

Decision Notice



Decision 075/2009 Mr Douglas Cassidy and North Lanarkshire Council

Name of a Councillor consulted by a particular constituent

Reference No: 200900517
Decision Date: 29 June 2009

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Douglas Cassidy (Mr Cassidy) asked North Lanarkshire Council (the Council) for the name of a Councillor who had provided advice to a constituent in relation to a planning application dispute. The Council withheld this information, citing the exemption in section 38(1) (b) of the Freedom of Information (Scotland) Act 2002 (FOISA) which allows public authorities to withhold information if it is personal data and if its disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (the DPA). Following a review, Mr Cassidy remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that North Lanarkshire Council had dealt with Mr Cassidy's request for information in accordance with Part 1 of FOISA, by withholding the name of the Councillor concerned. He did not require the Council to take any action.

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); 38(1)(b), (2)(a)(i) and (b) (Personal information)

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

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 5 November 2008, Mr Cassidy wrote to the Council seeking information in connection with a legal dispute between him and another person on a matter relating to title conditions. He referred to enclosed correspondence from the other party to this dispute, which suggested that, after that party had sought advice on the dispute from a Councillor, the Councillor had then discussed the matter with and received guidance from the Council's Legal Services department. Mr Cassidy's request made clear that he believed that this other person had benefited from legal advice provided by the Council. He requested:



- a. the name of the Councillor involved;
 - b. the advice provided by the Council [i.e. by the Legal Services department] to the Councillor;
 - c. the legal basis for the Council providing a legal service to a member of the public;
 - d. a copy of the Code of Conduct for Councillors.
2. Only part (a) of this request is under consideration in this case, and so this decision will not detail the Council's responses to the other parts of Mr Cassidy's requests.
 3. The Council's response was provided on 25 November 2008. The Council withheld the name of the Councillor involved in terms of section 38(1)(b) of FOISA, on the basis that it was personal data, disclosure of which would contravene at least one of the data protection principles).
 4. On 16 December 2008 Mr Cassidy wrote to the Council requesting a review of its decision, stating that he did not accept that the name of the Councillor should be withheld.
 5. The Council notified Mr Cassidy of the outcome of its review on 23 January 2009. The Council upheld its original decision and provided a more detailed explanation of its application of the exemption in 38(1)(b) of FOISA,
 6. On 11 March 2009, Mr Cassidy wrote to the Commissioner stating that he was dissatisfied with the outcome of the Council's review insofar as it had not released the name of the Councillor concerned and stating that he wished to apply for a decision in terms of section 47(1) of FOISA.
 7. The application was validated by establishing that Mr Cassidy 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

8. On 18 March 2009, the Council was notified in writing that an application had been received from Mr Cassidy and was asked to provide the Commissioner with the information withheld from him (i.e. the name of the councillor in question). The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



10. In its response, the Council provided submissions supporting its application of the exemption in section 38(1)(b).
11. The investigating officer also contacted Mr Cassidy and asked him for his views and comments regarding his legitimate interests in accessing the information under consideration. Mr Cassidy responded with arguments explaining why he considered he had a legitimate interest in the information.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Cassidy and the Council and is satisfied that no matter of relevance has been overlooked.

Consideration of section 38(1)(b)

13. The Council has applied the exemption in section 38(1)(b) of FOISA to the name of the Councillor.
14. The exemption under section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or as appropriate section 38(2)(b)) of FOISA, provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
15. In order for a public authority to rely on this exemption, it must therefore show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
16. The Council submitted that the information requested by Mr Cassidy was personal data, the release of which would contravene the first data protection principle.
17. The Council expressed the view that the whole circumstances of the contact, including the subject matter and the identity of the Councillor contacted, is the personal data of the constituent (as well as of the Councillor) and that it expects any member of the public to be entitled to contact any one of his or her Councillors without expectation or fear that such contact or his or her decision as to which Councillor to contact would be made public.



Is the information personal data?

18. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. Personal data is defined in section 1(1) of the DPA 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 (the full definition is set out in the Appendix).
19. In the first instance, the name of the Councillor concerned clearly relates to and identifies that person. The Commissioner is therefore satisfied that the name of the Councillor is the personal data of that person.
20. The Commissioner has also concluded that, considered in the particular context of Mr Cassidy's request, the name of the Councillor is the personal data of the named constituent. Mr Cassidy's request (which is information in the possession of the data controller) clearly identified the constituent by providing their full name and address. Therefore the release of the name of the Councillor would also disclose information relating to that constituent, confirming they consulted the named Councillor about a particular matter at the relevant time.

Would disclosure breach the first data protection principle?

21. As noted above, the Council has argued that release of the information in this case would breach the first data protection principle.
22. The first data protection principle requires that the processing of personal data (here, the release in response to an information request made under section 1(1) of 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. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met.
23. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the name of the Councillor does not fall into this category in this case. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.
24. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. If there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
25. The Commissioner will firstly go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the Councillor's name to be disclosed and whether the disclosure of this personal data would be fair and lawful.



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

26. The Council has argued that of all the conditions in Schedule 2 of the DPA, only the sixth might permit disclosure of the personal data in this case.
27. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and shares the 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 if 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(s) (in this case the Councillor and/or the constituent)
28. There are, therefore, a number of different tests which must be satisfied before Condition 6 can be met. These are:
 - Does Mr Cassidy have a legitimate interest in obtaining this personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could his legitimate interests be achieved by means which interfere less with the privacy of the Councillor and the constituent?
 - Even if the processing is necessary for the legitimate purposes of Mr Cassidy, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the Councillor and the constituent? This will involve a balancing exercise between the legitimate interests of Mr Cassidy and those of the Councillor and the constituent. Only if (or to the extent that) the legitimate interests of Mr Cassidy outweigh those of the Councillor and the constituent can the personal data be disclosed.

Does the applicant have a legitimate interest?

29. The investigating officer invited Mr Cassidy to comment on his legitimate interests. In his response he informed the Commissioner that he wished to establish the identity of the Councillor whom he (Mr Cassidy) believed had sought legal advice from the Council's legal department on behalf of someone who was involved in a planning dispute with Mr Cassidy.
30. Mr Cassidy went on to state that he wished to know the identity of the Councillor so he could complain to the Standards Commission about what he believed to be that Councillor's breach of professional conduct. He stated that as two individuals were involved in a planning dispute, it was unprofessional of the Councillor to use public resources to assist one of the parties and as such there was a wider public interest in the information being released.



31. The Commissioner has considered the arguments put forward by Mr Cassidy and he accepts that he does have a legitimate interest in having the information released because it will inform a potential complaint to the Standards Commission (be the complaint founded or unfounded). The Commissioner therefore concludes that Mr Cassidy has a legitimate interest in obtaining the personal data that has been withheld by the Council.
32. At this stage, the Commissioner would note that his consideration of this case does not require him to reach a view on whether Mr Cassidy's concerns about the Councillor's conduct are justified. He would point out that, during the investigation, the Council has maintained that no legal advice was provided to the Councillor by the Council.

Is disclosure of the information necessary to achieve those legitimate interests?

33. The Commissioner must now consider whether disclosure is necessary to achieve Mr Cassidy's legitimate interests.
34. The Council submitted that it had identified as Mr Cassidy's sole possible interest a desire to know whether and to what extent a person resident in the area had availed himself/herself to the right to contact an elected member.
35. However, Mr Cassidy has argued that he has a specific reason for his desire to know, that reason being his intention to submit a complaint to the Standards Commission, and to that end it is necessary for him to know the name of the Councillor concerned.
36. Taking into account the specific information requested by Mr Cassidy and how he intends to utilise that information, the Commissioner is satisfied that Mr Cassidy's aims cannot be achieved by any other means which would interfere less with the privacy of the third parties in question.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?

37. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Cassidy and/or those of the Councillor and the constituent concerned. Only if the legitimate interests of Mr Cassidy outweigh those of both the Councillor and constituent can the information be disclosed without breaching the first data protection principle.
38. The Commissioner notes that by releasing the name of the Councillor in question, he would be releasing information pertaining to a contact between two third parties and would be furnishing Mr Cassidy with personal knowledge of an interaction between both (a) the constituent and (b) the Councillor. He will begin by looking at any prejudice to the interests of the constituent.



Prejudice to the legitimate interests of the constituent

39. In a briefing recently published by the Commissioner¹, he notes a number of factors which should be taken into account in carrying out the balancing exercise mentioned above. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
 - the potential harm or distress that may be caused by the disclosure.
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individual as to whether the information would be disclosed.
40. As mentioned at paragraph 1 above, Mr Cassidy produced a letter which contained details relating to the planning dispute in question and argued that as some of the information surrounding the consultation with the Councillor was already in the public domain, to release the Councillor's name would not be prejudicial to the constituent's legitimate interests. However, on contacting the Lands Tribunal Service, the investigating officer ascertained that this letter was not actually available in the public domain, but rather only accessible to those parties involved in the planning dispute appeal to the Lands Tribunal. Mr Cassidy later confirmed this to be the case.
41. As noted above, the Council has indicated that it expects any member of the public to be entitled to contact any one of his or her Councillors without expectation or fear that such contact or his or her decision as to which Councillor to contact would be made public.
42. Having considered the requested information in the context of Mr Cassidy's request, although the withheld information is simply a name, disclosure of that name would also disclose the fact that this person was consulted by a particular constituent on a particular matter. As such, the Commissioner considers the information more widely to pertain to a private consultation between a Councillor (in their capacity as a representative of their constituency) and one of his/her constituents, and the Commissioner is satisfied that the constituent would not have had an expectation that details of which Councillor he consulted would be made public in the context of Mr Cassidy's information request.
43. As the information relates to his home and family circumstances, the Commissioner is of the view that the information being withheld relates to the private life of the constituent.

¹ "Personal information"- <http://www.itspubliknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



44. The Commissioner has been provided with no evidence to show that the constituent in question has consented to the disclosure of the information. He accepts that a person consulting their elected representative would do so in the expectation that the fact and content of that consultation would remain private.
45. In the circumstances, the Commissioner has concluded that disclosure of the name of the Councillor involved would entail an intrusion into the private life of the constituent concerned and would be prejudicial to the legitimate interests of that person. Having balanced the legitimate interests of the constituent against the legitimate interests identified by Mr Cassidy, the Commissioner finds the legitimate interests of Mr Cassidy to be outweighed by those of the constituent and as such he must conclude that disclosure would be unwarranted in this case.
46. In all the circumstances, the Commissioner is satisfied that Condition 6 of Schedule 2 is not met in this case. As a result, he must find that the disclosure of the information would breach the first data protection principle. Having drawn this conclusion in relation to the legitimate interests, rights and freedoms of the constituent involved, the Commissioner does not find it necessary to consider the arguments in relation to the legitimate interests, rights and freedoms of the Councillor in question.
47. Consequently, the Commissioner finds that the information is exempt from disclosure under section 38(1)(b) of FOISA

DECISION

The Commissioner finds that North Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Cassidy.

Appeal

Should either Mr Cassidy or North Lanarkshire 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.

Margaret Keyse
Head of Enforcement
29 June 2009



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

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.

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.

...