

Decision Notice



Decision 129/2012 Mr Dave MacKenzie and Highland Council

Complaints

Reference No: 201200798

Decision Date: 3 August 2012

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Rosemary Agnew
Scottish Information Commissioner

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



Summary

Mr MacKenzie asked Highland Council (the Council) for details of complaints made about activities at Ledgowan Estate in Wester Ross. The Council provided details of the complaints, but withheld certain information that identified complainants on the basis that this was personal data, disclosure of which would breach the first data protection principle.

The Commissioner agreed with the approach taken by the Council, having concluded that the information withheld by the Council was exempt under section 38(1)(b) of FOISA (third party personal data). The Commissioner found that the Council was entitled to withhold that information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of “the data protection principles”, “data subject” and “personal data”) (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of “personal data”); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

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

Background

1. On 5 August 2011, Mr MacKenzie wrote to the Council requesting details of complaints regarding activities at Ledgowan Estate in Wester Ross.
2. The Council responded to this request, having considered it as one made in terms of FOISA, on 8 September 2011. It provided copies of letters and emails received by its planning service, subject to the redaction of some information considered to be personal data that was exempt from disclosure under section 38(1)(b) of FOISA. The Council indicated that it had also withheld one letter in its entirety, as it was not possible to redact it since the content would identify the author.



3. On 8 March 2012, Mr Mackenzie wrote to the Council requesting a review of its decision, indicating that he was very dissatisfied with the way his request had been handled by the Council.
4. The Council notified Mr MacKenzie of the outcome of its review on 5 April 2012. The Council upheld its decision to withhold information that it considered to identify the complainants. However, it indicated that it now believed that the exemption used was incorrect. Having recognised that the withheld information was environmental information as defined in the EIRs, the Council indicated that it was exempt from disclosure under section 39(2) of FOISA. This applies to information that is environmental information as defined in regulation 2 of the EIRs, and enables an authority to consider that information solely in terms of the EIRs.
5. The Council went on to consider the request in terms of the EIRs and concluded that the withheld information was excepted from disclosure under regulation 11(2) of the EIRs, the effect of which is the same as section 38(1)(b) of FOISA.
6. On 20 April 2012, Mr MacKenzie 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 MacKenzie 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.
8. In this case, however, Mr MacKenzie's request for review had been made outwith the required timescale for the purposes of the Environmental Information (Scotland) Regulations 2004 (EIRs) (for reasons which are not relevant for this decision). The Commissioner is only able to consider the Council's handling of his request insofar as it was made under FOISA.
9. The case was then allocated to an investigating officer.

Investigation

10. On 9 May 2012, the Council was notified in writing that an application had been received from Mr MacKenzie and was asked to provide the Commissioner with any information withheld from him.
11. The Council was also informed that the Commissioner was unable to take forward any investigation of Mr MacKenzie's case insofar as it was made under the EIRs, and asked whether in this instance it would be willing to withdraw its application of the exemption in section 39(2) of FOISA, to allow wider consideration of the request under FOISA. The investigating officer noted that the effect of regulation 11(2) of the EIRs was the same as section 38(1)(b) of FOISA, and so there would be no material difference to the outcome of the case if the Council agreed to this approach.



12. The Council agreed to this proposal, and 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 about the application of the exemption in section 38(1)(b) of FOISA to the withheld information.
13. The Council responded with its submissions. It also indicated that it would disclose further information to Mr MacKenzie, having recognised that information relating to an employee of Scottish National Heritage had been withheld in error, and having received consent from one member of the public to their identity being disclosed.
14. After this additional information was disclosed, the investigating officer contacted Mr MacKenzie to establish whether he still wished to receive a decision in relation to the remaining withheld information, and to invite him to provide submissions to inform the Commissioner's decision. Mr MacKenzie confirmed that he still wished to receive a decision, and provided comments on the case.
15. The relevant submissions received from both the Council and Mr MacKenzie will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

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

17. The information withheld in this case is the names and contact details that were redacted from two of the pieces of correspondence that were disclosed to Mr MacKenzie, and one email that has been withheld in its entirety.
18. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would breach any of the data protection principles set out in Schedule 1 to the DPA.
19. The exemption in section 38(1)(b) is an absolute exemption, not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

20. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).



21. The Commissioner accepts that the withheld information in this case is personal data as defined in section 1(1) of the DPA, as it relates to living individuals who can be identified from that information.
22. The names and addresses of individuals would clearly allow their identification, and relates to them by revealing their address, and also by revealing that they had made complaints about the activities at Ledgowan Estate.
23. The Commissioner notes that the content of the complaint that was withheld in full provides a description of certain events involving the complainant. This information clearly relates to that individual, their activities and concerns, and she accepts that it would identify them. The Commissioner accepts that the content of this communication could not be redacted to allow render it anonymous (and so outside the definition of personal data), and so it was correctly identified by the Council as entirely personal data.
24. The Commissioner will go on to consider whether this information is exempt from disclosure under section 38(1)(b) of FOISA.

Would disclosure breach the first data protection principle?

25. The Council has argued that disclosure of the withheld information would breach the first data protection principle. This requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure into the public domain in response to Mr MacKenzie's information request.
26. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case does not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this case.
27. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, she must then consider whether the disclosure of this personal data would be fair and lawful.

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

28. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.

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



29. The Council has confirmed that it has not received the consent of the data subjects to the disclosure of the remaining withheld information.
30. In the circumstances, the Commissioner considers that condition 6 of Schedule 2 of the DPA would appear to be the only condition which might permit disclosure of the withheld personal data. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
31. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
- Does Mr MacKenzie have a legitimate interest in obtaining the personal data?
 - If he does, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects? (In this case, the data subjects are the individuals who submitted complaints to the Council.)
 - Even if the processing is necessary for Mr MacKenzie's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
32. There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr MacKenzie 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 MacKenzie.

Does Mr MacKenzie have a legitimate interest?

33. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In his published guidance on section 38 of FOISA², the Commissioner states:
- In some cases, the legitimate interest might be personal to the applicant – e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.*

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



34. Mr MacKenzie is an employee of the owner of the Ledgowan Estate. He has explained that his request was motivated by the harassment and disruption to the progress of work that he was feeling as a result of the Council's response to complaints, which he considered to be made by individuals or organisations that appeared to be either ill-informed or motivated by malice. He explained that he wanted to know the identities of those making complaints in order to inform them of the reason why work was being carried out.
35. He argued that it was unacceptable to him that the Council withheld any of the information pertaining to the business and for it to be complicit in the negative effect that had on the business and its employees.
36. The Commissioner accepts that Mr MacKenzie has a legitimate interest, as an employee of the estate concerned in understanding the identity of complainants and the basis of their complaints about work being undertaken by his employer.

Is disclosure of the personal data necessary for Ms MacKenzie's legitimate interests?

37. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so he must consider whether these interests might reasonably be met by any alternative means, or which would interfere less with the privacy of the complainants.
38. The Commissioner accepts that, without disclosure of the personal data under consideration, Mr MacKenzie would not be able to fully understand the source or nature of the complaints made in relation to the work undertaken on the Ledgowan Estate, or to engage in discussion with the concerned individuals.
39. She accepts that Mr MacKenzie's interest could not be met through any means other than by access to the withheld information, and so disclosure is necessary for the purposes of those interests in this case.

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

40. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects (the complainants). As noted above, this involves a balancing exercise between the legitimate interests of Mr MacKenzie and those of the data subjects. Only if the legitimate interests of Mr MacKenzie outweigh those of the individuals in question can the information be disclosed without breaching the first data protection principle.
41. In the Commissioner's briefing on section 38 of FOISA³, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:

³ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



- whether the information relates 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);
 - the potential harm or distress that may be caused to by the disclosure;
 - whether the individual has objected to the disclosure; and
 - the reasonable expectations of the individuals as to whether the information would be disclosed.
42. The Council has submitted that it would be unfair to disclose the remaining withheld information as the data subjects had provided the information to the Council in order that it could investigate their complaint and provide a response. It stated that they had no expectation that their identities, contact details or other biographical information would be made public.
43. It commented that it received numerous complaints from members of the public and, unless disclosure is necessary to enable a complaint to be investigated, the identity of the complainant is not disclosed unless this is required to take a case to Court. It maintained that this was in line with an individual's right to privacy in their correspondence as required by the Human Rights Act 1998.
44. It added that, in this case, the complaints relate to concerns about the creation of tracks at the Ledgowan Estate and the restriction of access to the land. The Council maintained that the identity of the complainants is irrelevant as the same right would be open to all people.
45. The Council submitted that disclosure of the withheld information could cause distress to the individuals concerned. It noted that disclosure in response to a request under FOISA is public disclosure, and that it considered this would be totally unwarranted as the public have the right to ask the relevant authorities to carry out investigations on their behalf without such an invasion of privacy, especially when their identity is not a factor in the matter being investigated.
46. It highlighted that it had consulted some of the data subjects when the opportunity arose, and that while one had agreed to the disclosure of their identity (prompting further disclosure by the Council), another had objected in strong terms.
47. The Commissioner has considered all of these points, along with those made by Mr MacKenzie (summarised above) when considering the balancing test in this case. The Commissioner recognises that Mr MacKenzie wishes to know the identities of the complainants in order to be able to contact them and discuss the matters of concern to them, and to correct any misunderstandings.
48. However, she also recognises that the individuals concerned chose to raise their concerns with the Council rather than with the Ledgowan Estate, and to ask it as the relevant authority to consider and respond to their concerns. She recognises that direct contact from the body complained about might be perceived as unwelcome or intimidating by the individuals concerned.



49. The Commissioner is of the view that the data subjects would not have any reasonable expectation that their identities would be publicly disclosed in the context of the information requested by Mr MacKenzie, which is the effect of the disclosure of information under FOISA. She accepts that the information pertains to the data subjects' personal rather than public lives and that there is the potential for distress to be caused to them by disclosure, should they be contacted directly by Mr MacKenzie or his employer.
50. On balance, while the Commissioner accepts that disclosure of the withheld information would be necessary to fulfill Mr MacKenzie's legitimate interests, she does not agree that this outweighs the prejudice that would be caused to the data subjects' rights, freedoms and legitimate interests and he considers that such prejudice would be unwarranted in this case. The Commissioner is therefore satisfied that Condition 6 of Schedule 2 is not met in this case.
51. Having concluded that disclosure of the withheld information would lead to unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects, the Commissioner must also conclude that disclosure would be unfair. As condition 6 cannot be met, she would also regard disclosure as unlawful. In all the circumstances, therefore, she finds that disclosure would breach the first data protection principle and that the information was therefore properly withheld under section 38(1)(b) of FOISA.

DECISION

In respect of the matters considered in this decision, the Commissioner finds that the Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Dave MacKenzie.

Appeal

Should either Mr MacKenzie or Highland Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
3 August 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or
- ...
- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.
- ...
- (5) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;
- ...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –
- ...
- "personal data" means data which relate to a living individual who can be identified –



- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...