

Decision Notice



Decision 093/2008 Mrs Kathleen Shutt and Argyll & Bute Council

Details of grants paid for common repairs to a block of flats

Reference No: 200701508

Decision Date: 7 August 2008

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mrs Shutt requested details of the total grant and the grant per apartment paid for common repairs to a block of flats from Argyll & Bute Council (the Council). When the Council did not respond to her initial request, Mrs Shutt requested a review. In its response, the Council provided details of the total grant but withheld the grant per apartment under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mrs Shutt remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the information withheld was not exempt from disclosure in terms of section 38(1)(b) of FOISA and required the Council to release details of the grant paid for each apartment to Mrs Shutt.

Relevant statutory provisions and other sources

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

Data Protection Act 1998 (DPA): section 1 (Basic interpretative provisions) (definition of personal data); schedules 1 (The data protection principles) (the first and second data protection principles) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

Housing (Scotland) Act 1987 section 246(6) and (7) (Conditions to be observed with respect to houses in respect of which an improvement grant has been made, and registration thereof).

The Housing Grants (Form of Notice of Payment) (Scotland) Regulations 2003: Schedule, Part I, paragraph 1

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

Decision of the Information Commissioner - FS50087443 Maldon District Council

http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50087443.pdf



Background

1. On 20 August 2007, Mrs Shutt wrote to the Council requesting the total grant cost and the grant per apartment for common repairs to a specified block of flats.
2. The Council did not respond to this request for information. On 9 October 2007, Mrs Shutt wrote to the Council requesting a review of its handling of this request.
3. The Council responded on 7 November 2007 and apologised for the delay in responding to Mrs Shutt's request. The Council provided details of the total approved grant but withheld the remaining information concerning the grant paid for each apartment on the basis that it was personal data and exempt from disclosure under section 38 of FOISA.
4. On 11 November 2007, Mrs Shutt wrote to the Commissioner, stating that she 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.
5. The application was validated by establishing that Mrs Shutt 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

6. On 30 November 2007, the Council was notified in writing that an application had been received from Mrs Shutt and was asked to provide the Commissioner with the information withheld as required for the purposes of the investigation. The Council provided the information requested and confirmed that the exemption applied to the grant for each apartment was that in section 38(1)(b) of FOISA. Further background information on the case was also supplied at this point. The case was then allocated to an investigating officer.
7. On 14 January 2008, the Council was asked to make comments on the application as required under section 49(3)(a) of FOISA. In particular, the Council was asked to provide details of its judgement that the exemption in section 38(1)(b) applied, and to provide further details as to how the grants were allocated.. The Council responded to this request on 22 January.
8. More detailed submissions on the exemption in section 38(1)(b) were sought from the Council in further letter dated 7 March 2008. The Council provided further comments on 1 April 2008.
9. The investigating officer also wrote to Mrs Shutt on 10 March 2008, to seek her comments on why she believed disclosure of the information withheld would serve a legitimate interest for the purposes of the test in condition 6 of schedule 2 of the DPA. Mrs Shutt responded to this request and provided her comments on 25 March 2008.



10. The submissions of both the Council and Mrs Shutt are summarised where relevant in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, all information and submissions that have been presented to the Commissioner by Mrs Shutt and the Council have been considered and the Commissioner is satisfied that no matter of relevance has been overlooked.
12. Since the Council has released the total grant for the common repairs, this decision will concentrate solely on the question of whether the Council acted in accordance with Part 1 of FOISA by withholding the details of the grants per apartment for the common repairs.

Section 38(1)(b) – personal information

13. The information withheld in this case is a breakdown per apartment of the grant awarded for common repairs of the named block of flats. The Council submitted that this information was personal data relating to the person applying for the grant for each apartment, and that disclosure of this information would breach the first and second data protection principles. It maintained that it was consequently exempt information under section 38(1)(b) of FOISA (as read with section 38(2)(a)(i) or (b)).
14. In order for a public authority to rely on this exemption it must first show that the information which has been requested is personal data for the purposes of the DPA, and second, that release of the information would contravene any of the data protection principles laid down in the DPA.
15. The particular exemption under section 38(1)(b) of FOISA is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information under consideration personal data?

16. 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 (the definition is set out in full in Appendix 1).
17. The Commissioner accepts that the information withheld from Mrs Shutt (the grant awarded in respect of each apartment) relates to living individuals who are identifiable from that information or from that information and other information in the possession of the data controller, i.e. the Council. It reveals the amount paid in response to a grant application made by the owner or occupant of each apartment for the maintenance of a property in which they have a personal interest.



18. In reaching this view, the Commissioner has noted that the grants payments were calculated taking into consideration the income and outgoings of the grant applicant (and his or her partner). Therefore, disclosure of the grant paid per apartment would also provide some insight into the more general personal finances of the applicants concerned.
19. Although Mrs Shutt has not asked for the applicants for the grants to be named, in most instances the applicant for this type of grant will be the occupant of the property concerned, and so will be easily identifiable by association with the address. Where the grant applicant is not also the occupant (e.g. where the owner does not occupy the apartment but made the application), the Commissioner takes the view that this person is also likely to be readily identifiable to others such as the tenant of the property concerned.
20. Therefore the Commissioner is satisfied that information withheld by the Council constitutes personal data as defined by the DPA.
21. However, FOISA does not exempt information from release simply because it is the personal data of a third party. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)) only if 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 the DPA. As noted above, the Council has argued that, in this case, to disclose the personal data would breach the first and second data protection principles.

First data protection principle – Personal data shall be processed fairly and lawfully

22. The first data protection principle requires that the processing of personal data (which would include the disclosure of data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data 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.
23. The Commissioner is satisfied in this case that the information withheld does not constitute sensitive personal data.
24. The Council submitted that it would not be reasonably foreseeable to the individuals applying for the grants that the information would be disclosed to the level of detail sought by Mrs Shutt. The Council noted that with access to the total grant figure paid, along with information about the application process, it would be possible for Mrs Shutt and others to calculate the net accessible income of each applicant with a substantial degree of accuracy. It later suggested that “all the other information required to deduce income” [of the applicants] was already in the public domain and so disclosure of the grant figure would provide the remaining “piece of the jigsaw”. The Council maintained that disclosure would be unfair for the purposes of the first data protection principle.



25. The Council has made no case that disclosure of the personal information would be unlawful, other than by being unfair for the purposes of this principle on the grounds set out above. The remainder of this section will therefore consider only whether disclosure of the personal information in question would be fair, and whether any of the conditions set out in Schedule 2 of the DPA can be met in this case.

Is it fair to release details of the grant paid for each apartment?

26. According to guidance from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK ("Freedom of Information Act Awareness Guidance No 1"), which can be viewed at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%20_1_%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 his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.

In addition, this guidance also states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

27. As noted above, the Council has submitted that it would be unfair to disclose information because it would enable others to deduce the level of net income of each of the grant applicants. The Council has provided a copy of the data protection statement and consent form provided to applicants and this makes no reference to public disclosure of the grant figure. This appears to support the claim that the applicants would not expect the disclosure of the information about the level of grant awarded.
28. The Commissioner has considered the Council's arguments about the ability of another person to deduce the net income of the grant applicant should the grant paid be disclosed. He accepts that an informed person in possession of background information about the process by which grants are calculated could gain some insight into the personal finances of the applicant.



29. However, the Commissioner considers any available insight to be limited only to net income level for the household, as the calculation takes into consideration a number of different types of income and expenditure of both the applicant and any partner. Using these variables, a net available income is then calculated, and value of the grant awarded will depend on this figure and the band within which it falls. Given the number of variables involved in these calculations, the Commissioner does not accept that the disclosure of the grant awarded per apartment would enable a person to infer any further details of the personal finances of the grant applicants concerned, beyond the identification of the band within which the net income falls. It would not, for example, allow salary or other income levels to be deduced.
30. The Commissioner has also noted that the Council's application forms indicated that certain information and conditions associated with the grants would be recorded on the title of the properties concerned.
31. The Council was therefore asked whether the grants concerned would routinely be recorded within publicly accessible registers within the Registers of Scotland. In response, the Council confirmed that such grants are generally recorded in the Land Register or the Register of Sasines as a type of charge against the property concerned.
32. Further research undertaken in the course of the Commissioner's investigation established that, under the terms of section 246(6) and (7) the Housing (Scotland) Act 1987, a local authority is required to record improvement or repair grants in this manner. Further, part I, paragraph 1 of the Schedule to the Housing Grants (Form of Notice of Payment) (Scotland) Regulations 2003 specifies the form of the Notice required by section 246(7) of the Housing (Scotland) Act. This includes the value of the grant paid.
33. Where recording in line with these provisions has taken place, the Council noted that it would be entitled to refuse a request for the grant payment figures under FOISA on the grounds that the information was already publicly available for the purposes of section 25. In this case however, the grants had not been recorded against the properties at the time of Mrs Shutt's request for information. [The Commissioner understands that the Council did record some of the grant information against the properties during the course of the investigation into this case. The Council also indicated that it expected the remaining grants to be recorded in the same manner in due course.]
34. The Commissioner has therefore noted that the applicants for the relevant grants made their application on a form which made clear that certain information about this grant would be recorded publicly in relation to the property concerned. The fact that the Council routinely complies with its statutory obligation to record details of grants paid in this manner, enabling any interested person to view these, undermines its argument that disclosure to Mrs Shutt or more generally under FOISA would be unfair. Although disclosure under FOISA would provide the information in a different manner than is routine or specifically provided for by statute, it would provide the same amount of detail as would have been ultimately made publicly available given the Council's statutory obligations and routine practice.
35. Having considered all of the above, the Commissioner has concluded that it would not be unfair for the Council to disclose the grant paid in respect of each apartment to Mrs Shutt.



Can any of the conditions in Schedule 2 of the DPA be met?

36. It is the Commissioner's view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in line with an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued 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.
37. Condition 6 requires a consideration of the balance between (i) the legitimate interests of those to whom the data would be disclosed, which, in this context, are members of the public (see section 38(2)(a) of FOISA) and prejudice to the rights, freedoms and legitimate interests of the data subjects, which, in this case, are the individuals who live in the other flats. However, because the processing must be "necessary" for the legitimate interests of members of the public to apply, only where (i) outweighs or is greater than (ii) should the personal data be disclosed.
38. Mrs Shutt was invited to comment on this matter. Her response explained that she had some concerns about the way in which the repairs on the relevant block of flats were undertaken and the grant payments made. Having considered Mrs Shutt's comments, the Commissioner is satisfied that Mrs Shutt and the wider public has a legitimate interest in understanding how public funds are used and allocated to contribute to building repairs of this type. In particular, Mrs Shutt has a legitimate interest in seeking information that will assist her in understanding whether the grants were fairly allocated, and whether this is a matter in which she wishes to pursue her concerns further through available complaint channels.
39. The Commissioner has considered whether the fact that the grant details concerned would ultimately be recorded in publicly available registers means that Mrs Shutt's legitimate interests in disclosure separately under FOISA should be given limited weight at the time of her request. He has noted that there is no specified timescale within which the grant should be publicly recorded. The Housing (Scotland) Act 1987 simply states that such recording should take place after the completion of the works concerned. The Commissioner recognises, therefore, that a significant period of time might elapse between the award of a grant and its public recording against the property concerned.
40. In this particular case, the Commissioner accepts that Mrs Shutt held a legitimate interest in the information withheld at the time of making her request irrespective of the fact that it could be anticipated that the information withheld would ultimately be made publicly available. The legitimate interests can be identified in her own concerns about in the specific works, and the wider public's legitimate interest in understanding how the Council uses and distributes public funds to support building improvement and repair works. The Commissioner accepts that there is a general legitimate interest in accessing details of the value of grants awarded in respect of individual properties in the period between its award and the later recording of it against the property.



41. Against the legitimate interests of Mrs Shutt and the general public, as identified above, the Commissioner is required to balance the legitimate interests of the data subjects in preserving their privacy and ensuring that their personal data is not processed in a manner that can be considered an unwarranted intrusion into their private lives.
42. The Commissioner is aware that the grant paid in respect of each applicant both directly and indirectly reveals information about the financial affairs of the grant applicants. It directly shows the sum provided in the form of a grant to contribute to repairs to the property concerned, but the level of grant paid could also indirectly offer insights into the overall net income of the grant applicant (and their partner). In general, the Commissioner accepts the disclosure of this level of information might be considered to be somewhat intrusive, although as noted above, he does not accept that any detailed insights into the personal finances of the grant applicants could be deduced from the information requested by Mrs Shutt, along with further information about the grant award process.
43. However, as noted above, the Council has a statutory obligation to register details including the value of any grant of this type in the publicly available registers held by the Registers of Scotland as a charge against the property.
44. Given that the Council has an obligation to make grant information available in this manner, and that the specific grants concerned would ultimately be recorded publicly, the Commissioner cannot accept in this case that disclosure under FOISA at the time of Mrs Shutt's request would have led to an unwarranted intrusion into the lives of the individual grant applicants. He takes the view that, by applying for the grants concerned, the individuals accepted that the grant would be publicly recorded in relation to the property. In these circumstances, disclosure of the payments in the context of Mrs Shutt's information request would make no further intrusion into the private lives of those concerned that was already to be expected given the statutory framework within which such grants are administered and the Council's routine practices.
45. The Commissioner has therefore concluded in this case that the legitimate interests of Mrs Shutt and the general public in disclosure of the grant paid for each apartment outweighs any prejudice to the right and freedoms or the legitimate interests of the data subjects. He therefore concludes that the test in condition 6 of schedule 2 of the DPA can be met in this instance.
46. Having concluded that the processing of this information via disclosure would be fair, and that condition 6 can be met, the Commissioner is satisfied that the disclosure is not unlawful for the purposes of the first data protection principle. He therefore concludes that there would not be any breach of the first data protection principle by disclosure of the information withheld in this case.

Second data protection principle

47. The second data protection principle provides that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be processed in any manner incompatible with that purpose or those purposes.



48. The sections on the interpretation of the Second Principle (in Part II of schedule 2 of the DPA) further provides that in deciding whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, consideration will be given to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.
49. The Council has argued that disclosure of the grant paid (which was not obtained by the Council) would enable the recipient to determine the net income of the grant applicants (which was provided by the applicants on the grant application forms). The Council argued that such disclosure would go beyond the purposes for which this information was gathered.
50. The Commissioner has considered this argument along with comments made in decisions from the Information Commissioner (responsible for the enforcement of both the DPA and the Freedom of Information Act 2000 [FOIA]) that address the interpretation of the second data protection principle in the context of requests made under freedom of information law.
51. In his decision reference FS50087443 (Maldon District Council), the Information Commissioner briefly considered whether the second data protection principle would be breached by release of certain personal data in response to a request under FOIA. In particular, the Maldon District Council had argued that because disclosure of information in response to freedom of information requests had not been specified in a fair collection notice issued to the data subjects concerned, disclosure of the information gathered in response to a request under FOIA would breach the second data protection principle. The Information Commissioner commented on this argument as follows:

The [Information] Commissioner considers that this is not a correct interpretation of the Data Protection Act. If [Maldon District] Council were correct in its interpretation, no disclosures of third party data would be permitted in response to FOI requests except where data subjects had been given prior notice. This would include cases where requests for information identified individuals acting in a public or official capacity in addition to information relating to their private lives.

The [Information] Commissioner considers that the correct interpretation of Principle 2 in this context is that the disclosure of third party data in response to a request submitted in accordance with other statutory rights is not inherently incompatible with any other lawful purpose for which information may be obtained. Principle 2 may, however, restrict the purposes for which a third party to whom personal data are disclosed may subsequently process those data.

The [Information] Commissioner considers that the central issue in considering whether or not the FOI Act requires the disclosure of personal data is not the second data protection principle, but rather the first principle.



52. The Commissioner considers this reasoning to be relevant also in this case. He does not consider the processing of data in response to requests under FOISA to be incompatible with the other purposes for which data concerning the grant applications was gathered, particularly bearing in mind that there is a statutory obligation for the Council to record information about the grants on publicly available registers.
53. In this instance, having considered the limited arguments put forward by the Council on this principle, the Commissioner has concluded that these do not demonstrate that disclosure of the grant paid in respect of each apartment would breach the second data protection principle.

Conclusion

54. The Commissioner has therefore found that disclosure of the information withheld in this case would not contravene either the first or the second data protection principle. He has therefore concluded that the exemption in section 38(1)(b) of FOSIA was misapplied in this case. He now requires the Council to provide Mrs Shutt with details of the grant paid in respect of each of the relevant apartments.

DECISION

The Commissioner finds that Argyll & Bute Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information requested by Mrs Shutt concerning grants paid in respect of individual apartments. He found that the exemption in section 38(1)(b) of FOISA had been wrongly applied to this information, and so the Council acted in breach of section 1(1) by withholding it.

The Commissioner therefore requires Argyll & Bute Council to release the information regarding the allocated grant and apartment, by 22 September 2008.

Appeal

Should either Mrs Shutt or Argyll & Bute 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.

Kevin Dunion
Scottish Information Commissioner
7 August 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.

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
 - (ii) [...]
 - (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.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

PART II INTERPRETATION

...

The second principle

- 5 The purpose or purposes for which personal data are obtained may in particular be specified—
 - (a) in a notice given for the purposes of paragraph 2 by the data controller to the data subject, or
 - (b) in a notification given to the Commissioner under Part III of this Act.
- 6 In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, regard is to be had to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

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.

Housing (Scotland) Act 1987

246 Conditions to be observed with respect to houses in respect of which an improvement grant has been made, and registration thereof

(..)

(6) Where a local authority pay an improvement grant or, in a case where an improvement grant is payable partly in instalments as the improvement works progress and the balance after the completion of the works in respect of a house, they shall specify in the notice or



record mentioned respectively in subsections (7) and (8) the matters specified in subsection (9).

(7) If subsection (6) applies, the local authority shall, where the applicant for the grant was not a tenant-at-will or was a tenant-at-will who since applying, has acquired his landlord's interest in the tenancy, cause to be recorded in the General Register of Sasines or registered in the Land Register, as the case may be, a notice in such form as may be prescribed.

The Housing Grants (Form of Notice of Payment (Scotland) Regulations 2003

SCHEDULE

Regulation 2

NOTICE OF PAYMENT OF [IMPROVEMENT GRANTS] [REPAIRS GRANT] [GRANT FOR MEANS OF ESCAPE FROM FIRE FOR A HOUSE IN MULTIPLE OCCUPATION]

UNDER SECTION [246(7)] [248(5)] [249(6)] OF THE HOUSING (SCOTLAND) ACT 1987

PART I

1. This Notice confirms that [name and designation of local authority] has paid [an improvement grant] [a repairs grant] [a grant for means of escape from fire for houses in multiple occupation] of [£] to [name and address of grant recipient] in respect of works carried out on the house described in Part II of this Notice in accordance with the provisions of the Housing (Scotland) Act 1987, as amended ("the Act").