

Decision Notice



Decision 124/2014 Mr Iain Lawrie and Aberdeenshire Council

ICT Service Review Reports

Reference No: 201302559
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www.itspublicknowledge.info

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Summary

On 3 September 2013, Mr Lawrie asked Aberdeenshire Council (the Council) for reports relating to a review of an ICT service. The Council withheld the information. Following an investigation, the Commissioner found that the Council was not entitled to withhold some of the information under the exemptions it had cited, and required the Council to disclose it to Mr Lawrie. Some information was correctly withheld under section 30(b)(i) and (ii) and section 38(1)(a) and (b) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) General entitlement); 2(1) and (2)(e) (Effect of exemptions); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 38(1)(a), (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"); Schedule 1 (The data protection principles) (the first data protection principle) and Schedule 2 (Conditions relevant for the purpose 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. "NESBReC" is the North East Scotland Biological Records Centre and its function is to collate, manage and provide biological information for the North East of Scotland. At the time of Mr Lawrie's request, the Council was conducting a restructuring review of NESBReC.
2. On 3 September 2013, Mr Lawrie wrote to the Council with the following request:

"Could you send me the reports/recommendations from the recent review visits to NESBReC. I am particularly interested in the ICT reports from [two named staff]".



3. The Council responded on 20 September 2013. It confirmed to Mr Lawrie that it held the information he was seeking but refused to disclose it, citing section 30(b) of FOISA and providing its reasons to Mr Lawrie.
4. On 23 September 2013, Mr Lawrie wrote to the Council requesting a review of its decision. He stated that the review need only cover the ICT reports mentioned in his request, and clarified that he was not asking for the outcome of any free and frank discussions relating to these reports, just the reports themselves: he was interested in information about the ICT infrastructure.
5. The Council notified Mr Lawrie of the outcome of its review on 21 October 2013. The Council upheld its original decision to withhold information under section 30(b) of FOISA.
6. On 1 November 2013, Mr Lawrie 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 Lawrie made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 4 November 2011 the Council was notified in writing that an application had been received from Mr Lawrie 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.
9. 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.
10. The submissions from the Council clarified which information within the withheld documents was withheld under section 30(b)(i) and (ii). The Council also decided to withhold information which was Mr Lawrie's own personal data under section 38(1)(a) of FOISA, and to withhold information which was the personal data of other named persons under section 38(1)(b) of FOISA.



Commissioner's analysis and findings

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

Scope of Mr Lawrie's request

12. Mr Lawrie's request was for "the reports/recommendations from the recent review visits to NESBReC"; he went on to say that he was particularly interested in the ICT reports from two named members of staff. When Mr Lawrie sought a review of the Council's response, he stated that the review need only cover the ICT reports mentioned in his original request. The Council confirmed to the investigating officer that it held two reports, one by each of the two individuals named in Mr Lawrie's request. During the investigation it was established that no other ICT reports were produced during the review. Reports 1 and 2 therefore form the withheld information under consideration in this decision.
13. During the investigation, Mr Lawrie indicated that he had intended his request to cover all reports relating to the review, not just ICT reports. However, in his request for review, he stated that the review need only cover the ICT reports mentioned in his request. This means that the Commissioner is unable to consider whether Mr Lawrie should have received any other reports in response to his request.
14. Mr Lawrie queried whether the first report (report 1) was information covered by his request, as it seemed to pre-date the structure review period referred to in his request. He thought that report 1 dated from approximately one year before the start of the Council's restructuring review, and consequently could not have been part of the review process in question.
15. The Council was asked to provide a timeline for the review and to confirm the dates of the two reports. The Council explained that the review process was approved by senior management to commence on 3 May 2012. It explained that the visit on which report 1 was based took place on 19 April 2012, while the visit relating to report 2 took place nine months later on 21 January 2013. The Council also clarified that report 2 was "an informal note from a GIS Meeting" but it considered that both of these documents contained information within the scope of Mr Lawrie's request.
16. The Commissioner notes Mr Lawrie's concerns about whether report 1 is covered by his request. Although the report was based on a visit taking place on 19 April 2012, which pre-dated the commencement of the review on 3 May 2012, the report itself carries a revision date of June 2012. It is clear that the Council considers report 1 as information generated by the review process, even though it was based on a visit which pre-dated the official start of the review. On this basis, the Commissioner is satisfied that report 1 falls within the scope of Mr Lawrie's request.



Withheld information to which no exemption has been applied

17. The Commissioner observes that when the Council revised its schedule of documents and exemptions during the investigation, it ceased to rely upon any exemptions for small sections of text in both reports, as follows:

Report 1: all the information up to, but not including the second heading (i.e. the cover page and the introduction).

Report 2: the title, the opening sentence (minus the name of an individual which it withheld under another exemption) and the location of the meeting.
18. As the Council has not shown why the exemptions originally cited apply to this information, the Commissioner must conclude that the information was wrongly withheld under those exemptions and should have been provided in response to Mr Lawrie's request. In failing to do so, the Council failed to comply with section 1(1) of FOISA.
19. Consequently, in the absence of any reliance upon an exemption, the Commissioner requires the Council to release the information listed above, on the grounds that it is no longer considered by the Council to be exempt. (This is subject to any redactions of personal data, in keeping with the Commissioner's findings on personal data later in this decision.)

Section 30(b)(i) and (ii) – Prejudice to effective conduct of public affairs

20. Under section 30(b) of FOISA, information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). Public authorities must assess whether disclosure would cause officials to be inhibited from providing advice or views, and the exemptions cannot be applied unless there are reasonable grounds for anticipating that disclosure would, or would be likely to, cause substantial inhibition.
21. In his application to the Commissioner, Mr Lawrie explained he did not agree with the Council's reasoning for withholding the two reports from him. He did not believe that disclosure of the reports would have any substantive effect on the free and frank provision of advice. His comments were based on his understanding that the information contained in the reports would be a factual statement of the state of the infrastructure and operations at NESBReC at the time of writing the reports. He did not expect the reports to contain discussions of views or opinions.
22. The Council applied the exemptions in section 30(b)(i) and (ii) to most of the contents of the reports, with the exception of some personal data withheld under section 38(1)(a) and (b), and some information to which no exemption was applied (as explained above). In support of its position, it presented arguments which covered both exemptions in section 30(b) but did not make a distinction between the two. The Council indicated that it did not see a clear distinction between information which represented a view and information which represented advice.



23. In applying the exemptions in section 30(b)(i) and (ii), the chief consideration is not whether the information constitutes advice or opinion, but whether disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the free and frank provision of advice or the exchange of views for the purpose of deliberation. The inhibition must be substantial and therefore of real and demonstrable significance.
24. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, and is not simply a remote or hypothetical possibility. For inhibition to be likely there must be at least a significant probability of it occurring.
25. Each request should be considered on a case-by-case basis, taking into account the effects on the future provision of advice or exchange of views anticipated from disclosure of the particular information involved. The content of the withheld information must be considered, taking into account factors such as its nature, subject matter, manner of expression and also whether the timing of disclosure would have any bearing. For example, releasing advice or views while a decision was being considered and for which further views were still being sought could be more likely to cause inhibition in future than disclosure of advice or views which had been acted upon.
26. The Council contended that reviews provided an opportunity to for it to question what it did and the resources it had, to see if these were fit for purpose. As part of a service review process, it was necessary for frank reports to be provided on the provision of a service; those involved in service reviews needed to be able to have a free and frank exchange of views and consider all options without inhibition. The Council explained that if contributors to service review processes were not able to express their views on the service freely and frankly, it would not be possible to give proper consideration to the matters at issue. The Council also considered that there was a risk that, if such information was regularly disclosed, advice might be tailored or tempered. It further submitted that disclosure of the information in question during a review process of this kind would restrict the exchange of information to an extent that the outcome would be less reliable.
27. The Council explained that the reports were part of the discussion between review team members which preceded the preparation of a final report for the Management Team. The Council stated that reviews were usually carried out by a team of officers, which would include representatives of the staff potentially affected by the review. It stated that it was made clear to team members that their discussions had to be confidential, and that during the review they should not communicate any of their discussions to colleagues, to avoid unnecessary concern among staff. It was possible that they could be considering major changes which could affect the jobs of their colleagues. The Council argued that if it was known that these discussions would be subject to oversight by those specifically affected by the review, it was highly likely that team members would feel restricted in what they said and the outcome of the review would be less robust.



Commissioner's conclusion on sections 30(b)(i) and (ii)

28. The Council explained in general terms why it was concerned that contributors to future reviews would feel inhibited if contributions to this review were disclosed under FOISA, but did not explain in more detail why this would be the case, in relation to any of the specific content of the reports.
29. The Commissioner notes that report 1, which is the more substantive of the two reports, was produced at the beginning of the review, but was not presented to the ICT Management Team for consideration at that time, nor was it ever formally presented to the NESBReC review team as being the views of the ICT Management Team. The Council has confirmed that this report was never reviewed or revised.
30. There are four sections clearly defined in report 1. While the Commissioner accepts that sections 3 and 4 include some opinions and advice, most of section 2 is factual and descriptive in nature.
31. In report 2, the first section is entirely factual, as are some parts of the second section
32. Although the exemptions in section 30(b)(i) and (ii) can apply to information which is not advice or views, it is usually less obvious why disclosure of such factual information would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. In this case, the Council has not explained why disclosure of factual information about the existing IT infrastructure would cause such inhibition. In the absence of any such explanation, the Commissioner does not accept that this information should be withheld under section 30(b)(i) or (ii).
33. The Commissioner accepts that the remaining information in the reports constitutes advice or views put forward for deliberation. She has considered carefully whether disclosure of the information would have been likely to cause substantial inhibition in relation to the future provision of advice or views, if the information had been disclosed at the time of Mr Lawrie's request for review.
34. The Commissioner notes that the two reports were compiled by managers with some seniority, whom it is reasonable to assume would be expected to contribute such information as part of any review process. She considers that, to some extent, this lessens the likelihood that participants in future reviews would be substantially inhibited from providing similar views and advice.
35. The Commissioner notes that the Council had set the date of 25 November 2013 for the commencement of the implementation of its findings from the review (i.e. any decisions taken by the Management team would be acted upon after this date). It is clear that the review outcome in this case (21 October 2013) coincided with the last month of the NESBReC review and preceded the implementation phase. The Council has not provided any arguments to show whether it considered the information to carry greater sensitivity at this stage in the review process: its arguments in support of the exemptions in section 30(b) relate to the longer-term effects of disclosure, rather than the effects of disclosure at this particular point in



the review process. However, the Commissioner takes the view that it would be reasonable to conclude that disclosure of the views and advice in the reports before completion of the review process would be more likely to inhibit participants in future reviews from providing free and frank advice or views.

36. Given the timing of Mr Lawrie's request in relation to the progress of the NESBReC review, the Commissioner accepts that disclosure of the information in the reports revealing advice or views exchanged for the purposes of deliberation would, or would be likely to, inhibit substantially the provision of advice or views in future, should a similar situation arise. Although the sensitivity of the information is likely to decline with the passage of time, in this case the request for the information was received (and the consequent review conducted) before the NESBReC review had been completed.
37. In the circumstances, the Commissioner accepts that the exemptions in section 30(b)(i) and (ii) applied to parts of the withheld information.

The Public interest test

38. Section 30(b)(i) and (ii) are exemptions which are subject to the public interest test in section 2(1)(b) of FOISA: the exemptions can only apply if, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption, i.e. the balance favours withholding
39. In its review outcome, the Council stated that it was in the public interest that contributors to service review procedures should be able to express their views on the service freely and frankly. In its submissions to the Commissioner it reiterated this argument, adding that the real public interest lay in ensuring that the Council was able to carry out a rigorous process of self-assessment in order to provide services to the public in the most efficient and cost-effective way. If advice was tailored or tempered, proper consideration of the matters at issue would not be possible, and management decisions would be prejudiced, with a detrimental effect on the public: if the review decision was based on unsound information, it was likely that the service provided by the Council would not be the most efficient and cost-effective, to the detriment of the taxpayer.
40. The Commissioner accepts that it may sometimes be in the public interest not to disclose advice or opinion until after a review process is complete. The Commissioner also recognises the public interest in making such processes as transparent as possible, particularly when, as the Council recognised, reviews are regarded as an opportunity to look at how things are working. There is a public interest in the disclosure of information which explains the decisions taken by Scottish public authorities.
41. On balance, the Commissioner finds that the public interest in disclosing the remaining withheld information is outweighed by that in maintaining the exemption in section 30(b)(i) and 30(b)(ii) of FOISA. In reaching this decision, she has taken into account the timing of Mr Lawrie's request, which was made during service review which had not been completed by the time the Council carried out its review under FOISA in relation to the request.



42. The Commissioner therefore finds that the Council was correct to withhold some information in the reports under the exemptions in section 30(b)(i) and (ii) when responding to Mr Lawrie's request and requirement for review.
43. As noted above, the Commissioner finds that the exemptions in section 30(b)(i) and (ii) were wrongly applied to some information in the reports. This information includes some instances of personal data, and the Commissioner will go on to consider whether the personal data were correctly withheld under the exemptions in section 38(1)(a) and 38(1)(b) of FOISA.

Section 38 – personal data

44. During the investigation, the Council confirmed it had withheld Mr Lawrie's own personal data under section 38(1)(a) of FOISA. It also indicated that it had withheld third-party personal data under section 38(1)(b) of FOISA.
45. The Council argued that the small size of the NESBReC unit and the fact that some staff were known to officers across several Council services meant that, even where no name was stated, it would be possible for many people to identify some, if not all, the named individuals from the information in the documents.
46. During the investigation, Mr Lawrie confirmed to the investigating officer that he was interested in any names of individuals should they appear in the two reports (although he did not require their contact details).

Section 38(1)(a) – Personal data of the applicant

47. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
48. The exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data. Section 38(1)(a) of FOISA does not deny individuals a right of access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
49. Personal data are 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).
50. The Council withheld Mr Lawrie's name where it appeared in the reports under section 38(1)(a) of FOISA.
51. The Commissioner has found that in two instances, Mr Lawrie's name appears with additional biographical details relating to his professional life. In one instance, he is not named in the report but can be identified from information which is.



52. The Commissioner is satisfied that the withheld name and the two pieces of biographical data are Mr Lawrie's personal data, as the information relates to him as an individual and he can be identified from those data.
53. In light of this conclusion, the Commissioner finds that the Council was entitled to withhold the information under section 38(1)(a) of FOISA. The Council commented in its submissions that if Mr Lawrie made a subject access request, it would respond as required by the DPA.
54. The exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld.

Section 38(1)(b) – Personal data of third-parties

55. The Council stated that it considered some of the information in the two reports to be exempt from disclosure under section 38(1)(b) of FOISA, on the basis that it was the personal data of employees of NESBReC or of the Council, who could be easily identified from the information should it be released into the public domain. It applied the exemption to any personal names appearing in both reports, including the list of attendees in report 2.
56. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) (as appropriate), exempts personal data if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.

Is the information under consideration personal data?

57. The Commissioner has considered the information withheld under this exemption together with the relevant submissions provided by the Council. She is satisfied that it falls within the definition of personal data. The information relates to living individuals who can be identified from the information, which comprises their names, direct contact details or information about an officer's job functions.
58. The Commissioner will now go on to consider whether disclosure of the information would breach the first data protection principle.

The first data protection principle

59. The first data protection principle requires that personal data be processed fairly and lawfully and, in particular, must 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 Commissioner is satisfied that none of the information withheld under this exemption is sensitive personal data.) The processing under consideration in this case is disclosure into the public domain in response to Mr Lawrie's information request.



Can any of the conditions in Schedule 2 be met?

60. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr Lawrie. In any event, neither Mr Lawrie nor the Council has argued that any other condition would be relevant. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of legitimate interests of the data subject(s) (the individual(s) to whom the data relate).
61. There are a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Mr Lawrie pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
 - (iii) Even if the processing is necessary for Mr Lawrie's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
62. There is no presumption in favour of the disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, Mr Lawrie's legitimate interests must outweigh 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 Lawrie.
63. Mr Lawrie has not set out in any detail what his interest is in the names although it is clear that he is affected by the structural review process on account of his employment at NESBReC. As someone who is likely to be affected by the review at NESBReC it is understandable why he may wish to see the reports in their entirety with any names which may appear therein, so he can understand both who is contributing to the process and what is being said about the roles each employee performs. The Commissioner can also accept that any member of the public following the restructuring review may also share this interest, particularly given the public function of NESBReC.

Is the disclosure necessary for the purposes of these interests?

64. Noting that Mr Lawrie simply informed the investigating officer he was interested in obtaining any names should they appear in the two reports, the Council accepted that Mr Lawrie had an interest in ensuring that the proper ICT infrastructure was in place to allow NESBReC to transfer successfully to Aberdeenshire Council; however, the Council did not consider that



Mr Lawrie needed to obtain the personal data within the two reports to pursue this interest. The Council argued, given that all the individuals named in the reports were already known to Mr Lawrie, he would not be prejudiced if such information was withheld. The issue for the Council was that disclosure under FOISA would effectively be releasing the names of third-parties to the world at large, far beyond the scope of what would be known locally.

65. The Council also acknowledged that it was hard to see Mr Lawrie's legitimate interest could be met by a less intrusive means. The size of NESBReC and the small number of ICT staff here (i.e. the "dataset") was such that simply to provide the two reports with the personal data redacted would not prevent anyone with knowledge of the NESBReC unit from identifying individuals.
66. The Commissioner accepts the submission made by the Council, but also recognises that disclosure of the withheld information would fulfil the legitimate interest in fully understanding the restructuring review of the ICT function at NESBReC.
67. The Commissioner is not aware of any other viable means of meeting these interests, which would interfere less with the privacy of the data subject than providing the information requested. For this reason, she is satisfied that disclosure of the information is necessary for the purposes of Mr Lawrie's legitimate interests.

Would disclosure be unwarranted by reason of prejudice to the legitimate interests of the data subject(s)?

68. As the Commissioner is satisfied that disclosure of the withheld personal data would be necessary to fulfil Mr Lawrie's legitimate interests, she must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As noted above, this involves a balancing exercise between the legitimate interests of Mr Lawrie and those of the data subjects. Only if the legitimate interests of Mr Lawrie outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
69. In the Commissioner's briefing on section 38 of FOISA¹, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
 - 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)
 - the potential harm or distress that may be caused by disclosure
 - whether the individual objected to the disclosure
 - the reasonable expectations of the individual as to whether the information should be disclosed.

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



70. Clearly the withheld information under consideration here relates to the work the data subjects carry out and to their professional lives. It is restricted to their job titles, professional skills and knowledge.
71. The Council argued that the individuals concerned were not sufficiently senior in its structure for disclosure to be warranted. They were not responsible for decision-making and did not have a public facing role. The Council stated that many of its employees had been involved in structure reviews and there was a general understanding among staff that information volunteered during reviews would not be made public. There could be no expectation, the Council argued, that the staff here would expect their personal data to be disclosed in this way. For this reason, the Council considered disclosure of the personal data in the reports to be unwarranted.
72. The Council has not stated whether the individuals concerned were asked if they objected to the disclosure, but has asserted that there is a “general understanding” among staff that information volunteered during reviews will not be made public. The Council has not supplied the Commissioner with any examples, illustrations or evidence to support this statement.
73. The Commissioner has considered the potential harm or distress that disclosure may cause. She accepts the Council’s argument that, while the public at large would not be aware of who works in NESBReC, this would be known by some within the Council and possibly some members of the public in contact with NESBReC or the Council.
74. As is made clear in her guidance on the exemption in section 38(1)(b), the Commissioner takes the view that senior employees should have a greater expectation that their work-related activity will be open to scrutiny, and there is a greater requirement for transparency in relation to their professional activities.
75. The Commissioner accepts that the staff named in the reports might have had a reasonable expectation that their personal data would be protected, even though it related to their professional activities. In the circumstances, she accepts that disclosure of their personal data would have caused unwarranted prejudice to their rights, freedoms or legitimate interests, and finds that this outweighs Mr Lawrie’s legitimate interest in obtaining the information. The Commissioner accepts that as condition 6 of Schedule 2 to the DPA could not be met, disclosure of their personal data would be unlawful. The information was therefore withheld correctly under section 38(1)(b) of FOISA.

Conclusion

76. The Commissioner finds that the Council was wrong to withhold all of the information in the two reports, for the reasons described above. She will provide the Council with marked up copies of the reports, showing what information should now be disclosed to Mr Lawrie.



DECISION

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply completely with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Lawrie.

The Commissioner finds that the Council:

- (i) was entitled to withhold information in the reports which was exempt from disclosure under section 30(b)(i) and (ii), or under section 38(1)(a) or (b).
- (ii) was not entitled to withhold information to which the exemptions in section 30(b)(i) and (ii) did not apply (and in doing so failed to comply with section 1(1) of FOISA).
- (iii) breached section 1(1) of FOISA by failing to provide information to Mr Lawrie for which it was no longer relying upon any exemption.

The Commissioner therefore requires the Council to disclose the information marked for disclosure in the copy reports provided to the Council with this decision notice, by 28 July 2014.

Appeal

Should either Mr Lawrie or Aberdeenshire Council wish to appeal against this decision, they have the right to 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.

Rosemary Agnew
Scottish Information Commissioner
11 June 2014



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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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 –
 - (i) paragraphs (a), (c) and (d); and
 - (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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or



- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

38 Personal information

(1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or

...

(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.

...