

Decision Notice



Decision 148/2010 Sandy Longmuir and Dundee City Council

Time spent by a council employee on duties as an elected member

Reference No: 200901898

Decision Date: 24 August 2010

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Sandy Longmuir requested from Dundee City Council (the Council) information relating to the time and cost of a council employee (the employee) performing duties as an elected member of another local authority. The Council responded by withholding the information under section 38(1)(b) of FOISA as it considered the information to be personal information. Following a review, Mr Longmuir remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Longmuir's request for information in accordance with Part 1 of FOISA. The Commissioner concluded that the Council was entitled to withhold information relating to the employee's expenses claims, and about absences (and cover for such absences) for purposes other than the employee's duties as an elected member.

However, the Commissioner concluded that the exemption in section 38(1)(b) of FOISA had been incorrectly applied to information relating to time off granted to the employee (and cover for time off) to allow them to undertake duties as an elected member. He required the Council to provide this information to Mr Longmuir or alternatively to provide him with a notice in terms of section 17 of FOISA if no such information is held.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement), 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); Schedule 1 (Data protection principles) (the first data protection principle); Schedule 2 (Conditions relevant for the purposes of the first principle: processing of any personal data) (conditions 1 and 6(1))

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.

Employment Rights Act 1996 (the ERA) section 50 (Right to time off for public duties).

Local Governance (Scotland) Act 2004 (the LGSA) section 11 (Pay, pensions etc. of councillors).



Background

1. On 8 September 2009, Mr Longmuir wrote to the Council requesting information in the following terms:

You have [an employee] in your employ by the name of [the employee] who also acts as a Councillor in [Council B]. I am interested in their claims for expenses and leave taken to fulfil their duties as a Councillor. I am also interested in the expense incurred by Dundee City in employing cover for their absences. I would like to request:

 - i. All [the employee's] expense claim forms since 1 January 2008;
 - ii. All applications for leave since 1 January 2009. I have no interest in special leave for personal reasons such as medical or bereavement. I am interested in special leave applications which pertain to their professional duties be it as [an employee] employed by Dundee City Council or as a Councillor for [Council B]. This should include in service day applications;
 - iii. The number of hours that Dundee City has had to [provide temporary cover] for [the employee's] absences since 1 January 2008;
 - iv. If possible, the cost to Dundee City Council of the cover referred to in iii. above;
 - v. Details of whether leave granted was paid or unpaid and details of any fixed hours granted by agreement for which [the employee] receives full pay while pursuing duties in another county (for which they are also compensated);
 - vi. Although it should be covered in the above I have a special interest in whether [the employee] received full pay for [a particular event] (the particular event).
2. The Council responded on 1 October 2009 indicating that it was withholding all of the information as it considered it to be exempt by virtue of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i).
3. On 1 October 2009, Mr Longmuir wrote to the Council requesting a review of its decision. In particular, Mr Longmuir drew the Council's attention to his belief that there was a public interest in knowing if the employee was being recompensed twice from the public purse in relation to their duties as an employee of the Council and as an elected member of Council B. Mr Longmuir also cited the employee's stance during the public debate regarding MPs' and MSPs' expenses. He regarded the employee's public stance on the use of public monies as a particular factor supporting the public interest in transparency regarding the employee's remuneration from the public purse.



4. The Council notified Mr Longmuir of the outcome of its review on 30 October 2009. The review upheld, without modification, the earlier decision to withhold all the information requested. The Council did, however, provide general details of legislation governing time off for public duties and Councillors' pay.
5. On 30 October 2009 Mr Longmuir 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 Longmuir 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 4 November 2009, the Council was notified in writing that an application had been received from Mr Longmuir 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, 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.
9. The Council's initial response confirmed its reliance on section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) as the sole grounds for withholding the information. It explained that it considered it would breach the first data protection principle in disclosing the information to Mr Longmuir as the employee had refused to consent to disclosure and the Council did not consider that condition 6(1) in Schedule 2 of the DPA applied in this case. The Council did not provide any further explanation regarding its rationale in deeming condition 6(1) inapplicable.
10. The Council also explained that it did not consider Mr Longmuir's concerns that the public may be paying twice for the same individual a relevant issue. It went on to justify this position by indicating that the right to time off to perform public duties and the entitlement to pay for acting as an elected member were both enshrined in legislation, respectively section 50 of the Employment Rights Act 1996 (ERA) and section 11 of the Local Governance (Scotland) Act 2004 (LGSA).



11. The Council also explained that it had negotiated local arrangements regarding leave of absence and leave provisions with an established local negotiating committee. These arrangements allowed for a maximum of 208 hours paid leave per financial year to undertake local authority duties as an elected member. The Council provided a copy of the relevant guidance document setting out these arrangements (the guidance) to the investigating officer. The Council had not previously made Mr Longmuir aware of, or provided him with a copy of, this document.
12. The Council also clarified that attendance at training days formed part of the contractual obligations of an employee, and such attendance was not considered to be leave and therefore did not require the submission of a leave application.

Commissioner's analysis and findings

13. 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 Longmuir and the Council and is satisfied that no matter of relevance has been overlooked.
14. As noted above, the Council withheld all of the information requested by Mr Longmuir on the basis that it is exempt from disclosure in terms of section 38(1)(b) of FOISA.
15. In what follows, the Commissioner has first considered the part of Mr Longmuir's request seeking (at part v) details of any fixed hours granted by agreement for which the employee receives full pay while pursuing duties in another county (hereinafter referred to as a local authority area). The Commissioner has considered the remaining parts of the request thereafter.

Information regarding details of fixed hours granted by agreement

16. The fifth element of Mr Longmuir's request in part related to information regarding details of any fixed hours granted by agreement for which the employee receives full pay while pursuing duties in another local authority area.
17. The Commissioner notes that, in its response to questions from the investigating officer, the Council provided a copy of the guidance mentioned in paragraph 11 above. This document provides guidelines concerning leave of absence and leave provisions for employees of the relevant Council department. Under the heading of "Discretionary Leave", paragraph 2.16 in this document indicates that an employee can be granted up to 208 hours paid leave in any financial year to undertake local authority duties as an elected member.



18. The Commissioner also notes that section 50 of the ERA creates a statutory entitlement to time off work to undertake duties of a public nature, although there is no statutory entitlement to remuneration for this time off. The Commissioner therefore notes that the time off arrangements outlined in paragraph 2.16 of the Council's guidance document exceed the minimum statutory requirements created by the ERA.
19. The Council indicated it did not consider that the guidance document fell within the scope of Mr Longmuir's request. It stated that had it considered the document to be within the scope of Mr Longmuir's request it would have provided him with a copy of, or link to, the document as it was not confidential. The investigating officer confirmed that a copy of the document is publicly available on the internet.
20. Having considered this document and the terms of Mr Longmuir's information request, the Commissioner does not agree with the Council's assessment that the guidance falls outwith the scope of the request. He has noted that the document clearly contains information regarding an agreement in relation to which the employee is entitled to receive full pay while pursuing duties as an elected member of a local authority.
21. The Commissioner therefore concludes that the Council was wrong to conclude that the guidance document did not fall within the scope of Mr Longmuir's information request.
22. Since this document is published, one option open to the Council was to withhold this information, on the grounds that it was already reasonably accessible to Mr Longmuir (in terms of section 25(1) of FOISA). Had it done so, it would have been appropriate to advise Mr Longmuir on how to access this information. However, the Council did not respond in these terms.
23. The Commissioner also understands that the Council did not consider this particular information to be exempt under section 38(1)(b), or any other exemption contained in FOISA.
24. In the circumstances, having concluded that this document fell within the scope of Mr Longmuir's information request, and that the Council neither supplied it to Mr Longmuir nor applied any appropriate exemption, the Commissioner can only conclude that the Council failed to comply with section 1(1) of FOISA.
25. In correspondence between with the investigating officer, Mr Longmuir has referred to this document and provided a link to it. Since Mr Longmuir has clearly identified this document and its relevance by other means, the Commissioner does not require the Council to take any action in response to this breach.

Consideration of Section 38(1)(b) read in conjunction with section 38(2)(a)(i)

26. The Council withheld under this exemption
 - i. the employee's expense claims,



- ii. details of the dates and duration of special leave granted to the employee to undertake their role as an elected member of Council B, and in each case whether this was paid or unpaid leave.
 - iii. the number of hours for which cover was arranged for the employee's duties and the associated costs.
27. The exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
28. The Council clarified in correspondence with the investigating officer that it was relying on this exemption as it considered that disclosure of the information would breach the first data protection principle.

Is the information under consideration personal data?

29. Personal data is 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 (the definition is set out in full in the Appendix).
30. In this case the information withheld from Mr Longmuir clearly relates to a specific named individual, who is both an employee of Dundee City Council and an elected member of Council B, providing details of that person's activities in each of these roles. The individual concerned is identifiable from this information, both in isolation, or in conjunction with other information that is in the possession of the Council.
31. The Commissioner is therefore satisfied that the withheld information constitutes personal data.

Would disclosure breach the first data protection principle?

32. The first data protection principle requires that the processing of personal data (here, the disclosure of the data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he 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 of the DPA in this case.



33. 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 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
34. 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 of the DPA be met?

35. As outlined in the Commissioner's guidance on the exemptions in section 38 of FOISA¹ only conditions 1 and 6 in Schedule 2 are likely to be relevant when considering a request for personal information under FOISA. Condition 1 permits the processing of personal data (here, disclosure in response to Mr Longmuir's information request), where the data subject has consented to its processing. The Council has confirmed that the employee was asked and declined to give their consent to the processing of their personal data, and so condition 1 can not be met in this case.
36. In the circumstances, and having considered all of the remaining conditions in Schedule 2 of the DPA, the Commissioner is of the view that condition 6(1) of Schedule 2 is the only condition which might be considered potentially to apply in this case.

Condition 6(1)

37. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued 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.
38. There are, therefore, three specific tests which must be satisfied before condition 6(1) can be met, namely:
 - a. Does the applicant (Mr Longmuir) have a legitimate interest in obtaining this 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?

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



- c. Even if the processing is necessary for the legitimate purposes of the applicant, would the 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 the applicant and those of the data subject. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subject can the personal data be disclosed.

Does the applicant have a legitimate interest in obtaining the information?

39. Mr Longmuir, in his correspondence with the Council and the Commissioner, identified that he wished to receive the information in order to ascertain whether in their role as an employee in one local authority and an elected member in another local authority the employee was being recompensed twice. He indicated that he wished to know if the employee was being provided with paid time off by Dundee City Council to perform duties as an elected member of Council B for which they also received payment.
40. Mr Longmuir additionally indicated to the Commissioner that he believed there was a strong public interest in knowing if somebody, such as the employee, was effectively being recompensed twice for his role as an elected member as such arrangements put members of the private sector wishing to become elected members at a considerable disadvantage. He explained that it was his understanding that many employees from the private sector and the self employed had to surrender income from their employment to act as an elected member.
41. With respect to the particular event (referred to in the final part of his request), Mr Longmuir indicated that (from an email he had received from Council B in response to another request for information) he understood that the employee had attended as part of a Council B delegation but this also counted as a training day as an employee of the Council. Mr Longmuir was concerned that there may have been a conflict of interest in the employee attending this event in both capacities. He was also concerned that this may have resulted in the public paying three times for his attendance – firstly as an elected member in receipt of payment from Council B; secondly as an employee of Dundee City Council on a paid training day; and thirdly via alternate staff being engaged to cover the employee's normal duties that day.
42. In its response to questions posed by the investigating officer, the Council indicated that it did not consider that Mr Longmuir had a legitimate interest in obtaining the information. It indicated that there was a statutory right to time off for public duties contained in section 50 of the ERA and a further statutory entitlement to pay for acting as an elected member contained in section 11 of the LGSA. The Council suggested that Mr Longmuir would be aware of this statutory framework and therefore had no legitimate interest in obtaining the information requested.
43. The Commissioner has considered this point, and has observed that the statutory framework identified by the Council simply creates certain rights or entitlements; it does not provide any enlightenment on the uptake or extent of use of such rights or entitlements by any person entitled to do so. The Commissioner does not consider that the existence of the statutory framework regarding the entitlement to time off for public duties and remuneration of Councillors entails that there can be no legitimate interest in understanding the uptake of such provision either by one individual or in general.



44. In this case, the Commissioner considers that Mr Longmuir has identified a legitimate interest in obtaining the information requested. Accordingly, the Commissioner considers that Mr Longmuir does have a legitimate interest in obtaining the information requested.

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

45. The Commissioner must now consider whether disclosure is necessary to meet the legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.
46. In this case, Mr Longmuir wishes to have access to the withheld information in order to understand the costs to Dundee City Council associated with time off afforded by it to the employee to perform their role as an elected member of Council B. He has also expressed particular interest in the arrangements on one particular date.
47. The Commissioner can envisage no other way of achieving the ends identified by Mr Longmuir without access to the particular information under consideration. The Commissioner is satisfied that there is no other information in the public domain which would allow Mr Longmuir to understand the number and cost to the Council of occasions where the particular employee concerned is absent as a result of his duties as an elected member.
48. The Commissioner has therefore concluded that the processing (via disclosure) is necessary to achieve the aims identified by Mr Longmuir.

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

49. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the employee. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Longmuir and those of the employee. Only if the legitimate interests of Mr Longmuir outweigh those of the employee can the information be disclosed without breaching the first data protection principle.
50. The Commissioner's guidance on the exemptions in section 38, identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
 - b. the potential harm or distress that may be caused by the disclosure;
 - c. whether the individual has objected to the disclosure;
 - d. the reasonable expectations of the individual as to whether the information would be disclosed.



51. The Council was invited to present submissions as to why it believed that disclosure would cause unwarranted prejudice to the legitimate interests of the employee, but it offered very limited arguments in this respect. The Council did indicate that the employee had declined to consent to the disclosure but, other than indicating that the statutory framework mentioned above existed, provided little further information to support its position.
52. The Council did identify that the employee had two roles, one as an employee of the Council and the other as an elected member of Council B. The Council further argued that, given that the employee did not hold a senior position within the Council, or one which was public facing, it would be an unwarranted intrusion to the rights, freedoms and legitimate interests of the employee to disclose information relating to their role as an employee of the Council.

Conclusions on the balancing exercise

53. In considering the balance of legitimate interests in this case, the Commissioner has considered all of the points made by the Council and Mr Longmuir.
54. He has first of all noted that the Council consulted the employee who is the data subject in this case, and that the employee has declined to give their consent to disclosure. While this refusal provides a clear indication of the data subject's wishes, it does not necessarily mean that processing via disclosure to Mr Longmuir would be unwarranted.
55. As noted above, one factor affecting a decision to disclose personal information under FOISA is whether the information relates to the individual's public life or their private life. The seniority of the position and whether it is a public facing role are important factors when considering the disclosure of personal data.
56. The Commissioner is aware that special leave can be granted to an employee for many reasons including sensitive personal reasons such as illness or bereavement. However, in this case, Mr Longmuir has made clear that he is not interested in knowing about absences for personal reasons – his request for details of leave is limited to those cases where this is for professional reasons and particularly in relation to his activities as an elected representative.
57. In this case, the Commissioner is satisfied that the information under consideration relates entirely to the employee's public life (as an employee and as an elected representative rather than their private and home life), but it relates to two separate roles within two different public authorities. The Commissioner accepts that the employee would reasonably hold different expectations with respect to the degree of scrutiny of their actions as an elected member, and as an employee of the Council. He considers that it was appropriate for the Council to recognise and take into consideration the two different roles performed by the employee when considering the legitimate interest test.



58. The Commissioner accepts that, within the hierarchical structure of the Council, the employee does not hold a senior position, although he does consider the role to be public facing. The Commissioner accepts that considered simply as an employee of a public authority occupying a position which is not a senior position, the employee is unlikely to have an expectation that personal information of the type under consideration in this decision will be disclosed in response to a request under FOISA.

Expense claims and absences for purposes other than duties as an elected member

59. Where the information under consideration relates solely to the employee's role within the Council, or would relate to the employee's absences or cover for such absences for reasons other than their duties as a Councillor, the Commissioner accepts that disclosure would be unwarranted by virtue of prejudice to the rights and freedoms or legitimate interests of the data subject. For such information, the Commissioner concludes that the legitimate interests identified by Mr Longmuir are outweighed by those of the employee.
60. Since the expense claims under consideration in this element of the investigation relate solely to the employee's role within the Council, the Commissioner concludes that condition 6 cannot be met in relation to these.
61. The Commissioner also concludes that condition 6 cannot be met in relation to information concerning absence for reasons other than the employee's duties as a Councillor, or the number of hours for which cover for such absence was arranged and the associated costs. The Commissioner considers this information to relate solely to the employee's role within the Council.
62. Since no condition within Schedule 2 of the DPA can be met with respect to this information, the Commissioner concludes that disclosure would breach the first data protection principle. Accordingly, the Commissioner concludes that this information was correctly withheld in terms of section 38(1)(b) of FOISA.

Absences for duties as an elected member

63. The remaining information under consideration (regarding the employee's absences or special leave from duties as an employee to undertake his duties as an elected member) relates to both of the employee's roles, as an employee of the Council and as an elected member of Council B.
64. The Commissioner considers that the specific roles and responsibilities which are undertaken by elected members are such that they might reasonably expect such information about their activities in public office to be released into the public domain, including information regarding their absence from any other form of public sector employment to enable them to perform their duties as an elected member. In this context, the Commissioner considers that this information should not be considered simply to relate to the employee's employment within the Council, and (by virtue of its relevance to this person's role as an elected member) that person would reasonably expect that such information might be disclosed in response to a request under FOISA.



65. Having balanced the legitimate interests of Mr Longmuir with those of the employee in relation to the remaining withheld information, the Commissioner is satisfied that any prejudice to the rights, freedoms and legitimate interests of the employee by the disclosure of information is outweighed in this instance by the legitimate interests of the requestor and the wider public. As such, he has concluded that disclosure would be in line with condition 6(1) within schedule 2 of the DPA.
66. Having reached this conclusion, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure of the information concerning the employee's absences for their duties as an elected member would be fair and lawful.
67. The Commissioner considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. 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) and, in any event, the Commissioner can identify no reason why disclosure should be considered unlawful.
68. Having found disclosure of the information concerning the employee's absences to undertake duties as an elected representative to be both fair and lawful, and in accordance with condition 6(1), the Commissioner therefore concludes that disclosure of this information would not breach the first data protection principle.
69. The Commissioner therefore concludes that the exemption in section 38(1)(b) has been wrongly applied by the Council to the withheld information relating to the employee's absences for duties as an elected member, and so it acted in breach of section 1(1) of FOISA by withholding this.
70. He now requires that all information held by the Council relating to the employee's absences from their duties as an employee in order to undertake their duties as an elected member of Council B should be disclosed or, if appropriate, that a notice in terms of section 17 of FOISA be issued. The relevant information includes:
 - a. the information contained in the tables in the documents enclosed as item 2 within the Council's letter to the Commissioner of 18 December 2009, subject to the removal of entries not associated with the employee's duties as an elected member of Council B.
 - b. the total number of hours for which cover was arranged for the employee's duties from 1 January 2008 to the date of Mr Longmuir's request (as confirmed in correspondence with the investigating officer).
 - c. the cost associated with (b) above (as confirmed in correspondence with the investigating officer).

“The particular event”



71. In the final part of his request, Mr Longmuir indicated that, although it should be covered by the earlier parts of his request, he had a special interest in whether the employee received full pay for attending one particular event.
72. As noted above, Mr Longmuir's submissions during the investigation explained that he understood that the employee had attended this event both in his role as an elected member representing the employer's side and as an employee of the Council. Mr Longmuir was further concerned that the Council may also have had to engage temporary cover to undertake the employee's duties thus, in his words, resulting in the public paying three times for the services of the employee that day.
73. The Council's initial submissions to the Commissioner did not address the particular event and the investigating officer subsequently sought further information from the Council. However, the Council's response on this point was somewhat confusing and apparently conflicted with information contained in a public record of the event. The investigating officer had to seek further information from the Council in an effort to rationalise the apparent anomaly between the Council's position and that of the official event record. The Council ultimately provided additional information that clarified the situation but the Commissioner is disappointed that it was necessary to instigate additional enquiries in order to obtain accurate information from the Council.
74. The Commissioner has, in the paragraphs above, already required the Council to disclose to Mr Longmuir all information held by it relating to the employee's absences from his duties as an employee in order to undertake his duties as an elected member of Council B. The Commissioner does not therefore consider it necessary to make a separate requirement regarding the specific event as any relevant information, if held by the Council, would fall within the requirement to disclose information contained in paragraph 70 above.

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 Sandy Longmuir.

The Commissioner finds that by withholding the personal information detailed in paragraphs 60 and 61 above under section 38(1)(b) of FOISA, the Council complied with Part 1.

However, the Commissioner finds that the Council failed to comply with Part 1 of FOISA by wrongly applying the exemption in section 38(1)(b) of FOISA to the information detailed in paragraph 70. In so doing, the Council breached the requirements of section 1(1) of FOISA.

The Commissioner finds that the Council also breached the requirements of section 1(1) of FOISA by failing to supply to Mr Longmuir, or to apply any appropriate exemption in relation to, the guidance document discussed in paragraphs 11 and 17 above.

Decision 148/2010
Sandy Longmuir
and Dundee City Council



The Commissioner requires the Council to provide (to the extent that it is held), the information specified in paragraph 70 above or, if (and to the extent that) no such information is held, to issue a notice in terms of section 17 of FOISA, and to do so by 8 October 2010

Appeal

Should either Mr Longmuir or the 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
24 August 2010



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.

...

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

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.

...