

Decision Notice

Decision 019/2018: Mr Tom Taylor and East Renfrewshire Council

Names of Councillors with Council Tax Arrears

Reference No: 201701113

Decision Date: 19 February 2018



Scottish Information
Commissioner

Summary

The Council was asked to name the three councillors who were known to be in arrears with Council Tax payments during a specific period. The Council refused to disclose this information, on the basis that the information was personal data, disclosure of which would breach the data protection principles, and that the information was therefore exempt from disclosure under section 38(1)(b) of FOISA.

The Commissioner found that the Council had correctly withheld the names of two of the councillors, but should have disclosed the name of the third councillor. The Commissioner required the Council to disclose the name of the councillor.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (b) and (5) (definition of "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, Part 1 - the principles) (the first data protection principle); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6)

Local Government Finance Act 1992 (the 1992 Act) section 112 (Council tax and community charges: restrictions on voting)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 31 March 2017, Mr Taylor made an information request to East Renfrewshire Council (the Council). He explained that, following the Council's response to a previous information request, he was aware that three elected members were in arrears with their community charge (council tax) payments between 27 May 2016 and 10 March 2017. Mr Taylor highlighted the Local Government Finance Act 1992 (the 1992 Act), which he stated makes it an offence for a councillor in council tax arrears of at least two months to vote at a meeting of the Council or its committees in which financial matters relating to council tax are being considered. (Mr Taylor's request referred to section 106 of the 1992 Act, which relates to England and Wales; the equivalent provision for Scotland is section 112. Section 112 is set out in Appendix 1.)
2. In his request, Mr Taylor referred the Council to a decision of the Upper Tribunal (DH v Information Commissioner and Bolton Council [2016] UKUT 0139 (AAC)¹) (the Bolton case) made under the (UK) Freedom of Information Act 2000. In that case, the Upper Tribunal

¹ https://assets.publishing.service.gov.uk/media/5785141fe5274a0da9000105/GIA_4597_2014-00.pdf

ordered Bolton Council to disclose the name of an elected member who had received reminders for non-payment of council tax.

3. The Council responded to the request on 11 April 2017. It refused to provide Mr Taylor with the names of the councillors, on the basis that the names were exempt from disclosure under section 38(1)(b) of FOISA.
4. On 13 April 2017, Mr Taylor asked the Council to carry out a review of its decision. He again referred the Council to the Bolton case. He argued, amongst other things, that a councillor is an elected official with public responsibilities, to which non-payment of council tax was directly and significantly relevant, and that voters would wish to know whether a councillor was carrying out their duties. He also argued that councillors could not expect their names to be withheld, even if identifying them would intrude significantly into their private life.
5. The Council notified Mr Taylor of the outcome of its review on 15 May 2017. It confirmed its original decision and continued to withhold the names of the councillors under section 38(1)(b) of FOISA. The Council gave detailed reasons for its decision.
6. On 23 June 2017, Mr Taylor applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Council's review: he argued that the councillors' names were not exempt from disclosure under section 38(1)(b) of FOISA.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Taylor made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 10 July 2017, the Council was notified in writing that Mr Taylor had made a valid application. The Council was asked to provide the Commissioner with the names of the three councillors. The Council did so and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to invite public authorities to comment on an application. The Council was invited to comment on this application and to answer specific questions.
10. The Council commented on this application and answered the questions put to it by the investigating officer.

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 him by both Mr Taylor and the Council. He is satisfied that no matter of relevance has been overlooked.
12. It is public knowledge that, between 27 May 2016 and 10 March 2017, three of the Council's elected members had council tax arrears. Mr Taylor wants to know the names of the councillors.
13. One of the difficulties the Commissioner has in this case is providing intelligible reasons for his decision without identifying – or materially increasing the risk of identifying – the individuals in question. In the case of *Scottish Ministers v Scottish Information*

Commissioner (William Alexander's Application) [2007] CSIH 8², the Court of Session commented that, in giving reasons, the Commissioner is necessarily restrained by the need to avoid disclosing information which ought not to be disclosed.

14. The Commissioner would also like to make it clear that, although Mr Taylor referred to the Upper Tribunal decision in the Bolton case and, although that decision is referenced in this decision, the Commissioner is not bound by it.

Section 38(1)(b) - Personal Information

15. The Council relied on section 38(1)(b) of FOISA (as read with section 38(2)(a)(i)) to withhold the names of three councillors in arrears with their council tax payments.
16. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) (or, as appropriate, section 38(2)(b)) exempts information from disclosure if it is "personal data", as defined in section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA. This exemption is an absolute exemption: this means that it is not subject to the public interest test in section 2(1)(b) of FOISA.
17. In order to rely on this exemption, the Council must show, firstly, that the names are personal data for the purposes of the DPA and, secondly, that disclosing the names would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.
18. The Council submitted that disclosing the names of the councillors would contravene the first data protection principle.

Are the councillors' names personal data?

19. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, 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".
20. The Council takes the view, as do Mr Taylor and the Commissioner, that the names of the councillors comprises their personal data. The information clearly relates to identifiable individuals and has biographical significance.

Would disclosure contravene the first data protection principle?

21. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 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. "Processing" in the context of a disclosure under FOISA means disclosing the personal data into the public domain.
22. The Commissioner agrees with the Council that the personal data do not comprise sensitive personal data. Consequently, it is not necessary for him to consider the conditions in Schedule 3 in this case.
23. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For

² <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that disclosure will also be fair and lawful.

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

24. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47³, that the conditions require careful treatment in the context of a request for information under FOISA, given that the conditions are 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, freedoms or legitimate interest of the data subject(s).
25. The first condition in Schedule 2 which might be considered relevant in this case is condition 1. Condition 1 applies when the data subject has consented to the processing. The Council provided the Commissioner with evidence that the individuals were asked to consent to their names being disclosed, but all three refused. The Commissioner is satisfied that consent has not been given by any of the councillors and so condition 1 of Schedule 2 cannot be met.
26. Condition 6 in Schedule 2 is, in the Commissioner's view, the only other condition which might allow the names to be disclosed to Mr Taylor. The Council also identified this condition as relevant in its review response (15 May 2017). 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(s).
27. The tests which must be met before condition 6 can apply are:
 - (i) Does Mr Taylor have a legitimate interest or interests in obtaining the names?
 - (ii) If so, is the disclosure necessary to achieve those legitimate 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 councillors?
 - (iii) Even if the processing is necessary for Mr Taylor's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the councillors?
28. There is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr Taylor must outweigh the rights and freedoms or legitimate interests of the councillors before their names can be disclosed. If both sets of legitimate interests are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the names to Mr Taylor.
29. The Commissioner has considered these tests for each councillor, taking into account their particular (and differing) circumstances.

Does Mr Taylor have a legitimate interest in obtaining the names?

30. The DPA does not define "legitimate interest", but the Commissioner takes the view that matters in which an individual properly has an interest should be distinguished from matters

³ <http://www.bailii.org/uk/cases/UKHL/2008/47.html>

about which he or she is simply inquisitive. The Commissioner's published guidance⁴ on section 38(1)(b) 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."

31. In his correspondence, Mr Taylor highlighted the restrictions on voting provisions of the 1992 Act. Under section 112 of the 1992 Act, it is an offence for a councillor in council tax arrears (with at least two months' arrears) to vote on financial matters relating to council tax at a meeting of the Council or one of its committees. It is also an offence, if any such councillor present, who is aware of the arrears, fails to disclose that they are in such arrears of council tax. Mr Taylor argued that there was, therefore, a public interest in disclosing the names of the councillors who had council tax arrears.

32. Mr Taylor's interest therefore lies in scrutinising whether the councillors of the local authority complied with the 1992 Act and how the Council monitored such compliance. In his information request, Mr Taylor commented:

"If an individual councillor is unable to represent their electorate and undertake their duties because of this statutory prohibition, then it is reasonable that this fact is open to legitimate public scrutiny..."

33. The Council accepted that the public generally has a legitimate interest in whether or not their elected representatives can properly represent their interests. However, it did not accept that this amounted to a legitimate interest in the disclosure of the names of councillors who were in arrears with council tax payments:

"It does not equate Council tax arrears per se with an inability to properly represent interests given that a councillor's participation in meetings and votes is not impeded by the fact of council tax arrears but rather by council tax arrears of a certain extent."

34. It is public knowledge that three councillors were, during a particular period, in arrears with their council tax payments. In this case, the Commissioner accepts that Mr Taylor, as a member of the public and as a resident of East Renfrewshire, has a legitimate interest in disclosure of the names of the councillors, at least in those cases where the councillor has been in default for at least two months, to enable scrutiny of individual councillors' compliance with the 1992 Act. Disclosing the names would also let Mr Taylor and, indeed, the wider public scrutinise the effectiveness of the processes implemented by the Council to ensure compliance with the 1992 Act.

35. The scrutiny of elected officials and Council performance is an important facet of local democracy. Scrutiny is important at any time, but it should be noted that Mr Taylor's request was made shortly before a local government election, when the local electorate was about to vote on who should represent its local interests. At that particular point, transparency, accountability and efficacy in the democratic process was especially important.

36. The Commissioner therefore accepts that, in this case, Mr Taylor (and the public more generally) has a legitimate interest in obtaining the withheld personal data where the councillor has been in default for at least two months.

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

Is disclosure of the information necessary for the purposes of these legitimate interests?

37. Having accepted that Mr Taylor has a legitimate interest in the personal data, the Commissioner must consider whether disclosure of the personal data is necessary for Mr Taylor's legitimate interests. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
38. The Council did not consider disclosure to be necessary to achieve an appropriate level of public scrutiny. It stated that the participation of a councillor in any relevant votes could be discerned from examination of the sederunt (the record of those present) of any relevant Council or committee meeting, the agenda and minutes of which are open to the public and available for online inspection.
39. During the period in which one or more of the three councillors were in arrears of council tax, there was a Council meeting⁵ on 9 February 2017 which involved the setting of Council tax under an item entitled "Revenue Estimates." The Council said that other matters which might also be subject to the restrictions in section 112 of the 1992 Act would have been the subject of discussion at Cabinet meetings⁶ attended by administration councillors, including decisions of the Cabinet to pursue or otherwise write-off Council tax arrears deemed irrecoverable.
40. The Council was satisfied that no councillors participated in a meeting relating to Council tax while they were in arrears of more than two months. It commented that the published minutes clearly identify the nature of the business conducted at the meeting, and record those in attendance and participating in discussions. The withdrawal of any particular individual from discussion of a particular item is noted in the minute, even if they are generally in attendance for other business. In this way, a member of the public can clearly see who participated in any decision taken by the Cabinet or by the Council in connection with council tax matters.
41. The Council acknowledged that members of the public would not have any "formal avenue" to establish whether participating councillors had arrears of an extent which would make participation an offence under section 112 of the 1992 Act. However, the Council commented that, before each year's budget meeting, it issues formal correspondence to all elected members advising of the impact of section 112 of the 1992 Act and what they should or should not do if in arrears of two months or more. The Council's monitoring officer also communicates personally with any councillors found to be in arrears of two months or more so that they are aware of the implications if they participate in the budget meeting. The Council supplied an example copy of the letter to the Commissioner.
42. The Commissioner has considered the submissions from both parties carefully and in the light of the decision by the Supreme Court in the case of *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55⁷. In this case the Supreme Court stated (at paragraph 27 of the judgment):

"... A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would

⁵ <http://www.eastrenfrewshire.gov.uk/CHttpHandler.ashx?id=19778&p=0>

⁶ <http://www.eastrenfrewshire.gov.uk/CHttpHandler.ashx?id=19775&p=0>

⁷ <http://www.bailii.org/uk/cases/UKSC/2013/55.html>

understand that a measure would not be necessary if the legitimate aim could be achieved by something less."

43. As the Supreme Court confirmed, "necessary" means "reasonably" rather than absolutely or strictly necessary. When considering whether disclosure would be necessary, public authorities need to consider whether the disclosure is proportionate as a means and fairly balanced as to ends, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subjects.
44. The Council has rightly pointed out that there are other means by which compliance with the 1992 Act is ensured. There is a public record of attendance at meetings and the Council actively monitors compliance with section 112. However, the information available to the public is not sufficient to show whether the means employed by the Council are fully effective and whether the process is properly implemented and complied with. Members of the public (and Mr Taylor) must simply trust in the efficacy of the Council's monitoring because they have no means of testing it. Without knowing the names of the councillors who would be committing an offence if they voted on council tax decisions, Mr Taylor cannot scrutinise whether any of this works in practice. Other than disclosure under FOISA, there is no other practical way for a person, such as Mr Taylor, to obtain this information.
45. The Commissioner can therefore identify no other viable means of meeting Mr Taylor's legitimate interests which would interfere less with the privacy of the data subjects than providing the information requested by Mr Taylor. For this reason, he is satisfied that disclosure of the information of those councillors with at least two months of council tax arrears is necessary for the purposes of Mr Taylor's legitimate interests.

Would disclosure be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the councillors?

46. As the Commissioner is satisfied that disclosure of the names in cases where there were at least two months' arrears is necessary to fulfil Mr Taylor's legitimate interests, he is required to consider whether that disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the councillors. This involves a balancing exercise between the legitimate interests of Mr Taylor and those of the councillors. Only if the legitimate interests of Mr Taylor outweigh those of the councillors can the information be disclosed without breaching the first data protection principle.
47. In the Commissioner's guidance on section 38(1)(b) of FOISA, he 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 the disclosure
 - whether the individual objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information should be disclosed.
48. Mr Taylor commented:

"If an individual councillor is unable to represent their electorate and undertake their duties because of this statutory prohibition, then it is reasonable that this fact is open to legitimate

public scrutiny, especially given the legal duty to declare it at a meeting at which they are present, and given this relates to their public life not their private life.”

49. Mr Taylor believed that voters want to know if a councillor is carrying out his or her duties; that means that a councillor could not reasonably expect their name to be withheld, even if identification intruded significantly into their private life. He reiterated the Upper Tribunal's judgement in the Bolton case that elected officials are not in the same position as other members of the public when it comes to disclosure of their names: they can expect their names to be disclosed in circumstances where ordinary members of the public might expect the opposite.
50. The Council said that it was unaware of any information which would inform the reasonable expectations of a councillor in this regard. All of the councillors had objected to their name being disclosed. Disclosure would cause distress: the Council explained in detail why this would be the case. Each councillor provided their personal view to the Commissioner (through the Council) about the potential disclosure of their name.
51. The Commissioner notes that information on the non-payment of council tax by a councillor can pertain to both their private and public life. There is a private element to non-payment of council tax, even in the case of a councillor: as described in the Bolton case, it is a matter of a private debt in respect of which the individual incurs a private liability and arises from a person's occupation of private property. The liability may arise jointly with other persons with whom the individual forms a household. However, in the case of a councillor, it is not just a private matter. A councillor is an elected official with public responsibilities to which non-payment of council tax is directly and significantly relevant. Non-payment of council tax ultimately affects the Council's ability to deliver services. Non-payment by a councillor may also prevent the councillor from participating in decisions on financial matters. Setting the council's budget is, in general terms, an important public role undertaken by a councillor. As stated in the Bolton case:

“The loss of one vote could make a fundamental difference to the outcome. This adds a significant public dimension to the non-payment of council tax. The very fact that Parliament has legislated in this way reflects the connection between non-payment and the councillor's public functions.”
52. No information has been provided to the Commissioner, such as internal or external guidance or a policy, which would inform a councillor's expectation of being named if they failed to pay their council tax.
53. The Commissioner accepts, as does Mr Taylor, that an ordinary member of the public could reasonably expect not to be named in response to a request under FOISA in the event of non-payment of council tax. However, a councillor is not an ordinary member of the public. Those who have taken public office should expect to be subject to a higher degree of scrutiny, especially with respect to information which affects their ability to perform their public office or role. More specifically, unless the local electorate know the identity of any councillor to whom section 112 applies, they cannot discover whether that councillor is failing to fulfil his or her functions, nor can they know that the process of declarations under section 112 is being adhered to.
54. As noted elsewhere, the Commissioner cannot give a detailed explanation for his decision without identifying – or materially increasing the risk of identifying – the individuals involved. However, the Commissioner is able to set out the criteria which he has taken into account in

coming to a decision in relation to each councillor. The criteria, while not exhaustive, are likely to assist the Council – and other Scottish local authorities – faced with similar requests.

Were the individuals serving as councillors when the information request was made?

55. At the time of Mr Taylor's request and request for review, all three individuals were serving councillors. Although not binding on him, the Commissioner agrees with the First-tier Tribunal (General Regulatory Chamber) in *Daniel Vulliamy and the Information Commissioner's Office EA/2017/0071*⁸ that an individual who is no longer a councillor would reasonably have a greater expectation that his or her council tax record while in office would remain confidential, unless countervailing factors required disclosure.
56. Given that the three individuals were serving councillors when Mr Taylor made his information request, whether or not any of the three individuals ceased to be councillors following the elections in May 2017 is not materially relevant to the Commissioner's decision. Even if the relevant point of consideration for the Commissioner is taken to be the time of the Council's review – which was after the election and at a time when one or more of the individuals may no longer have been serving councillors – the Commissioner would still take the view that the individuals concerned would have had a reasonable expectation that information about their council tax arrears could be disclosed, given that the arrears related to their recent period of service as a councillor and to a matter which may have affected their ability to vote on financial decisions.

The role of the councillor

57. The Commissioner's guidance on section 38(1)(b) of FOISA makes it clear that, when deciding whether disclosure would cause unwarranted prejudice to an individual, the Commissioner will consider the seniority of the person's role and whether their role is public facing.
58. Councillors make important decisions on behalf of the public and on behalf of their constituents. Their role is a very public one. This means it may be reasonable to disclose personal data of a councillor's personal data, where it would not be reasonable to disclose the personal data of a member of the public.

The extent of the arrears

59. How long a councillor had been in arrears will also be relevant. If the individual was in arrears for a short period, or for a period of less than two months (the relevant period for the 1992 Act), they might reasonably expect that this would not be disclosed, unless there were other factors that favoured disclosure. Indeed, as noted above, this is also relevant to the determination of whether Mr Taylor has a legitimate interest and the necessity of disclosure.

Have the councillors misled the public as to their arrears?

60. If any of the councillors had issued public statements supporting, for example, strict enforcement of council tax arrears, or had intentionally misled the public as to whether they had arrears, it would be more reasonable for them to expect that their own arrears might be disclosed (even where such arrears were below the two month threshold).

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2116/Vulliamy,%20Daniel%20EA.2017.0071%20\(12.12.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2116/Vulliamy,%20Daniel%20EA.2017.0071%20(12.12.17).pdf)

Whether the councillors objected to disclosure

61. Data subjects do not, in the context of FOISA, have the right to veto the disclosure of their names. However, the Commissioner will take account of any express refusal to consent when balancing the requester's legitimate interests with those of the data subject.
62. In this case, all of the councillors have objected to their names being disclosed. The Commissioner has considered carefully the comments from each individual in respect of their council tax arrears and their views on any distress or harm that disclosure under FOISA would cause them. The Commissioner has given appropriate weight to these representations, but the tests in section 38(1)(b) of FOISA must be applied objectively.

Mitigating circumstances

63. The Commissioner must consider the potential harm or distress that may be caused by disclosure. The Commissioner is aware that there is widespread media interest in council tax arrears of councillors, both in this and in other local authority areas. He fully acknowledges the likelihood that the names of the councillors in this case would be publicised in the media, or disseminated by Mr Taylor, if disclosed under FOISA.
64. Each case needs to be considered individually. There may be a number of different reasons why a councillor in arrears did not pay their council tax on time, ranging from simply forgetting to pay, or being unable to pay, through to refusing to pay. The reasons for not making a payment are also relevant; in order to explain matters, the councillor may have to disclose personal matters may cause distress.
65. The Commissioner accepts that disclosure of the information would be likely to cause varying degrees of harm and distress to each of the three councillors. As stated above, the Commissioner has considered the level of harm or distress to each councillor dependent on their respective circumstances. At the most general level, disclosing a failure to pay council tax, to any extent, is likely to cause reputational damage, and to have an impact on public perceptions and confidence in a councillor as a public figure, unless there are mitigating circumstances (which may be private) that are also made public.

The Commissioner's conclusion on condition 6 of Schedule 2

66. As noted above, the Commissioner is required to consider whether disclosing the names of the councillors would cause unwarranted prejudice to their rights and freedoms or legitimate interests. This involves a balancing exercise between the legitimate interests of Mr Taylor and those of the councillors. Only if the legitimate interests of Mr Taylor outweigh those of the councillors can the information be disclosed without breaching the first data protection principle.
67. The Commissioner recognises the important role that citizens such as Mr Taylor play in the scrutiny of the performance and processes of public bodies. Mr Taylor wishes to scrutinise the actions of elected members and the processes followed by the Council. This is a legitimate and important function. The subject of his scrutiny (broadly, the proper voting on tax or other financial matters and the personal conduct of those who vote and act in respect of such matters) is also an important area of concern.
68. The Commissioner has attributed weight to Mr Taylor's legitimate interest, while acknowledging that it is not correct to say that there has been no such scrutiny by the Council. The Council is correct, for example, to point to the public record of votes on the setting of council tax in its published minutes.

69. While Mr Taylor has a strong legitimate interest in obtaining the names of councillors who have been in default for at least two months, the Commissioner has considered whether this is outweighed by reason of prejudice to the councillors' rights and freedoms or legitimate interests.
70. Given that the Commissioner has found that there is no condition in Schedule 2 which would permit the Council to disclose their names, disclosure would breach the first data protection principle. The Commissioner finds on balance that in respect of two of the councillors there is no condition in Schedule 2 which would permit the Council to disclose the names as disclosure would breach the first data protection principle. This means that the names are exempt from disclosure under section 38(1)(b) of FOISA.
71. In relation to the third councillor, the Commissioner has taken a different view. He finds that the requirements of condition 6 can be met and that the disclosure of their name is not unwarranted by reason of prejudice to their rights and freedoms or legitimate interests.

Fair and lawful processing

72. As indicated above, the Commissioner must be satisfied that disclosure would be fair and lawful, in addition to finding that a condition in Schedule 2 of the DPA applies, before concluding that disclosure would be consistent with the first data protection principle.
73. The Council did not make any submissions to the Commissioner to the effect that disclosure would be unlawful, except to the extent that there was no condition in Schedule 2 which would permit disclosure. As the Commissioner has found a Schedule 2 condition which would permit disclosure of the name of one of the councillors, the Commissioner need not consider the question of lawfulness further.
74. In the Commissioner's guidance on section 38(1)(b) of FOISA, he sets out a number of factors to be taken into account in considering whether disclosure is fair. There is a considerable overlap between these and the issues which should be taken into account when considering whether disclosure is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject, which have been discussed in detail in his consideration of condition 6 above. In the present case the Commissioner is also satisfied, for the reasons set out in his consideration of condition 6, that disclosure of the name of one of the councillors would be fair.
75. Consequently, the Commissioner finds that disclosure of the name of one of the councillors would not breach the first data protection principle and that the name is not exempt from disclosure under section 38(1)(b) of FOISA.
76. The Commissioner therefore requires the Council to disclose to Mr Taylor the name of the third councillor, which was wrongly withheld. The Commissioner will make it clear to the Council, under separate cover, the name of which councillor must be disclosed.
77. As has been made clear elsewhere in this decision, the Commissioner is unable to explain in more detail his reasons for coming to this conclusion without identifying – or materially increasing the risk of identifying – the councillors involved. However, both the Council and the councillors (at least in relation to their own personal circumstances) are fully aware of the background to the Commissioner's decision and will be able to judge the background against the criteria set out in the decision.

Decision

The Commissioner finds that East Renfrewshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Taylor.

While the Council was entitled to withhold the names of two of the councillors, the Commissioner finds that the Council breached Part 1 of FOISA by withholding the name of the third councillor under section 38(1)(b).

The Commissioner therefore requires the Council to provide Mr Taylor with the name which was wrongly withheld by **5 April 2018**.

Appeal

Should either Mr Taylor or the 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

19 February 2018

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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 –
- ...
- (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

1. The data subject has given his consent to the processing.

...

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

Local Government Finance Act 1992

112 Council tax and community charges: restrictions on voting

- (1) This section applies at any time to a member of a local authority, or a member of a committee of a local authority or of a joint committee of two or more local authorities (including in either case a sub-committee), if at that time—
 - (a) a sum falling within paragraph 1(1)(a) of Schedule 8 to this Act (including a sum falling within that paragraph by virtue of paragraph 11 of Schedule 11 to this Act) has become payable by him and has remained unpaid for at least two months; or
 - (b) a sum falling within paragraph—
 - (i) 4 or 5 of Schedule 2 (collection etc. of community charges); or
 - (ii) 11 of Schedule 5 (as read with the said paragraphs 4 and 5), to the 1987 Act⁹ has become payable by him and has remained unpaid for at least three months.
- (2) Subject to subsection (4) below, if a member to whom this section applies is present at a meeting of the authority or committee at which any of the following matters is the subject of consideration, namely—
 - (a) the setting of council tax under section 93(1)(a) above;
 - (b) the substitute setting of council tax under section 94(1) above;
 - (c) a reduced or deemed setting under paragraph 3 of Schedule 7 to this Act;
 - ...
 - (e) the exercise of any functions under Schedule 2, 3 or 8 or paragraph 11 of Schedule 11 to this Act, or Schedule 2 or paragraph 11 of Schedule 5 to the 1987 Act,he shall at the meeting and as soon as practicable after its commencement disclose the fact that this section applies to him and shall not vote on any question with respect to the matter.
- (3) If a person fails to comply with subsection (2) above, he shall be guilty of an offence, and shall for each offence be liable on summary conviction to a fine not exceeding level 3 on the standard scale, unless he proves that he did not know—
 - (a) that this section applied to him at the time of the meeting; or
 - (b) that the matter in question was the subject of consideration at the meeting.
- (4) Subsections (1) to (3) of section 41 (removal or exclusion of disability) of the 1973 Act¹⁰ shall apply in relation to this section and any disability imposed by it as they apply in relation to section 38 (provision as to disability of members of authorities from voting) of that Act and any disability imposed by that section.

⁹ Abolition of Domestic Rates Etc. (Scotland) Act 1987

¹⁰ Local Government (Scotland) Act 1973

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info