

Decision 176/2007 - Mr J Andrew and Falkirk Council

Request for information relating to details of individual expense claims

Applicant: Mr J Andrew
Authority: Falkirk Council
Case No: 200700492
Decision Date: 27 September 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 176/2007 - Mr J Andrew and Falkirk Council

Request for information relating to individual expenses of a particular group of Council employees – personal information - documents withheld under section 38(1)(b) read in conjunction with section 38(2)(a)(i) or (b) of the Freedom of Information (Scotland) Act 2002 (FOISA) – Commissioner upheld the Council’s decision.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 38(1)(b) and (Personal information)

Data Protection Act 1998 (DPA): sections 1 (Basic interpretive provisions) (definition of “personal data”); Schedule 1, Part 1 paragraph 1 (The first data protection principle) and Schedule 2 condition 6(1) (Conditions relevant for purposes of the first principle: processing of any personal data).

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

Other decisions referred to:

Decision 078/2006 *Mr Leslie Pryde and Falkirk Council*

Facts

Mr Andrew requested information relating to the individual expenses of a particular group of employees from Falkirk Council (the “Council”). The Council withheld this information on the grounds that it was exempt from disclosure under section 38(1)(b) (Personal Information) of FOISA. The Council upheld this decision following an internal review. Mr Andrew remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Andrew’s request for information in accordance with Part 1 of FOISA. He did not require Falkirk Council to take any action.



Background

1. On 7 January 2007, Mr Andrew wrote to the Council requesting information relating to Corporate and Commercial Services – Estates Management. The specific information requested was as follows:
 - (i) Expenses details for Estates Management Section; and
 - (ii) Individual expenses, salary gradings and job descriptions for six named Falkirk Council employees.
2. On 5 February 2007, the Council wrote to Mr Andrew in response to his request for information. It provided details of expenses attributable to Estates Management Section for financial accounting period 05/06. The Council confirmed that it provided information for accounting year 05/06 because the applicant had not specified a particular financial year. The Council also provided information relating to job descriptions with corresponding salary grades.
3. The Council's response confirmed that it also held information relating to individual expenses for the named staff. However, the Council withheld this information on the grounds that it was exempt from disclosure under section 38 (Personal information) of FOISA. It stated that this information was personal information relating to the individuals concerned, and that disclosure would breach the Data Protection Act 1998 (the DPA). The Council noted that the information requested by Mr Andrew had been sought before, and this request had been subject to my decision 078/2006, *Mr Pryde and Falkirk Council*. In this decision, I found that the Council acted in accordance with Part 1 of FOISA when withholding information about expenses claimed by same individuals (excluding one person who was named by Mr Andrew, but not Mr Pryde) to whom Mr Andrew's request also related.
4. On 15 February 2007, Mr Andrew wrote to the Council requesting a review of its decision. In particular, Mr Andrew expressed concern that the Council had adopted the same arguments to withhold the information as in its response to the request considered in my decision 078/2006. Mr Andrew questioned the Council's reliance on these same arguments, which he felt were not relevant in the different circumstances of his request.
5. On 15 March 2007, the Council wrote to notify Mr Andrew of the outcome of its review. The Council upheld its decision to withhold the information concerning individual expenses and, confirmed that in doing so it was relying on the exemption in section 38(1)(b), read in conjunction with section 38(2)(a).



6. On 2 April 2007, Mr Andrew wrote to my Office, stating that he was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Andrew had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.
8. Mr Andrew's request for review and subsequent application expressed dissatisfaction only with the part of his request concerning information on individuals' expenses. I will not consider the other parts of his original request any further in this decision.
9. I would also note that in his request for review, Mr Andrew also made a new and wider information request for information about expenses claimed by all staff working within the same department as those originally named. As this new request went beyond the original request to which Mr Andrew's application relates, I will not consider this in my decision.
10. On 9 May 2007, the Council was notified in writing that an application had been received from Mr Andrew and was asked to provide my Office with specified items of information required for the purposes of the investigation.
11. On 24 May 2007, the Council responded by forwarding to this Office a sample of the claim forms for one of the individuals identified in Mr Andrew's request.
12. The case was then allocated to an investigating officer.

The Investigation

13. The investigating officer subsequently wrote to the Council on 18 June 2007, asking it to provide comments on the application and to respond to a number of specific questions regarding the application. The Council was also asked to provide copies of all the information being withheld by it for the purposes of the investigation.



14. The Council responded on 12 July 2007, providing some specific comments regarding this case. However, for its detailed reasoning with respect to the application of the exemption in section 38(1)(b), the Council referred me to the submissions it provided previously in relation to the request considered in decision 078/2006. The Council confirmed that its decision to adopt this same reasoning was based on the close similarities between the two requests and that disclosure of the information would make the information available to the individual to whom it was previously refused.
15. The Council enclosed with its submissions copies of both Mr Pryde's and Mr Andrew's information requests, which are indeed very similar. Both sought information relating to expenses claimed by a number of individual Council employees. The employees named in the two requests overlap almost entirely – with one additional person named in Mr Andrew's request who was not named in Mr Pryde's request. The Council also provided a copy of the submissions made in relation to Mr Pryde's case and indicated that it wished to rely on the same reasoning in relation to its decision to withhold the information sought by Mr Andrew.
16. I will address the Council's position in more detail below, however to summarise the Council took the view that the information requested was exempt by virtue of sections 38(1)(b) of FOISA, because the information requested constitutes personal data of the individuals to whom Mr Andrew's request relates, as defined by section 1 of the DPA, and that to disclose the information requested would breach the first data protection principle, which states that personal data must be processed fairly and lawfully.
17. In the case that prompted my decision 078/2006, the Council had argued that disclosure would not be fair in the particular circumstances of Mr Pryde's case. The Council had submitted that disclosure of the information requested would have an extremely negative effect on the data subjects given the history of the applicant's relationship with the staff members concerned. Although the applicant in this case does not have the same relationship or history with the Council, it submitted that given the similarity of the two requests, the same considerations applied in this case.
18. In his application to my office, Mr Andrew indicated that a major factor in my decision 078/2006 was the potential for distress if the information requested were disclosed to the specific applicant. He suggested it was unfair that the reasoning applied in that decision be carried forward to his own request for information. He submitted that it was "surely absurd" that the circumstances involving one individual should prevent others from understanding how their taxes are spent.



19. The investigating officer wrote to Mr Andrew on 19 July 2007 seeking further submissions on how his own legitimate interests, and those of the wider public, would be served by disclosure of information about the expenses of these particular individuals. Although FOISA does not require an applicant to disclose their reasons for requesting information, I noted that in a case like this it can be helpful to understand why information has been sought, in order to properly understand the circumstances of that case.
20. Mr Andrew did not respond to this invitation to make additional submissions, and so (in line with the approach explained in that letter) this decision has been reached in the light of only the submissions included within Mr Andrew's original application to me.

The Commissioner's Analysis and Findings

21. In coming to a decision on this matter I have considered all of the information and the submissions that have been presented to me by both Mr Andrew and the Council and I am satisfied that no matter of relevance has been overlooked
22. I must decide whether the Council acted in accordance with Part 1 of FOISA when withholding the details of expenses claimed by six named employees of the Council.
23. Mr Andrew's request did not specify whether he was seeking total sums claimed over the course of a particular year or years, or whether he wanted a detailed breakdown of expenses by type (e.g. travel, subsistence etc.) or by individual claim for each individual.
24. The Council did not seek clarification from Mr Andrew on this point, but it has indicated to me that it would apply the same reasoning to withhold both the total sums claimed by each individual, and more detailed breakdowns of their claims. I have considered both of these types of information in what follows below.

Section 38(1)(b) – Personal Information

25. The Council argued in its submissions that the information requested is exempt under section 38(1)(b) of FOISA, which read in conjunction with section 38(2)(a)(i) or (b) provides that information is exempt information if it is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles set out in Schedule 1 of the DPA.



26. In this case, the Council has stated that disclosure of the requested information under FOISA would breach the first data protection principle.
27. In considering this exemption I am therefore required to consider firstly whether the information under consideration is personal data and if so, whether release of the information to Mr Andrew would indeed breach the first data protection principle.
28. It should be noted that section 38(1)(b) is an absolute exemption and as such if engaged, is not subject to the public interest test contained in section 2(1)(b) of FOISA.
29. As previously noted, the Council has relied in this case on submissions and arguments presented in the investigation that led to my decision 078/2006. Although my analysis and findings in relation to Mr Andrew's request for information are detailed below, the Council's submissions are summarised more fully along with my comments on these in paragraphs 25-37 of decision 078/2006. This can be accessed through the following link:

<http://www.itspublicknowledge.info/UploadedFiles/Decision078-2006.pdf>
30. The focus of this investigation is to consider whether the arguments previously presented by the Council remain relevant when considered in relation to Mr Andrew's request for information, and therefore whether the decision not to disclose the information should be maintained also in this case.

Is the information under consideration personal data?

31. Section 38(2)(a) of FOISA refers explicitly to the definition of "personal data" contained in section 1(1) of the DPA. "Personal data" are defined in section 1(1) of the DPA as follows:

data which relate to a living individual who can be identified:

- a) from those data
- 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.



32. Mr Andrew requested information relating to named individuals' expenses. I consider that information detailing an individual's expense claims to their employer is information relating to a living individual which has that individual as its focus. I am therefore satisfied that the information requested by Mr Andrew constitutes the personal data of those individuals as defined by the DPA.

Would release of the information breach the first data protection principle?

33. The Council has submitted that disclosure of the requested information would breach the first data protection principle, which 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 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met

34. I have considered the definition of "sensitive personal data" in section 2 of the DPA and I am satisfied that the personal data in question is not sensitive personal data. Therefore I am not required to consider whether any of the conditions in Schedule 3 can be met.
35. Although primarily focusing on the issue of 'fairness', the Council has argued that it has an obligation of confidentiality towards its employees implicit within its employee/employer relationship and to release the information would be unlawful and would therefore breach the first data protection principle. As I concluded in decision 078/2006, I am satisfied that there is no explicit obligation of confidentiality attached to this relationship and further that any obligation of confidentiality implicit in the employer / employee relationship would not automatically be breached by release of the information under consideration in this case. I am aware of no other legal requirements which would be breached should the information be released and the Council did not advise me of any other such legal requirement and I therefore conclude that it would not be unlawful to release the information in question.
36. Turning my attention to the principle of fairness, I have had regard to the following "Freedom of Information Awareness Guidance 1 from the Information Commissioner, who is responsible for overseeing and regulating the DPA. This can viewed at;
<http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>
37. According to the above Guidance, the assessment of fairness includes looking at whether the third party or parties would expect that his/her information might be disclosed to others and/or whether the third party or parties would expect that his/her information would be kept private.



38. Having considered the information and submissions provided to my Office, I accept that the expectations of the individuals concerned would be that the information about their individual expense claims would not be disclosed without their consent.
39. I understand that the Council sought the views of officials in the course of their handling of Mr Pryde's request and I accept that in the light of the response to consultation in that case, officials could be expected also to deny their consent in response to this request, made less than two years later. I am also satisfied that following my decision in Mr Pryde's case, these officials would not expect their individual expenses details to be provided in response to an information request of this type.
40. Whilst I have ordered the disclosure of information about expenses claimed by individual employees in previous decisions, I have made it very clear that each case must be considered on its own merits. In this particular case, Mr Andrew's request for information to the Council is very similar to the request made by Mr Pryde and considered in decision 078/2006. It was decided in that case that the information should not be disclosed due to the very specific circumstances surrounding the individuals concerned. I accepted that disclosure would be likely to cause unjustified stress to the individuals concerned.
41. In this case, given the relatively brief period of time that has passed since that decision, I am satisfied that disclosure in response to Mr Andrew's request would be likely to have an effect of the same nature on the same group of individuals. In my view it is reasonable to conclude that the individuals concerned would not expect information of the type requested by Mr Andrew to be released into the public domain in response to a freedom of information request.
42. I am therefore satisfied that release of the information withheld in response to Mr Andrew's request would amount to unfair processing for the purposes of the first data protection principle. I have taken into consideration Mr Andrew's comments with respect to transparency and the public interest, however, in all circumstances of the case I am satisfied none of the conditions laid out in Schedule 2 of the DPA could be met.
43. I feel that it is relevant to add that, in this particular case, it is my view that condition 6 of Schedule 2 of the DPA (the only condition which I consider might be considered to apply in this case) could not be met in this instance. Condition 6 enables processing (for example by disclosure) to be considered fair for the purposes of the first data protection principle where it is necessary for the legitimate interests pursued by the third party to whom information is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights or freedoms or legitimate interests of the data subject/s.



44. I accept that Mr Andrew has a legitimate interest in disclosure of the information in as much as the Council and its employees should be accountable with respect to spending and expenses claims made. However, I have noted that the Council has provided Mr Andrew with departmental figures relating to expenses incurred in financial year 2005/06. The Council has also offered to provide Mr Andrew with details for additional accounting periods. I believe that the legitimate interests identified by Mr Andrew are at least partly served through this disclosure. It is my view that disclosure of more detailed information, would entail an unwarranted intrusion into the privacy of the individuals concerned.
45. Although Mr Andrew's legitimate interests would also be served by the disclosure of more detailed information, when this is weighed against the legitimate interests of the individuals concerned I am of the view that the substantially negative effect to the data subjects of this information going into the public domain means that disclosure would be unwarranted. Further details to support this view are contained in paragraphs 32 – 37 of decision 078/2006. I have no reason to believe that the situation has changed in such away since that decision was made to justify release at this time.
46. Consequently, I am satisfied that the information relating to third parties which has been withheld, is exempt from release in terms of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b).

Decision

I find that Falkirk Council (the Council) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Andrew, and in particular by applying the exemption in section 38(1)(b) of FOISA to that information.

I do not require the Council to take any action in response to this decision.



Appeal

Should either Mr Andrew or Falkirk 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 notice.

Kevin Dunion
Scottish Information Commissioner
27 September 2007



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.

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 1: 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

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.