

Decision Notice



Decision 154/2011 Paul Hutcheon of the Sunday Herald and tie Limited

Salaries of officials earning over £100,000

Reference No: 201100863

Decision Date: 8 August 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Hutcheon asked tie Limited (tie) to provide information about the salaries of officials known to earn more than £100,000 per annum, for financial years 2009/10 and 2010/11, within bands of £5,000. Mr Hutcheon had previously received this information within bands of £20,000.

tie withheld the information under section 38(1)(b) of FOISA, and upheld this decision after review. Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner did not accept that disclosure would breach the first data protection principle and therefore found that tie had wrongly withheld the information under section 38(1)(b) of FOISA. He required tie to provide the information to Mr Hutcheon.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i), (2)(b), and (5) (definitions of “the data protection principles”, “data subject” and “personal data”) (Personal information)

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

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. Mr Hutcheon had previously requested information about all tie employees on a salary of over £100,000 in financial years 2009/10 and 2010/11. tie had provided Mr Hutcheon with the job titles of six employees on a salary of more than £100,000 and information about their respective salaries, within bands of £20,000 (e.g. £100,000 to £120,000).



2. On 19 January 2011, Mr Hutcheon asked tie to provide salary information for the six officials listed in the response to his previous request, for the same period, but in bands of £5,000. Mr Hutcheon asked tie to consider a decision from the Commissioner which he felt was relevant to his request.¹
3. On 22 January 2011, Mr Hutcheon asked tie to provide the salary of another named official, again within a band of £5,000 and for financial years 2009/10 and 2010/11.
4. On 23 February 2011, tie responded to Mr Hutcheon's request of 19 January 2011. tie advised Mr Hutcheon that it considered the information covered by his request to be exempt from disclosure under section 38(1)(b) of FOISA, and provided reasons for this decision.
5. On the same day, 23 February 2011, Mr Hutcheon requested a review of the response from tie, explaining that he believed the public had a right to know about the salaries of senior officials within the banding level requested, for transparency.
6. On 18 March 2011, tie responded to Mr Hutcheon's request of 22 January 2011. It provided salary details within a band of £20,000, but refused to provide the information within a band of £5,000. tie did not state which exemption applied, but confirmed that it considered the information to be the personal data of the official concerned and referred to its previous response regarding salary information for other members of the tie Executive Team.
7. On 21 March 2011, Mr Hutcheon requested a review of this response to his request of 22 January 2011, citing similar reasons to those set out in his request for review of 23 February 2011.
8. On 3 May 2011, tie provided Mr Hutcheon with its response to both his requests for review (23 February 2011 and 21 March 2011). tie confirmed that the requested information had been withheld under section 38(1)(b) of FOISA, and provided further reasoning in support of its decision.
9. On 10 May 2011, Mr Hutcheon wrote to the Commissioner, stating that he was dissatisfied with the outcome of tie's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
10. The application was validated by establishing that Mr Hutcheon 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.

¹ Decision 114/2010 Kenneth Roy, Editor of the Scottish Review and Shetland Health Board.
<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/201000151.asp>



Investigation

11. On 13 May 2011, tie was notified in writing that an application had been received from Mr Hutcheon, and was asked to provide the Commissioner with the information withheld. This was provided by tie and the case was then allocated to an investigating officer.
12. The investigating officer subsequently contacted tie, 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, tie was asked to explain why it considered that salary information could be provided in bands of £20,000 but not in bands of £5,000.
13. On 1 June 2011, tie provided the Commissioner with further information and comments in relation to Mr Hutcheon's application, and advised that it also wished to rely upon the arguments set out in its letters to Mr Hutcheon of 23 February 2011 and 3 May 2011. These are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

14. 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 Hutcheon and tie, and is satisfied that no matter of relevance has been overlooked.
15. On 20 June 2011, tie provided Mr Hutcheon with exact salary details for both its outgoing Chief Executive and the Tram Project Director (as the next in line to the Chief Executive), explaining that salary information for its Chief Executive was publicly available in its annual accounts. It confirmed that the Tram Project Director's salary details had also been placed in the public domain. The Commissioner will therefore exclude the information relating to these two officials from consideration in the following decision.

Section 38(1)(b) – personal information

16. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would breach any of the data protection principles set out in Schedule 1 to the DPA.
17. The exemption in section 38(1)(b) is an absolute exemption, not subject to the public interest test laid down by section 2(1)(b) of FOISA.



Is the information personal data?

18. 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. The Commissioner accepts that the withheld information is personal data as defined in section 1(1) of the DPA, as it relates to living individuals who can be identified from that information. The Commissioner will now go on to consider whether this information is exempt from disclosure under section 38(1)(b) of FOISA.

Would disclosure breach the first data protection principle?

20. tie argued that disclosure of the information requested by Mr Hutcheon would breach the first data protection principle, which requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met.
21. The Commissioner does not consider any of the personal data withheld in this case to be sensitive personal data. He will therefore consider only whether any of the conditions in Schedule 2 to the DPA would permit disclosure of the information.

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

22. The Commissioner considers that condition 6 of Schedule 2 of the DPA would appear to be the only condition which might permit disclosure of the personal data requested by Mr Hutcheon. Condition 6 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.
23. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
 - Does Mr Hutcheon have a legitimate interest in obtaining the personal data?
 - If he does, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects (the individuals to whom the data relate)?
 - Even if the processing is necessary for Mr Hutcheon's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?



24. There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Hutcheon must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that tie was correct to refuse to disclose the personal data to Mr Hutcheon.

Does Mr Hutcheon have a legitimate interest?

25. In its response to Mr Hutcheon's request (23 February 2011), tie invited him to explain why he had a legitimate interest in the information withheld. When requesting a review on 23 February 2011 (and for that matter in the subsequent request for review of 21 March 2011), Mr Hutcheon simply made reference to an interest in "transparency" when asking tie to reconsider its decision to withhold the information he had asked for, and stated that he wanted taxpayers and the wider public to have this information.
26. During the investigation, Mr Hutcheon was invited to provide further explanation of his reasons for requiring the salary information, and in particular why he required the information within bands of £5,000 rather than £20,000, as previously provided by tie.
27. Mr Hutcheon then explained that he believed senior salaries were a matter of acute public interest, and £20,000 bandings simply did not give the public the level of information they required for the purposes of transparency and accountability. He believed that bandings of £5,000 struck the right balance, as found in previous cases. He argued that the controversial nature of the Edinburgh tram project further amplified the need for transparency in relation to senior salary levels, and referred to the fact that some other public authorities had given out similar information in bands of £5,000, or in some cases had disclosed exact salaries.
28. The Commissioner accepts that Mr Hutcheon, an investigative journalist, has demonstrated a legitimate interest in the disclosure of information which he believes will increase transparency and accountability in relation to public money spent on the salaries of senior officials responsible for a high-spending (and high-profile) project.

Is disclosure of the information necessary for Mr Hutcheon's legitimate interests?

29. The Commissioner must decide whether Mr Hutcheon's legitimate interests require disclosure of the salaries within bands of £5,000. In doing so, it is relevant to ask whether the previous disclosure of salary levels within bands of £20,000 should be considered sufficient to satisfy those interests.
30. Mr Hutcheon has not explained to the Commissioner in any detail what advantage would be gained through disclosure of the salary payments in bandings of £5,000 rather than £20,000, but (as noted above) he has made clear his belief that the salary payments are a matter of acute public interest and that the controversy surrounding the Edinburgh tram project increases the need for transparency in this respect. He has referred to similar disclosures from other public authorities, where salary information was provided in the narrower £5,000 bandings or in full.



31. The Commissioner is prepared to accept that there is a difference, in degrees of accountability and transparency, between disclosure of a person's salary within a band of £5,000 and disclosure within a band of £20,000. While disclosure within a band of £20,000 may be sufficient for some purposes, the Commissioner accepts that disclosure within a band of £5,000 is required in relation to Mr Hutcheon's legitimate interests, bearing in mind that the expenditure in question relates to a matter of significant public debate.

Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

32. tie maintained that disclosure of the salary information within a band of £5,000 would have the effect of causing unwarranted prejudice to the rights, freedoms and legitimate interests of the members of staff concerned. Tie took the view that the information related to the private lives of those individuals, all of whom had objected to disclosure.
33. From the Commissioner's point of view, the key question is why disclosure of salary information at this level would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects, in a way that disclosure of salary information within a band of £20,000 did not.
34. tie argued that there was a very high likelihood that the contracts of employment for the officials concerned would come to an end after completion of the tram project. Revealing the salary details of these staff, even within a £5,000 band, might have a damaging impact on their negotiation of personalised employment contracts in future employment with a new employer. tie considered it very unlikely that these staff would continue working in "a semi-public sector role" after completion of the tram project, and stated that the private sector market remained highly competitive and was not as buoyant for job-seekers as it once had been.
35. tie also argued that its constitution differed from other public sector bodies, as from the onset it had been set up to be able to attract, recruit and retain the specialist skills required for the trams project. As a single-purpose delivery vehicle, tie considered that it could not be compared to other public sector bodies and, in the absence of any specific guidance from either the [UK] Information Commissioner or this Commissioner in relation to salary information for staff in such bodies, it should not be treated in the same way as such entities.
36. tie further explained that all of its staff were employed on individualised personal contracts, which were typical of the private sector and which highlighted the uniqueness of the tram project in the public sector. In this, tie considered that it differed from the public sector in general, where collective bargaining conventions determined pay and conditions within an agreed structure. As a comparator, it referred to the pay scales for Local Government Chief Officers, set under 'Blue Book' rules, noting that pay review bodies were also a common feature in the setting of public sector salaries (but not in its own situation).



37. tie acknowledged that there may be a general acceptance of the disclosure of salary information in relation to senior public sector officials, at the level requested, but submitted that (for the reasons set out above) its situation was not genuinely comparable with that of the public sector in general.
38. tie also argued that its decision to withhold the requested information was a legitimate way of addressing the risk of staff departures, which was a significant concern as a result of the negative publicity surrounding the tram project and its effects on staff morale.
39. tie emphasised the exceptional media and public scrutiny surrounding the project and its Executive Team. It argued that to provide more information about individuals who had received great personal exposure for several months, given the “significant negativity” around the tram project, would only add more unwarranted prejudice to their rights and freedoms. tie pointed to concerns outlined by the Auditor General that any further loss of senior staff might cause problems for the future delivery of the tram project. tie took the view that disclosure would create further unjustified public antipathy against the individuals concerned.
40. The Commissioner does not dismiss these arguments, but returns to the fact that salary information has already been disclosed in bands of £20,000. He asked tie to explain why these arguments did not apply in relation to disclosure of the information in bands of £20,000 rather than £5,000. tie referred to the arguments outlined above, submitting that disclosure at the level request would be contrary to the legitimate expectations of the individuals concerned.
41. tie also made reference to the existing guidance from the Information Commissioner regarding disclosure of public sector salary information², which includes the following:
- “Disclosure should only be to the extent necessary to fulfil a legitimate public interest. This may involve narrowing down advertised scales, for example to the nearest £5000. Only in exceptional circumstances is disclosure of exact pay likely to be justified.”
- tie noted that this reference to disclosure of salary within a band of £5,000 was guidance, not mandatory or a legislative requirement. All prevailing circumstances of the case required to be considered when making a decision on disclosure.
42. The Commissioner accepts that tie differs from most other Scottish public authorities, in being a limited company established for a limited purpose. It is not, however, unique in this respect. He acknowledges that, in relation to senior salaries, there may have been a greater degree of individual negotiation involved than would normally be the case within the public sector, while it may also be the case that the individuals concerned would be more likely to find future employment in the private rather than the public sector. tie cannot, however, be considered unique in the public sector in requiring skills at a senior level which are transferrable to the private sector. In any event, the Commissioner takes the view that as tie is publicly funded, it shares with other Scottish public authorities the same expectations in relation to accountability and transparency regarding public spending.

² Public sector salaries: how and when to disclose.

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf



43. tie argued that the individuals in question maintained their objection to disclosure, in part because they had never reasonably expected such a level of detail about their financial package to be made public.
44. The Commissioner is aware that the recruitment pack for tie's non-executive Chair states that Board Members must act in accordance with Government policies on transparency and openness.³ The Commissioner also notes that tie has recently disclosed the salary information requested, in bands of £20,000. This leads the Commissioner to conclude that tie has demonstrated commitment to the principles of openness and transparency in public authorities.
45. In the circumstances, the Commissioner considers it unlikely that the senior officials involved would not have had a reasonable expectation that details of their salaries might require to be disclosed at the same level of detail (i.e. within a band of £5,000) as has become usual practice among other Scottish public authorities.
46. The Commissioner has considered the argument that the rights and freedoms of the individuals concerned would suffer unwarranted prejudice if further information was released, given the "significant negativity" around the tram project, and given that these individuals have received great personal exposure for several months. The Commissioner accepts that there has been significant media attention and comment on the trams project, some of which has focused on the key officials involved. However, the Commissioner returns to the point that tie has already disclosed details of these officials' salaries, in bands of £20,000. This has already been reported in the media. It is not clear to the Commissioner why tie anticipates that disclosure in bands of £5,000 would now (or at the time tie dealt with the request) cause the individuals concerned to suffer unwarranted prejudice, in a way that the previous disclosure evidently did not.
47. The Commissioner takes the view that tie has not made a persuasive case for withholding the salary information in bands of £5,000. The difference (in terms of consequences) between disclosing information in bands of £5,000 and bands of £20,000 has not been made clear to the Commissioner. He does not accept that disclosure of salary information in bands of £5,000 would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects. On balance, therefore, the Commissioner finds in this case that Mr Hutcheon's legitimate interests outweigh those rights and freedoms or legitimate interests. Consequently, he finds that condition 6 can be met in relation to that disclosure.
48. Having reached this conclusion, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure would also be fair and lawful. He has already considered the question of fairness in the context of the legitimate interests of the data subjects and, for the reasons already outlined in relation to condition 6, finds that disclosure would be fair. tie has not put forward any arguments as to why the disclosure of the information would be unlawful, other than in terms of a breach of the data protection principles. In the circumstances, the Commissioner can identify no reason why disclosure should be considered unlawful.

³ http://www.munroconsulting.com/documents/TEL_tie_Chair_Recruitment_Pack.pdf



49. The Commissioner therefore finds that tie was not entitled to withhold the requested information under the exemption in section 38(1)(b) of FOISA and requires it to release that information to Mr Hutcheon, insofar as it has not been disclosed to him already.

DECISION

The Commissioner finds that tie Limited failed to comply with Part 1 (and in particular section 1(1)) of FOISA in wrongly withholding the information requested by Mr Hutcheon under section 38(1)(b) of FOISA.

The Commissioner requires tie to provide Mr Hutcheon with the information he requested (insofar as not disclosed already) by 23 September 2011.

Appeal

Should either Mr Hutcheon or tie Limited 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
8 August 2011



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

...

- (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.

...

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

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

...

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.

...