

Decision Notice



Decision 058/2008 Dunfermline and Coast Association of Community Councils
and the Scottish Ministers

Appointment of Scottish Water non-executive board members

Reference No: 200800054
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Summary

Dunfermline and Coast Association of Community Councils (DCACC) requested information relating to the appointment of Scottish Water non-executive board members from the Scottish Ministers (the Ministers). The Ministers provided DCACC with some of the information requested but withheld some specific information on the basis that it was personal information relating to the unsuccessful applicants and section 38(1)(b) of FOISA applied. Following a review, DCACC remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with DCACC's request for information in accordance with Part 1 of FOISA, by correctly applying section 38(1)(b) to the information withheld. He did not require the Ministers to take any action.

Relevant statutory provisions and other sources

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

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions - definition of personal data) and 2 (Sensitive personal data); Part 1 of Schedule 1 (The data protection principles - the first data protection principle).

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

Background

1. On 3 September 2007, DCACC wrote to the Ministers requesting the following information relating to the appointments for the Scottish Water non-executive board:
 - The list of candidates seeking appointment [request 1]
 - List of candidates referred to the Minister [request 2]



- The instructions from the Minister regarding the skills, knowledge and personal qualities the Minister felt was required [request 3]
 - The advert placed for the posts [request 4]
2. The Ministers responded on 28 September 2007. The Ministers supplied overall figures in response to requests 1 and 2, but refused to supply a list of named candidates on the basis that it was personal data under the DPA. The Ministers also supplied, in full, the information sought by requests 3 and 4.
 3. On 31 October 2007, DCACC wrote to the Ministers requesting a review of their decision with respect to requests 1 and 2. DCACC submitted to the Ministers that Scottish Water was a publicly owned body and that information on those seeking and obtaining appointment to that body should be in the public domain in the interests of accountability.
 4. The Ministers notified DCACC of the outcome of their review on 14 December 2007. The Ministers upheld their original decision to withhold the information sought by requests 1 and 2. The Ministers highlighted to DCACC that information pertaining to those who had been appointed was made public. They provided detailed reasoning as to why they did not consider disclosure of information relating to unsuccessful candidates to be consistent with the DPA.
 5. On 14 January 2008, DCACC wrote to the Commissioner's Office, stating that they were dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 6. The application was validated by establishing that DCACC had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 23 January 2008, the Ministers were notified in writing that an application had been received from DCACC and asked to provide the Commissioner's Office with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, providing them with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. In their submissions to this Office the Ministers submitted that they were also relying on section 30(c) of FOISA to withhold the information sought by DCACC.



Commissioner's analysis and findings

10. The Ministers submitted that the exemptions contained within sections 30(c) and 38(1)(b) of FOISA applied to the information sought by DCACC concerning the identities of those individuals seeking appointment to the non-executive board and the identities of those referred to the Ministers.
11. In addition, the Ministers submitted that section 30(c) of FOISA also applied to the information withheld insofar as disclosure of the names of the applicants for these public appointments would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs in terms of enabling such appointment processes to be effectively undertaken in future.

Section 38(1)(b) (Personal information)

12. With respect to their application of section 38(1)(b) of FOISA, the Ministers submitted that disclosure of the names of those applying for the Scottish Water non-executive board member posts, which they considered to be personal data for the purposes of the DPA, would contravene the first data protection principle on fair and lawful processing of personal data. The Ministers considered that of the six conditions for processing, as set out in Schedule 2 of the DPA, only the sixth might be of relevance but was not met in this particular instance.
13. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)), information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in Schedule 1 to the DPA.
14. In considering this exemption, the Commissioner is required to consider two separate matters: firstly whether the information under consideration is personal data and, if so, whether the release of the information would indeed breach any of the data protection principles.

Is the information under consideration personal data?

15. "Personal data" is 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 (see the full definition in the Appendix below).



16. The information in question (i.e. the names of individuals applying for the posts and those referred to the Minister) is clearly information from which these individuals can be identified, and which relates to them (by confirming their interest in a significant public appointment and their unsuccessful status – it is biographical in a significant sense and focuses on them). The Commissioner is therefore satisfied that the names of the applicants, recorded in a form which indicates that they were unsuccessful, constitute their personal data under the terms of the DPA.

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

17. 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 (of the DPA) is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
18. Having considered the definition of "sensitive personal data" in section 2 of the DPA, the Commissioner does not consider that the information sought by DCACC to fall into this category.

Is it fair to release the names of individuals applying for public appointments?

19. According to guidance ("Freedom of Information Act Awareness Guidance No 1") from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK, which can be viewed at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201_%20personal_information_v2.pdf, the assessment of fairness includes looking at whether the disclosure would cause unnecessary or unjustified distress or damage to the person whom the information is about, whether the third party would expect that their information might be disclosed to others and/or whether the third party has been led to believe that their information would be kept secret.
20. In their submissions the Ministers highlighted that none of those applying for these posts would have had any expectation that their names would be released. The Ministers referred to the job advertisement and the induction pack letter, where it was clearly stated that all correspondence relating to the application would be treated in strict confidence. The Ministers also argued that the disclosure of the information in question would serve no obvious purpose other than identifying the individuals concerned.



21. The Commissioner has considered all of the Ministers' submissions and has concluded that disclosure in this case would not be fair to the individuals concerned. In reaching this conclusion, the Commissioner has taken into account the fact that all applicants were provided with assurances that while certain personal information might be made public in the event of them being appointed, all correspondence relating to their application would be treated in strict confidence. Given that the information the DCACC is seeking relates entirely to the unsuccessful candidates (the identities of the successful candidates being in the public domain), who are by definition persons who do not occupy the public offices to which the requests for information relate, the Commissioner takes the view that these individuals would have no reasonable expectation that personal information contained in their applications (including their identities) would enter the public domain.
22. As the Commissioner has determined that it would be unfair to disclose the information in question, and the first principle requires the processing to be both fair and lawful, he is satisfied that the Ministers were correct in their application of section 38(1)(b) of FOISA. The section 38(1)(b) exemption is for this purpose an absolute exemption and therefore not subject to the public interest test.
23. As the Commissioner has determined that the Ministers were correct in their application of section 38(1)(b) of FOISA, he is not required to consider any further exemptions cited by the Ministers.

DECISION

The Commissioner finds that the Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by DCACC, by withholding the information referred to in requests 1 and 2 under section 38(1)(b) of FOISA.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
22 May 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.

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 –

- (i) paragraphs (a), (c) and (d); and

- (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

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;

...

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,



- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

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.