

Decision Notice



Decision 041/2012 Mr Paul Hutcheon of the Sunday Herald and North Lanarkshire Council

Provision of performance related pay to Chief Officers

Reference No: 201100513
Decision Date: 1 March 2012

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Summary

Mr Hutcheon made a request to North Lanarkshire Council (the Council) for information relating to the provision of Performance Related Pay (PRP) to the 29 Chief Officers in the Council. The Council responded by disclosing some information to Mr Hutcheon and offering to provide information on the maximum PRP which is achievable by each of the Chief Officers. However, it relied on the exemption in section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) for withholding other information from him, on the basis that it was personal data, disclosure of which was contrary to the data protection principles. Following a review, Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had only partially complied with Part 1 of FOISA in dealing with Mr Hutcheon's information request, by incorrectly withholding information as to the actual amount of PRP paid to the 29 Chief Officers under section 38(1)(b). The Commissioner also found that the Council had not provided Mr Hutcheon with all of the non-exempt recorded information that it holds falling within scope of part (a) of his request.

However, the Commissioner was satisfied that the Council was entitled to withhold information relating to the Chief Officers' objectives and targets in line with section 38(1)(b) of FOISA.

The Commissioner required the Council to disclose the actual amount of PRP paid to each of the 29 Chief Officers in the financial year 2009/10, and the list of names of those individuals who considered/decided how much PRP each Chief Officer should receive.

Relevant statutory provisions and other sources

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) and (2)(a)(i) and (b) (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 the purposes of the first principle: processing of any personal data: conditions 1, 3 and 6)

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



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 19 January 2011, Mr Hutcheon wrote to the Council, making reference to a letter from the Council’s Chief Executive to a named councillor dated 25 October 2010, which set out the levels of Performance Related Pay (PRP) for the Council’s 29 Chief Officers. Mr Hutcheon asked for:
 - a) the name of every individual who considered/decided how much PRP each Chief Officer should receive;
 - b) the objectives and targets each of the Chief Officers had to meet before receiving all or some of the PRP and
 - c) how much PRP each of the Chief Officers actually received, rather than the maximum figure they could receive according to performance.
2. The Council responded on 16 February 2011. It provided Mr Hutcheon with a document entitled “Chief Officer Performance Review & Development Scheme – Guidance Notes for Reviewers and Reviewees” which, it explained, provided information which would address parts (a) and (b) of Mr Hutcheon’s request. The Council also provided Mr Hutcheon with a copy of the Chief Officer Performance Review and Development Document.
3. The Council offered to provide Mr Hutcheon with information on the maximum amount of PRP Chief Officers could receive, but withheld the actual level of PRP paid to the Chief Officers, as it considered this to be personal data and that its disclosure would contravene the data protection principles. As such, the Council considered that the actual level of PRP paid was exempt from disclosure under section 38(1)(b) of FOISA.
4. On 16 February 2011, Mr Hutcheon wrote to the Council requesting a review of its decision. Mr Hutcheon disagreed that the exemption in section 38(1)(b) of FOISA applied to the actual payments, given the seniority of the officers involved. He commented that a “raft” of public bodies had published bonus figures for senior staff and that he could see no reason why the Council should not do the same. Mr Hutcheon also stated that he still wanted to receive the information covered by parts (a) and (b) of his request.



5. The Council notified Mr Hutcheon of the outcome of its review on 15 March 2011. The Council upheld its original decision to rely on the exemption in section 38(1)(b) of FOISA for withholding information covering part (c) of Mr Hutcheon's request. The Council also explained that it was also relying on section 38(1)(b) of FOISA for withholding the information covering parts (a) and (b) of Mr Hutcheon's request.
6. On 21 March 2011, Mr Hutcheon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Hutcheon 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

8. On 10 May 2011, the Council was notified in writing that an application had been received from Mr Hutcheon and was asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to section 38(1)(b) of FOISA.
10. In its response, the Council explained that information in relation to names of individual officers who considered/decided how much PRP each Chief Officer should receive is contained in the "Chief Officer Performance Review & Development Scheme – Guidance Notes for Reviewers and Reviewees", which was provided to Mr Hutcheon in response to his request. The Council also provided a submission to justify its reliance on the exemption in section 38(1)(b) of FOISA for withholding information in relation to parts (b) and (c) of Mr Hutcheon's information request.
11. Further submissions were also received from the Council in which it sought to justify its reliance on section 38(1)(b) of FOISA.
12. A copy of the "Chief Officer Performance Review & Development Scheme – Guidance Notes for Reviewers and Reviewees" was also obtained from the Council during the course of the investigation.
13. Mr Hutcheon was also invited to comment on the matters raised by this case, in particular in relation to his legitimate interests in accessing the withheld information insofar as it was personal data. Mr Hutcheon's comments were received on 1 August 2011.



14. All submissions received from the Council and Mr Hutcheon, insofar as relevant, are considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 1(1)

16. Section 1(1) creates a general right of access to recorded information held by a public authority, except where (as provided by section 1(6)) that right is disapplied by the application of one of the exemptions in Part 2 of FOISA, or another provision in Part 1 of FOISA.
17. In part (a) of his request, Mr Hutcheon asked for the name of every individual who considered/decided how much PRP each Chief Officer should receive.
18. In its response, the Council provided Mr Hutcheon with a copy of the "Chief Officer Performance Review & Development Scheme – Guidance Notes for Reviewers and Reviewees" (the Guidance Notes) which, it explained, set out information as to who carries out the performance review.
19. In his request for review, Mr Hutcheon clearly indicated to the Council that he still required the information which would address part (a) of his request.
20. In response to his request for review, the Council advised Mr Hutcheon that it was relying on the exemption in section 38(1)(b) of FOISA for withholding this information from him. However, as mentioned in the background section, in its submissions to the Commissioner, the Council argued that this information is contained in the Guidance Notes provided to Mr Hutcheon in response to his request.
21. Having reviewed the information in these Guidance Notes, the Commissioner is not satisfied that this document provides the name of the individual who considered/decided how much PRP each Chief Officer should receive, as Mr Hutcheon requested. The Guidance Notes state the *role* of those who are to carry out the reviews, but not the *names* of the individuals carrying out these roles. The name of the person who carried out the review will not always be clear from the role. For example, although the Chief Executive determines the PRP awards for Executive Directors, Heads of Service are simply described as being assessed by "Executive Directors", of which there are a number.



22. From the information provided to the Commissioner for the purposes of the investigation, it is apparent that the Council does hold a list of names of those who carry out the performance reviews for each of the 29 Chief Officers. The Council has asserted that, in providing Mr Hutcheon with a copy of the Guidance Notes, it has responded to request (a) and, according to its letter to the Commissioner of 7 July 2011, it is not relying on any exemption in FOISA for withholding this information from Mr Hutcheon. However, in providing only information as to roles as opposed to names, the Commissioner finds that the Council has not provided Mr Hutcheon with access to recorded information held by it which would answer part (a) of his request.
23. As the Council has not relied on any exemption in FOISA for withholding the names from Mr Hutcheon, the Commissioner requires the Council to provide Mr Hutcheon with the names of those who carry out the reviews for each of the Chief Officers.

Section 38(1)(b) – Personal information

24. The Council has applied the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), to information it has withheld from Mr Hutcheon which will address parts (b) and (c) of his request.
25. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or, as appropriate, 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 Data Protection Act 1998 (the DPA). This particular exemption is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
26. In order to rely on this exemption, therefore, the Council must show firstly that the information being withheld is personal data for the purposes of the DPA, and secondly that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.
27. The Council has submitted that the information withheld from Mr Hutcheon which would address parts (b) and (c) of his request is personal data, disclosure of which would be unfair and would also contravene the first data protection principle.
28. In considering the application of the exemption, the Commissioner will therefore first consider whether the information that has been withheld is personal data as defined in section 1(1) of the DPA.

Is the information personal data?

29. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller (the full definition is set out in the Appendix).



30. The information under consideration here is the objectives each of the 29 Chief Officers had to achieve to meet their targets in financial year 2009/2010, together with information as to the actual amount of PRP awarded to each of the officers over the same period.
31. Having considered the withheld information, the Commissioner accepts that this information is the personal data of the Chief Officers as it relates to them as individuals and they can be identified from it.
32. Having reached this conclusion, the Commissioner must now go on to consider whether disclosure of the personal data would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

33. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure of the personal data into the public domain in response to Mr Hutcheon's information request.
34. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and is satisfied that the personal data in this case does not fall into this category. As a result, it is not necessary to consider the conditions in Schedule 3 to the DPA in this case.
35. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
36. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed.

Can any Schedule 2 condition be met?

37. The Council advised the Commissioner that it had considered conditions 1 to 6 inclusive in Schedule 2 of the DPA in relation to whether the processing of personal data might be necessary for one or more of the purposes specified therein, but had concluded that none of the conditions applied. Detailed submissions were provided by the Council regarding its consideration of conditions 1, 3 and 6 in Schedule 2.

Condition 1

38. Condition 1 of Schedule 2 permits data to be processed (in this case, disclosed into the public domain in response to Mr Hutcheon's information request) if consent to such processing is given by the data subjects. The Council advised that the data subjects had not given consent to the processing of their personal data. The Commissioner is therefore satisfied that condition 1 cannot be fulfilled in this case.



Condition 6

39. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. the 29 Chief Officers).
40. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Mr Hutcheon have a legitimate interest in obtaining the personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced to its ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for Mr Hutcheon's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
41. There is no presumption in favour of the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr Hutcheon must outweigh the rights and freedoms or legitimate interests of the Chief Officers 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 Hutcheon.

Does Mr Hutcheon have a legitimate interest?

42. As Mr Hutcheon made clear in his request for review to the Council, he believes that he and the general public have a legitimate interest in relation to transparency and accountability. Given the seniority of the officers involved, he considers that the level of any PRP/bonuses received should be in the public domain, and he can think of no other way that these interests can be achieved short of disclosure.
43. Mr Hutcheon believes the seniority of the officers is key. Mr Hutcheon commented on *Decision 033/2011 Paul Hutcheon of the Sunday Herald and the Scottish Ministers*, which concerned the PRP/bonuses paid to the Permanent Secretary to the Scottish Government, and noted that there is a public interest in knowing about the bonuses enjoyed by people at the very top of an organisation. Mr Hutcheon also explained that there are a number of quangos and public bodies who have published the bonus levels, not just of their Chief Executive Officer, but also of senior officers/directors.



44. In its submissions, the Council stated that it had not asked Mr Hutcheon why he considers that he has a legitimate interest in receiving the withheld information, but it was seeking to rely on comments made by the previous Commissioner in *Decision 025/2008 Mr George Gebbie and the Scottish Legal Aid Board*, where he indicated that a balance has to be struck between a public authority's duty to be transparent and accountable and a public authority's duty to respect its employees' reasonable expectations as to privacy.
45. The Commissioner considers that there is a general interest in ensuring that public authorities are transparent and accountable in relation to the way they spend public money, and that this extends to understanding how much money is paid to senior officers of the Council on top of their salary, together with the level of performance that these officers are required to achieve to be entitled to receive some or all of their PRP.
46. Having considered the views of both the Council and Mr Hutcheon, the Commissioner has concluded that Mr Hutcheon does have a legitimate interest in obtaining the information. The Commissioner accepts that, as a journalist, Mr Hutcheon's role leads him to write about matters of local and national interest regarding the workings of public authorities, which affect the public, including the public purse. Part of this role includes ensuring that local government is transparent and accountable and that public money is spent in the most cost efficient way, for the benefit of the community it serves. This accords with the wider public interest in whether the remuneration that senior public servants receive is reasonable in the current economic climate.

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

47. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so she must consider whether these interests might reasonably be met by alternative means.
48. The Commissioner notes that the Council offered to provide Mr Hutcheon with information as to the maximum PRP which was achievable by each Chief Officer.
49. While this would give Mr Hutcheon some understanding of how PRP works in the Council, it would not fulfil his (and the public's) legitimate interest in understanding how much was *actually* paid in each case, as the figure could be anywhere between zero and the maximum amount.
50. The Commissioner also notes that the Council made no offer to Mr Hutcheon regarding the provision of the objectives that the Chief Officers would have to meet to achieve the targets on which the decision of how much PRP to pay is based.



51. In this case, the Commissioner does not accept that the information offered to Mr Hutcheon is sufficient to enable Mr Hutcheon (and other members of the public) to pursue his legitimate interests. Furthermore, the Commissioner can see no alternative route available to Mr Hutcheon (and other members of the public) to access information as to the objectives set for each of the Chief Officers. As a consequence of this, the Commissioner can identify no viable means of meeting the legitimate interest identified by Mr Hutcheon which would interfere less with the privacy of the 29 Chief Officers. Therefore, she is satisfied in all the circumstances that disclosure of the information under consideration is necessary for the purposes of the legitimate interest identified by Mr Hutcheon.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

52. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr Hutcheon and those of the Chief Officers. Only if the legitimate interests of Mr Hutcheon outweigh those of the Chief Officers can the information be disclosed without breaching the first data protection principle.
53. The Commissioner's guidance¹ on the exemption in section 38 identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
 - the potential harm or distress that may be caused by the disclosure;
 - whether the individual has objected to the disclosure;
 - the reasonable expectations of the individual as to whether the information would be disclosed.
54. In considering this matter, the Commissioner has also had regard to the guidance² issued by the (UK) Information Commissioner, entitled "Public Sector Salaries: how and when to disclose" (the ICO guidance).
55. The ICO guidance indicates that those who are paid from the public purse should expect some information about their salaries to be made public. However, it also acknowledges that salary information relates to personal financial circumstances and deserves some protection.
56. The ICO guidance indicates that there will always be some legitimate interest in knowing how public money is spent, how much public sector salaries compare with those in other areas and how money is distributed between different levels of staff. However, it makes clear that this legitimate interest can often be met via routine disclosure of salary bands, and without individuals' salary information being disclosed.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>

² http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf



57. The ICO guidance identifies situations in which disclosure of the advertised salary band is insufficient to answer legitimate questions. This includes where the pay scales do not disclose the full cost to the authority, such as when there is a significant element of performance related pay or other bonuses paid. In circumstances where it is appropriate to reveal detail of an individual's remuneration, the ICO guidance suggests that, in most cases, it will be sufficient to release the approximate amount paid to an individual, for example, to the nearest £5,000. The ICO guidance indicates that it will only be in exceptional circumstances that disclosure of an exact salary may be appropriate.
58. The Commissioner has also noted the terms of decision notice FS50262907³ issued by the Information Commissioner. This decision considered whether honorarium and bonus payments made to the Chief Constable of the City of London Police should be disclosed. Notwithstanding that the bonus scheme concerned contained a confidentiality clause and the Chief Constable had objected to disclosure, the Information Commissioner concluded that disclosure of the approximate value of the bonuses and honorarium payments (in terms of £5000 bands) would not breach the first data protection principle. With respect to the honorarium payments, the Information Commissioner indicated that he would have required disclosure of the precise value, had a previous disclosure not had the effect that doing so would reveal bonus payments made to another employee.
59. Consideration has also been given by the Commissioner to the decision of the First Tier Tribunal on Information Rights (the First Tier Tribunal) in case number EA/2010/0024⁴. In this case, the First Tier Tribunal agreed with the Information Commissioner that it would not be a breach of the first data protection principle for the Olympic Delivery Authority to disclose the percentage of the maximum bonus payment that certain Directors received over and above their salary in a particular year.
60. In reaching this conclusion, the First Tier Tribunal were of the view that information as to the amount of bonus payments paid to these Directors was the sort of information that a senior manager must expect to fall within the public, as opposed to private, realm when he or she takes the sort of roles the individuals fulfil in this case. The First Tier Tribunal also concluded that the disclosure of the information does not impinge on the relationship with more senior management, or on the personal attributes that may affect an individual's work performance, for good or ill. And although this disclosure extends beyond what the individuals will have come to expect from reading previous years' public accounts, the First Tier Tribunal took the view, that it would not be reasonable to expect the disclosure necessarily to be maintained at precisely that level.
61. The First Tier Tribunal also commented on evidence it has seen of remuneration schemes in other bodies reflecting a trend towards greater transparency in PRP in the public and semi-public sector, and its view that individual executives in this case may be expected to have been aware of that trend and of the likely impact on the positions they have attained.

³ http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50262907.pdf

⁴ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i477/Decision;EA.2010.0024;dt04.01.11%>



62. In this same decision, the First Tier Tribunal was also required to make a decision on whether disclosure of performance targets for the Chief Executive and Directors would breach the first data protection principle.
63. The First Tier Tribunal concluded that, although the targets in this case were more of a corporate rather than personal nature, it considered that this information fell outwith the scope of work-related data that those staff would reasonably expect to be exposed to public inspection. The First Tier Tribunal also accepted that disclosure of the information would have a direct impact on the appraisal scheme and its operation. The First Tier Tribunal therefore agreed with the Information Commissioner that release of the performance targets for the Chief Executive and the Directors would breach the first data protection principle.

Submissions on the balance of legitimate interests

64. The Council submitted that the Chief Officers have a strong expectation of privacy in relation to PRP information, especially where the percentages of PRP payments awarded to Chief Officers are directly linked to each individual's performance in the workplace.
65. The Council also argued that, as PRP payments are inextricably linked to staff performance, disclosure of information about the payments made to the Chief Officers would reveal personal human resource information about their levels of performance.
66. With regard to the objectives of the Chief Officers, the Council argued that disclosure of the objectives of individual Chief Officers is likely to beg questions as to outcomes, because it will be possible to deduce from the amount of PRP paid, which Chief Officers did or did not receive the maximum PRP achievable.
67. It explained that the Chief Officers themselves do not have access to information about objectives (and outcomes) for any other Chief Officer within the authority. The Council has provided the Commissioner with a detailed submission setting out why it considers that release of the data setting out each individual Chief Officer's objectives would enable another Chief Officer to draw a comparison between the PRP they were paid and that of the other Chief Officers based on each officer's attainment of their individual objectives, and the types of questions that may arise from that.
68. The Council has also noted (while acknowledging that the request could have been submitted from another source) that the request, in this case, has come from a journalist who writes for a national newspaper; the Council is concerned that should the requested information be published certain conclusions could be drawn from the data. Furthermore, the Council is concerned that if comparative data were to be released from other local authorities, this would be likely to lead to the production of a "league table" of certain Chief Officers, where there is no statutory or public accounting requirement for this.
69. The Council considers that the information under consideration in this case should be contrasted with *Decision 033/2011 Paul Hutcheon of the Sunday Herald and the Scottish Ministers*, as there is only one post of Permanent Secretary to the Scottish Government within Scotland and there can therefore be no exposure of that post holder to unwanted comparison.



70. The Council also argued that disclosure of this information would be an unwarranted intrusion into the right of privacy of individual officers and would be contrary to Article 8 of the European Convention on Human Rights.

Conclusions with respect to the balancing exercise

Part (b) - Objectives and targets set for each Chief Officer

71. The Chief Officers' targets and objectives are agreed between the individual officers and their line manager or, in the case of the Chief Executive, with senior politicians. The Commissioner accepts that these targets and objectives would only be known to the officer and their manager (or senior politicians, as appropriate) and as such would not be known more widely within the Council. The Commissioner acknowledges that it would be within the Chief Officers' reasonable expectations that information as to their targets and objectives would not be shared with anyone else.
72. The Commissioner also accepts that if information as to the objectives and targets for each of the Chief Officers were to be disclosed, this may invite comparisons to be drawn between officers within the Council, and that these comparisons may not be fully informed or accurate. This, the Commissioner accepts, would cause unwarranted intrusion into the privacy of the Chief Officers and unwarranted prejudice to their legitimate interests.
73. While the Commissioner accepts that there is a legitimate interest in the disclosure of objectives and targets, on balance she does not accept that this is sufficient to outweigh the unwarranted prejudice that would be caused to the legitimate interests of the Chief Officers if this information were to be disclosed. As such, condition 6 of schedule 2 of the DPA cannot be met in this case.
74. Given that no other condition in schedule 2 can be met, the Commissioner must conclude that disclosure of the objectives and targets would breach the first data protection principle and that the information is exempt from disclosure under section 38(1)(b) of FOISA.

Part (c) - Actual PRP payments made to each Chief Officer

75. The Commissioner is aware that the Local Authority Accounts (Scotland) Amendment Regulations 2011 (the Regulations)⁵ require local authorities to prepare as part of their annual accounts a Remuneration Report. The Report must include bonuses paid to senior employees or receivable by such employees. The Regulations came into force on 31 March 2011 and do not apply to any accounts that relate to a financial year that began prior to 1 April 2010. As a result, the Regulations do not require payment of the PRP payments which Mr Hutcheon has asked for.

⁵ <http://www.legislation.gov.uk/ssi/2011/64/contents/made>



76. However, in the light of the Regulations, the Commissioner considers that the Chief Officers would have been aware at the time Mr Hutcheon's request was received, that any PRP payments they received in financial year 2010/11 would be disclosed as part of the Council's annual accounts, and would, as a consequence, be available in the public domain. The Commissioner takes the view that this awareness on the part of the Chief Officers would diminish any sense of intrusion into their personal life when the Council is dealing with a request for this information for the preceding financial year. The Commissioner considers that this would be the case particularly at the time that the Council dealt with Mr Hutcheon's request for review (16 February 2011) given that the Chief Officers would be aware that their bonuses were being included in the annual accounts for the current year.
77. The Scottish Ministers have clearly taken the view that there is an interest in such payments being published and that this interest outweighs any likely harm to those in receipt of such payments.
78. Having balanced the legitimate interests of Mr Hutcheon with those of the Chief Officers, the Commissioner has concluded that the legitimate interests identified by Mr Hutcheon outweigh any prejudice to the rights and freedoms or legitimate interests of the Chief Officers. She is satisfied that disclosure of the actual amount of PRP paid to each Chief Officer would not be unwarranted, and so condition 6 of schedule 2 of the DPA can be met in this case.
79. The Commissioner therefore finds, for the reasons already outlined in relation to condition 6, that disclosure of this information would be fair. The Council has not put forward any specific arguments as to why the disclosure of the information would be unlawful, although their reference to the rights under Article 8 of the ECHR could be relevant to this test.
80. The Commissioner has given consideration to the Council's comments regarding Article 8 of the ECHR.
81. The Commissioner is always mindful of the right to respect for individuals' private and family life provided by Article 8, but she is satisfied in this case, having balanced the interests of the data subjects against those of Mr Hutcheon, and in the absence of any further comments on this point from the Council, that disclosure of the information is proportionate and would not breach Article 8.
82. For the reasons set out above, the Commissioner is satisfied that disclosure of this information would not be unlawful on these grounds. The Commissioner can identify no other reason why disclosure would be considered unlawful.
83. Having found disclosure of the withheld information to be both fair and lawful, and in accordance with condition 6(1), the Commissioner therefore concludes that disclosure of the actual amount of PRP paid to each Chief Officer would not breach the first data protection principle.
84. The Commissioner therefore concludes that the exemption in section 38(1)(b) has been wrongly applied by the Council in relation to the actual amount of PRP paid to each Chief Officer, which addresses part (c) of Mr Hutcheon's request.



85. The Council also considered, but discounted, condition 3 of schedule 2 of the DPA. Having also considered this condition, the Commissioner agrees with the Council that it would not be applicable in this case, but given the Commissioner's findings in relation to condition 6, the fact that condition 3 does not apply does not affect the outcome of the decision.

Decision 025/2008

86. Within its submissions, the Council argued that this application from Mr Hutcheon falls to be considered against the previous Commissioner's *Decision 025/2008 Mr George Gebbie and the Scottish Legal Aid Board*. This considered, in part of *Decision 025/2008*, whether the Scottish Legal Aid Board was correct to apply the exemption in section 38(1)(b) of FOISA to information regarding the actual bonus payments made to Scottish Legal Aid Board employees over a two year period, together with the bases and performance indicators met by those individuals to justify the payments.
87. In *Decision 025/2008*, the Commissioner concluded that the Scottish Legal Aid Board had acted correctly in withholding this information from Mr Gebbie in line with section 38(1)(b) of FOISA. The Commissioner accepted, in that case, that it would not be within the expectation of the individuals concerned (both those in a senior role, such as the Chief Executive, and those in less senior roles) that information of the detail requested by Mr Gebbie would be disclosed to the public.
88. Part of the Commissioner's consideration in *Decision 025/2008* concerned the terms of the Financial Reporting Manual (FRM), which is applicable to non-departmental public bodies and the guidance for the appointment and remuneration of Chief Executives. Consideration of this information, together with other submissions from the Scottish Legal Aid Board concerning the individual's legitimate expectations along with the information that was already publicly available informed the Commissioner's conclusion.
89. As mentioned above, in this case for Mr Hutcheon, the Commissioner has taken account of the terms of the Local Authority Accounts (Scotland) Amendment Regulations 2011 (the Regulations), and the influence that the requirements in these would have on the expectation of the 29 Chief Officers in respect of the information that should be disclosed into the public domain regarding the amount of PRP payments they actually received.
90. Given that the Regulations require the publication of far more detailed information than the FRM, and the requirement for consent from relevant individuals is not a feature of the Regulations as it was in the FRM, the Commissioner considers that at the time of Mr Hutcheon's request, it would not have been beyond the expectations of the 29 Chief Officers, whose personal data was under consideration, that information about the actual amount of PRP they received would be disclosed into the public domain.



91. Therefore, where these two decisions deal with similar information and the application of the exemption in section 38(1)(b) of FOISA, the frameworks which inform the amount and type of information which should be published by authorities regarding the actual amount of PRP paid to staff are different. As a consequence of these differences, and the more detailed nature of the information that local authorities are required to publish under the Regulations, the Commissioner considers that the expectations of the staff in this case would be different to the expectation of those staff whose bonus payments were being considered in *Decision 025/2008*.
92. In differentiating between these two cases, the Commissioner also notes that four years have passed since *Decision 025/2008* was issued and, as the First Tier Tribunal commented (see above), there is evidence of remuneration schemes reflecting a trend towards greater transparency in terms of PRP.

DECISION

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

The Commissioner finds that by relying on the exemption in section 38(1)(b) of FOISA for information as to the objectives and targets each of the 29 Chief Officers had to meet, the Council complied with Part 1.

However, he found that the actual amounts of PRP paid to each Chief Officer was not exempt under section 38(1)(b) of FOISA, and so by withholding this information, the Council failed to comply with Part 1 and, in particular, with section 1(1) of FOISA.

The Commissioner also found that in failing to provide Mr Hutcheon with all recorded information it held falling within scope of part (a) of his request, the Council failed to comply with Part 1 and in particular, with section 1(1) of FOISA.

The Commissioner therefore requires the Council to provide Mr Hutcheon with the list of names of those who considered/decided how much PRP each Chief Officer should receive and also the actual amount of PRP that each Chief Officer received in financial year 2009/2010 by 16 April 2012.

Decision 041/2012
Mr Paul Hutcheon
and North Lanarkshire Council



Appeal

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

Margaret Keyse
Acting Scottish Information Commissioner
1 March 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

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

(...)

- (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.

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

1. The data subject has given his consent to the processing.
...
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
...
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.
...