

Decision Notice



Decision 139/2012 Mr Leslie Sinclair and Falkirk Council

Former Councillor's annual pension and tax free lump sum on retirement

Reference No: 201201188
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Scottish Information Commissioner

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Summary

Mr Sinclair asked Falkirk Council for details of a former Councillor's tax free lump sum and annual pension on retirement. The Council withheld this information on the basis that it was personal data, disclosure of which would breach the first data protection principle.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information on this basis.

Relevant statutory provisions

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) and (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) (the first data protection principle) and 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. On 25 April 2012, Mr Sinclair wrote to the Council requesting details of a former Councillor's tax free lump sum and annual pension on his retirement.
2. The Council responded on 23 May 2012. It refused to supply the requested information on the basis that it was personal data, exempt from disclosure under section 38(1)(b) of FOISA.
3. On 31 May 2012, Mr Sinclair wrote to the Council requesting a review of its decision. He disagreed with the Council's decision, arguing that salaries and pensions were paid by the taxpayer and should be available on request.



4. The Council notified Mr Sinclair of the outcome of its review on 4 June 2012. It indicated that the position remained as set out in its initial response.
5. On 12 June 2012, Mr Sinclair 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 Sinclair 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 25 June 2012, the Council was notified in writing that an application had been received from Mr Sinclair and was asked to provide the Commissioner with the 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, 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 regarding its application of the exemption in section 38(1)(b) of FOISA.
9. After receiving submissions from the Council, the investigating officer contacted Mr Sinclair, inviting him to make submissions to inform the Commissioner's decision.
10. The relevant submissions received from both the Council and Mr Sinclair will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 38(1)(b) of FOISA – personal information

12. The Council has withheld the information requested by Mr Sinclair under the exemption in section 38(1)(b) of FOISA.



13. 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.

Is the information personal data?

14. 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).
15. The Commissioner accepts that the withheld information in this case is personal data. It is information about the income received by a living individual on his retirement. This information clearly relates to the former Councillor, and identifies him, since (in the context of this case) it would be disclosed in response to a request specifically naming him.
16. The Commissioner will 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?

17. The Council has argued that disclosure of the withheld information would breach the first data protection principle. This 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. The processing under consideration in this case is disclosure into the public domain in response to Mr Sinclair's information request.
18. 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 do not fall into any of the relevant categories. It is not, therefore, necessary to consider the conditions in Schedule 3 in this case.
19. 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, she must then consider whether the disclosure of this personal data would be fair and lawful.



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

20. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.
21. The Council confirmed that it contacted the former Councillor, but he did not agree to the information being released.
22. In the circumstances, 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 withheld personal data. 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 Sinclair 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 former Councillor?
 - Even if the processing is necessary for Mr Sinclair's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the former Councillor?

Does Mr Sinclair have a legitimate interest?

24. 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.

¹ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

² <http://www.itspubliacknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



25. When asked to comment on this test, Mr [Sinclair] argued that there was a legitimate interest for tax payers, who contributed to the pensions received by Councillors, to assess the information. He argued that the people who paid the salary and pension contributions had a right to know.
26. The Commissioner has considered Mr [Sinclair]'s submissions carefully, but she does not consider that he has demonstrated a legitimate interest in accessing the withheld information.
27. While the Commissioner recognises that public funds received from taxation would have paid the salary of the former Councillor, and so there might be a legitimate interest in accessing information about the salary of public sector employees, she considers occupational pension arrangements to be of a different nature.
28. The value of an occupational pension is a product of contributions made by both an employee and their employer (and also, in the case of the scheme under consideration at least, receipts from invested funds), and the value of that pension will be a product of a range of factors, including the length of service and salary, but also decisions taken by the employee. For example, an employee may choose to opt in or out of a pension scheme; they might transfer contributions from the pension scheme of one employer to the scheme of another, or make additional voluntary contributions.
29. Given the nature of occupational pension schemes, and the wide range of variables that can influence the value of the lump sum or annual value of the pension on retirement, the Commissioner does not consider that any simple connection can be drawn between tax payer contributions, a person's professional activities and the value of their pension. For these reasons, she does not accept that the fact that taxpayers make a contribution to the pension funds of Councillors means that there is a (general or specific) legitimate interest in knowing the value of an individual's pension.
30. In reaching this conclusion, the Commissioner notes that Mr [Sinclair] has argued that he does not see the difference between knowing the former Councillor's pension, and knowing the state pension received by millions of individuals.
31. She considers that there is a difference between knowing the value of the state pension and that of individual occupational pensions, however. The state pension is set at a fixed rate, which is paid to all individuals who have made obligatory national insurance contributions over the necessary period. That fixed rate means that (provided individuals have made sufficient contributions) there will be no variation according to personal decisions taken about whether to contribute, or the extent of contributions made to a separate occupational pension.
32. Having concluded that Mr [Sinclair] has not demonstrated that he has a legitimate interest in the information under consideration, the Commissioner must conclude that Condition 6 of Schedule 2 is not met in this case.



33. As condition 6 cannot be met, the Commissioner would also regard disclosure as unlawful. In all the circumstances, therefore, she finds that disclosure would breach the first data protection principle and that the information was therefore properly withheld under section 38(1)(b) of FOISA.

DECISION

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

Appeal

Should either Mr Sinclair or Falkirk 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
20 August 2012



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
 - (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.

...