



Scottish Information
Commissioner

Decision 049/2008 Mr Jim Roberts and East Ayrshire Council

Depute head teacher's training record

Applicant: Mr Jim Roberts
Authority: East Ayrshire Council
Case No: 200700435
Decision Date: 31 March 2008

Kevin Dunion
Scottish Information Commissioner

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Decision 049/2008 Mr Jim Roberts and East Ayrshire Council

Depute head teacher's training record – information withheld under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 on the grounds that disclosure would breach the first data protection principle (fair and lawful processing) – upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement), 2(1) and (2)(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i) and (b) (Personal information).

Data Protection Act 1998 (the DPA) section 1 (Basic interpretative provisions) and Schedule 1, Part 1, paragraph 1 (The first data protection principle).

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

Facts

Mr Roberts wrote to East Ayrshire Council (the Council) requesting information about the training records of specified members of staff at Cumnock Academy. The Council provided Mr Roberts with certain of this information but withheld the training record of a specified depute headteacher under section 38(1)(b) of FOISA (on the grounds that to disclose such information would be unfair and would breach the first data protection principle). Following a review which upheld the Council's original decision, Mr Roberts applied to the Commissioner for a decision.

Following an investigation, the Commissioner accepted that the first data protection principle would be breached by disclosure of the information requested by Mr Roberts and therefore that the Council had dealt with his request in accordance with Part 1 of FOISA.



Background

1. Mr Roberts wrote to the Council on 7 January 2007, requesting information about training that had been provided by the Council to specific members of staff at Cumnock Academy in East Ayrshire.
2. In his request, Mr Roberts asked for a copy of “the record of all training provided by East Ayrshire Council as a responsible employer to my wife in her employment at Cumnock Academy from her commencement of duties at that school.” Mr Roberts also requested similar training information in respect of the headteacher and the senior depute head (both named) between the dates of 1 January 2000 and 1 January 2007.
3. The Council responded to Mr Roberts on 6 February 2007, advising him that the training records he had requested constituted personal information and therefore were subject to the DPA. The Council informed Mr Roberts that it considered the release of this type of information was appropriate for senior staff with high profile positions, but that for other staff its release would be unfair as it would breach their rights under the DPA. In light of this the Council provided Mr Roberts with the information he had requested about the head teacher, but withheld the training information of both the depute head and Mr Roberts’ wife. It advised him, however, that his wife’s records were available to her by way of a subject access request under the DPA.
4. Mr Roberts was dissatisfied with this response and he wrote back to the Council on 15 February 2007, requesting a review of its decision to withhold the information relating to the senior depute head. He suggested that the senior depute head would deputise for the headteacher when appropriate and that his career development plan would specify what information, instruction, supervision and training would be required to allow that individual to fulfil this “high profile role or position” in a competent and satisfactory manner, similar to that undertaken by the head teacher. Mr Roberts argued that consequently the training matrix should be the same for both postholders and he asked the Council to reconsider its decision to withhold the training information of the senior depute head.
5. The Council carried out a review and responded to Mr Roberts on 16 March 2007. In its letter the Council informed Mr Roberts that it had reviewed all of the correspondence to date. The Council upheld its original decision and advised Mr Roberts that it was of the view that the training record of the senior depute head was exempt from disclosure in terms of section 38(1)(b) of FOISA, as the information sought was personal data and its disclosure would breach the data protection principles.



6. Mr Roberts was dissatisfied with the outcome of the review and on 22 March 2007 applied to me for a decision in terms of section 47(1) of FOISA.
7. Mr Roberts' application was validated by establishing that he had made a valid request for information to a Scottish public authority and had applied to me only after asking the authority to review its response to that request.

The Investigation

8. On 18 April 2007 the Council was informed that a valid application had been received from Mr Roberts and asked to provide my Office with copies of all information withheld from Mr Roberts. This was duly provided and the case was allocated to an investigating officer.
9. On 18 May 2007 the Council was invited to provide its comments on the application, as required by section 49(3)(a) of FOISA, and in particular on its use of the exemption in section 38(1)(b) of FOISA. These were duly provided.
10. In the Council's refusal notice, issued to Mr Roberts in response to his initial request, the Council advised Mr Roberts that it considered the information requested to be personal information and that its release would contravene the first data protection principle. The Council advised that in reaching this view it had taken into account one of my previous decisions, *Decision 013/2005 Mr Wright and Perth & Kinross Council* (available on my website: <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2005/200500978.asp>).
11. The Council relied specifically upon paragraph 34 of that decision, where I took the view that it would be in the interests of openness, transparency and accountability for more senior officials to be open to scrutiny, noting that such officials would be less likely to expect details such as their professional qualifications to remain confidential. I concluded that the disclosure of such details in respect of certain senior officials would not breach the data protection principles, while the disclosure of equivalent information in respect of more junior officials would. Having regard to that decision, the Council decided to release information about the headteacher but not other staff.



12. In its submission to me the Council stated that it had taken the view that staff occupying Heads of Service posts or above had high-profile positions and accordingly less right to privacy in their public roles. The Council stated that it had reached this position having considered the relevant guidance provided by the (UK) Information Commissioner and my *Decision 013/2005*. The Council added that as a consequence it provided information on the salaries, expenses, qualifications and training of those employees routinely under FOISA, salary and expenses information being provided pro-actively on its website.
13. In this instance the Council sought the views of both the headteacher and the specified deputy headteacher to see if they had any objections to their training records being released. Neither individual wanted their respective training records released. However, the Council decided to disclose the head teacher's training record to Mr Roberts, while withholding the training record of the deputy head teacher.
14. The Council argued that its decision in this case was made based on the seniority of the staff involved and their wishes on the matter, taking into consideration available guidance (e.g. the Information Commissioner's guidance concerning access to information about public authorities' employees: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_spec ialist_guides/public_authority_staff_info_v2.0_final.pdf). The Council stated that the names of the head teachers in its schools were well-known. These names would appear on each school's letterhead and on the Council website, and as such they had a reasonably high profile. However the Council maintained that this was not the case with other staff in schools. Instead, it was argued that the deputy headteacher in question occupied a less senior role and did not consent to the release of the information. The Council therefore refused to release the deputy head teacher's training record and argued that this was in line with its current practice.
15. Further, the Council argued that the deputy headteacher in question was not the only deputy headteacher within Cumnock Academy who could deputise in the absence of the headteacher, the individual in question being one of a number of deputy head teachers within the school and there being no post of senior deputy headteacher in this or any of its schools. It was argued that if the Council accepted the argument that the training record of the deputy headteacher should be released then it would face a similar challenge for the next level down (who might also be required to deputise on occasion).



16. The Council also pointed out that training was based on the needs of the individual, taking account of the job role and the individual's previous qualifications, skills and experience, and therefore would be very personal to the individual concerned. It submitted that the skills required to run a school in the short term in the absence of the head were not the same as those required to do so on a long-term basis, the range of decisions required over a day being limited (with the possibility of deferring matters, including strategic decisions, until the head's return).
17. Mr Roberts' arguments for disclosure of the information are basically as narrated above in paragraph 4. I will consider the arguments presented by both parties more fully in my analysis and findings below.

The Commissioner's Analysis and Findings

18. In coming to a decision on this matter, I have considered all of the submissions and other information that have been presented to me by both Mr Roberts and the Council and I am satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) – personal information

19. Section 38(1)(b) of FOISA, read with section 38(2)(a)(i) or (as appropriate) section 38(2)(b) exempts from disclosure information which is personal data, where its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. The DPA defines personal data in section 1(1) 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 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.”

The data protection principles are those set out in Schedule 1 to the DPA.
20. It should be noted that the section 38(1)(b) exemption described above is an absolute exemption in that it is not subject to the public interest test laid down by section 2(1)(b) of FOISA.



21. Firstly, I have to determine whether the information in question is personal data. The information is the training record of the depute head teacher over the period specified by Mr Roberts, which consists of a list of training courses (with details of some of the training providers) attended by the individual concerned over that period.
22. Having considered the information that has been withheld by the Council, I am satisfied that the depute head teacher's training record constitutes that individual's personal data. The depute head teacher can be identified from the training record. The record is biographical in a significant sense and it focuses on the depute head teacher. I therefore accept that it relates to the depute head teacher in question. I must now consider whether the release of this information would (as the Council has argued) breach the first data protection principle.
23. The first data protection principle requires 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 is also met. "Sensitive personal data" is defined in section 2 of the DPA: having considered the information in question in the light of this definition, I am satisfied that it is not sensitive personal data and therefore that the conditions in Schedule 3 are not relevant to it.
24. The (UK) Information Commissioner considers the question of fairness in his *Freedom of Information Act Awareness Guidance No 1 – Personal Data* (http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201_%20personal_information_v2.pdf). Examples given in this guidance of the types of questions which should be asked when assessing whether the disclosure of personal data (which would be a form of processing) would be fair are:
 - Would disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
 - Would the third party expect that his or her information might be disclosed to others? Is disclosure incompatible with the purposes for which it was obtained?
 - Has the person been led to believe that his or her information would be kept secret?
 - Has the third party expressly refused consent to disclosure of the information?



- Does the legitimate interest of a member of the public seeking information about a public authority, including personal information, outweigh the rights, freedoms and legitimate interests of the data subject?
25. The guidance distinguishes between information relating to an individual's private and public lives, suggesting that information about an individual acting in an official or work capacity is less likely to deserve protection. Potential damage or distress to the individual in a personal or private capacity should be taken into account, although the section 38(1)(b) exemption should not be used simply to spare officials embarrassment in their working lives. It accepts that there will be information relating to a public authority's employees which it would be unfair to disclose, while also acknowledging that the strong public interest in the expenditure of public funds may mean that it is not unfair to disclose certain information about staff. In all of this, an important consideration will be the seniority of the staff concerned, it being less likely that disclosure will be unfair the more senior the official is.
26. The guidance referred to above is supplemented by *Data Protection Technical Guidance: Freedom of Information – Access to information about public authorities' employees* (the document referred to in paragraph 16 above). In considering the expectations of the employees concerned regarding disclosure, this document states that more senior staff and those carrying out public functions should expect more information about them to be disclosed. While asking authorities to consider whether the information requested can be edited to remove personally identifiable information, it concedes that this will not be feasible where (as in this case) the information is specifically about the activities of a named employee.
27. The duties of a deputy headteacher are set out in Annex B of the agreement, "A Teaching Profession for the 21st Century" (<http://www.scotland.gov.uk/Resource/Doc/158413/0042924.pdf>), which was the outcome of consultations held between employers, teacher representatives and the Scottish Executive following recommendations made in the McCrone Report.
28. Annex B of the agreement states: "The role of the Deputy Headteacher is to assist and, where necessary, to deputise for the Headteacher in the conduct of the schools affairs." Clearly, this constitutes a senior position within the school. It is a rather less senior position within the authority as a whole, however, and largely I accept the Council's arguments that the deputy headteacher's role is rather less public in nature than that of the headteacher. I also note the Council's reliance on my *Decision 013/2005 Mr Wright and Perth & Kinross Council* and consider the position of deputy headteacher to be considerably less senior than that of Executive Director (being the only postholder disclosure of whose details was required by that earlier decision).



29. While I do not consider that disclosure of the depute head teacher's training record withheld in this case could reasonably be expected to cause unnecessary or unjustified distress or damage to the person to whom the information is about, I do consider it appropriate to consider that person's reasonable expectations as to disclosure of the information in question. In doing so, I note the individual's stated objection to the information being disclosed (while accepting that this is relevant but not conclusive in the circumstances).
30. I also note the arguments advanced by both parties in relation to the role of the depute head teacher and its relationship to training. Having considered all relevant information available to me, I accept that the individual specified in this case is not in the unique position Mr Roberts claims, that the expectations of that individual when deputising in the ordinary course of events will not be comparable to what is expected of the headteacher on an ongoing basis, and that the depute head teacher's training needs and provision will differ accordingly. In any event, I accept that an individual employee's training information will, by its nature, be rather more personal in character than, say, information about that individual's pay and emoluments. Taking all of this into account, I do not accept that the reasonable expectations of the depute headteacher specified by Mr Roberts would have extended to disclosure of the information requested. In all the circumstances, noting that the depute headteacher is not a particularly senior employee of the authority as a whole, I do not consider that disclosure of that individual's training record would be fair.
31. Having concluded that disclosure of the information requested would be unfair, I am not required to go on to consider whether it would be unlawful or whether it would meet any of the conditions in Schedule 2 to the DPA. I therefore agree that the information was properly withheld under section 38(1)(b) of FOISA.



Decision

I find that East Ayrshire Council complied with Part 1 of FOISA in dealing with Mr Roberts' information request, the information withheld from Mr Roberts being properly withheld under section 38(1)(b) of FOISA.

Appeal

Should Mr Roberts or East Ayrshire Council wish to appeal against my decision, there is a 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 notice.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007

Margaret Keyse
Head of Investigations
31 March 2008



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

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

- (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 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

...