

Decision Notice



Decision 252/2011 Mr Roy Macdonald and Dundee City Council

Information relating to an accident at work

Reference No: 201100957

Decision Date: 19 December 2011

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Scottish Information Commissioner

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Summary

Mr Roy Macdonald (Mr Macdonald) requested from Dundee City Council (the Council) various pieces of information relating to an injury that he suffered at work. The Council responded by advising Mr Macdonald that it considered all of the requested information to be exempt from release in line with sections 33(1)(b) and 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which the Council removed its reliance on the exemption in section 33(1)(b), but upheld its reliance on section 36(1) for withholding all of the relevant information, and in addition sought to rely on section 38(1)(a) of FOISA for certain of the information, Mr Macdonald remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Council also sought to rely on the exemption in section 38(1)(b) for information contained in one document it was withholding from Mr Macdonald.

Following an investigation, the Commissioner found that the Council had partially failed to comply with Part 1 of FOISA in responding to Mr Macdonald's information request, by incorrectly withholding some information under section 36(1). The Commissioner also found that the Council had failed to provide Mr Macdonald with all of the (non exempt) information it held falling within scope of part (g) of his request, and so breached section 1(1).

However, the Commissioner was satisfied that the Council was entitled to withhold certain information in line with sections 38(1)(a) and 38(1)(b) of FOISA.

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); 36(1) (Confidentiality); 38(1)(a) and (b) and (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of personal data); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for the purposes of the first principle: processing of any personal data: conditions 1 and 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. On 13 January 2011, solicitors acting for Mr Macdonald (in this decision, all references to correspondence with Mr Macdonald is to correspondence with his solicitors) wrote to the Council to request the following information in connection with a compensation claim in relation to an injury Mr Macdonald sustained at work:
 - (a) the internal incident report of the Council relating to the incident
 - (b) any report relating to the incident prepared under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995
 - (c) all policy documents/statements regarding the restraint of aggressive/violent pupils at school/a named educational unit
 - (d) Mr Macdonald's Health and Safety training record
 - (e) Mr Macdonald's Occupational Health records
 - (f) Mr Macdonald's personnel records
 - (g) all risk assessments prepared by the Council concerning the management of aggressive/violent pupils at school prepared under the Manual Handling Operations Regulations 1992 and the Management of Health and Safety at Work Regulations 1999 and current at the date of the incident
 - (h) the record of a named pupil, in so far as the record relates to any aggressive/violent behaviour at school prior to the date of the incident.
2. The Council replied on 30 March 2011, advising Mr Macdonald that it considered all of the information he had requested to be exempt from disclosure under section 33(1)(b) of FOISA (on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council) and under section 36(1) of FOISA (on the basis that it comprised information that was prepared in contemplation of litigation and would not be recoverable in legal proceedings).
3. On 21 April 2011, Mr Macdonald wrote to the Council requesting a review of its decision. Mr Macdonald drew the Council's attention to his understanding that it is standard practice in respect of personal injury claims to recover information covered by parts (a), (b) and (g) of his request from the employer, and that as information covered by parts (d), (e) and (f) consisted of information personal to him, he had a right to have access to this information. Mr Macdonald also commented that he could not see how releasing any of the information he had asked for would prejudice the Council. He also confirmed that he was no longer seeking the information covered by part (h) of his request.



4. The Council notified Mr Macdonald of the outcome of its review on 19 May 2011. In its response, the Council explained that it was no longer seeking to rely on the exemption in section 33(1)(b) of FOISA for withholding relevant information. It did, however, uphold its reliance on section 36(1) for all relevant information coming within scope of parts (a) to (g) of Mr Macdonald's request, and in addition sought to rely on the exemption in section 38(1)(a) for information covered by parts (d), (e) and (f) of the request as it considered this to be Mr Macdonald's personal data.
5. On 24 May 2011, Mr Macdonald wrote to the Commissioner, stating that he 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.
6. The application was validated by establishing that Mr Macdonald had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 27 May 2011, the Council was notified in writing that an application had been received from Mr Macdonald and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council on 13 June 2011, 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, with particular reference to sections 36(1) and 38(1)(a) of FOISA. The investigating officer also pointed out to the Council that it had not provided a copy of any information that it was seeking to withhold that it considered to come within the scope of part (g) of Mr Macdonald's request, and it was asked to identify what pieces of withheld information are of relevance to this part of Mr Macdonald's request.
9. In its response, the Council provided a submission to justify its reliance on the exemption in section 36(1) of FOISA for all of the information withheld from Mr Macdonald. The Council also provided a submission to justify its reliance on section 38(1)(a) of FOISA for information covered by parts (a), (b), (d), (e) and (f) of Mr Macdonald's request.
10. In response to the investigating officer's query regarding part (g) of Mr Macdonald's request, the Council advised that it held a Generic Management Plan for Risk associated with behaviour.



11. During the investigation, in response to correspondence from the investigating officer, the Council advised that it was seeking to rely on the exemption in section 38(1)(b) of FOISA for information contained in document 15 which had been withheld from Mr Macdonald.
12. Following further correspondence, the Council released its Generic Management Plan for Risk associated with behaviour to Mr Macdonald during the investigation. Mr Macdonald acknowledged receipt of the plan, but indicated that he considered that the Council should hold other more specific information.
13. Comments were sought from the Council as to whether it held any further information falling within scope of part (g) of his request.
14. In response, the Council advised that it also held two policies entitled “Managing Disruptive Behaviour Guidelines” and “Physical Intervention Guidelines”, which come within scope of part (g) of Mr Macdonald’s request. The Council explained that, as an employee, Mr Macdonald would have access to these policies via the Council’s intranet site, but that it was happy to send copies to him if required.
15. Mr Macdonald advised that he could not access this information and the Council subsequently provided a copy to him on 9 November 2011.
16. Following receipt of this information, Mr Macdonald advised the Commissioner that he was satisfied that all relevant information held by the Council which would address part (g) of his request had now been provided to him.
17. The investigating officer contacted Mr Macdonald during the investigation seeking his submissions on the matters raised by this case. These submissions, along with those of the Council are summarised and considered (where relevant) in the Commissioner’s analysis and findings section below.

Commissioner’s analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all of the information withheld from Mr Macdonald and the submissions made to him by both Mr Macdonald and the Council and is satisfied that no matter of relevance has been overlooked.
19. In all, information in 17 documents has been withheld from Mr Macdonald.

Section 38(1)(a) – Personal information

20. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.



21. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a “subject access request”) under section 7 of the Data Protection Act 1998 (DPA). The DPA will therefore usually determine whether a person has a right to their own personal data. Section 38(1)(a) of FOISA does not deny individuals a right to access information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
22. 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).
23. The Council has relied on the exemption in section 38(1)(a) to withhold information covered by parts (a), (b), (d), (e) and (f) of Mr Macdonald’s request.
24. Parts (a) and (b) of Mr Macdonald’s request seek details contained in reports made pertaining to the incident in which Mr Macdonald was involved. Documents 6, 7 and 15 fall within the scope of parts (a) and (b). The Commissioner is satisfied that all of the information in documents 6 and 7, and certain of the information withheld in document 15, relates to Mr Macdonald and that he can be identified from this data. He is therefore satisfied that all of this information is Mr Macdonald’s personal data and, as such, is exempt from disclosure under section 38(1)(a) of FOISA.
25. However, the Commissioner considers that some of the information in document 15 does not relate to Mr Macdonald, but to a third party and this information is not exempt under section 38(1)(a) of FOISA. The Commissioner will address this information in more detail below.
26. Parts (d), (e) and (f) of Mr Macdonald’s request relate to his own training and personnel records. Documents 1 to 5 fall within the scope of these requests. The Commissioner is satisfied that all of the information in these documents relates to Mr Macdonald and that he can be identified from this data. He is therefore satisfied that all of this information is Mr Macdonald’s personal data and, as such, is exempt from disclosure under section 38(1)(a) of FOISA.
27. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required (or entitled) to go on to consider whether the public interest lies in the information being disclosed or withheld.

Section 36(1) - Confidentiality

28. The Council has applied the exemption in section 36(1) to all of the information withheld from Mr Macdonald. Given that he has already determined that all of the information in documents 1 to 7, and certain of the information in document 15, is exempt from disclosure under section 38(1)(a), the Commissioner will not go on to consider whether the exemption in section 36(1) also applies to this information.



29. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communications which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
30. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponents or prospective opponents will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. There must be a reasonable prospect of litigation – a real likelihood, not just a fear or possibility.
31. For information to be covered by litigation privilege, it must have been created for the “dominant purpose” of obtaining legal advice on the litigation or for lawyers to use in preparing the case. this is a question of fact in each case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. however, pre-existing documents will not become privileged just by being passed over to a lawyer.
32. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
33. The Council considers, given that Mr Macdonald wishes to claim compensation from it regarding an incident at work, that his information request is a “fishing expedition” to find out whether any information exists which could enable him to raise a personal injury claim against the Council. Accordingly, the Council submits that Mr Macdonald certainly contemplates litigation, and is seeking to use FOISA to recover information which he considers will assist his case and, by definition, prejudice the Council’s case.
34. It is the Council’s contention that nothing in FOISA has modified the well-established rules relating to the recovery of documentary and evidence in Court proceedings either pre or post litigation. These rules, the Council submits, include the well known rule that in no circumstances will the Court at any stage grant a “fishing” diligence for the recovery of documents which a party hopes will disclose material for a case that he has not viewed on record. This is, the Council advised, because these rules confer confidentiality on material which is not recoverable.



35. As a consequence of this, the Council argued that, the terms of section 36(1) are clearly established, because an application under section 1 of the Administration of Justice (Scotland) Act 1972¹ (this being an application to the court to order the production or recovery of documents or property which are relevant to a court case) falls within the definition of “legal proceedings”.
36. With regard to the term “contemplation of litigation”, the Council considers that this should be construed from the point of view of a defender and, as a prudent body which is a major employer, the Council submits that many of its documents are created with a view to avoid litigation or maximise prospects of success. The Council submits that the documents withheld from Mr Macdonald were created in contemplation of litigation to the extent that the Council is a defender.
37. It is the Council’s view that the position of a pursuer is, of course, very different as a pursuer only contemplates litigation when they consider that they may have a claim. The Council contends that any view that “in contemplation of litigation” can only apply at or near the time of a response to an actual claim is too narrow an interpretation and is an error of law. This is why, the Council submits, the “no fishing” rule has been so firmly established.
38. The Commissioner notes the arguments advanced by the Council, but would stress that the rules governing the information which can be requested through the court recovery process are different to those governing requests under FOISA (although clearly there will be some overlap, particularly when determining whether information is subject to litigation privilege in terms of section 36(1)). It may well be the case that an application to the courts made under the 1972 Act will lead to less (or, indeed, more) information being disclosed than a request under FOISA, but that does not mean that a request made under FOISA should be interpreted only in the light of what a person would be entitled to by virtue of the 1972 Act.
39. The Commissioner considers that for information to be exempt under section 36(1) in this case, the information must not only have been prepared in contemplation of litigation, but must also be confidential.
40. The Commissioner notes that documents 13, 16 and 17 are published in full on the Council’s website and therefore cannot be considered to be confidential. He has also concluded that, given that the information in documents 8, 9 and 12 is designed to be shared with parents and pupils of the educational institute in question (document 8, for example, is a parent/carers handbook), the information cannot be viewed as having the necessary quality of confidentiality. As such, the Commissioner finds that the information in these documents is not exempt under section 36(1) of FOISA.
41. In considering the information in documents 10, 11, 14 and 15 (the information not found to be exempt under section 38(1)(a) only), the Commissioner has considered the purpose for which the communication was made; as noted above, whether the information in these documents was prepared in contemplation of litigation will depend on the circumstances of each case.

¹ <http://www.legislation.gov.uk/ukpga/1972/59/introduction>



42. As Lord Justice-Clerk Thomson commented in *Young v National Coal Board* 1957 SC 99 (at page 105):
- “The court has inherent power to compel the parties to a cause to produce documents which may have a bearing on the issues between them. The court will not, however, in the ordinary run of things order production of documents which have been prepared in anticipation or in development of a party’s case. Once the parties are at arms length, or are obviously going to be at arms length, the details of their preparation of weapons and ammunition are protected as confidential. Just when the parties come to be at arm’s length may often be a difficult question, especially as some potential defenders prepare well in advance against the contingency of accidents, and indeed, under modern conditions, few accidents and particularly few industrial accidents can happen without it occurring to one or other party at any early stage that questions of disputed liability may arise.”*
43. As Lord Justice-Clerk Thomson made clear, it can be difficult to identify when parties come to be at arms length (and, as a result, when the *post litem motam* rule will come into effect). However, a general apprehension of future litigation or possibility that someone might at some point in the future make a claim against the Council, is not, in the Commissioner’s view, sufficient, given that, according to Lord Justice-Clerk Thomson, the parties must either be at arms length, or are “obviously going to be” at arms length.
44. Mr Macdonald sustained an injury in the course of his employment in November 2010. His solicitors wrote to the Council, advising it that they had been approached by Mr Macdonald in connection with a compensation claim (and making the information request which has led to this decision) in January 2011. Clearly, from January onwards, the Council will have contemplated that litigation would take place.
45. Having considered documents 10, 11 and 14, the Commissioner cannot agree that they were prepared in contemplation of litigation; the documents were all prepared before the incident took place and there is nothing to suggest that they were prepared in anticipation or in development of the Council’s case. As a consequence, the Commissioner does not consider the information in these documents to be exempt from disclosure under section 36(1) of FOISA.
46. The Commissioner is also satisfied that the remaining information in document 15 (i.e. the information which the Commissioner has concluded is not exempt from disclosure under section 38(1)(a)) is not exempt under section 36(1) of FOISA. Document 15 is in four parts. The Commissioner considers that the first part (an incident reporting form) is not subject to litigation privilege. Whilst it is clear from case law that no party can recover from another material which the other party has made in preparing his own case, an exception has been made for reports by employees present at the time of the accident and made to their employees at or about that time (see, for example, Lord Walker in *Young v National Coal Board* 1957 SC 99 at p101).



47. The incident form was prepared by a member of staff who witnessed the incident in question. Unfortunately, the report is undated, but given that appendices to the document are dated three days after the incident, the Commissioner has concluded, on the balance of probabilities, that the report was made to the Council at or about the time of the incident. As such, the Commissioner has concluded that the report is subject to the exception to the *post litem motam* rule mentioned above.
48. The Commissioner has also concluded that the remaining parts of document 15 were, as with documents 10, 11 and 14, not prepared in contemplation of litigation, given that they are designed for an entirely different purpose.
49. As the Commissioner has concluded that none of the information in documents 8 to 17 inclusive is exempt by virtue of section 36(1) of FOISA, he is not required to consider the application of the public interest test in section 2(1) of FOISA.

Section 38(1)(b) – Personal data

50. The Council has relied on section 38(1)(b) of FOISA for withholding the information in document 15 which is not Mr Macdonald's personal data. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or, as appropriate, 38(2)(b) of FOISA exempts information from disclosure if it is "personal data" as defined by section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the Data Protection Act (the DPA). This particular exemption is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
51. In order to rely on this exemption, therefore, the Council must show firstly that the information being withheld is personal data for the purposes of the DPA, and secondly that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.

Is the information personal data?

52. The definition of personal data is set out above in paragraph 22.
53. The Commissioner accepts that the information that has been withheld in document 15 (other than the information that has been found to be exempt under section 38(1)(a)) is personal data as it relates to an individual, who can be identified from that data.
54. The Commissioner must now consider whether disclosure of this personal data would contravene the first data protection principle, as argued by the Council.

Would disclosure breach the first data protection principle?

55. The first data protection principle 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 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.



56. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and is satisfied that the personal data in this case does not fall into this category. It is, therefore, not necessary to consider the conditions in Schedule 3 to the DPA in this case.
57. 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. For example, if there is a specific condition in the schedules which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
58. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of the data subject's personal data would be fair and lawful.

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

59. In its submissions, the Council has commented that neither Condition 1 nor Condition 6(1) in Schedule 2 to the DPA is met in this case.
60. Condition 1 of Schedule 2 permits data to be processed (in this case, disclosed into the public domain in response to Mr Macdonald's information request) if consent to such processing is given by the data subject. The Council advised that the data subject has not given consent to the processing of their personal data. The Commissioner is therefore satisfied that condition 1 cannot be fulfilled in this case.
61. In the circumstances, the Commissioner considers that the only other condition in Schedule 2 to the DPA which might be considered to apply is condition 6(1). This allows personal data to be processed (as noted above, in this case, this means put into the public domain in response to Mr Macdonald's information request) if disclosure of the data is necessary for the purposes of the 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.
62. There are a number of tests which must be met before condition 6(1) in Schedule 2 of the DPA can apply:
 - Does Mr Macdonald have a legitimate interest in being given this personal data?
 - If yes, is the disclosure necessary to achieve those legitimate aims? In other words, is 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 subject (in this case, the complainant)?



- Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject? This will involve a balancing exercise between the legitimate interests of Mr Macdonald and those of the data subject. Only if the legitimate interests of Mr Macdonald outweigh those of the data subject can the personal data be disclosed.

Does Mr Macdonald have a legitimate interest?

63. There is no definition within the DPA of what constitutes a “legitimate interest”, but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In his published guidance on section 38 of FOISA², the Commissioner states:
- In some cases, the legitimate interest might be personal to the applicant – e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.*
64. Mr Macdonald was invited to provide his reasons for requiring the information, to inform the Commissioner’s consideration of condition 6(1).
65. Mr Macdonald submitted that he has a legitimate interest in the report being released as he is pursuing a compensation claim against the Council and the information contained in the report is necessary to process this claim.
66. In its submissions, the Council has indicated that it does not accept that Mr Macdonald has a legitimate interest in the information in document 15. However, the Council contended that even if he does have a legitimate interest in obtaining the personal data, disclosure of the information in this document is not necessary to advance those legitimate interests.
67. The Commissioner has noted the Council’s comments. Having considered the submissions from Mr Macdonald, the Commissioner accepts that Mr Macdonald has a legitimate interest in obtaining the information in parts 1 and 2 of document 15 to assist him in pursuing a compensation claim against the Council regarding the injury he sustained as they would provide some information on the incident which led to his injury. However, parts three and four would not do this, and the Commissioner has therefore concluded that no legitimate interest exists,

Is the disclosure of the personal data necessary for Mr Macdonald’s legitimate interests?

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



68. The Council has argued that disclosure of the withheld information is not necessary for Mr Macdonald's legitimate interests as this is, in the Council's view, simply a "fishing expedition".
69. The Council explained that disclosure of the information in document 15 is not proportionate as a means to advance Mr Macdonald's legitimate interests, as these could be met by Mr Macdonald using other methods such as, an application under the 1972 Act, in order to access the information that he is seeking. The Council also advised that these other methods would interfere less with the privacy of the data subject.
70. The Commissioner acknowledges the comments made by the Council and he also notes that in his requirement for review to the Council, Mr Macdonald did recognise that an alternative method for him to use to access this information was to make an application to the Court, to obtain relevant orders under the 1972 Act.
71. The Commissioner has considered the comments from the Council, and accepts that there are other means open to Mr Macdonald to attempt to access the information that he is seeking. The Commissioner has also noted the comment by Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 that there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down and the references which FOISA makes to provisions of the DPA must be understood in the light of the legislative purpose of the DPA, i.e. the protection of the fundamental rights and freedoms of persons, in particular their right to privacy with respect to the processing of personal data.
72. Given that disclosure under FOISA is disclosure into the public domain, while disclosure under the 1972 Act is for limited circumstances in relation to the court action, the Commissioner has concluded that disclosure under FOISA is not *necessary* for the purposes of the legitimate interests identified by Mr Macdonald.
73. As such, the Commissioner has concluded that disclosure of the personal data in question would breach the first data protection principle and, accordingly, is exempt from disclosure under section 38(1)(b) of FOISA.
74. Given that the Commissioner is satisfied that the Council was correct to withhold personal data relating to Mr Macdonald in document 15 under the exemption in section 38(1)(a) of FOISA, and that it was correct to withhold the personal data relating to a third party under the exemption in section 38(1)(b) of FOISA, he does not require the Council to disclose any of the information in document 15 to Mr Macdonald.

Section 1(1) – General entitlement: part (g) of Mr Macdonald's request

75. Section 1(1) creates a general right of access to recorded information held by a public authority, except where (as provided by section 1(6)) that right is disapplied by the application of any exemption in Part 2 of FOISA, or another provision in Part 1 of FOISA.



76. Within part (g) of his request, Mr Macdonald asked for all risk assessments prepared by the Council concerning the management of aggressive/violent pupils at school prepared under the terms of the Manual Handling Operations Regulations 1992 and the Management of Health and Safety at Work Regulations 1999 and current at the date of the incident.
77. In response to Mr Macdonald's request, the Council advised that it was withholding all of the information covered by all parts of his request under the exemptions in sections 33(1)(b) and 36(1) of FOISA. In responding to Mr Macdonald's requirement for review the Council advised that it was now seeking to withhold all of the information covered by all parts of his request under the exemption in section 36(1) of FOISA, and that it was also seeking to rely on the exemption in section 38(1)(a) for information covered by parts (a), (b), (d), (e) and (f) of his request.
78. However, during the investigation, the Council identified information in its "Management Plan for Risk associated with Behaviour – User Guide" which fell within the scope of part (g) of Mr Macdonald's request. The Council advised that it was not relying on any exemptions in FOISA for this information, and subsequently provided it to Mr Macdonald during the investigation.
79. The Council advised that it also held other information, but that it did not consider this to be a Risk Assessment in terms of the Manual Handling Operations Regulations 1992 and the Management of Health and Safety at Work Regulations 1999. The Commissioner has considered this other information, but is satisfied that this information does not fall within scope of this part of Mr Macdonald's request.
80. As mentioned previously, Mr Macdonald was not satisfied with the information that has been disclosed to him within the Management Plan for Risk associated with Behaviour – User Guide. Mr Macdonald considered that the Council should hold further, more specific information regarding how to deal with violent pupils at the Education Unit where he worked.
81. The Council was invited to provide submissions on Mr Macdonald's belief that other, relevant information was held by it.
82. In response, the Council explained that all educational establishments follow the Council's policy and guidelines in respect of managing behaviour, and the education department make their policies and guidelines readily available to all staff through the intranet. The Council provided copies of two policies, entitled "Managing Disruptive Behaviour" and "Physical Intervention" which it considered relevant to this part of Mr Macdonald's request.
83. The Council advised that as an employee, Mr Macdonald would have access to these policies via the intranet, but it was willing to send copies of these out to Mr Macdonald, if required. Following confirmation from Mr Macdonald that he was unable to access these documents, the Council provided these to him. Following receipt of this information, Mr Macdonald confirmed that he was satisfied that the Council had provided him with the information it held which was relevant to part (g) of his request.



84. As the Council held recorded information falling within the scope of part (g) of Mr Macdonald's request, and was not relying on any exemption(s) in FOISA for withholding this from him, the Commissioner finds that the Council did not comply with section 1(1) of FOISA in responding to part (g) of Mr Macdonald's request. However as the Council has now provided all relevant information to Mr Macdonald, the Commissioner does not require the Council to take any action in relation to this breach.

DECISION

The Commissioner finds that Dundee City Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Macdonald.

The Commissioner finds that the Council was entitled to withhold certain information under the exemption in sections 38(1)(a) and 38(1)(b) of FOISA.

However, the Commissioner found that the Council was not entitled to withhold certain information on the basis of the exemption in section 36(1) of FOISA. As a result, the Council failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA.

The Commissioner also found that by failing to provide Mr Macdonald with all relevant recorded information that it held falling within the scope of part (g) of his request, the Council failed to comply with Part 1 (and, in particular, section 1(1)) of FOISA.

The Commissioner therefore requires Dundee City Council to provide Mr Macdonald with all of the information contained in documents 8, 9, 10, 11, 12, 13, 14, 16 and 17 by 2 February 2012.

Appeal

Should either Mr Macdonald or Dundee City 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.

Decision 252/2011
Mr Roy Macdonald
and Dundee City Council



Margaret Keyse
Head of Enforcement
19 December 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
- (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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...



38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
 - (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.
- ...
- (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
 - (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

- 1 The data subject has given his consent to the processing.
...
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.
...