

Decision Notice



Decision 056/2011 Mr Mark Irvine and South Lanarkshire Council

Numbers placed at specified points in pay structure

Reference No: 201001957
Decision Date: 17 March 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Irvine made a number of requests to South Lanarkshire Council (the Council) for the number of persons placed on specific spinal column points within the pay structure. The Council responded to each request by stating that it considered the requested information to be personal data and exempt in terms of section 38(1)(b) of FOISA. Following a review, which upheld the original response, Mr Irvine remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Irvine's request for information in accordance with Part 1 of FOISA. He concluded that disclosure of the withheld information would not contravene the data protection principles and therefore that the Council had incorrectly applied the exemption in section 38(1)(b) of FOISA. Consequently, he required the Council to provide Mr Irvine with the information.

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) and 38(1)(b), (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) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part I: The principles) (the first data protection principle) and Schedule 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 10 May 2010, Mr Irvine wrote to the Council as follows:

I am seeking information about the basic hourly rate of pay for the council job category Land Service Operative 3:

How many of the total number of LSO 3 posts are placed at Spinal Column Point 25?



2. Between 11 May and 21 May 2010, both dates inclusive, Mr Irvine wrote to the Council a further nine times, requesting the numbers of LSO3 posts placed at each of spinal column points 26 to 34 inclusive.
3. The Council responded to each of Mr Irvine's requests on 1 June 2010, informing him that it considered the ten requests to be vexatious in terms of section 14(1) of FOISA and that it was therefore not obliged to comply with them.
4. Between 7 and 18 June 2010, Mr Irvine wrote to the Council, requesting a review of each decision and challenging the Council's arguments in support of section 14(1) of FOISA.
5. The Council notified Mr Irvine of the outcome of its reviews on 6 July 2010, in each case upholding the earlier decision to treat his request as vexatious.
6. On 12 July 2010, Mr Irvine 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.
7. The application was validated by establishing that Mr Irvine had made the ten requests 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 those requests. The case was then allocated to an investigating officer.
8. During the investigation, the Council withdrew its reliance on section 14(1) of FOISA and Mr Irvine withdrew his application to the Commissioner.
9. On 1 September 2010, the Council responded to Mr Irvine's requests for information. In each response, the Council informed Mr Irvine that the information requested was personal data and that it was withholding the information under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b).
10. On 6 September 2010, Mr Irvine wrote to the Council requesting a review of each decision to withhold the information requested. He questioned the use of section 38(1)(b) of FOISA.
11. The Council responded on 8 October 2010, in each case upholding the original decision that the information was exempt under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (2)(b)).
12. On 11 October 2010, Mr Irvine wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
13. The application was validated by establishing that Mr Irvine had made the ten requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.



Investigation

14. On 21 October 2010, the Council was notified in writing that an application had been received from Mr Irvine 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.
15. 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 (specific reference being made to the requirements of section 38(1)(b)).
16. The Council confirmed that it was relying upon section 38(1)(b) of FOISA, read in conjunction with section (2)(a)(i) or (2)(b), in that the information requested was personal data, the disclosure of which would breach the first data protection principle.
17. The Council made further submissions in the course of the investigation relative to Mr Irvine's legitimate interest in obtaining the personal data in question (on which Mr Irvine had provided his own submissions).
18. The relevant submissions obtained from the Council and Mr Irvine will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

19. 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 Irvine and the Council and is satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) - Personal Information

20. The Council submitted that the number of individuals paid at a particular spinal column point was personal data for the purposes of the DPA and that disclosure of this information would contravene the first data protection principle on fair and lawful processing of personal data. Consequently, it argued that the information was exempt under section 38(1)(b) of FOISA.
21. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate), exempts information from disclosure where that information is personal data and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles in Schedule 1 to the DPA.



22. In considering the application of this exemption, the Commissioner must first determine whether the information in question is personal data as defined in section 1(1) of the DPA and then, if it is, whether any of it is sensitive personal data as defined in section 2 of the DPA. If he is satisfied that the information is personal data, he will go on to consider whether its disclosure would breach any of the data protection principles, considering the implications of its status as sensitive personal data as and where appropriate.
23. It must be borne in mind that this particular exemption (i.e. section 38(1)(b) read in conjunction with section 38(2)(a)(i) or (b)) is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

24. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, 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."
25. The Council submitted that, in this case, Mr Irvine was looking for statistical information regarding the number of people within a job category placed at particular points in the Council's spinal salary scale column. It considered that detailing an individual's hourly rate and, therefore, by extrapolation, their salary within that grade, amounted to personal data.
26. The Council advised that the statistics could only be compiled from the personal information of the employees concerned. It also submitted that those individuals could be identified from the statistical data requested, combined with other information held by the Council as data controller: this could be done by someone unconnected with the compilation of the statistics.
27. The Commissioner has considered the Council's submissions in the light of the decision of the House of Lords in the case of *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47*¹. On the basis of the Opinion of the House of Lords in that case, he considers it arguable that the information requested by Mr Irvine is not personal data. However, he also considers it important in the circumstances of this particular case to address the further arguments put forward by the Council as to why, in its view, disclosure would contravene the data protection principles. He has therefore gone on to consider whether disclosure of the requested information would breach any of the data protection principles, specifically (as the Council has submitted) the first principle.

Would disclosure breach the first data protection principle?

28. The Council argued that disclosure of the information would breach the first data protection principle.

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



29. The first data protection principle 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 in response to Mr Irvine's information request.
30. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the withheld information in this case does not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this decision.
31. 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 Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
32. 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 this personal data would be fair and lawful.

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

33. In the circumstances, the Commissioner considers that condition 6 would appear to be the only condition which would permit disclosure to Mr Irvine. In any event, the Council has not argued that any other condition would be relevant. 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 (the individuals to whom the data relate).
34. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a) Does Mr Irvine have a legitimate interest in obtaining the personal data?
 - b) If yes, 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 subject?



- c) Even if the processing is necessary for Mr Irvine's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Mr Irvine 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 the Council was correct to refuse to disclose the personal data to Mr Irvine.

Does the applicant have a legitimate interest?

35. The Council submitted that it did not consider that Mr Irvine had a legitimate interest in obtaining the requested information. In the Council's view, it was important to consider the "third party" to which the information was to be disclosed. It noted that the exemption referred to disclosure of the information "to the public" and not the requester. Consequently, the Council's argued that the requester's interests had to be aligned with those of the public. In effect, therefore, the identity of the requester should not be taken into account when applying the exemption, issue being disclosure to the public and the legitimate interests of the public (i.e. a public interest). In support of this position, it referred to guidance issued by the (UK) Information Commissioner on the equivalent exemption in the Freedom of Information Act 2000 and to decisions of the Information Tribunal on that exemption.
36. While noting that Mr Irvine had argued there was a public interest in ensuring that the Council as an employer met its obligations, including the requirements of equal pay (see below), the Council was not convinced that releasing the requested information would further that interest. Equal pay, it contended, related to equal pay for equal tasks. Releasing the information in relation to pay without reference to the tasks of those individuals would not advance the public interest in ensuring equal pay.
37. The Council further drew the Commissioner's attention to a recent decision of the Court of Session – *Mrs Elaine North and others v Dumfries and Galloway Council*² which it claimed cast doubt on whether "these employees" could be used as comparators by "many female employees" in equal pay claims. It suggested that as a result of this decision, there was no public interest in releasing this information.
38. The Council also acknowledged that the Commissioner would consider whether an applicant had a personal legitimate interest in obtaining information. It was of the view that Mr Irvine did not have a legitimate personal interest in obtaining this information, because he was not a claimant to the equal pay claims currently ongoing against the Council. It considered the Court of Session decision referred to in the preceding paragraph to add force to the argument that Mr Irvine had no personal interest in the information.

² <http://www.scotcourts.gov.uk/opinions/2011CSIH2.html>



39. In his application, Mr Irvine submitted that his request focused on the way the Council used public money to treat traditional male jobs more favourably than those of their female colleagues. In this regard he believed there to be a serious public interest in the matter, gender equality being a fundamental human right (a cornerstone to the effective exercise of which was transparency in pay arrangements). He noted that the public appeared to be entitled to know the level of remuneration paid to its chief executive but not that of its manual workers, suggesting that it was concealing its true pay arrangements from its largely female workforce and attempting to avoid public scrutiny. He cited a number of other local authorities which had already disclosed their pay arrangements.
40. Within his submissions to the Commissioner, Mr Irvine referred to his work with Action 4 Equality Scotland, which was pursuing equal pay claims on behalf of a considerable number of the Council's employees. He also noted that he maintained a blog as a freelance writer, dealing with a wide range of issues including equal pay. He believed his request to relate to a matter of legitimate public interest and concern, in addition to being of concern to council employees fighting against potentially discriminatory pay practices.
41. So far as the public interest was concerned, Mr Irvine emphasised that Scotland's Single Status (Equal Pay) Agreement had been hailed as a major landmark agreement in 1999, by both employers and trade unions, to the benefit of civic Scotland. The declared intention of the new agreement had been to introduce new and fairer pay arrangements for around 250,000 council workers, based on a non-discriminatory, equality-proofed approach to job evaluation. He considered openness and transparency to be at the heart of any equality-proofed job evaluation scheme, so that employees could understand not only the basis on which their own jobs are paid, but the jobs of other council employees as well.
42. As indicated above, the Commissioner considers the appropriate question to be whether the applicant has a legitimate interest in obtaining the personal data under consideration. That interest, however, will in many cases not be confined to the individual applicant and may therefore coincide with the public interest. In this case, the Commissioner has found it appropriate to take into consideration all of the arguments on legitimate interest put forward by the Council and Mr Irvine.
43. The Commissioner has considered the Court of Session decision cited in paragraph 39 above. He notes, however, that the Council has simply asserted that the decision is relevant to this case, its only further explanation of that position being that the decision "casts doubt upon whether these employees can be used as comparators by many female employees in equal pay claims". It has not explained whether, to what extent or why it considers the situation addressed by the Court of Session in that case to be comparable to the situation it is experiencing in relation to ongoing equal pay claims. The Court of Session, naturally, reached its conclusions on the basis of specific facts and circumstances (relating largely to the lack of comparability of the terms and conditions on which the respective groups of employees were employed) and it is not for the Commissioner to make enquiries of his own as to whether these conclusions are of relevance to the Council's position in this case. In the absence of relevant arguments of any substance from the Council, the Commissioner is not in a position to accord any weight to the Council's reference to this decision.



44. In the circumstances of this particular case, having considered the arguments put forward by both the Council and Mr Irvine, the Commissioner accepts Mr Irvine's submissions that he has a legitimate interest in obtaining the information he has requested. Clearly, he has a serious, ongoing interest in equal pay matters. Clearly, also, these are matters of legitimate wider interest, both to employees of the Council and to the wider public. Given the considerable sums of public money involved and the fundamental issues of fair and equal treatment which require to be addressed, it is important that (subject to there being in place adequate safeguards for individuals of the kind considered later in this decision) a local authority's arrangements for securing equal pay are open to adequate public scrutiny.
45. While he has been unable to take into account the Court of Session decision referred to above, the Commissioner has considered the broader arguments put forward by the Council that the requested information simply would not further such interest as Mr Irvine has in it, or for that matter the acknowledged public interest in equal pay matters. He will, of course, consider next whether disclosure of this information is *necessary* to achieve Mr Irvine's legitimate interests, but at this stage he would record that (having considered all relevant submissions) it does not appear reasonable to take the view that the requested information has no relevance to questions of equal pay, or such limited relevance that it would be of no practical value to the pursuit of the legitimate interests he has identified in the preceding paragraph. On balance, therefore, he considers it appropriate to conclude that a legitimate interest exists in relation to the information under consideration.

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

46. The Commissioner must now consider whether disclosure of the requested information is necessary for those legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means. The Council submitted that it was not satisfied that disclosure was necessary.
47. In support of this position, the Council made reference to certain Information Tribunal decisions, citing in particular paragraph 29 of the decision in the case of *Mrs S M Butters and the Information Commissioner (EA/2008/0088*³):
- The Tribunal considered that whilst there was a legitimate interest in the public being confident of the fitness to practice of nurses, the IC had been correct in concluding that this did not require disclosure of complaints. In terms of paragraph 6, the legitimate interest did not make disclosure "necessary". There were other means by which confidence could be maintained, most notably through a regulatory system that publicised its determinations where the particular professional had found not to be fit and proper. The public confidence would not be increased by a knowledge of any or all complaints, whether or not well founded.*

³ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i290/Butters%20v%20IC%20\(EA-2008-0088\)%20Decision%2030-01-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i290/Butters%20v%20IC%20(EA-2008-0088)%20Decision%2030-01-09.pdf)



48. The Council suggested that while the *Butters* decision related to specific individuals, the principle applied equally in this case. The issue of equal pay was best, it contended, considered by cases before Employment Tribunals (as was happening at present). Such tribunals, it submitted, would consider all of the facts involved, including the tasks undertaken by employees and not merely rates of pay. The Council submitted that under the circumstances, disclosure of the information to the public was not necessary to advance the public interest.
49. As should be clear from the 3-stage test set out in paragraph 36 above, the Commissioner accepts that having a legitimate interest in the disclosure of certain information does not automatically make that disclosure “necessary”. Equally clearly, however, any consideration of the question of necessity must look at the actual information the applicant has requested. Mrs Butters requested a statement submitted to the Nursing and Midwifery Council by a named nurse in connection with a complaint on a matter of considerable sensitivity. In this case, Mr Irvine has requested numbers of individuals paid at specified levels. The Commissioner will consider the nature of the requested information further below (when determining whether disclosure would cause unwarranted prejudice to the legitimate interests of the data subjects), but at this point he considers it sufficient to note that in his view there are substantial differences in character between the information in the *Butters* case and that requested by Mr Irvine, which cannot be dismissed as being of no relevance when determining whether disclosure is necessary.
50. As indicated above (see paragraph 36(b)), the key question for the Commissioner here is whether disclosure of the requested information is proportionate as a means (of achieving the applicant’s legitimate interests) and fairly balanced as to ends, or whether these legitimate aims could be achieved by means which interfere less with the privacy of the data subject. In this connection, he would note that it is not for him to challenge the key role of Employment Tribunals in determining questions of equal pay. He does not believe it to follow, however, that he is required to determine the question he has set out above in the negative in this particular case.
51. In this case, the Commissioner has accepted that the applicant has a legitimate interest in certain matters and has not been persuaded by the Council’s arguments as to the relevance of the requested information to the pursuit of that legitimate interest. He accepts, in the circumstances, that the legitimate interest he has identified is capable of being met by the information. That legitimate interest has not been met by other means and, having considered the legitimate interest along with the information, he can identify no means of meeting the interest which would interfere less with the privacy of the data subject than disclosure of the requested information. As will be apparent from the Commissioner’s further analysis of the information below, he would not consider its disclosure to be an intrusion of any significance on the privacy of the individuals concerned. In all the circumstances, therefore, he concludes that disclosure of the requested information is necessary to achieve Mr Irvine’s legitimate interests.



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

52. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr Irvine and those of the employees in question. Only if the legitimate interests of Mr Irvine outweigh those of the employees can the information be disclosed without breaching the first data protection principle.
53. In his submissions, Mr Irvine commented that he could not see any way in which release of the data would prejudice the rights of the data subjects. He considered that he had requested the data to be released in a format which did not identify any individual council employee, suggesting that such information was routinely gathered and published by many employers for equality monitoring purposes.
54. The Council argued that the concept of fairness was concerned with the method by which the information was obtained and, in particular, the purpose or purposes for which the Council had advised employees that it would use their personal information. One of the considerations, it submitted, was whether the individual had been deceived or misled about the purposes for which the Council would use the information. It submitted, as the Commissioner would accept, that disclosure would be equivalent to making the information available to the world at large.
55. The Council also made reference to paragraphs in its Code of Conduct, which state that personal information about employees will not be disclosed to any third party except where there is a statutory requirement or some other court order. It submitted that these would make most disclosures of the personal data of employees unfair, in the absence of an expectation on the part of employees that their data would be processed in a certain way.
56. The Council stated that it had considered whether employees were aware, and therefore agreeable, to their information being used for this statistical purpose and made available to the public. It considered that its employees are aware that the Council was subject to a number of legal obligations in relation to equalities legislation and that relative statistics would be extracted and published. Consequently, it was fair to disclose this sort of information to the public to comply with equalities legislation.
57. The issue, in the Council's view, was whether the information sought by Mr Irvine fell within this or a similar use of the personal information for public statistical purposes, which would be expected by employees. The Council stated that it would not normally gather and produce this statistical information and employees would not expect that it would release their salary information. The Council further submitted that the information related to a relatively small number of employees undertaking a particular category of work for the Council. It could not, therefore, be comparable to Council-wide equalities statistical information.



58. The Council went on to distinguish this case from other examples cited by Mr Irvine in favour of disclosure, specifically MPs' expenses and the salary details of its Chief Executive. It considered there to be a strong expectation in the case of elected representatives and high-level employees of the Council that their personal data would be disclosed in the public interest of openness and transparency in relation to the expenditure of public funds. However, the data subjects in this case did not fit into these categories. They were not in high-level decision-making positions within the Council.
59. The Council further contended that disclosure of the requested information to the public might cause harm to the employees concerned, especially (but not restricted to) where employees could be identified by others outside the Council. The Council drew the Commissioner's attention to the possibility that Mr Irvine might publish any information disclosed on his Action 4 Equality blog, given that he had published previous disclosures by the Council there. Given the terms of his application to the Commissioner, and in particular his reference to the Council treating "traditional male ... jobs more favourably than their female colleagues", it suggested that he had prejudged the information and was likely to use it to argue that the employees in question were overpaid.
60. Consequently, the Council believed that the employees concerned might suffer some distress at seeing the information made available to a member of the public in the first instance, and to the wider public via a blog site, with the possibility that publication would involve additional adverse comments on the group of employees in the specified job.
61. The Council considered it might be possible for Mr Irvine to identify particular employees paid at particular spinal column points because of the small number of employees identified at that level. It also believed that through his contact with Action 4 Equality Scotland and a specific firm of solicitors and its clients (which included employees of the Council who had raised equal pay claims), Mr Irvine could obtain other information which would identify the employees concerned.
62. The Commissioner will first address the prospect of Mr Irvine (or, for that matter, anyone else who might have access to the information) being able to identify the data subjects following disclosure. From the submissions the Council has provided, he is unable to identify how this might come about. Having considered the withheld information, he acknowledges that the numbers of employees paid at certain spinal column points are quite small. Clearly, as indicated above, the Council is able to identify the individuals concerned from information in its possession. It is not apparent to the Commissioner, however, how anyone else would be able to identify any of these individuals, given simply a job category, a number and the fact that they worked for a particular local authority: to all intents and purposes, the individual would still be one of many occupying a post of the same general description (which would not, it would appear, equate to a single job title).



63. Equally, the Commissioner is not persuaded that identification would become any easier with access to information in the possession of Action 4 Equality Scotland, the firm of solicitors referred to by the Council or certain of that firm's clients. The Council has not indicated what this information might be, and why in particular any of those identified should be in a better position than anyone else to do more than surmise, with no particular expectation of accuracy, at the identities of the individuals concerned.
64. Clearly, the data subjects would be able to identify themselves as occupying a particular point on the pay scale. Each of them, presumably, is aware of that already. The question is what impact disclosure of the information, in the form requested by the applicant, would have on their rights and freedoms or legitimate interests.
65. In this connection, the Council has made much of disclosure being contrary to the reasonable expectations of the employees concerned. The Commissioner acknowledges the relevance of this as a factor in assessing the legitimate interests of the data subjects, as he has done in a number of previous decisions on this exemption. In most cases, he would accept that an individual employed at such a junior level within a public authority (and paid accordingly) would not expect details of their remuneration to be made public, but this premise must be considered in the context of what information has actually been requested. In this case, as indicated above, he is not satisfied that disclosure of the requested information would lead to the individuals concerned becoming identifiable to the world at large (or that such an outcome would be likely). He is aware of no reason why the data subjects should have a reasonable apprehension of becoming so identifiable.
66. The Commissioner has also taken account of the Council's references to its Code of Conduct. He notes, however, that both of the paragraphs cited refer to information *concerning an employee's private affairs*. While accepting that information from which an individual employee's level of pay could be identified might fall into that category, he does not consider the information requested by Mr Irvine (given that he does not believe it to identify the individuals concerned to anyone outwith the Council) to do so. Consequently, he does not find the Code of Conduct to be relevant in this case.
67. Having considered all the arguments presented to him, therefore, the Commissioner does not consider disclosure of the requested information to be contrary to the data subjects' reasonable expectations. Neither, given the nature of the information and his conclusions on the question of identifiability, does he believe it would be reasonable to conclude that its availability to the applicant or the wider public would carry with it the likelihood of distress, even assuming it were to be used by Mr Irvine in the manner suggested by the Council.
68. On balance, therefore, the Commissioner finds in this case that Mr Irvine's legitimate interests outweigh the rights and freedoms or legitimate interests of the data subjects. He therefore does not consider that disclosure of the requested information would be unwarranted. Consequently, he finds that condition 6 can be met in relation to that disclosure.



69. 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. The Council 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.
70. The Commissioner therefore finds that the Council was not entitled to withhold the requested information under the exemption in section 38(1)(b) of FOISA and requires the Council to release the information to Mr Irvine.

DECISION

The Commissioner finds that South Lanarkshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Irvine. In particular, the Commissioner finds that the Council wrongly applied the exemption in section 38(1)(b) of FOISA to the information withheld, and in doing so breached section 1(1) of FOISA.

The Commissioner requires the Council to supply Mr Irvine with the information requested by 2 May 2011.



Appeal

Should either Mr Irvine or South 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.

Kevin Dunion
Scottish Information Commissioner
17 March 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

(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.

...