

Decision Notice



Decision 095/2009 Councillor David Alexander and Falkirk Council

Reports by Pinnacle Housing Ltd

Reference No: 200800576

Decision Date: 4 August 2009

www.itspublicknowledge.info

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Summary

Councillor David Alexander asked Falkirk Council (the Council) to provide him with copies of two reports prepared by a consultant who had been appointed to carry out a specific area of work which would normally have been carried out by the Council's Head of Service for Housing Services. The Council refused the request on the grounds that the reports were exempt under sections 30(b)(i) and (ii), 30(c), 36(2) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Councillor Alexander remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the Council had partly complied with Part 1 of FOISA by withholding the majority of the information contained within the reports. However, he concluded that it had wrongly withheld some information in the reports and ordered the Council to provide Councillor Alexander with a redacted version of the reports.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

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

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 29 January 2008, Councillor Alexander wrote to the Council to request a copy of all internal reports prepared by a named consultant into the workings of the Council's Housing Service, and/or the consultant's views of the changes required to make the department more efficient.



2. The Council responded on 29 February 2008. The Council confirmed that two reports were covered by the terms of Councillor Alexander's request, but refused to provide copies of the reports under the exemptions in sections 36(2) and 38 of FOISA. The Council acknowledged that there was a clear public interest in the proper administration and management of Housing Services, but believed this was satisfied by a recent inspection of its Housing Service by Communities Scotland and publication of its report. The Council noted that Communities Scotland had had access to all Housing Services' staff and records, and had interviewed the consultant during the inspection.
3. On 14 March 2008, Councillor Alexander wrote to the Council requesting a review of its decision. He argued that the Council's Housing Department was a public body and open to scrutiny and that the role of an elected member is to properly scrutinise the delivery of public services within the area and ensure value for money; accordingly, he maintained that the reports should be made available for proper scrutiny.
4. The Council notified Councillor Alexander of the outcome of its review on 14 April 2008. The decision to withhold the information was upheld, on the grounds originally stated in the response to the request. The Council found the information in the reports was also exempt from disclosure under section 30(b) and (c) of FOISA.
5. On 16 April 2008, Councillor Alexander wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Councillor Alexander 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 14 May 2008, the Council was notified in writing that an application had been received from Councillor Alexander and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, providing it with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked for more information about the terms on which the consultant had been engaged to produce the reports, and why it considered that disclosure would constitute an actionable breach of confidence. The Council was asked for further explanation of its reasons for applying the exemptions in section 30(b) and (c) and, in relation to the exemption in section 38, was asked to confirm which of the data protection principles it considered would be contravened by disclosure of the information in the report.



9. The Council responded on 9 July 2008. It provided a full submission, explaining the context in which the reports were commissioned and the status of the consultant in relation to the Council. The Council also provided a detailed account of the factors it had taken into consideration in deciding that the reports constituted information exempt from disclosure under FOISA.
10. The Council had explained to Councillor Alexander that in dealing with his request under FOISA, it was obliged to consider the effects of disclosing the information to any member of the public, and could not take into account the fact that he was an elected member of the Council. The Council and the Councillor both expressed willingness to consider whether the matter might be resolved through settlement, and made some attempts to identify a way in which this could be achieved. In the end, no settlement proved possible, although the Commissioner is satisfied that in attempting settlement in this way, the Council complied with its duty to provide advice and assistance to Councillor Alexander under section 15(1) of FOISA.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the information withheld and the submissions presented to him by both Councillor Alexander and the Council. The Commissioner is satisfied that no matter of relevance has been overlooked.

Background to the reports

12. In July 2007, Pinnacle Housing Ltd was engaged by the Council to provide certain consultancy services to the Council, these services being entitled "Interim Head of Service" (this is addressed in more detail later in the decision). It was agreed that a named consultant would perform this service on behalf of the Pinnacle Housing Ltd. The consultant was to undertake the Head of Service role and work with the Council to prepare a scoping study of the Housing Service. The Council explained that these arrangements were made because the Head of Service post had become vacant and the Housing Service was due to be inspected by Communities Scotland, then the regulatory body for housing services in Scotland. A short-term, external appointment was arranged in order to assist with the preparations for, and conduct of, the inspection.
13. The consultant's reports are dated August 2007 and December 2007. In August 2007, Communities Scotland carried out an inspection of housing service delivery by the Council, and published its report in February 2008: at the time of writing this report is still available on the website of Communities Scotland although the agency itself has now ceased to exist.¹

¹ http://www.scr.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/rslcs_021382.pdf



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

14. Section 30(c) applies where the disclosure of information would, or would be likely to, "otherwise" prejudice substantially the effective conduct of public affairs. The word "otherwise" refers to the exemptions in section 30(a) and (b). Section 30(c) is a broad exemption, and therefore the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information.

The Council's submission

15. In relation to section 30(c), the Council argued that disclosure of the reports at the time of the request and request for review would have been likely to prejudice work on the ongoing changes and improvements to the management and operation of Housing Services. The Council's reasons are summarised as follows:
- the process of improvement is difficult, and energy and direction would be diverted following publicity focussing on the bad points identified during self-examination;
 - the tenor of the reports is such that staff subject to criticism in the reports are likely to become defensive and take against the process of self-analysis;
 - disclosure would have a significantly detrimental impact on staff morale during a difficult time.
16. The Council argued that the proper conduct of public affairs should involve public authorities in self-examination to identify good and bad points and improvements to make, and considered that public authorities would be deterred from undertaking such assessments if they were not allowed some degree of privacy to do so. To make the process of self-examination more difficult to do and less effective would not be in the public interest.
17. The Council also asked the Commissioner to take into account the fact that the request was made at a time when the subject matter of the reports was still very much under consideration, and during a period when the Council was implementing an improvement plan and restructuring the management of Housing Services.

The Commissioner's view

18. In order to understand the potential effect of disclosing the reports in response to Councillor Alexander's request, the Commissioner has looked carefully at the content of the reports, the timing of the request and the context created by the Communities Scotland inspection and report.



19. The Commissioner notes that Councillor Alexander submitted his information request after the Council had received the draft report from Communities Scotland, but before publication of the final report in February 2008. Councillor Alexander's request for review was made after publication of the Communities Scotland report, but before the deadline for the Council to submit an improvement plan for Housing Services to Communities Scotland. The Commissioner accepts that the Council was engaged in reviewing and restructuring the management of Housing Services during this period and was also engaged in a wider review of its committee and service structure.
20. Against this background, the Commissioner has considered the contents of the two reports. The Commissioner finds that disclosure of either report would have led to key housing service staff becoming involved in public debate about the consultant's views, and accepts that this would have been likely to impede progress with the task of improving service delivery, which Communities Scotland had identified as a priority for the Council. He also takes the view that if the second report had been disclosed at the time of Councillor Alexander's request, the contents were likely to adversely affect the process of planning and implementing the improvements which Communities Scotland had required and upon which key staff in the Housing Service were engaged.
21. The Commissioner therefore accepts that the exemption in section 30(c) applies to the majority of the contents of the two reports. The Commissioner does not accept, however, that background information about the Council and its Housing Services, information about the context and scope of the assessment undertaken by the consultant, and the summary of external factors ("imperatives") supporting the need for action are exempt from disclosure under section 30(c).
22. The Commissioner found that much of the background information is factual in nature and mirrors publicly accessible information, for example, information on the Council's website. The Commissioner considered that information about the context and scope of the assessment undertaken by the consultant would not, if disclosed, have been likely to cause the same level of prejudice to the effective conduct of public affairs as disclosure of the consultant's views and detailed proposals. The Commissioner therefore found that the following parts of the reports were not exempt under section 30(c) of FOISA:
 - pages 1 – 8 of report dated August 2007 (the first report)
 - pages 2, 3 (with some exceptions), 4 and first paragraph of page 5 of report dated December 2007 (the second report)
23. The Commissioner will consider later in his decision notice whether this information should be withheld under one more of the other exemptions cited by the Council.



24. In relation to the remaining information in the reports, to which the exemption in section 30(c) applies, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption in section 30(c) outweighs the public interest in disclosure of the information (as required by section 2(1)(b) of FOISA). Unless he finds that it does, he must order the information to be disclosed (unless any of the other exemptions cited by the Council are found to apply).

The public interest test

25. The Commissioner has considered the Council's argument (paragraph 16 above) that it is not in the public interest to make the process of internal evaluation more difficult and less effective, or to create disincentives for public authorities to carry out such exercises. The Commissioner accepts that, in this respect and more generally, there is an inherent public interest in preventing substantial prejudice to the effective conduct of public affairs.
26. Against this, the Commissioner has considered arguments from Councillor Alexander about the public interest in disclosing the information.
27. Councillor Alexander has argued that the public interest lies in disclosure, firstly because of the public money that was invested in the consultant's services; and secondly, to enable public scrutiny of the information in the reports. Councillor Alexander pointed to the general public interest in open access to information. He also referred to "Best Value" and "Following the Public Pound" requirements for local authorities, and argued that the primary role of a Councillor is the proper scrutiny of public services.
28. The Commissioner accepts that there is a strong public interest in disclosure of information which promotes accountability for public expenditure and enables scrutiny of the decisions taken by Scottish public authorities. The Commissioner considers that the publication of Communities Scotland's inspection report goes some way towards satisfying the public interest in terms of accountability for, and scrutiny of, the standard of service provided by the Council's Housing Services. However, the Communities Scotland report does not cover all of the issues considered by the consultant in his two reports.
29. The Commissioner has considered all arguments relating to the public interest test, from both the Council and Councillor Alexander, in reaching his conclusions. He finds that there are strong arguments both for and against disclosure in the public interest. He has therefore examined whether the public interest in disclosure might be satisfied by disclosure of some parts of the reports, while withholding the information most likely to be detrimental to the effective conduct of public affairs.
30. The Commissioner takes the view that the public interest in disclosure (in relation to accountability for public funds spent on the consultant's services, and in relation to the scrutiny of public services) would be satisfied by disclosure of information about the recommendations made by the consultant. Specifically, the Commissioner finds that the public interest in disclosure of the following information is not outweighed by the public interest in maintaining the exemption in section 30(c) of FOISA and that it should be disclosed:



- in the first report, pages 24 and 25 (Recommendations), with the exception of recommendation 3;
- in the second report, page 13 (Recommendations), with the exception of part of recommendation 5 and the whole of recommendation 8.

31. The Commissioner finds that the remaining information was correctly withheld under section 30(c), and that the public interest in disclosure of that remaining information is outweighed by the public interest in maintaining the exemption.
32. In relation to the information listed in paragraph 30, the Commissioner must consider whether any of the other exemptions cited by the Council should be upheld. The Commissioner must also consider the other exemptions cited in relation to the information listed in paragraph 22, which was found to be wrongly withheld under section 30(c) of FOISA. The Commissioner will first consider the application of the exemptions in section 30(b)(i) and (ii) to this information.

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

33. In order for the Council to be able to rely on the exemptions laid down in section 30(b)(i) and (ii), it must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)).
34. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in section 30(b)(i) and (ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion (although this may also be relevant) but whether the release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the exchange of views.
35. The Council has provided detailed reasons for withholding information from the reports under section 30(b)(i) and (ii). Its arguments relate to the context in which the reports were prepared; the subject matter and content of the advice and opinion contained within the reports; and the timing of the request in relation to the implementation of the improvement plan for the Housing Service. The Council considered that the release of the reports would substantially inhibit the future provision of advice (either in-house or external) and would have inhibited the expression of opinion on the management and operation of Housing Services at a time when work was still ongoing. The Council argued that the consultant was able to frame his report in candid terms because of his expectation of confidence. The Council did not believe it would be in the public interest to inhibit the level of candour evident in the reports.
36. As noted above, the Commissioner will consider the Council's arguments only in relation to the information which he found either not to be exempt under section 30(c) of FOISA or which he found to be exempt under section 30(c), but which, after considering the public interest test, he decided should be disclosed. This information can be summarised as:
- Part (a): background information about the Council and its Housing Services;



- Part (b): information about the context and scope of the assessment undertaken by the consultant;
 - Part (c): a summary of external factors (“imperatives”) supporting the need for action;
 - Part (d): the Recommendations sections in both reports (with exceptions noted in paragraph 30)
37. The Commissioner finds that information falling within Parts (a) to (c) above, if disclosed, would not, and would not be likely to, inhibit substantially either the free and frank provision of advice or the exchange of views for deliberation. In relation to Part (a), similar information about the Council and its Housing Services is available on the Council website. In relation to Parts (b) and (c), the Commissioner does not accept that disclosure of the context and scope of the assessment undertaken by the consultant would, or would be likely to, inhibit substantially the provision of advice or exchange of views for deliberation in future assessments; or the provision of advice or views relating to ongoing work on the Housing Services improvements plan.
38. In relation to the Recommendations sections in both reports (Part (d)), the Commissioner notes that the information constitutes advice and opinion provided as part of an exchange of views for the purposes of deliberation. He takes the view that disclosure of these parts of the reports would not, and would not have been likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation. The Commissioner accepts that officials or consultants may take more care in recording their views, and pay more attention to the manner of expression, if aware that their views may be disclosed in response to an information request. However, he has not been presented with any arguments which persuade him that the effect of disclosing information of this type under FOISA would be, or has been, that of limiting the range or quality of discussion in which officials or consultants are willing to participate in their professional lives. The Commissioner notes that the consultant was acting as the Council’s Interim Head of Service; he considers that the provision of such advice or views forms part of the normal professional duties of a senior officer, and this diminishes the risk that disclosure of the Recommendations sections of the reports would, or would be likely to, inhibit substantially the provision of similar advice or views in future. Similarly, given that the Consultant was only temporarily contracted to carry out the work as an Interim Head of Service, it is difficult to see how substantial inhibition could occur in the future.
39. The Commissioner therefore does not accept that the information in parts (a) to (d) of paragraph 36 above is exempt from disclosure under section 30(b)(i) or (ii) of FOISA. As the Commissioner is satisfied that the exemptions in section 30(b)(i) and (ii) were wrongly applied to this information, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
40. The Commissioner next considered whether the information summarised in paragraph 36 is exempt from disclosure under section 36(2) of FOISA.



Section 36(2) - Confidentiality

41. The Council has applied the exemption in section 36(2) of FOISA to the entire contents of both reports (as noted above, the Commissioner will consider the exemption only in relation to information found not to be exempt under section 30(b) or (c) of FOISA, whether having found that the exemption does not apply or having considered the public interest test in relation to the information). The exemption in section 36(2) applies where information has been obtained by a public authority from a third party, and where disclosure of the information would constitute a breach of confidence actionable by the third party or any other person. In order to rely on section 36(2), an authority must demonstrate that certain conditions apply.
42. In most cases, it is simple to determine whether information has been obtained from a third party. However, matters are not so straightforward here. It is clear that the information was obtained by the Council from the consultant. However, given that the consultant was contracted to carry out work as an Interim Head of Service, can it really be argued that the information was obtained from a third party? Clearly, if the information had come from a Head of Service (or Interim Head of Service) who was actually employed by the Council, then the information could not be considered as having come from a third party.
43. After some consideration, the Commissioner has accepted, albeit with some reluctance, that the information contained in the reports prepared by the consultant requires to be treated as information which was provided to the Council by a third party, on the basis that the consultant was neither an employee of the Council nor, apparently, contracted to carry out the full range of duties normally associated with the post of Head of Service, but was instead engaged to help prepare the Council for the forthcoming inspection by Communities Scotland in the absence of a full-time Head of Service.
44. Given that the Commissioner has accepted that the information was obtained by the Council from a third party, he will now go on to consider whether disclosure of the information would constitute an actionable breach of confidence. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:
 - the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
 - the information must have been received by the public authority in circumstances from which an obligation on the authority to maintain confidentiality could be inferred. The obligation may be explicit (for example, expressed in a contract or other agreement), or implied from the circumstances or the nature of the agreement between the parties.
 - there must be a disclosure or use of the information which is not authorised by the person who communicated the information but which would cause detriment to that person.



45. The Commissioner first examined whether the information withheld had the necessary quality of confidence; that is, whether the information had the basic attribute of inaccessibility, and was not common knowledge or able to be produced by a member of the public without skill and labour.
46. The Commissioner did not consider this to be the case regarding certain background information in the reports, about the Council and its Housing Services, as similar information about the Council and its Housing Services is available on the Council website or from other publicly accessible sources. Nor did the Commissioner accept that information about the scope and context of the consultant's report had the necessary quality of confidence, given that information about the consultant's appointment and the type of work (in general terms) to be carried out by the consultant is already public knowledge.
47. However, in general the reports present conclusions based on the consultant's own opinions about the Housing Service, rather than conclusions which could be drawn from widely-available, factual information. The Commissioner therefore accepts that the recommendations in the reports have the required quality of inaccessibility and do not constitute information which is common knowledge or which is able to be produced by a member of the public without skill and labour.
48. The Commissioner then went on to examine whether the Council had received the information in circumstances which imposed an obligation to maintain confidence.
49. The Commissioner notes that the Consultancy Agreement between Pinnacle Housing Ltd and the Council imposes obligations of confidentiality on Pinnacle Housing Ltd. It does not specify, for example, that any information provided by the contractor should be treated in confidence. However, the two reports prepared by the consultant are marked "private and confidential" and "without prejudice" and it is unclear whether the contractor had any right to stipulate to the Council who, either within or outwith the Council, should or should not be allowed to see the reports or how long the reports were expected to remain confidential for.
50. For whatever reason, the Council appears to have been happy to accept the obligation of confidence, and advised the Commissioner that the consultant was writing both confidentially for the Council and with the expectation that the Council would observe an obligation of confidentiality to himself and to Pinnacle Housing Ltd. The Council has further advised that the first report was intended only for the Director of Housing and Social Work Services and the Council's Chief Executive, although this is not clear either from the Consultancy Agreement or from the report itself. The Council also advised that it was anticipated that the second report might form the basis of a wider discussion within the corporate management team and possibly a report to committee in some "modified" form. Again, there is nothing in the Consultancy Agreement or in the report itself which specifies that this is the case.
51. However, the Commissioner has accepted that, on balance, the reports, as presented by the consultant, were intended for restricted circulation within the Council. He found that the language used by the consultant and his candid criticism supported the Council's view that the consultant was writing in expectation that the Council would observe an obligation of confidentiality to himself and to Pinnacle Housing Ltd.



52. The Commissioner then went on to consider whether the unauthorised (i.e. without the approval of the consultant) disclosure of the information which remains under investigation would cause detriment to the consultant.
53. The only information which the Commissioner is considering here are the recommendations on page 24 of the first report (subject to the redaction of recommendation 3) and the recommendations on page 13 of the second report (subject to the partial redaction of recommendation 5 and the redaction of recommendation 8).
54. It is clear from correspondence between the Council and the Commissioner that the consultant had some concerns about potential detriment to himself or Pinnacle Housing Ltd and, accordingly, had appended the “without prejudice” reference to the reports. However, having considered the information contained in the redacted version of the recommendations, the Commissioner cannot accept that disclosure would cause detriment to the consultant or to Pinnacle Housing Ltd. The recommendations are factual and merely reflect the work carried out by the consultant.
55. Consequently, the Commissioner is satisfied that disclosure of the information specified in paragraph 53 would not be an actionable breach of confidence.

Section 38(1)(b) – personal information

56. Section 38(1)(b), read in conjunction with either section 38(2)(a)(i) or (2)(b) (as appropriate), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
57. The Council applied the exemption in section 38(1)(b) of FOISA in relation to information in the report which would allow identification of certain individuals. The information specified in paragraph 53 includes reference to a senior Council officer. Although the reports refer only to the officer’s job title, the Commissioner accepts that this is sufficient information to enable identification of the individual concerned, and that the references to the officer constitute personal data as defined by the DPA; that is, 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 likely to come into the possession of, the data controller.
58. The Council argued that disclosure of the personal data in the reports would contravene the first data protection principle in the DPA, which states that personal data shall be processed fairly and lawfully, and 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, at least one of the conditions in Schedule 3 of the DPA must also be met; however, the Commissioner is satisfied that the information withheld is not sensitive personal data and so he is not required to consider the conditions in Schedule 3 to the DPA.



59. The Commissioner considers that only condition 6(1) of Schedule 2 to the DPA might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to Councillor Alexander's information request) if disclosure of the data 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 (in this case, the senior Council official).
60. There are a number of tests which must be considered before condition 6(1) can apply:
- Does Councillor Alexander have a legitimate interest in having 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?)
 - 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? This will involve a balancing exercise between the legitimate interests of Councillor Alexander and those of the senior Council official. Only if the legitimate interests of Councillor Alexander outweigh those of the senior Council official can the personal data be disclosed.
61. As already established in this Decision Notice, the Commissioner is satisfied that there is a strong public interest in disclosure of information which promotes accountability for public expenditure. The personal data in question appears within the context of recommendations put forward by a consultant to whom the Council had paid a substantial sum. In the context of this case, the Commissioner finds that this means that there is a legitimate interest in the personal data. The Commissioner is satisfied that the legitimate interests of Councillor Alexander can only be met through disclosure of the information and has not identified any other means of doing so which would interfere less with the privacy of the data subject.
62. In relation to the question of unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject, the Council has acknowledged that, all other things being equal, the Council official would not be able to resist disclosure of their identity in a report because of their seniority. However, the Council considers that there are particular reasons why it would be unfair to release the personal data in question in this case. These reasons relate to the Council's opinion of the report.



63. The Council's arguments have been considered in detail by the Commissioner in reaching his decision. The Commissioner will not provide his detailed considerations on this point in this decision notice, as to do so would require further disclosure of the nature and contents of the reports. However, the Commissioner has concluded that disclosure of the personal data in question (which is limited to the information listed in paragraph 53) would not cause unwarranted prejudice to the rights and freedoms or legitimate interests of the senior Council official. The Commissioner takes the view that the references to the senior Council official are limited to recommendations about actions relating to their professional responsibilities, and he does not accept that the broader arguments put forward by the Council carry weight in relation to the limited information identified. The Commissioner has concluded that Councillor Alexander's legitimate interests outweigh the rights, freedoms and legitimate interests of the senior Council official in this case.
64. Having found that condition 6 of schedule 2 of the DPA can be met for the information currently under consideration, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure would also be fair and lawful. The Commissioner considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. The Commissioner has already found that there would be no breach of confidence if the information were to be disclosed and in any event the Council has not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles). The Commissioner is therefore satisfied that the disclosure of the data under FOISA would not breach the first data protection principle.
65. The Commissioner therefore finds that the exemption in section 38(1)(b) of FOISA should not be upheld in relation to the information specified in paragraph 53.

Conclusion

66. The Commissioner has found that some parts of the reports are not exempt from disclosure under any of the exemptions in FOISA cited by the Council, and should therefore be provided to Councillor Alexander. The Commissioner has provided the Council with copies of the reports marked up to show the information which should be disclosed. In summary, this information comprises:
- the recommendations on page 24 of the first report, with the exception of recommendation 3;
 - the recommendations on page 13 of the second report, with the exception of recommendation 8 and after partial redaction of recommendation 5 (i.e. the words falling between "awarded" and "in the Evaluation");
 - background information about the Council and its Housing Services;
 - information about the context and scope of the assessment undertaken by the consultant;
 - the summary of external factors ("imperatives") supporting the need for action.



DECISION

The Commissioner finds that Falkirk Council (the Council) mostly complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Councillor Alexander.

The Commissioner finds that the Council correctly withheld certain information under section 30(c) of FOISA, and in doing so complied with Part 1.

However, the remainder of the information was wrongly withheld under sections 30(b) and (c), 36(2) and 38(1)(b) of FOISA. By withholding this information, the Council breached Part 1 and section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Councillor Alexander with the information specified in paragraph 66 above, by Friday 18 September 2009.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
4 August 2009



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.

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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or



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

36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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.

...



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.