but rather to relieve public authorities of the burden of providing information the applicant can access readily without asking for it. None of the information to which the Council continues to apply section 25(1) can be said to fall into this category, given the challenges described above. Indeed, the Council's actions suggest it was intentionally trying to prevent Mr Keane accessing information it could quite readily provide to him.
42. In all the circumstances, on the basis of the submissions she has been given and the further researches she has carried out by way of verification, the Commissioner is not satisfied that the Council was entitled to apply section 25(1) of FOISA to the information it continues to withhold under this exemption. She requires the Council to disclose this information to Mr Keane.
43. The Commissioner must also question whether the Council has complied with its duty under section 15(1) of FOISA (Duty to provide advice and assistance) in relation to this information. She will consider this further below, after she has considered the application of the other exemptions claimed.
44. The Commissioner will now go on to consider whether the Council was entitled to rely on 38(1)(b) to withhold some of the remaining withheld information.

Section 38(1)(b) – Personal information

45. 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.
46. As summarised above, the Council's position with regard to its application of section 38(1)(b) needed considerable clarification during the investigation. Initially, its reasons for applying

the exemption were wholly inadequate and further submissions were required to rectify this. Only towards the end of the investigation did it become clear which information within the report was being withheld under this exemption.

47. The Council submitted that the information it was withholding was personal data for the purposes of the DPA and that its disclosure would contravene the first data protection principle. It therefore argued that the information was exempt under section 38(1)(b) of FOISA.
48. In order to rely on this exemption the Council must show, firstly, that any such information would be personal data for the purposes of the DPA and, secondly, that disclosure of that data would contravene one or more of the data protection principles to be found in Schedule 1.
49. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

50. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller" (the full definition is set out in Appendix 1).
51. The Council submitted that the information it was withholding under section 38(1)(b) was personal data as defined by section 1(1) of the DPA. It explained that the information related to current and former Council employees, being information describing each individual's role and responsibilities within the Council, their level of involvement in the running of the crematorium, and the author's opinions on each individual's performance in these roles. Some of the information concerned an employee's family life and request for early retirement.
52. In the Council's view, even if the names were redacted from the report, the remaining information would still allow individuals to be identified.
53. Despite being asked to do so, the Council did not confirm whether it considered any of the information to be sensitive personal data.
54. The Commissioner has considered the submissions received from the Council on this point, along with the withheld information. The Commissioner is not satisfied that all of the information withheld under this exemption comprises personal data. Elements of this information cannot, on a reasonable interpretation, be said to relate to any particular living individuals. No living individual can be identified from these elements. Therefore, the Commissioner finds that the Council was not entitled to apply section 38(1)(b) to this information. The Council is also withholding this information under section 30(c) of FOISA, so the Commissioner will go on to consider it under that exemption below.
55. For the remainder of the information the Council claims to be exempt under section 38(1)(b), the Commissioner is satisfied that the information does comprise personal data. The information records the roles, responsibilities and involvement of the individuals concerned with the running of the crematorium, the author's views on these matters, and some information relating to an individual's private life. Given the nature of the information, it is possible to identify living individuals from it: the Commissioner accepts that it would not be practicable to remove the risk of identification. It is about those individuals and so can be

said to relate to them. It is therefore those individuals' personal data, as defined by section 1(1) of the DPA.

Would disclosure contravene the first data protection principle?

56. In its submissions, the Council argued that disclosure of the withheld personal data would contravene the first data protection principle. This requires that personal data are processed fairly and lawfully. The processing in this case would be the disclosure of the information into the public domain, in response to Mr Keane's request.
57. The first principle also states that personal data 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 by 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 the personal data in question are not sensitive personal data for the purposes of section 2 of the DPA, so it is not necessary for her to consider the conditions in Schedule 3.
58. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA which would permit the withheld personal data to be disclosed. If any of these conditions can be met, she must then consider whether the disclosure of the information would be fair and lawful.
59. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.

Can any of the conditions in Schedule 2 be met?

60. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure of the information to Mr Keane. Neither Mr Keane nor the Council has argued that any other condition would be relevant. Condition 6 allows personal data to be processed 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 subjects (the individuals to whom the data relate).
61. There are, therefore, a number of tests which must be met before condition 6 can apply. These are:
 - (i) Does Mr Keane have a legitimate interest in obtaining the personal data?
 - (ii) If so, is the disclosure necessary to achieve those legitimate interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subjects?
 - (iii) Even if the processing is necessary for Mr Keane's legitimate interests, would it nevertheless be unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?
62. There is no presumption in favour of disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. The legitimate interests of Mr Keane must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 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 Keane.

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

63. Despite being asked to do so, Mr Keane did not provide any further comments detailing his legitimate interest in obtaining the personal data. In his application to the Commissioner, Mr Keane's arguments for disclosure of the information focused on the public interest in transparency. Referring to the NCI report by Dame Elish Angiolini, which described the Council's practices in a negative light, Mr Keane noted that the report covered the actions of senior Council staff with management responsibility for the crematorium whose posts, by their nature, should expect to be subject to a high degree of scrutiny.
64. Mr Keane submitted that the NCI report showed that Council staff had not told the truth to a previous enquiry (by PriceWaterhouseCoopers) into the way the service operated. In his view, there was a public interest in knowing that those responsible for the Council's practices at Hazlehead were held accountable.
65. The Council's submissions on Mr Keane's legitimate interest acknowledged that, given the circumstances surrounding the report, members of the public might have a legitimate interest in the information as this would demonstrate transparency and accountability.
66. The Commissioner has considered all relevant submissions she has received on this point, along with the withheld personal data.
67. While the Commissioner accepts that, as a journalist, Mr Keane might have a specific interest in obtaining the information, she can also identify a broader public interest in transparency, so the public can have confidence in the Council's actions in dealing with those responsible for the Council's practices at Hazlehead. This would be addressed, at least in part, by disclosure of the personal data withheld in this case. In this regard, therefore, the Commissioner accepts that Mr Keane and the general public have a legitimate interest in obtaining the withheld personal data.

Is disclosure necessary to achieve those legitimate interests?

68. The Commissioner must now go on to consider whether disclosure of the withheld personal data would be necessary to meet the legitimate interest she has identified above. As also indicated above, this will include consideration of whether the legitimate interest might be met by alternative means which would interfere less with the privacy of the data subjects.
69. The Council's submissions on this point recognised that Mr Keane's legitimate interests could only be met by disclosure of the report, with no suggestion that this could be achieved if the personal data were redacted.
70. In this case, the Commissioner has carefully considered all relevant submissions she has received on this point. She considers that the legitimate interest in transparency in relation to how the Council deals with those responsible for the practices at Hazlehead cannot be met in full without disclosure of the withheld personal data. To that extent, disclosure is necessary, so she must go on to consider whether it would nevertheless be unwarranted, in this case, by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.

Would disclosure nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

71. The Council submitted that the contents of the report were not intended for public disclosure and the individuals concerned were following an investigative process which required a high

degree of confidentiality to ensure issues could be investigated fairly and objectively. The Council believed the individuals involved would have no expectation that such information would be made public.

72. Disclosure of the information in full, the Council argued, would allow members of the public to draw their own (and possibly incorrect) conclusions regarding an individual's involvement in, or responsibility for, any failings at Hazlehead, in advance of any further investigations being carried out. In the Council's view, this level of intrusion into the private lives of individuals was unwarranted.
73. The Council took the view that it would be unfair to disclose information containing the author's views on each individual's performance in their roles, and that relating to an individual's private life. It also believed that this would equate to an unwarranted intrusion into the private lives of those individuals.
74. During the research carried out by the investigating officer to identify whether the information withheld under section 25(1) was publicly available (as detailed previously), some of the personal data withheld by the Council under section 38(1)(b) was identified as already in the public domain, within the NCI report.
75. The Commissioner has taken account of all the relevant submissions, together with the withheld information and the investigating officer's research findings. The Commissioner has also taken account of her own briefing on the exemptions relating to personal data, published on her website⁵.
76. In relation to the withheld personal data that is already available in the public domain (contained in the NCI report), the Commissioner notes that the Council has not chosen to apply section 25(1) to that information.
77. Given that this information is already available in the public domain, the Commissioner cannot identify any reason why disclosure of that same information, in the context of the report under consideration here, could prejudice the rights and freedoms or legitimate interests of the data subjects. Accordingly, the Commissioner does not accept that the Council was entitled to rely on section 38(1)(b) to withhold the personal data which is already available in the public domain. She requires the Council to disclose this information to Mr Keane.
78. Turning to the remainder of the withheld personal data, the Commissioner acknowledges that this records statements by the individuals concerned about their own and others' involvement in the practices at Hazlehead, and the author's views on these. It also includes information concerning an individual's private life. Insofar as the withheld personal data relate to Council employees, she acknowledges that these employees can be considered relatively senior and therefore subject to a higher level of scrutiny. It is still appropriate, however, to consider what reasonable expectations they would have in relation to disclosure of the information concerned. In all the circumstances, having considered the data in question and all relevant submissions, she does not believe these individuals would have a reasonable expectation of disclosure.
79. Having considered these competing interests, the Commissioner must balance them. Having done so in this particular case, in relation to this particular information, the Commissioner finds that the legitimate interest in transparency is outweighed by the

⁵<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

prejudice to the rights and freedoms of the data subjects that would result from disclosure. On balance, therefore, she must find that the requirements of condition 6 cannot be met here (in respect of the remaining withheld personal data).

80. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the remaining withheld personal data. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure of this information would breach the first data protection principle and that the remaining withheld personal data are therefore exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.
81. Given that the Commissioner has found the remaining withheld personal data to be exempt from disclosure under section 38(1)(b), she is not required to go on to consider the Council's application of section 30(c) to that information.
82. As the Council is withholding other information (including that which the Commissioner has decided does not comprise personal data) under the exemption in section 30(c), she will now go on to consider the Council's application of this exemption.

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

83. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of 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 such disclosure.
84. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
85. The Commissioner takes the view that it is important for public authorities to treat each request for information on a case-by-case basis. Disclosure in one case should not be taken to imply that information of a particular type will routinely be disclosed in future. The circumstances of each case, including the content of the information under consideration and the timing of the request, must be taken into consideration.
86. As summarised above, the Council's position with regard to its application of section 30(c) changed at various points during the investigation. To begin with, the Council wished to rely on section 30(c) (in conjunction with section 38(1)(b)) for the entire report. The Council subsequently changed its position, applying section 30(c) in isolation to the whole report (with the exception of two small sections of text where it applied section 38(1)(b) in isolation). The Council's final position was to revert to relying on section 30(c) (in conjunction with section 38(1)(b)) for large sections of the report, with the exception of one small section of text where it applied section 30(c) in isolation.
87. In its submissions to the Commissioner, the Council explained that the document was an internal management report that formed part of ongoing management investigations into the

failings at Hazlehead. The Council submitted that disclosure of the information would limit its ability to conduct a fair and impartial investigation and to conduct its business effectively. It therefore argued that the information was exempt under section 30(c) of FOISA.

88. As management investigations were still ongoing, the Council highlighted the possibility that the evidence and findings contained within the report might lead to disciplinary action. The Council considered it would be unfair to those individuals named in the report if members of the public and the media were able to draw their own conclusions prior to completion of the Council's investigations. In the Council's view, disclosure of the report, prior to any ensuing disciplinary action (or any decision on whether such action should be taken), would enable the public to pre-judge the case without full consideration of the facts and circumstances. This, the Council submitted, would substantially affect its ability to conclude a fair and impartial investigation.
89. The Council further submitted that early disclosure of the report would affect the impartiality of any future proceedings relating to the role of senior managers into the failings at Hazlehead. By enabling the individuals involved to argue that the investigation had been prejudiced, this would prevent the Council from taking the appropriate action.
90. The Council also believed disclosure of the information would affect future internal investigations as individuals might be unwilling to participate fully, if they believed their statements would be placed into the public domain.
91. During the research carried out by the investigating officer to identify whether the information withheld under section 25(1) was publicly available (as detailed previously), some of the information withheld by the Council under section 30(c) was identified as being already available in the public domain, contained in the NCI report, the audit report by PriceWaterhouseCoopers or in information published on the Council's own website.
92. The Commissioner has taken account of all the relevant submissions, together with the withheld information and the investigating officer's research findings. The Commissioner has also taken account of her own briefing on the exemption in section 30(c) of FOISA, published on her website⁶.
93. In relation to the withheld information that is already available in the public domain (contained in the NCI report, the audit report by PricewaterhouseCoopers or in information published on the Council's website), the Commissioner notes that the Council has chosen not to rely on section 25(1) for that information.
94. Given that this information is already available in the public domain, the Commissioner cannot see that disclosure of this same information, as contained in the report under consideration here, would result in the harm claimed by the Council. She cannot see how disclosure of information already available in the public domain could substantially prejudice the effective conduct of the Council's affairs. Accordingly, the Commissioner does not accept that the Council was entitled to rely on section 30(c) to withhold the information already available in the public domain. She requires the Council to disclose this information to Mr Keane.
95. Turning to the remainder of the information being withheld under section 30(c), the Commissioner is not persuaded that disclosure of the majority of this information would cause the harm envisaged by the Council. Indeed, she finds elements of the Council's

⁶<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

submissions to be somewhat over-stated for the majority of the information, which is factual or comments on information/events already in the public domain.

96. The Commissioner notes, from the Council's submissions, that it considers disclosure of the information would somehow prejudice the outcome of its internal investigations, and would adversely impact on any future investigations by making individuals less willing to participate. However, she is not persuaded that disclosure of the majority of the information, described above, would have the effect claimed by the Council.
97. The Commissioner notes that the events surrounding Hazlehead have been well publicised. She notes the level of detail contained in the reports listed previously, in particular the NCI report. Taking account of the level of detail already publicly available, the Commissioner is not persuaded (from the submissions she has received) that disclosure of the majority of the remaining withheld information would result in the harm claimed by the Council.
98. In the absence of any submissions persuading her otherwise, the Commissioner does not accept that disclosure of the majority of the remaining withheld information would, or would be likely to, prejudice substantially the effect conduct of public affairs. She does not believe such a conclusion can be reached on the basis of the arguments provided.
99. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of the majority of the information withheld under this exemption.
100. Given that the Commissioner does not accept the application of the exemption for the majority of the information withheld under section 30(c), she is not required to consider the public interest test in section 2(1)(b) of FOISA for this information. As no other exemption has been claimed to justify the withholding of this information (except where section 38(1)(b) of FOISA has been claimed but not upheld – see above), the Commissioner requires the Council to disclose it to Mr Keane.
101. Turning to the remaining information being withheld under section 30(c), the Commissioner has considered the Council's arguments in relation to this particular information, which records the author's views on Council practices at Hazlehead. The Commissioner accepts that disclosure of this information, in advance of any subsequent investigations, would or would be likely to, prejudice such subsequent investigations in the manner described by the Council. For this information, the Commissioner is satisfied that exemption in section 30(c) is engaged.
102. As the exemption in section 30(c) has been found to apply to the remaining withheld information, the Commissioner is now required (for this information) to go on to consider the public interest test in section 2(1)(b) of FOISA.

Public interest test

103. The exemption in section 30(c) is a qualified exemption, which means its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information (insofar as she has found it to be exempt) is outweighed by the public interest in maintaining the exemption in section 30(c) of FOISA.
104. The Council acknowledged there was a public interest in openness and transparency, especially given the nature of the investigation into practices at Hazlehead which, it submitted, was the main consideration in deciding whether the report could be disclosed in

full. The Council also recognised that disclosure of the information would allow the public to assess who was accountable for the failings at Hazlehead.

105. In contrast, the Council contended that disclosure of the report into the public domain would substantially prejudice any subsequent investigation. Individuals might be reluctant to participate in such investigations if they believed their statements and personal details would be placed into the public domain.
106. In conclusion, the Council acknowledged that accountability and transparency were important, but argued that they were outweighed by the greater public interest in being able to carry out investigations impartially and without prejudice, in order to ensure appropriate levels of public service.
107. Despite being asked to do so, Mr Keane did not provide any further comments on the public interest. In his application to the Commissioner, Mr Keane's arguments for disclosure of the information focussed on the public interest in transparency. He emphasised that the report covered only the Council's most senior staff members whose posts, by their very nature, should expect to carry a high degree of scrutiny.
108. Mr Keane referred to the NCI report by Dame Elish Angiolini, which described the Council's practices in a negative light. He noted that the Hazlehead facility was the only option for those bereaved parents without the means to finance a burial. In Mr Keane's view, confidence in the provision of this public service was very low, and the public must be confident that those responsible for the practices at Hazlehead were held accountable.
109. Mr Keane submitted that the NCI report showed that Council staff had lied to a previous enquiry by PriceWaterhouseCoopers about the way the service operated. He argued that many families believed senior Council staff held a degree of culpability, yet there appeared to be no transparency in the way in which the Council was dealing with those responsible.
110. The Commissioner acknowledges there is a large public interest in transparency and accountability concerning matters related to Hazlehead. She accepts that disclosure of the information would allow public scrutiny and assessment of the Council's actions concerning the practices at, and management of, this facility. This, in turn, would contribute to informing the public about the extent to which the Council was dealing with the matters raised in the NCI report, thereby satisfying the public interest in openness, transparency and accountability. To a large degree, however, the Commissioner considers this will be met by disclosure of the information the Commissioner has found not to be exempt.
111. On the other hand, the Commissioner accepts that there is a significant public interest in the Council ensuring that it can carry out internal investigations without prejudice, and that individuals must be allowed to participate safe in the knowledge that their contributions will not be made public.
112. The Commissioner has already acknowledged that disclosure of the information would, or would be likely to, substantially prejudice the effective conduct of public affairs. Having balanced the public interest arguments for and against disclosure, she is satisfied on balance that the public interest in ensuring effective investigations outweighs that in disclosure of the remaining withheld information.
113. The Commissioner therefore finds that the Council was entitled to withhold the remaining information under the exemption in section 30(c) of FOISA.

Section 15(1) of FOISA – duty to provide advice and assistance

114. It is essential to any requester pursuing their right to information that (where the public authority is not simply providing the information, but rather is directing the requester to a place where it may be obtained) the requester knows enough about where to look for it to be able to pursue that right effectively. To this end, the authority's duty to provide advice and assistance can be vital.
115. Section 15(1) of FOISA requires a Scottish public authority, so far as is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty where (in relation to the provision of advice and assistance in a particular case) it conforms with the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code⁷).
116. The version of the Section 60 Code which was in force when Mr Keane made his information request was the December 2014 version. At section 9.4 in Part 2, the Section 60 Code stated:

When information is otherwise accessible

Where a public authority refuses a request on the grounds that the information is otherwise accessible, it must send the applicant a refusal notice which acknowledges that it holds the information and explains why the exemption at section 25(1) of FOISA (or exception at regulation 6(1)(b) of the EIRs) applies.

The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases the authority should bear in mind its general duty to provide advice and assistance to applicants.

117. As discussed previously, in applying section 25(1) of FOISA to information which the Council claimed to be publicly available, the Council chose not to disclose the information to Mr Keane. In this regard, the Council's position was that it wished to redact the relevant information for which it was claiming section 25(1), but would be happy to provide Mr Keane with a link to the NCI report if requested.
118. As also noted above, accessing the information claimed by the Council to be publicly available proved to be a challenging and time-consuming task, given the size of the publications involved. This research also identified that some of the information was only accessible at different weblinks to those provided by the Council, or could not be located at all. For these reasons, the Commissioner has not upheld the Council's application of section 25(1). The duty to provide advice and assistance, however, stands alone and must be considered separately.
119. Although the Council stated its willingness to provide Mr Keane with a link to the NCI report, it has already been established (from the Council's submissions) that some of the information

⁷<http://www.gov.scot/About/Information/FOI/Section60Code3>

claimed to be publicly available was, where it was so available, contained in other publications. The Commissioner notes that the Council expressed no intention of providing Mr Keane with links to these other publications.

120. In the absence of any further information identifying where, in the relevant reports, particular information could be located, the Commissioner takes the view that simply providing Mr Keane with a link to one sizeable report was inadequate and unhelpful. If it wished to, and could, claim section 25(1) rather than simply providing the information, it needed to provide locational details which enabled Mr Keane to exercise his access rights effectively. In the circumstances, she is not satisfied that the Council did this.
121. The Commissioner cannot accept, therefore, that the Council provided, or was willing to provide, Mr Keane with reasonable advice and assistance to enable him to locate the information it held and which it considered exempt under section 25(1) of FOISA. In other words, it failed to comply with section 15(1) of FOISA in this regard.

Handling issues

The Council's application of section 25(1) in conjunction with section 30(c)

122. As explained above, although it later changed its position, at one point during the investigation the Council attempted to apply section 25(1) of FOISA alongside section 30(c), in relation to the same information.
123. In this regard, the Council had submitted, in relation to information in the report that was either factual, or already available in the public domain, the inclusion of this information in the report clearly demonstrated the evidence relied on in reaching the report's conclusions and findings therein.
124. The Council took the view that the author of the report had chosen to rely on certain sections of other reports already available in the public domain. In the Council's opinion, the inclusion of these specific extracts (compared to those the author had chosen not to include), clearly demonstrated that they not only carried weight in his investigation, but also gave an indication of what his conclusions and findings would be.
125. The Council submitted that disclosure of this information would jeopardise the impartiality of the Council's internal investigations, would allow members of the public to pre-judge the outcome in the context of the report, and would substantially prejudice the Council's ability to conduct a fair and impartial investigation.
126. In conclusion, the Council believed that section 30(c) could therefore apply to information already in the public domain, and to factual information, when attention was drawn to extracts of a previous investigation in the context of a management investigation.
127. The Commissioner takes the view that information which is reasonably accessible to an applicant (as required by section 25(1)) cannot, by its nature, be considered exempt under any other exemption in FOISA. The purpose of section 25(1), as considered above, is clearly not to prevent access to information, and public authorities should always bear this in mind when considering its application.

Engaging with the Commissioner

128. The Commissioner notes that, during this investigation, the Council failed to respond to some parts of the investigating officer's request for submissions. This resulted in extra work and unnecessary delays in the investigation.

129. The Commissioner would urge the Council and all Scottish public authorities, when responding to any request for submissions during an investigation, to ensure that comprehensive submissions are provided. Failure to do so not only results in extra work for both the Commissioner's staff and the public authority, but also causes unnecessary delays in bringing an investigation to a conclusion, to the detriment of the applicant's rights under FOISA.

Compliance required

130. The Commissioner requires the Council to disclose to Mr Keane the following information:

- (i) information the Council is no longer withholding under any exemption in FOISA;
 - (ii) information found to have been wrongly withheld under section 25(1) of FOISA;
 - (iii) information found to have been wrongly withheld under section 38(1)(b) of FOISA, and
 - (iv) information found to have been wrongly withheld under section 30(c) of FOISA,
- all of which will be indicated on a copy of the report provided to the Council.

Decision

The Commissioner finds that Aberdeen City 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 Keane.

The Commissioner finds that the Council complied with Part 1 by correctly withholding some information under section 30(c) and section 38(1)(b) of FOISA.

However, the Commissioner also finds that the Council failed to comply with Part 1 by:

- (i) incorrectly withholding some information under sections 25(1), 30(c) or 38(1)(b) of FOISA (and thereby failing to comply with section 1(1)), and
- (ii) failing to provide adequate advice and assistance, as required by section 15 of FOISA, as to where Mr Keane might locate the information it considered to be otherwise available.

The Commissioner therefore requires the Council to provide Mr Keane with that information she has found to have been wrongly withheld (which will be indicated on a copy of the report provided to the Council along with this decision notice) by **1 September 2017**.

Appeal

Should either Mr Keane or Aberdeen City 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 Aberdeen City Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Acting Scottish Information Commissioner

18 July 2017

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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

- (a) section 25;

...

- (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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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-

...

- (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, 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.

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