



Scottish Information
Commissioner

Decision 086/2006 Mr Tommy Sheridan, MSP and the Scottish Parliamentary Corporate Body
<i>Mortgages taken out by Members of the Scottish Parliament under the Edinburgh Accommodation Allowance</i>

Applicant: Mr Tommy Sheridan, MSP
Authority: The Scottish Parliamentary Corporate Body
Case Nos: 200502318 and 200503296
Decision Date: 22 May 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 086/2006 – Mr Tommy Sheridan, MSP and the Scottish Parliamentary Corporate Body

Request for information about mortgages taken out by individual Members of the Scottish Parliament under the Edinburgh Accommodation Allowance – information withheld on the basis of section 38(1) of the Freedom of Information (Scotland) Act 2002 – third party personal information – upheld by the Commissioner

Facts

Tommy Sheridan, MSP made separate requests in May and July of 2005 to the Scottish Parliamentary Corporate Body (the SPCB) for details of the claims made by Members of the Scottish Parliament (MSPs) who used the Edinburgh Accommodation Allowance (the EAA) to purchase private properties.

Much of the information requested by Mr Sheridan was subsequently provided to him by the SPCB. However, the SPCB refused to provide him with some of the information requested on the basis that the information is personal data which it would be unfair to disclose.

On both occasions, Mr Sheridan subsequently asked the SPCB to review its decision to withhold this information from him, but, on each review, the SPCB upheld its decision.

Mr Sheridan subsequently made two separate applications to the Scottish Information Commissioner for a decision as to whether the SPCB had been correct not to provide him with the information. Given that both applications related to the same subject, Mr Sheridan agreed to his applications being conjoined by the Commissioner. This decision notice therefore deals with both of Mr Sheridan's applications.

Outcome

The Commissioner found that the SPCB complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to supply Mr Sheridan with the information which was the subject of both applications to him on the basis that the information is exempt in terms of section 38(1)(b) of FOISA.



He also found that the SPCB failed to respond to Mr Sheridan on two occasions in line with section 10(1) and section 20(1) of FOISA. However, he does not require the SPCB to take any remedial action in relation to these breaches.

Appeal

Should either Mr Sheridan or the SPCB 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 of receipt of this notice.

Background

1. On 26 May 2005, Mr Sheridan emailed the SPCB, asking it to provide him with the identity of the 48 MSPs who had used the EAA to purchase private properties and to tell him when the properties were purchased by each MSP and how much the mortgages were for at the time of purchase.
2. The SPCB replied to Mr Sheridan on 2 June 2005. With its response, the SPCB enclosed a list of the names of the 48 MSPs in question. However, the SPCB refused to supply Mr Sheridan with the dates on which the properties were bought and how much the mortgages were at the time of the purchase on the basis that the information is exempt under section 38 of FOISA. This was on the basis that the information is personal data and that release of the information would breach the first data protection principle (which states that the processing of personal data must be fair and lawful).
3. Mr Sheridan was unhappy with this response and asked the SPCB to review its decision not to supply the information on 10 June 2005 (this was received by the SPCB on 13 June 2005). In his request for review, Mr Sheridan argued that the information should be in the public domain, given that it relates to the spending of public money and that it would show to what extent MSPs may have gained financially from the EAA.
4. The SPCB subsequently carried out a review and upheld its original decision. Mr Sheridan was notified of this on 12 July 2005.
5. Mr Sheridan remained unhappy that the information had been withheld from him and, on 27 July 2005, asked the Scottish Information Commissioner to determine whether the information should have been withheld from him.



6. Mr Sheridan made a related information request to the SPCB on 28 July 2005. This time, Mr Sheridan asked for confirmation as to whether each of the 48 MSPs in question purchased a property or whether there were any joint purchases (i.e. by more than one MSP). He also asked for details of the maximum EAA available and the amounts claimed by each of the MSPs from 1999; whether the Parliament monitors any financial gain made by individual MSPs when properties bought using the allowance are then sold and how many MSPs have taken out more than one mortgage using the EAA since 1999.
7. The SPCB provided details of the maximum EAA available and the amount claimed by each of the 48 MSPs on 23 September 2005. The Parliament also confirmed that the Parliament does not monitor any financial gain made by an individual MSP. However, the Parliament refused to confirm whether each of the 48 MSPs purchased a property or if there were any joint purchases, on the basis that the information is exempt under section 38 of FOISA as it is personal data and the release of the information would breach the first data protection principle (which states that the processing of personal data must be fair and lawful).
8. Mr Sheridan asked the SPCB to review its decision to withhold this information on 4 November 2005. In his request for review, Mr Sheridan commented that he failed to see what is unfair about members of the public knowing whether the MSPs who use public money via the EAA to purchase properties have indeed used it to buy and sell property and whether MSP couples have both made use of the scheme to purchase a property.
9. The SPCB carried out a review and upheld its original decision. In advising Mr Sheridan of the outcome of the review on 8 December 2005, the SPCB commented that MSPs claiming the EAA are required to provide evidence of the amount claimed by them. It also clarified that the SPCB only holds the information provided by the MSP at the time the initial request for the allowance is made and that the EAA does not require MSPs to notify the SPCB of changes to their circumstances.
10. Mr Sheridan was dissatisfied with the outcome of the review and, on 13 December 2005, submitted a second application to the Commissioner. This application was subsequently conjoined with Mr Sheridan's first application.

The Investigation

11. Mr Sheridan's applications were validated by establishing that he had made valid information requests to a Scottish public authority (i.e. the SPCB) and had appealed to me only after asking the authority to review its responses to his requests.



12. The investigating officer sought comments from the SPCB in relation to each of the applications made by Mr Sheridan in terms of section 49(3)(a) of FOISA.

Submissions from the SPCB

13. In commenting on the applications, the SPCB confirmed that it held the information requested by Mr Sheridan and that the information had been withheld from him on the basis that it consisted of personal data which it would be unfair to disclose under section 38(1)(b) of FOISA.
14. The SPCB argued that section 7(4)(a) of the Data Protection Act 1998 (the DPA) requires the consent of an individual, who can be identified from the information requested, to be obtained before the information is disclosed and that, in this case, the SPCB did not have the consent of the 48 MSPs to provide the information. In addition, by responding to some of Mr Sheridan's questions, the information may disclose information regarding third parties' personal and financial affairs and, again, the SPCB did not have the consent of the third parties to do this.
15. Having established that it did not have consent, the SPCB considered whether it would be reasonable in all the circumstances to comply with the request in the absence of this consent. However, the SPCB considered that it would not be reasonable in the circumstances to seek consent as it would be unlikely to be forthcoming from all parties involved.
16. The SPCB also took into account the expectations of those involved on how the data would be processed and for what purpose. The SPCB took the view that although the MSPs who had purchased property using the EAA would expect this fact to be disclosed (indeed, this information has been published by the SPCB), the MSPs would not expect third party data to be disclosed, nor would they or the third parties involved have expected the information requested to be disclosed.
17. The SPCB therefore considered that it would be unfair to release the information.

Submissions from Mr Sheridan

18. Although applicants are not required to specify why they want to access specific information, Mr Sheridan has made it clear that he wants to be able to estimate reliably how much the property bought by MSPs using the EAA has increased and how much MSPs have gained financially through the use of public funds. Mr Sheridan commented that "an MSP's private property dealings are entirely their business" but also commented that under the EAA the property purchase is facilitated by public money.
19. The investigating officer also gave Mr Sheridan an opportunity to comment on the submissions made by the SPCB.



20. In response, Mr Sheridan commented that what is paramount is that the EAA is a public fund used to compensate MSPs for overnight accommodation and related expenses in pursuit of their fulfilment of their public duties as MSPs. He also commented that the EAA was at no time intended or designed to allow or facilitate MSPs to make personal profit from the subsequent sale of properties purchased under the EAA.
21. Mr Sheridan stated that, given the EAA is paid out of public money, the use of and consequences of applying these monies must legitimately lie in the public domain. He believes that if an MSP receives a direct public subsidy that leads, inadvertently or otherwise, to that individual personally profiting from the subsidy, then that is of legitimate public concern.
22. In response to the comments made by the SPCB on third parties, Mr Sheridan takes the view that the EAA scheme is designed for MSPs, not their partners, and that if third parties decide to become part of a financial arrangement involving the use of public monies to purchase a property, they have to accept that their identities may be revealed.

The Edinburgh Accommodation Allowance

23. The EAA is an allowance which can be claimed by MSPs whose constituencies are generally outwith Edinburgh and the Lothians (full details of the EAA and the constituencies for which the EAA can be claimed can be viewed on the Scottish Parliament's website at <http://www.scottish.parliament.uk/msp/MSPAllowances/index.htm>.) MSPs whose main residence lies within one of the 28 constituencies which are generally furthest away from Edinburgh (such as Aberdeen Central, Dumbarton, Kilmarnock & Loudon and Orkney) are eligible for a total allowance under the EAA of £9,446 for each financial year, comprising either an allowance of up to £83.97 per night that the MSP requires to stay overnight for Parliamentary duties in Edinburgh or an allowance to cover the costs of residential accommodation within Edinburgh and the Lothians, where the costs are a necessary consequence of having to stay overnight for Parliamentary duties in Edinburgh.
24. The EAA can therefore be used by MSPs for one of the 28 constituencies furthest away from Edinburgh to pay for costs such as rent or the interest on the capital required to purchase a property. Any profit made on the subsequent sale of the property by the MSP does not have to be repaid at any time to the Parliament, (nor would any loss be recoverable from the Parliament.)



The Commissioner's Analysis and Findings

25. The SPCB has relied on section 38(1)(b) of FOISA to withhold the following information from Mr Sheridan:

- the dates on which properties were bought by the 48 MSPs who used the EAA to claim interest payments on mortgages
- how much the mortgages were for at the time the properties were bought and
- whether each of the 48 MSPs had bought the property jointly (i.e. with another MSP).

26. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)), information is exempt information if it constitutes personal data and the release of the information would breach any of the data protection principles contained in the DPA.

27. In this case, the SPCB has argued that the release of the 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.

28. I am therefore required to consider two separate matters: firstly, whether the information which the SPCB refused to supply to Mr Sheridan is personal data and, if so, whether the release of the information to Mr Sheridan would breach the first data protection principle.

29. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1) of FOISA.

Is the information personal data?

30. "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, 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."



31. The definition of what amounts to “personal data” for the purposes of the DPA was considered in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746. In that case, the (English) Court of Appeal decided that whether or not data constituted “personal data” for the purposes of the legislation depended on the relevance or proximity of the data to the data subject. The court considered that the information required to be biographical in a significant sense and that the information should have the subject as its focus.
32. In my view, information about when a person bought a property and how much their mortgage was for falls within the definition of personal data.
33. Mr Sheridan also asked the Parliament to tell him which of the 48 MSPs had purchased a property or purchased a property jointly.
34. Again, in my view, information about whether an MSP purchased property on his/her own or jointly with another MSP is personal data within the definition set out in paragraph 31 above.
35. As a result, I must now go on to consider whether the release of the information would breach any of the data protection principles. In this case, the SPCB has argued that release of the information would breach the first data protection principle.

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

36. The first data protection principle states that personal data must 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 is also met. (I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that any of the information sought by Mr Sheridan falls into this category.) In this case, the SPCB is of the opinion that the release of the information would be unfair as the MSPs in question would have no expectation that the information would be released.
37. According to guidance from the Information Commissioner (“Freedom of Information Awareness Guidance 1”, which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.



38. As mentioned above, the SPCB has argued that because it does not have the consent of the MSPs (or the third parties) in question to release information about the dates on which property was bought etc., then the information cannot be released. In taking this view, the SPCB has referred to section 7(4)(a) of the DPA. However, consent is not a prerequisite to release and this is made clear by section 7(4)(b), which allows information to be released without consent if it is reasonable in all the circumstances. Guidance from the Information Commissioner (referred to in paragraph 37 above) sets out the circumstances in which it may be reasonable for information to be released, only one of which is the consent of the third party.
39. I have taken account of the arguments put forward by Mr Sheridan as to why the information should be released. These are set out in more detail above but, to summarise, Mr Sheridan takes the view that because the MSPs in question have received public money through the EEA to assist in the purchase of properties, then the public have a right to know the details of the purchases.
40. However, I am not satisfied that it would be fair for details of the dates on which properties were bought by the MSPs, how much the mortgage was for at the time the property was bought or whether the property was purchased jointly with another MSP to be released to Mr Sheridan. I am satisfied that there is no expectation on the part of the MSPs that information about the properties which they have bought would be made public or, indeed, that this information would be used to calculate what profit, if any, they made on the sale of the property. While it is well known that the cost of property in Edinburgh has increased over the past few years (as it has in most of Scotland), property prices are outwith the direct control of the MSPs in question.
41. The SPCB has already released into the public domain details of the recipients of the EEA and the amount of the allowance each of those MSPs have received. I take the view that the SPCB was correct to release this information into the public domain. The EEA is, as Mr Sheridan has argued, paid out of public funds. MSPs should expect the information already released by the SPCB to be made publicly available. As a result, the release of this information by the SPCB did not breach the first data protection principle.
42. However, I am concerned that the information which is the basis of Mr Sheridan's applications to me goes beyond what is fair in the circumstances.



43. In many situations, in considering the first data protection principle, the interests of individuals must be balanced against the need to ensure that payments made out of public funds have been made correctly. However, in considering whether the release of information is fair, regard must also be had to whether the information relates to a person's business life or private life. I am satisfied that a distinction can be drawn between matters which relate to a person's business circumstances (for example allowances received by an MSP) and those which are intrinsically personal. In this instance, I take the view that details of when a property was purchased, the amount of the mortgage and whether the property was purchased with another MSP relate to the MSPs' private lives.
44. In the circumstances, I therefore find that the release of information to Mr Sheridan would not be fair. In finding that, I am not required to consider whether there is a condition in schedule 2 to the DPA which would allow the information to be processed or to consider any of the other data protection principles set out in the DPA.
45. Given that I have found that the release of the information to Mr Sheridan would be unfair, I must find that the information is exempt in terms of section 38(1)(b) of FOISA.
46. In coming to this decision, I took into account the fact that details of the purchase and sale of heritable property (including details of mortgages) must be recorded with the Registers of Scotland and that, provided a person has sufficient details to instruct a search to be carried out (such as an address), then information such as the date on which property is bought will be available through the Registers.
47. However, in considering what information is available from the Registers of Scotland, I also took into account the duties which the SPCB has as a data controller under the DPA and the fact that the data was processed by the SPCB for limited purposes. Having done so, I remained of the view that the SPCB was correct not to release the information to Mr Sheridan on the grounds that the release of the information would have breached the first data protection principle.

Technical breaches of FOISA

48. During the investigation, I have also considered whether the SPCB complied with the timescales in FOISA when responding to Mr Sheridan's information requests. In terms of section 10(1) of FOISA, a public authority must reply to an information request within 20 working days of receipt. In terms of section 20(1) of FOISA, a public authority must also reply to a request for a review within 20 working days of receipt.
49. I note that in responding to Mr Sheridan's later information request and request for review, the SPCB took longer than 20 working days to respond.



Decision

I find that the Scottish Parliamentary Corporate Body (SPCB) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to supply Mr Sheridan with the information which is the subject of both of his applications to the me on the basis that the information is exempt under section 38(1)(b) of FOISA.

I also find that the SPCB failed to respond to Mr Sheridan on two occasions in line with section 10(1) and section 20(1) of FOISA. I do not require the SPCB to take any action in relation to these breaches.

Kevin Dunion
Scottish Information Commissioner
22 May 2006