

Decision Notice

Decision 117/2017: Mr Mark Irvine and Glasgow City Council

Discretionary payments in remuneration package

Reference No: 201700668

Decision Date: 31 July 2017



Scottish Information
Commissioner

Summary

The Council was asked about a senior Council employee's remuneration package.

In response, the Council provided some information, but withheld some other information which it considered to be the individual's personal data.

During the investigation, the Council changed its position, and withdrew its reliance on the exemption in section 38(1)(b) to withhold the information.

The Commissioner investigated and found that the Council had initially failed to comply with Part 1 of FOISA in withholding the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 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) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles) (the first and second data protection principles) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 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 15 February 2017, Mr Irvine made a request for information to Glasgow City Council (the Council). Referring to an article in *The Telegraph* newspaper in April 2012, which reported the remuneration package of a senior Council employee, Mr Irvine understood that this individual had left the Council's employment in 2010/11 and that the figure reported would have represented a "leaving package". The information he requested was:
 - (i) a breakdown of the figure into its component parts, annual salary, pension payments etc.;
 - (ii) an explanation of the basis of the "compensation for loss of office" payment and how this payment was calculated, and
 - (iii) confirmation of whether the individual's remuneration package benefited from any discretionary payments, e.g. "added years" under the Local Government Pension Scheme.
2. The Council responded on 15 March 2017, providing the information sought in parts (i) and (ii) of Mr Irvine's request. In response to part (iii) the Council refused to provide the

information as it considered this to be personal information which was exempt from disclosure under section 38(1)(b) of FOISA.

3. On 16 March 2017, Mr Irvine wrote to the Council, requesting a review of its decision on the basis that he did not agree that the information sought in part (iii) of his request was exempt from disclosure. Given that the individual concerned was one of the Council's most senior officials, and that other aspects of his remuneration package had been disclosed, Mr Irvine believed the same logic must apply to discretionary payments agreed by the Council. In Mr Irvine's view, disclosure of the information was important since this individual appeared to have been the author of a Council report on "Discretionary payments and retirement payments", from which he seemed to have benefited personally on leaving the Council's employment.
4. The Council notified Mr Irvine of the outcome of its review on 7 April 2017, upholding its original decision in full. It considered disclosure of the withheld information would breach the first data protection principle in the DPA. The Council also informed Mr Irvine that the information already disclosed, relating to other aspects of the individual's remuneration package, had been released in accordance with the CIPFA Code of Practice on Local Authority Accounting (the CIPFA Code).
5. On 10 April 2017, Mr Irvine wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr Irvine stated he was dissatisfied with the outcome of the Council's review because, as a publicly minded citizen and taxpayer, he believed he was entitled to know how Scotland's largest Council was spending public funds. He took the view that the Council had a duty to ensure that senior officers were not paid any more favourably than any other Council employee, and submitted that there was no legitimate reason for the Council to withhold the information, other than to shield itself from criticism over its use of public money.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Irvine had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to her for a decision.
7. On 28 April 2017, the Council was notified in writing that Mr Irvine had made a valid application 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, focusing on the requirements of section 38(1)(b) of FOISA. The Council was also asked to send the Commissioner the information withheld from Mr Irvine. Mr Irvine was also asked to provide his legitimate interest arguments.
9. Mr Irvine provided his comments on why he considered he had a legitimate interest in the personal information.
10. The Council subsequently informed the investigating officer that it had obtained consent from the data subject to disclose the information requested. It disclosed the information to Mr Irvine and confirmed that it no longer wished to rely on section 38(1)(b) of FOISA (although it later clarified that it considered it had been correct to do so at the time of Mr Irvine's information request and his requirement for review).

11. Mr Irvine subsequently informed the investigating officer that, despite the Council's decision to disclose the information to him in full, he still required a decision from the Commissioner as he did not agree that the Council had valid grounds to refuse his original request or his requirement for review.
12. The Council duly provided the withheld information to the Commissioner, together with its submissions.

Commissioner's analysis and findings

13. 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 Irvine and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) – Personal information

14. 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.
15. The Council submitted that the information comprised personal data for the purposes of the DPA and that its disclosure, without the consent of the data subject, would contravene the first and second data protection principles. It therefore argued that, at the time it responded to Mr Irvine's information request and requirement for review, the information was exempt under section 38(1)(b) of FOISA.
16. 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?

17. "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).
18. The Council submitted that the information under consideration in this case was personal data as defined by section 1(1) of the DPA. It explained that the information related to income received by a living individual upon his retirement from the Council and, in this context, it would clearly identify him. It related to that one individual only.
19. The Council confirmed that it did not consider any of the information to be sensitive personal data.
20. The Commissioner has considered the submissions received from the Council on this point, along with the withheld information. She is satisfied that the information does indeed comprise personal data. The information records details of the calculation of an individual's pension and lump sum. Given the nature of the information, and indeed of the request, it is possible to identify a living individual from it. The Commissioner recognises that it would not be practicable to remove the risk of identification. The information is clearly about the individual and so can be said to relate to him. It is therefore that individual's personal data, as defined by section 1(1) of the DPA.

Would disclosure contravene the first data protection principle?

21. In its submissions, the Council argued that, in the absence of the data subject's consent, 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 Irvine's request.
22. The first data protection 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, so it is not necessary for her to consider the conditions in Schedule 3.
23. 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 data would be fair and lawful.
24. 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?

Condition 1

25. Condition 1 in Schedule 2 to the DPA allows personal data to be processed if the data subject (the individual to whom the data relate) has consented to the processing.
26. The Council explained that, following Mr Irvine's application to the Commissioner, it had obtained the data subject's consent to disclosure of the information, and no longer wished – at that time – to rely on the exemption in section 38(1)(b) of FOISA. The Council confirmed that, had such consent not been obtained, it would have continued to withhold the information under section 38(1)(b) of FOISA.
27. The Council confirmed that, at the time it responded to Mr Irvine's request and requirement for review, it had not sought the consent of the data subject to disclose the information. This, the Council explained, was because it had not considered it appropriate to seek such consent, given the data subject had retired from the Council several years previously. The Council confirmed that, as a general rule, it did not contact former employees for their consent.
28. In this case, the Council submitted that it had sought consent with a view to ensuring that it had exhausted all possible options for disclosing the information. It believed it had acted in the spirit of FOISA, while bearing in mind the individual's familiarity with its FOI processes when employed. It considered it fortuitous that it had been able to make contact.
29. While it was unable to pre-empt any response from an individual, the Council had no reason to believe the relevant consent would have been withheld, had it been sought earlier.
30. The Commissioner has considered these comments carefully. She notes that the Council did not consider it appropriate to seek the data subject's consent at the time it responded to Mr Irvine's original request and requirement for review. It is not clear why this option

presented itself only after an application had been made to the Commissioner, but the Commissioner recognises that there is no positive obligation on public authorities to seek a data subject's consent to disclose their personal information under FOISA. She recognises that it may not have been seen as entirely straightforward to contact this individual and would commend the Council for doing so, even at a relatively late stage in the process. This did, after all, lead to the information being disclosed.

31. As a matter of fact, the Council did not have the data subject's consent when it responded either to Mr Irvine's information request or his requirement for review. The Commissioner is satisfied that the existence of the data subject's consent, at a particular time, cannot be addressed other than as a question of fact. At the material time for dealing with this information request, the Council did not have the requisite consent, so the Commissioner must conclude that condition 1 in Schedule 2 to the DPA could not be met to permit disclosure of the withheld personal data to Mr Irvine.
32. The fact that the data subject consented to disclosure readily once approached, however, and the absence of any apparent reason why their position is likely to have been different had they been approached earlier, may still be relevant when considering the data subject's rights and freedoms or legitimate interests for the purposes of condition 6 in Schedule 2. The Commissioner will go on to do this now.

Condition 6

33. The Council provided arguments on the application of condition 6 in Schedule 2 to the DPA. 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 subject.
34. There are, therefore, a number of tests which must be met before condition 6 can apply. These are:
 - (i) Does Mr Irvine 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 subject?
 - (iii) Even if the processing is necessary for Mr Irvine'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 subject?
35. 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 Irvine must outweigh the rights and freedoms or legitimate interests of the data subject 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 Irvine.

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

36. Mr Irvine submitted that he had a legitimate interest in the Council's use of public money, especially when government at all levels was operating on tight budgets. He referred to "capped" equal pay settlement offers to lower-paid Council workers and submitted that the

public had a right to know if the Council was especially generous to one of its more senior officers and, if so, the reasons for that treatment.

37. The Council submitted that there was no general legitimate interest in knowing the value of an individual's pension, referring to the Commissioner's findings in *Decision 139/2012 Mr Leslie Sinclair and Falkirk Council*¹.
38. The Council also explained that the level of information and detail sought by Mr Irvine did not require to be disclosed under the CIPFA Code. In its view, disclosure under the CIPFA Code provided adequate comfort regarding use of public funds.
39. The Commissioner has considered all of these arguments. Clearly, with a view to effective scrutiny of public expenditure, there is a legitimate interest in the remuneration of the most senior officers of a local authority, including sums paid on termination of such an individual's employment. In many cases, including this one, such sums will be substantial.
40. In *Decision 139/2012*, the Commissioner did not find there to be a legitimate interest in knowing the value of an individual's occupational pension. Given the wide range of variables – including decisions taken by the employee – that could influence the value of the lump sum or annual value of the pension on retirement, the Commissioner was not satisfied that any simple connection could be drawn between taxpayer contributions, a person's professional activities and the value of their pension.
41. In this case, however, the outstanding part of the request related to discretionary payments, in other words to decisions made by the Council rather than by the data subject. The annual pension and lump sum had, in any event, been disclosed – and was detailed in the Council's annual accounts.
42. The Commissioner also acknowledges that the CIPFA Code may provide a baseline for information that should be published on local authority expenditure. It does not, however, follow that information on such matters should only be made available to the public where the CIPFA Code provides, or that there is no legitimate interest in the absence of such provision.
43. In all the circumstances, the Commissioner is satisfied that Mr Irvine had a legitimate interest in obtaining the withheld personal data.

Is disclosure necessary to achieve those legitimate interests?

44. 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 subject.
45. The Council argued that Mr Irvine's reasons for considering he had a legitimate interest in the information (use of public funds and assurance that senior officials are not treated differently to other employees) could have been addressed by a request for anonymised data for a range of grades.
46. The Commissioner concedes that a general legitimate interest in the matters referred to by the Council might be met by disclosing anonymised data for a range of grades. That, however, would appear to exclude the possibility of a specific legitimate interest in disclosure of a particular payment or "package" awarded to an individual at a particularly senior level,

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201201188.aspx>

with a view to exercising effective scrutiny as described above. In this case, the Commissioner is satisfied that a legitimate interest exists at that level, and there would appear to be no reasonable means of addressing it fully except by disclosure of the withheld information. Accordingly, she is satisfied that disclosure is necessary in the circumstances.

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

47. Mr Irvine did not accept that disclosure of the withheld personal data could be detrimental to the data subject, bearing in mind that the decision to award “added years” or not lay with the Council alone.
48. The Council noted that the withheld personal data related to a retired individual, no longer in its employment. In those circumstances, it considered disclosure without consent would have been unwarranted in terms of the data subject’s right to privacy. It was concerned about the possible implications of disclosure for any future requests for the personal data of current or former employees.
49. As ever, the Commissioner has considered this case on its own merits. Aspects of this decision may be relevant to future information requests, but she is unable to say that it can be transposed automatically, in its entirety, to any future set of circumstances.
50. As indicated above, the withheld personal data relate to a very senior employee of the Council. Their annual pension and lump sum were disclosed, being published in the Council’s annual accounts already. The Commissioner does not consider the data still under consideration to be any more inherently “personal” in nature than what has been disclosed – indeed, as Mr Irvine has argued, it derives from decisions made by the Council rather than the data subject.
51. As noted above in the context of condition 1, the data subject consented to disclosure quite readily once approached. It does not appear likely in the circumstances that their position on consent would have been any different had they been approached earlier. The Commissioner notes that the individual in question was familiar with the FOISA regime through his previous employment with the Council. Bearing in mind all the considerations narrated in this and the preceding paragraph, the Commissioner is satisfied that it would have been within the data subject’s reasonable expectations that these personal data would be disclosed.
52. On balance, therefore, the Commissioner is not satisfied that disclosure of the withheld personal data would be unwarranted by reason of prejudice to the data subject’s rights and freedoms or legitimate interests. She would therefore conclude that Mr Irvine’s legitimate interests should prevail and that the requirements of condition 6 could be met in this particular case.

Fair and lawful processing

53. As indicated above, the Commissioner must be satisfied that disclosure would be fair and lawful, in addition to the application of any relevant Schedule 2 conditions, before concluding that disclosure would be consistent with the first data protection principle.
54. The Council submitted that disclosure would be unlawful, but only in the absence of a Schedule 2 condition permitting disclosure. As she has found a Schedule 2 condition which would permit disclosure, the Commissioner need not consider the question of lawfulness further.

55. The Council also argued that disclosure would be unfair. It considered the data subject would have reasonable expectations that information on income received in retirement would be kept confidential. It would be unfair, in the Council's view, to breach those reasonable expectations. In all essentials, this argument has been considered already in relation to the application of condition 6 and the Commissioner does not find it necessary to consider it further at this point.
56. On the arguments she has received, therefore, the Commissioner is satisfied that disclosure of the withheld personal data would be both fair and lawful.
57. The Commissioner therefore finds, in the circumstances of this particular case, that disclosure of the withheld information sought in part (iii) of Mr Irvine's request would not breach the first data protection principle.

The second data protection principle

58. The Council also argued that the second data protection principle would be breached by disclosure of the withheld personal data. The second data protection principle requires that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
59. The Council submitted that it had processed the withheld personal data because that processing was necessary for the performance of a contract to which the data subject was a party. Disclosure of the information without the data subject's consent would, in the Council's view, be incompatible with that purpose, particularly as it seemed likely that any information disclosed to Mr Irvine would be published on the internet.
60. The Commissioner acknowledges that the interpretation provisions relating to the second principle (Part II of Schedule 1, paragraph 6) state that "the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed" should be taken into account in determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained. On the other hand, the Commissioner also considers it appropriate to take into account what the UK Information Commissioner (the ICO) has to say on the relevance of the second principle to disclosures under Freedom of Information legislation, in her guidance: "Personal information (section 40 and regulation 13)"²:

We consider that a FOIA disclosure that complies with the DPA in other respects will not breach the second principle. The "specified and lawful purposes" are the public authority's business purposes, i.e. the purposes for which it obtains and processes data. Disclosure under FOIA is not a business purpose. A public authority does not have to specify, either when it obtains personal data or in its notification to the Information Commissioner as a data controller under the DPA, that the personal data may be disclosed under FOIA. Furthermore, the aim of FOIA is to promote transparency and confidence in public authorities. So, if disclosure would be fair and lawful under the first principle, and the information is not exempt under another FOIA exemption, then that disclosure cannot be incompatible with the public authority's business purposes.

61. Given the ICO's overarching responsibility for ensuring compliance with the DPA across the whole of the United Kingdom, the Commissioner must give considerable weight to this

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

guidance. She has been given, and can identify, no particular reason why she should depart from it in this case. She has found that disclosure would be fair and lawful for the purposes of the first principle and it is not suggested that any other FOISA exemption would be applicable here. In all the circumstances, therefore, she is not satisfied that the Council was entitled to claim that the second data protection principle would be breached by disclosure of the withheld personal data.

62. As she is not satisfied that disclosure of the withheld personal data would breach either the first or the second data protection principle, the Commissioner must find that the Council was not entitled to withhold the information under section 38(1)(b) of FOISA.

Decision

The Commissioner finds that Glasgow City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to part (iii) of the information request made by Mr Irvine. She does not consider the Council was entitled to withhold the information requested under section 38(1)(b) (Personal information) of FOISA, and finds that in doing so it failed to comply with section 1(1) of FOISA.

Given that, during the investigation, the Council fully disclosed the withheld information to Mr Irvine, the Commissioner does not require it to take any action with regard to this failure, in response to Mr Irvine's application.

Appeal

Should either Mr Irvine or Glasgow 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.

Margaret Keyse
Acting Scottish Information Commissioner

31 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

...

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

...

(e) in subsection (1) of section 38 –

...

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

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.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

...

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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