

Decision Notice



Decision 146/2012 Mr K and South Lanarkshire Council

Employment status of a named individual

Reference No: 201102116

Decision Date: 31 August 2012

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
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Summary

Mr K asked South Lanarkshire Council (the Council) for information about the employment status of a named individual, and for information upon which the Council had based certain statements in a letter written to Mr K in 1998. The Council advised Mr K that information about the employment status of the named individual was considered to be exempt from disclosure under FOISA, and that it did not hold information about the statements made in its letter of 1998.

After investigation, the Commissioner found that the Council had been entitled to withhold certain information as personal data, the disclosure of which would breach the first data protection principle. She also accepted that the Council did not hold the remainder of the information requested.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 17(1) (Information not held); 38(1)(b), (2)(a)(i), (2)(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. In this decision notice, references to “BCW” or “Buchanan Clark & Wells” are references to the BCW Group, which is contracted to provide certain services to the Council in relation to the collection of Council tax payments and arrears.



2. On 2 March 2011, Mr K made a two-part information request to the Council, asking for the following information:
 - a) The status and job responsibilities of a named individual in respect of that person's employment for and on behalf of either the Council or Buchanan Clark & Wells; and confirmation as to whether the Council or BCW was the direct employer of that person between January 2001 and January 2006.
 - b) Information which would show what "fresh evidence, mistake or material fact" and what "remunerative work" the Council was referring to in a letter (to Mr K) dated 26 August 1998.
3. On 31 March 2011, the Council responded to Mr K's request. In relation to the request for information about a named individual, the Council advised that the information was personal data which was exempt from disclosure under section 38(1)(b) of FOISA. In relation to the request for information referred to in the letter of 26 August 1998, the Council advised that it did not hold any records about Mr K in its Benefits and Revenue service going back as far as 1998.
4. On 4 April 2011, Mr K asked for a review of the Council's response. He did not agree that the information he sought about the named individual was personal data, and explained that he was seeking to clarify whether the person was a Council employee or employed by BCW and acting on behalf of the Council. He also asked the Council to widen its search for information falling within the second part of his request (to all departments and also sources such as archived material), and offered to provide a copy of the letter in question (along with "other relevant information") to help the Council locate the information he had asked for.
5. On 12 May 2011, the Council sent Mr K the outcome of its review. The review response gave further explanation of why the information about the named individual was considered to be exempt from disclosure under section 38(1)(b) of FOISA. It also described the searches and enquiries carried out in relation to the second part of Mr K's request, and explained why these searches might reasonably have been expected to retrieve any relevant information if it was still held by the Council. The Council confirmed that it did not hold any information covered by the second part of Mr K's request.
6. On 8 November 2011, Mr K wrote to the Commissioner, expressing his dissatisfaction 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 K 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

8. On 21 February 2012, the Council was notified in writing that an application had been received from Mr K and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA).
9. The Council was asked for information relating to the employment status of the individual in question, and also for further details of the searches it had carried out in respect of the information it claimed not to hold. The Council was asked to confirm whether it had been able to refer to a copy of the letter of 26 August 1998 when carrying out these searches.
10. The investigating officer also wrote to Mr K to ask for more information about some of the concerns raised in his application to the Commissioner. Mr K provided annotated copies of correspondence with the Council, and an explanation of the background to his request. This was disclosed to the Council, with Mr K's permission.
11. During the investigation, the Council agreed that Mr K should receive confirmation that BCW staff worked with Council staff in relation to debt recovery work, and that there was no secondment of employees between the Council and BCW.
12. Submissions from all parties involved in this case (where relevant) are summarised and considered in the Commissioner's analysis and findings section below.

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 her by both Mr K and the Council and is satisfied that no matter of relevance has been overlooked.

Information not held

14. As noted above, Mr K asked the Council to provide information which would show what "fresh evidence, mistake or material fact" and what "remunerative work" the Council was referring to in a letter it had sent him on 26 August 1998. The Council advised that it did not hold any records relating to Mr K going back to 1998 in its Benefits and Revenue section, and therefore could not provide the information because it was not held.
15. In his request for review, Mr K asked the Council to search more widely and offered to provide a copy of the letter dated 26 August 1998 (along with "other relevant information") if that would assist the Council to locate the information he was seeking.



16. In its review response, the Council listed three areas in which it might have held relevant information and advised that all three had been searched, but no relevant information had been located. The Council advised that information in two of the relevant service areas was retained for only five years at the Council Archives before being destroyed, and that its Archives had confirmed that no information older than five years was held. Legal Services had also checked their records and located no relevant information. In this connection, the Council advised that work relating to Mr K had been carried out for the Council by a firm of external solicitors: however, the firm's file on this matter had been destroyed some time before the Council had requested it in 2008.
17. During the investigation, the Council confirmed that it did not have (and so could not refer to) a copy of the letter dated 26 August 1998 when dealing with Mr K's information request and request for review. It stated that it was possible for employees of the Council to identify the nature of the information sought by Mr K from their personal knowledge.
18. The Council was asked whether there were any circumstances in which it would hold information longer than five years. It advised that there were times when this happened, and that it had done so in connection with Mr K as there were "ongoing issues". However, the Council believed that it would be very unusual to hold information for a period of 12 years. It stated that the matter to which the correspondence related was closed, in that the period during which Mr K could have lodged an appeal had long since expired. It stated that it might have held records in relation to this matter which later became unnecessary (as no further action was planned) and were subsequently destroyed.
19. The Council was asked whether its staff had searched actively for the information, or whether the responses to Mr K were based on their knowledge that information was not retained for more than five years in its Archives, or that the legal file concerning Mr K was known to have been destroyed by the external firm of solicitors. The Council confirmed that, on receipt of the request, staff had carried out a search of the manual records held in its Records Centre. This search had not been repeated during the review process, as staff in the Records Centre were absolutely sure that documentation of that type and age would have been destroyed in line with their procedures. However, a second physical search had since been carried out, again without finding any relevant information.
20. The Council could not provide any evidence that the information in question had been destroyed, as its disposal/destruction records list only a consignment number of the box holding the information to be destroyed, the dates upon which it was due to be destroyed, and the actual date of destruction. There is no list of individual records held in each box.
21. The Commissioner has concerns about some aspects of the way in which the Council dealt with this part of Mr K's request. In his request for review, Mr K offered to provide the Council with a copy of the letter of 26 August 1998. The letter might have been helpful to staff who were otherwise relying upon their memory of events, but Mr K's offer was not taken up. The Council advised Mr K that it held no information for more than five years old in its Archives, but later advised the Commissioner that in some cases, including Mr K's, it held information for a longer period. It is not clear to the Commissioner where such information is held within the Council.



22. On balance, however, the Commissioner accepts that the Council has now carried out searches and enquiries which would reasonably be expected to retrieve any information falling within the scope of Mr K's request. The Commissioner accepts that it would be unusual for the Council to retain information for 12 years unless there were clear operational reasons or statutory requirements.
23. The Commissioner therefore accepts that the Council did not hold information covered by the second part of Mr K's request, and finds that the Council complied with section 17(1) of FOISA by giving Mr K notice in writing that the information was not held.

Information withheld under section 38(1)(b) of FOISA

24. Mr K also asked for information about whether a certain named individual was employed by the Council or by BCW. The Council considered this information to be the individual's personal data and decided that disclosure of this information would contravene the first data protection principle in the DPA. The Council therefore advised Mr K that the information was exempt from disclosure under section 38(1)(b) of FOISA and would not be provided.
25. 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.
26. 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?

27. In the following paragraphs, the term "data controller" refers to the Council, and the term "data subject" refers to the named individual whose employment status Mr K sought to establish.
28. 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).
29. The Commissioner accepts that the withheld information is personal data as defined in section 1(1) of the DPA, as it relates to a living individual who can be identified from that information. She 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?



30. The Council argued that disclosure of the information requested by Mr K would breach the first data protection principle, which 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. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met.
31. The Commissioner does not consider any of the personal data withheld in this case to be sensitive personal data. She will therefore consider whether any of the conditions in Schedule 2 to the DPA would permit disclosure of the information.

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

32. 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.
33. 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 personal data requested by Mr K. 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.
34. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
- Does Mr K have a legitimate interest in obtaining the personal data?
 - If he does, is disclosure of the data 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?
 - Even if the processing is necessary for Mr K's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject?
35. 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 K must outweigh the rights and freedoms or legitimate interests of the data subject 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 K.

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



Does Mr K have a legitimate interest?

36. 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. The Commissioner's published guidance on section 38 of FOISA 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
37. The Commissioner considered whether Mr K had a legitimate interest in information which would clarify whether he was dealing directly with the Council or with a contractor (BCW) when speaking to, or corresponding with, the named individual.
38. The Commissioner takes the view that, as a general principle, members of the public should be able to ascertain whether they are dealing directly with a Scottish public authority or with a private company acting on its behalf. In some circumstances it is possible that a different regulatory or statutory framework may apply to the contractor, which may affect the citizen's rights. In this case, the Commissioner notes that there does not appear to be any information readily available to the public (for example, on the Council's website) which would explain the role of BCW in relation to Council Tax collection, and advise the public whether any of their rights are affected; for example, in relation to the Council's Customer Charter³ or the Council's complaints procedure.
39. The Council's Customer Charter indicates that the Council aims to answer phone calls "within 5 rings, give you a greeting, tell you our service or facility and our name". It is not clear from the information provided to the public whether the same standards are expected of BCW employees working in the Council's offices. Nor does the public have ready access to information about any arrangements or agreement with BCW regarding the confidentiality of information provided by members of the public, or information which is held about them; an issue raised by Mr K in the course of correspondence with the Commissioner. The Council has published a Privacy Policy⁴ which explains how it handles personal information, but it is not clear from this document whether the same policy covers information which members of the public provide to BCW, or which is created in the course of BCW's dealings with the public.

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

³ http://www.southlanarkshire.gov.uk/info/670/consultations_complaints_and_compliments/900/south_lanarkshire_council_and_you

⁴ http://www.southlanarkshire.gov.uk/downloads/file/6120/privacy_policy



40. It appears to the Commissioner that residents of South Lanarkshire who deal with BCW in relation to their Council tax affairs may well be unclear whether they are doing so on the same footing as if they were dealing with the Council. All of the matters described in the preceding paragraph may be self-evident to officers of the Council working with such issues on a day-to-day basis, but they will not necessarily be apparent to members of the public. Given the lack of explanation available to the public about the role of BCW, and how this affects their rights, the Commissioner finds that members of the public have a legitimate interest in information clarifying whether they are dealing with BCW or the Council.
41. The Council does not accept that Mr K has a legitimate interest in disclosure of the personal data. It believes that the evidence provided by Mr K indicates that he was aware when he was dealing with the Council and when he was dealing with BCW. The Council stated that, at all times, employees identified their employer when speaking on the telephone and sending correspondence.
42. Mr K takes a different view, which led him to make the request for information about the employment status of a particular individual. He advised that the individual in question had answered the phone with the words “Buchanan Clark and Wells,” but had also sent letters on the Council’s headed paper, which might be taken to imply that the individual was a Council employee.
43. When asked about this, the Council explained that employees of the Council and employees of BCW worked closely together with a common purpose of retrieving outstanding sums owed to the Council. Some BCW employees worked in the same Council Offices as employees of the Council, and it was possible that an employee of the Council could have answered a telephone call intended for an employee of BCW or vice versa. The Council did not accept that Mr K had produced evidence of any attempt to confuse, obscure, or cover up in any way the identity of individuals contacting Mr K.
44. The Council maintained that Mr K did not have a legitimate interest in obtaining what was, in effect, the employment history of an individual, taking the view that while Mr K might be interested in receiving that information, his interest was not legitimate in the sense of being reasonable and acceptable in the circumstances.
45. The Council provided a copy of its current contract with BCW to assist the Commissioner in relation to the Council’s arguments. It advised that it no longer held a copy of the earlier contract with BCW, which would cover the period to which Mr K’s request referred.
46. The Commissioner considers that it would be natural for people working closely together and sharing office space to pick up a ringing phone at an empty desk, in order to take a message, and that this may have led to some confusion over whether Mr K was dealing with a Council employee or an employee of BCW. On the other hand, as noted previously, the Commissioner finds that (as a general principle) members of the public should be able to discover whether they are dealing with the Council or a contracted service provider. In the circumstances of this case, she finds that Mr K has a reasonable and acceptable (legitimate) interest in clarifying whether he was dealing directly with the Council or with its contractor.



47. The Commissioner acknowledges that there might also, in certain circumstances, be a more direct legitimate interest in knowing whether a particular individual who has held themselves out as an employee of an authority, or as acting on that authority's behalf, was in fact entitled to do so. This might be the case, for example, where such information could be relevant in disclosing personal conduct of a criminal or otherwise seriously improper nature. She does not, however, believe this more direct interest can be equated in every case with the legitimate interest she has identified in the previous paragraph.

Is disclosure of the personal data necessary for Mr K's legitimate interests?

48. While acknowledging that Mr K has a legitimate interest as described above, the Commissioner notes that the telephone calls and correspondence giving rise to this confusion took place several years before Mr K made his information request. Although it is clear that Mr K has not yet resolved his dispute with the Council, the Commissioner takes the view that confirmation of the employment status of the named individual is now perhaps less important, in terms of Mr K's identifiable legitimate interests, than it might have been during the period covered by his request. Since that time, Mr K has been provided with information about the working relationship between BCW and the Council which should have given him some reassurance about the basis on which this operates.
49. The Council has now provided some background information about its contractual relationship with BCW and explained how employees of the two organisations worked closely in relation to debt recovery. The Council described the role of BCW as essentially an agent of the Council in relation to debt recovery matters, and explained that BCW employees located within Council premises were wholly involved in the same matters as employees of the Council and did not deal with any debt owed to any third party.
50. During the investigation, the Council confirmed there was no secondment of employees between the Council and BCW. With the agreement of the Council, Mr K was advised of this by the investigating officer. By providing this information, the Council clarified the working relationship between its own officials and the employees of BCW, and removed the possibility that the individual in question might have been a Council employee seconded to BCW. However, this information did not establish whether a particular individual was employed by the Council or by BCW.
51. As indicated above, the legitimate interest the Commissioner has identified is in Mr K knowing whether he was dealing with the Council or with BCW. Ultimately, any issues he might have are with the Council, as the authority to which Council Tax is payable (and on whose behalf BCW was working – the Commissioner does not consider there can be any room for doubt on this point). Having considered all of the information provided to Mr K in connection with this matter, together with all relevant submissions, the Commissioner does not accept that disclosure of the personal data he has requested is necessary to meet Mr K's legitimate interest.



52. If there are fundamental issues raised by this case (and it must be questionable in any event whether they could ever be resolved, given the passage of time), they would appear to be questions of clarity of communication. Given the intrusion into personal privacy, however minor, inherent in **any** disclosure of personal data, the Commissioner does not accept that such a disclosure would be a proportionate means of addressing the legitimate interest she has identified in this particular case.
53. Having concluded that disclosure of the personal data in question is not necessary to satisfy Mr K's legitimate interest, the Commissioner must find that condition 6 in Schedule 2 to the DPA cannot be met in this particular case. In the absence of a condition permitting disclosure, she must also find that disclosure would be unlawful. Consequently, disclosure would breach the first data protection principle and the Council was correct in withholding the information under section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that South Lanarkshire Council complied with Part 1 of FOISA in responding to the information request from Mr K.

Appeal

Should either Mr K 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.

Margaret Keyse
Head of Enforcement
31 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.

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

- (b) 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-

...

- (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

...

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.

...