



Scottish Information
Commissioner

**Decision 086/2007 – Mrs Helen Toner and South Lanarkshire
Council**

Decisions on awarding early retirement to teachers 2003-2005

**Applicant: Mrs Helen Toner
Authority: South Lanarkshire Council
Case No: 200600778
Decision Date: 31 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 086/2007 – Mrs Helen Toner and South Lanarkshire Council

Information about decision-making process regarding early retirement offers to teachers 2003-2005.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 17(1) (Notice that information is not held); 15 (Duty to provide advice and assistance); section 38(1)(b) (Personal information).

Data Protection Act 1998 section 1(1) (Basic interpretative provisions); Section 2 (Sensitive personal data); Schedule 1 (The data protection principles: the first principle).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mrs Toner made a series of requests to South Lanarkshire Council (the Council) for information relating to the Council's early retirement package for teachers.

Some information was provided by the Council, but Mrs Toner was advised that some of the information she had requested was not held, while other information was exempt from disclosure under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) because it was personal data which could not be disclosed without breaching one of the data protection principles laid down in the Data Protection Act 1998 (the DPA).

Mrs Toner applied to me for a decision in relation to three of her requests but later agreed that the investigation and decision should be confined to one request. In respect of this request, Mrs Toner remained dissatisfied that the Council claimed not to hold certain information covered by her request.



Background

1. Between April 2003 and February 2006 Mrs Toner was engaged in correspondence with the Council regarding the early retirement package offered to some teachers in March 2003 and again in 2004. During 2005 and early 2006 Mrs Toner made a number of requests for information to be supplied under FOISA. This decision notice relates to her request of 28 March 2005, as clarified by her on 16 May 2005.
2. Mrs Toner's information request of 28 March 2005 refers to previous correspondence with the Council, but includes a specific request for the following information:
 - a) minutes of all meetings at which the criteria [for early retirement] were discussed and finalised
 - b) all written references to the criteria
 - c) the checklist that compared her against the criteria
 - d) a minute of the meeting at which the decision was taken to refuse her early retirement
 - e) a copy of the full evaluation by Education Resources of its overall service requirements
 - f) the structure for the school she worked in
 - g) criteria for "other offers of early retirement" referred to by a Council official
 - h) all background papers including the checklist for her own case
3. On 1 April 2005 the Council wrote to advise Mrs Toner that she should make a new request in writing to the Council's Education Resources service. Mrs Toner sent an undated letter, received by the Council on 20 April 2005, confirming that she wished her letter of 28 March to be treated under FOISA as a request for information.
4. On 25 April 2005 the Council wrote to advise Mrs Toner that she should meet with Council officials to discuss her concerns and clarify certain aspects of her request. However, she was also advised of her right to request a review of this response. Mrs Toner does not appear to have received this letter.
5. On 8 May 2005 Mrs Toner wrote to the Council to complain that she had had no response to her request for information of 28 March. She noted that she was willing to meet to try to reach an amicable solution.
6. On 13 May 2005 the Council wrote to advise Mrs Toner that she should regard its letter of 25 April as the response to her request of 28 March, and advised of her right to seek a review of that response. Mrs Toner phoned the Council to advise that she had not received its letter dated 25 April 2005. The letter was faxed to her on 16 May 2005.



7. Mrs Toner wrote to the Council on the same day to state that she was not satisfied with the reply of 25 April. Although she was willing to try to resolve her outstanding issues through a meeting, she did not accept that her information request was unclear.
8. A meeting was arranged for 21 June 2005. However, on 16 June 2005 the Council wrote to Mrs Toner to acknowledge that the letter received from her on 18 May 2005 had clarified her request. The Council enclosed some information in relation to her requests and advised that other information was exempt from disclosure under section 38 of FOISA as it contained personal information relating to other teaching staff. Mrs Toner was also told that some of the information she had requested did not exist.
9. On 5 July 2005 Mrs Toner wrote to the Council stating that she had met with a representative of the Education Resources service but that the meeting had not resolved the ongoing issue of her request for early retirement on the terms announced in 2003. She listed the issues which she intended to include in her forthcoming request for review. On 27 July 2005 the Council wrote back with comments on each of the issues she had raised.
10. On 20 September 2005 Mrs Toner requested a review of the Council's response to her information request of 28 March 2005, in addition to the responses received to some of her other requests.
11. The Council replied on 20 October 2005. It accepted that her letter of 16 May 2005 should not have been treated as a separate request, but as clarification of her request of 28 March 2005. The Review Panel found that her letter of 28 March 2005 did not, in the main, require clarification, but concluded that the Council had been justified in seeking to resolve or clarify matters by meeting with Mrs Toner.
12. The Review Panel decided that Mrs Toner should receive some further information after the redaction of certain personal data which it believed to be exempt under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i). It found that some of the information she requested was not held in terms of section 17(1) of FOISA. Some information was deemed to have been provided already. Regarding the information described as item (e) in paragraph 2 above, the Review Panel found that clarification was necessary as the subject matter was potentially so wide that it was possible that the cost of compliance would bring section 13 of FOISA into play (Fees for disclosure in certain circumstances).
13. The Review Panel acknowledged and apologised for the failure of the Council to respond in appropriate terms where the reason for refusing to provide the information was that the information was not held by the Council, and advised that procedures had been put into place to prevent any re-occurrence in the future.



14. Mrs Toner was not completely satisfied with this response and on 18 April 2006 she applied to me for a decision on the matter. After some correspondence between my Office and Mrs Toner, her application was validated in respect of her request of 28 March 2005 (and its subsequent clarification on 16 May 2005), by establishing that she had made a valid information request to a Scottish public authority and had applied to me for a decision only after asking the public authority to review its response to her request.

The investigation

15. A letter was sent to the Council on 9 June 2006, informing it that an application had been received and that an investigation into the matter had begun and seeking comments in terms of section 49(3)(a) of FOISA.
16. The Council was asked to supply copies of the information it had provided to Mrs Toner, and to explain how it had been established that certain information was not held. In relation to the information described in paragraph 2 item (e), the Council was asked whether it had since obtained the clarification requested by the Review Panel and whether it had now provided the relevant information to Mrs Toner.
17. The Council provided its submission on 5 July 2006. Further information was provided by the Council in response to questions from the investigating officer during the course of the investigation.

The Commissioner's Analysis and Findings

18. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mrs Toner and the Council and I am satisfied that no matter of relevance has been overlooked.

Item (a) – minutes referring to discussion of criteria for early retirement



19. As noted in paragraph 2, item (a), Mrs Toner requested minutes of all meetings at which the criteria [for early retirement] were discussed and finalised. She received an excerpt from the minute of one meeting of the Education Management Team (14 May 2003); this minute simply records that the criteria used to assess requests for early retirement had been approved.
20. Following enquiries from my Office, the Council confirmed that informal discussions did take place to assess the suitability of the criteria in terms of fairness and equity, but these discussions were not minuted.
21. In the circumstances, I accept the Council's explanation of the limited information it holds in relation to item (a) of Mrs Toner's request. I find that she had been provided with all information the Council holds in relation to item (a).

Item (b) – all written references to the criteria

22. Mrs Toner also asked for all written references to the criteria for early retirement (item (b)). She was initially sent the Education Management Team Report on early retirement, dated 14 May 2003. After the review of the response to her request she was also supplied with the appendices to that report, after personal data relating to other teachers had been removed.
23. The Council advised the investigating officer that it had held discussions with senior officers to establish what information was held which would be covered by Mrs Toner's request. The report supplied to Mrs Toner was the only document identified during those discussions.
24. The investigating officer queried whether additional information containing references to the criteria might be held within the Council, noting that the information provided contained no detailed description of the criteria or any indication of how individuals were to be assessed against the criteria. The basis for the Council's decision on each application was not entirely clear from the information provided to Mrs Toner.
25. The Council advised that the only sections involved in the early retirement exercise were Education Personnel and Finance and Personnel, and the only staff involved were the Education Personnel Manager and the former Head of Service (Finance and Personnel) who had now retired.
26. The Education Personnel Manager confirmed that there was no record (emails, minutes or notes) of discussions between her and the former Head of Service (Finance and Personnel) regarding the establishment of the early retirement criteria, and no notes or emails regarding the criteria were held by either officer. The archived files of the former Head of Service (Finance and Personnel) had been searched, along with paper and electronic files held by Education Personnel.



27. I accept that all relevant records and files within the Council were included within the search for information covered by item (b) of Mrs Toner's request and that accordingly an adequate search has been carried out by the Council. It may seem surprising that the basis for the Council's decision-making on this issue was not more fully documented, but after investigating fully, I accept that this is so, and that all information relating to item (b) has been provided to Mrs Toner.
28. I find that the information withheld from the appendices of the Education Management Team Report constitutes personal data which, if disclosed, would contravene the data protection principles in the Data Protection Act 1998 (the DPA). 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 of the DPA is met, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
29. I have considered the definition of "sensitive personal data" in section 2 of the DPA and do not consider that any of the information sought by Mrs Toner falls into this category.
30. According to guidance from the Information Commissioner ("Freedom of Information Awareness Guidance 1", which can be viewed at <http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private.
31. The appendices of the Education Management Report largely consist of personal data relating to the teachers who applied for the early retirement package. I found that it would be unfair to disclose information relating to the costs of providing individual teachers with early retirement. The information was taken from their personnel files, and there is a general expectation that such information will be treated confidentially.
32. I have considered whether it would be possible to anonymise this data in order to allow Mrs Toner to compare her position with those of other teachers. However, I agree with the Council that this would not be practicable: it would be necessary to remove both the name of the teacher and the name of the school in order to anonymise the data, and the awarding of early retirement was linked to the assessment of the needs of each school. The data would therefore be meaningless without the name of the school.
33. Accordingly, I find that the Council was correct to withhold the information in the appendices of the Education Management Report under section 38(1)(b) of FOISA.



Item (c) – the checklist that compared her to the criteria and

Item (d) - a minute of the meeting at which the decision was taken to refuse her early retirement

34. In response to Mrs Toner's request for the checklist that compared her to the criteria, the Council advised that it did not hold a document referred to as a checklist. The Council also stated that it did not hold any minute of the meeting at which it was decided that Mrs Toner should not be given early retirement.
35. During the investigation the Council was asked what information would typically have been created and stored during the process of assessing applications for early retirement. The Council explained that the name of each applicant was entered onto a spreadsheet with details taken from their personnel file and pension records. (Mrs Toner has received a redacted version of this spreadsheet – see paragraph 22 above.) Applicants were then assessed according to the criteria detailed as category 1, 2 etc. at the foot of each spreadsheet.
36. Although the Council did not state this, it appears that the spreadsheet was used to record whether an applicant met the criteria laid down in the categories at the foot of each spreadsheet.
37. Applicants were then informed in writing whether or not their application had been approved.
38. From this reply, and following the investigation regarding "all references to the criteria" discussed above, I have concluded that the Council does not hold any checklist apart from the spreadsheet which has already been provided to Mrs Toner, and that the only record of the decision regarding each individual applicant was the letter advising them whether or not they had been granted early retirement. The Council was therefore justified in advising Mrs Toner that it did not hold the information she requested and responding to that part of her request in terms of section 17(1) of FOISA.



39. I would comment that it has been difficult to establish the procedure used by the Council in reaching its decision for individual applicants. It is evident from the terms of her request that Mrs Toner expected a different procedure to have been used, in which each applicant was compared to a list of criteria and graded against that list. It would have been helpful, in terms of section 15 of FOISA (Duty to provide advice and assistance), for the Council to have explained to Mrs Toner at the outset what information was held in relation to the early retirement assessment process. Of course, the Council may have attempted to explain this to Mrs Toner in its meeting with her of 25 June 2005, but it is evident from the terms of her subsequent request for review that she still expected the Council to hold information in certain formats which (it has now been established) had never been the case. The same difficulty presented itself during the investigation of this case, and again it took considerable efforts to establish what information had been created during the early retirement exercise.

Item (e) - a copy of the full evaluation by Education Resources of its overall service requirements

40. During previous correspondence with the Council, Mrs Toner had been advised that the decision on her application for early retirement had been reached following a full evaluation by Education Resources of its overall service requirements. Following Mrs Toner's request for a copy of this evaluation, she met with the relevant Head of Service (30 June 2005): the Council has stated that at this meeting it was explained to her that each year Education Resources undertook an evaluation of the teacher staffing requirements for each school. However, it is clear that Mrs Toner was not fully satisfied by the explanation, as she included the matter in her request for review of 20 September 2005.
41. In its review of Mrs Toner's requests (20 October 2005) the Council advised Mrs Toner that it required further clarification of what information she required, in relation to this part of her request, as the subject matter was potentially so wide that the response might incur a fee under the relevant Fees Regulations. Mrs Toner was asked to clarify the nature and extent of the information she required.
42. The Council has confirmed that Mrs Toner has not provided any clarification, and that no further information has been provided to her. The Council had already provided (16 June 2005) a document entitled "Secondary Schools Teaching Staff Entitlement" which details staffing requirements for Mrs Toner's school for the 2004/5 session.



43. The Council was asked to provide the investigating officer with a brief explanation of the range of information that might be covered by Mrs Toner's request. The Council indicated that for each of its schools for each year it carried out an evaluation to create similar information to that already provided in relation to Mrs Toner's school: this information was held by the Council thereafter.
44. I accept that the Council has demonstrated a willingness to meet with Mrs Toner and explain its position to her. However, in terms of section 15 of FOISA I consider that it would have been helpful to provide Mrs Toner with the simple explanation given to my Office (see previous paragraph) when requiring further clarification from her. Without this explanation Mrs Toner had no way of knowing that the information covered by this part of her request was all of a type which she had already received in relation to her own school. I therefore find that the Council failed to comply with section 15 of FOISA in relation to this part of Mrs Toner's request.
45. Now that an explanation of the nature of the information held by the Council is available to Mrs Toner, it is open to her to make a new information request which specifies more exactly what information she wishes to receive.

Item (f) - the structure for the school she worked in

46. Again in reference to previous correspondence with the Council, Mrs Toner requested "the structure for this resource and [named] school". From the context, it is clear that her request related to the evaluation of service requirements (item (e)). The Council provided Mrs Toner with the Education Resources Structure diagram and Secondary Schools Teaching Staff Entitlement for her school.
47. In her application for a decision from me, Mrs Toner did not specify any dissatisfaction with the Council's response to this part of her request. I consider that the Council has supplied the information requested in item (f).

***Item (g) - criteria for "other offers of early retirement" referred to by a Council official
and***

Item (h) - all background papers including the checklist for her own case

48. Mrs Toner also asked for information about offers of early retirement made in 2004. She asked to be furnished with the criteria for these offers and all background papers including the checklist for her own case.
49. The Council submitted that Mrs Toner was provided with details of the criteria used in its letters to her dated 23 June 2004 and 16 June 2005.



50. I would comment that the information provided to Mrs Toner in the letter of 23 June 2004 and referred to in the letter of 16 June 2005 is couched in terms of certain factors which were considered, rather than criteria which had to be met. However, as noted above in paragraphs 22-27, the extent of the Council's search for information on the criteria used to assess early retirement applications has been fully investigated and very little detailed information has been found to exist. It seems clear that the Council does not hold any additional information which would provide further explanation of the criteria used to assess applications.
51. In relation to the request for background papers and to help her understand the reasons and criteria for the 2004 early retirement exercise, Mrs Toner was provided with a document entitled "Guidelines for use in managing the re-deployment of teaching staff involved in school re-organisations within South Lanarkshire".
52. The Council was asked how broadly it had interpreted the term "background papers" and whether it had considered that memoranda, minutes or emails relating to the early retirement process could be covered by this part of Mrs Toner's request. The Council explained that it had interpreted this request to relate to information specific to Mrs Toner and her assertion that she should have been considered for early retirement in 2004. She had been informed that she was not considered as she was not employed in a school that was merging. The implication seems to be that as Mrs Toner was not considered, there were no background papers relating to her case.
53. I consider this to be a reasonable interpretation of Mrs Toner's request and in any case, based on the evidence of the searches carried out in relation to item (b), it seems unlikely that the Council would have retrieved any further information relating to a broader interpretation of the request.

Conclusion

54. Overall, I have found that the Council has been able to demonstrate that Mrs Toner has been provided with all relevant information relating to her request, as required by Part 1 of FOISA.
55. I have found it surprising that so little information is available from the Council to document the basis on which decisions were taken to grant early retirement to some members of staff and not to others. From the information provided to Mrs Toner and made available to me, the decision-making process is not entirely transparent. However, after investigating fully, I accept that the Council is not seeking to withhold any information which should have been provided under the terms of Mrs Toner's request.



Decision

I find that South Lanarkshire Council generally acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs Toner. However, I find that the Council failed to comply with section 15 of FOISA in dealing with one part of Mrs Toner's request, in that it failed to provide reasonable advice and assistance to Mrs Toner. I do not require the Council to take any action regarding this breach.

Appeal

Should either South Lanarkshire Council or Mrs Toner 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
31 May 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

17 Notice that information is not held

- (1) Where
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but

- (a) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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) section 10 of that Act (right to prevent processing likely to cause damage or distress); and

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

(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.

[...]