

Decision Notice



Decision 032/2009 Mr Paul Bradley and West Lothian Council

Job evaluation scores

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Summary

Mr Paul Bradley (Mr Bradley) requested a range of information regarding the evaluation of jobs from West Lothian Council (the Council). The Council withheld certain information under a number of exemptions within the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, during which the Council maintained its decision to withhold this information under the terms of section 30(c) (on the basis that disclosure would prejudice substantially the effective conduct of public affairs) and section 38(1)(b) (on the basis that the information was personal data, disclosure of which would breach the data protection principles) of FOISA, Mr Bradley remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Bradley's request for information in accordance with Part 1 of FOISA. He found that the exemptions in sections 30(c) and 38(1)(b) had been wrongly applied. He also noted that the Council had failed to comply with the timescale for conducting a review set out in section 21(1) of FOISA. He required the Council to release the withheld information to Mr Bradley.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 21(1) (Review by Scottish public authority); 30(c) (Prejudice to effective conduct of public affairs) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions - definition of "personal data") and 4(4) (The data protection principles); schedules 1(The data protection principles) (Part I - the first and second data protection principles and Part II – paragraphs 5 and 6) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1))

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



Background

1. Before setting out the details of Mr Bradley's information request, it may be helpful to provide some background information to his request. In 1999, a Single Status Agreement was reached between employers and trade unions across Scotland. One of the main elements of the Single Status Agreement was the implementation of an appropriate system to evaluate all jobs within local authorities in order to place them into a new joint structure. Single Status required that all local authorities produce a new pay and grading system with all jobs assessed using the same evaluation system. The Scottish Joint Council produced a Scottish Councils' Job Evaluation Scheme (JE Scheme), which was adopted by West Lothian Council to evaluate its jobs. The JE Scheme provides guidance on the job evaluation process, including which job aspects are to be considered, how jobs are evaluated, points allocated per aspect and how job ratings are appealed. The only element not included within the JE Scheme, is the salary associated with the Job Evaluation (JE) points allocated to a specific job, as each authority decides its own salaries and pay bands.
2. Jobs are evaluated using the JE Scheme by assessing each job against 13 factors, such as working environment, physical effort and mental skills. Each factor has a number of levels of demand against which a job is assessed and rated. Levels can range from 1 to 9, with 1 being the lowest and 9 the highest, although for some factors, level 5 is the highest. Each level within a factor has a score, which, when totalled, gives a JE score. Local authorities can then decide upon the upper and lower JE points limit for each pay band.
3. The JE Scheme specifies a number of accepted principles of job evaluation practice, one of which is that the process evaluates jobs rather than people. It makes clear that the evaluation is of the content of the job rather than the abilities or performance of individual jobholders.
4. On 27 November 2007, Mr Bradley, an employee of the Council, emailed the Council requesting the following information:
 - a. Job evaluation factor levels for the following posts with the Environmental Health Service (EHS):
 - Technical Officer Level 1
 - Technical Officer Level 2
 - Environmental Health Officer (EHO) Level 1
 - EHO Level 2
 - Senior EHO
 - Principal EHO
 - Environmental Health & Trading Standards (EH & TS) manager
 - b. A full copy of the current edition of the JE Scheme.
 - c. A copy of the criteria used to match job evaluation scores to pay scales including the upper and lower scores for each pay band.



5. The Council responded on 24 December 2007. It withheld the job evaluation factor levels (request a) and the criteria for matching scores to pay bands (request c) on the basis of the exemptions in sections 30(c), 33(1)(b) and 38(1)(a) of FOISA. The Council offered to provide a paper copy of the JE Scheme (part b) to Mr Bradley upon confirmation of a postal address.
6. On 11 January 2008, Mr Bradley emailed the Council requesting a review of its decision. Mr Bradley indicated that other local authorities had released similar information and that no personal information had been requested by him. He suggested that employee relations could not be harmed by an open council sharing competently gathered data from the JE process. He also suggested that it was only by seeing data from other posts that postholders can be assured that the JE process is transparent, consistent and fair.
7. The Council notified Mr Bradley of the outcome of its review on 1 April 2008. The Council maintained its decision to withhold the information, but substituted the reasons for so doing. The Council withdrew its reliance on sections 33(1)(b) and 38(1)(a) of FOISA. However, it upheld its application of section 30(c) and now applied the exemption in section 38(1)(b) to the requested information.
8. On 1 May 2008, Mr Bradley emailed the Commissioner, stating that he was dissatisfied with the outcome of the Council's review in response to parts a and c of his request and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mr Bradley 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

10. On 21 May 2008, the Council was notified in writing that an application had been received from Mr Bradley and it was asked to provide the Commissioner with copies of the withheld information. The Council responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Council on 24 June 2008, providing it with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to provide background information on the JE Scheme and justify its reliance on sections 30(c) and 38(1)(b) of FOISA to withhold the information. The Council responded on 15 July 2008 with its comments and the requested information.
12. The investigating officer emailed Mr Bradley on 16 July 2008 to clarify what information had been released to him regarding the job evaluation process. On 28 July 2008, Mr Bradley responded and confirmed that he had received the factor levels for his own post and a version of the JE Scheme that omitted some key procedural information.



13. Following the suggestion of the investigating officer, the Council subsequently released a copy of the full JE Scheme to Mr Bradley in fulfilment of part b of his request on 24 September 2008.
14. The investigating officer emailed Mr Bradley on 26 September 2008 to confirm that he had received this information from the Council and to ask whether he would like to provide any additional submissions on why the withheld information should be released. Mr Bradley's response confirmed that he had received the information released by the Council and provided further submissions.
15. Further comments and background information were provided by the Council in response to further requests from the investigating officer during the investigation.
16. In response to one of the investigating officer's questions, the Council provided an explanation of the relationship between the JE points and pay band boundaries, which appeared to be relevant to, although not actually the specific information sought by, part c of Mr Bradley's request (seeking the criteria used to match JE scores to pay scales).
17. The investigating officer subsequently asked the Council whether it would consider releasing this information to Mr Bradley to assist his understanding of this process. The Council responded to this suggestion by releasing this information in a letter to Mr Bradley on 24 October 2008.

Commissioner's analysis and findings

18. In coming to a decision on this matter, the Commissioner has considered all the information and submissions presented to him by Mr Bradley and the Council and he is satisfied that no matter of relevance has been overlooked.
19. In what follows, the Commissioner has considered whether the exemptions in sections 30(c) and 38(1)(b) of FOISA apply to the information withheld from Mr Bradley, i.e. the factor levels for specified posts (request a) and the criteria for matching JE Scores to pay bands including upper and lower scores for each pay band (request c).
20. Mr Bradley's application to the Commissioner did not express any dissatisfaction with the Council's response to request b (for the full JE scheme). As a result, this did not form part of the investigation.
21. With respect to requests a and c, the Council has withheld two documents. The first contains pay band information and associated JE points boundaries, which together are understood to be the criteria by which scores are matched to pay bands. This will be referred to below as the "pay band information". The second, which will be referred to as the "factor levels", is a single page spreadsheet detailing the jobs Mr Bradley specified and the factor levels points associated with each.



Section 30(c) – Prejudice to the effective conduct of public affairs

22. The Council has applied the exemption in section 30(c) of FOISA to both the pay band information and the factor levels.
23. Section 30(c) of FOISA exempts from disclosure information which would “otherwise” (i.e. otherwise than provided for in section 30(a) and (b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption, and as such is subject to the public interest required by section 2(1)(b) of FOISA.
24. As has been stated in previous decisions, the Commissioner expects any public authority citing this exemption to show what specific harm would be caused to the conduct of public affairs by release of the information in question. The risk of damage being caused by release of this information would have to be real or very likely, not hypothetical. The harm caused would require to be significant and not marginal, and it would have to occur in the near (and certainly the foreseeable) future rather than in some distant time.
25. The Council’s arguments with regard to the application of section 30(c) focussed on the effect of disclosure on the process for appealing with regard to the evaluation of their post. Before going on, it is helpful to note that the JE Scheme’s model appeal procedure specifies the possible grounds of appeal as follows:

“Appeals will be admissible where they are based on the following grounds:

- factual inaccuracy in either the inputs or the outputs of the evaluation process
- failure to apply the agreed local job evaluation procedure
- misapplication of the factor definitions, levels and guidance of the Scottish Councils’ Single Status Job Evaluation Scheme.

Appeals on the grounds of comparability with other jobs (either within the individual Council, other Councils or nationally), or appeals seeking to restore previous differentials will be inadmissible.”

26. Appeals are heard before a panel chaired by an independent person who has not been involved in the evaluation process in either a management or trades union capacity. The process to be followed in these appeals is also set out in the JE Scheme.



The Council's reasoning

27. The Council argued that disclosure of the information withheld from Mr Bradley would prejudice substantially the outcome of the JE appeals process. It noted that the appeals process is intended to determine whether the factor level scores for a post are correct, based on the factual evidence in relation to that post. Given that the points for each factor level are pre-determined by the JE Scheme, the Council stated that the determination of factual accuracy in relation to the factor level scores is all that is required to ensure that jobs have been evaluated correctly. It went on to suggest that the provision of the pay band information was not only unnecessary, but would also be unhelpful, given that it would not provide anything additional in terms of accuracy, and it could affect the outcome of the appeal process, by transferring the focus to the proximity of any job to a grade boundary rather than the factual accuracy of the factor level scores.
28. The Council suggested that the appeals process would be jeopardised if appellants focussed their appeal on the proximity of the score to the grade boundary rather than the accuracy of factor level scores. It also noted that disclosure might affect a person's decision to appeal, and suggested that this might lead to the failure to correct mistakes in the evaluation of posts that were close to the bottom of any grade, if post-holders for these positions did not appeal.
29. The Council noted also that disclosure might encourage another type of erroneous analysis, by encouraging comparison of posts, rather than the factual accuracy of the assessment of a specific post.
30. With respect to the factor levels for individual posts, the Council advised that provision of this information for each post would involve considerable resources and would lead to delays in the appeals process, and so hinder the Council in achieving the best interests of its employees, and harming employee relations.
31. The Council also submitted that release of the pay band information would seriously undermine the independence and consistency of the Appeals Panel because this panel must operate without knowledge of the points scores to ensure consistency and lack of bias.
32. The Council submitted that, if the grade boundary information were released to individual appellants prior to the completion of the appeals process, it was virtually certain that this information would become known to individuals on the Appeals Panel. The Council claimed that, in such circumstances, the Panel could no longer function properly and the Council would be unable to complete the effective implementation of the new equal pay structure.
33. The Council also reiterated its assessment that disclosure of factor levels and the banding information would lead to confusion and consternation among different groups of employees. It maintained that there was a clear danger of the appeals process being skewed and anomalies between posts being created as a result. Such a result would, it claimed, lead to delays in completing a robust equal pay scheme and would lead to significant increase in the costs to the Council in making compensation payments to employees to reduce equal pay anomalies, and in the future annual salary bill of the Council.



34. The Council maintained that any other conclusion would strip it of its ability to manage the appeals process in an accurate, effective and expeditious manner, which is seen to be fair and impartial to all employees.
35. In support of its submissions, the Council provided a copy of an email from the Independent Chair of its Appeals Panel commenting on the potential disclosure of this type of information. The Independent Chair commented that:
 - a. such information has no role in the appeal process, and that the focus should be on the facts regarding the content of the role rather its position within a band.
 - b. such information should not be known or made known to panel members. Knowledge of where the appellant sits within the pay scale relative to the grade boundary could, or could be perceived to, influence panel members decisions to uphold the appeal, in that they might recognise that such a decision would be likely to result in the movement of the appellant to a higher pay band.
 - c. the availability of such information might cause applicants to use it in ways which would be detrimental to their case, for example by requiring the Panel Chair to rule evidence as inadmissible, and then be very conscious of the potential influence of this knowledge on decision making and the potential perception of this.
 - d. this information would not be helpful to applicants in constructing their appeals, and may lead appellants to base their appeal on pay and grading or comparison with other roles. If they did so, the appeal would fall due to raising inadmissible grounds.
 - e. all employees affected by single status should have access to the same information to determine whether to make their appeal. Access to additional information at later stages would be unfair to those who chose not to appeal or whose appeals had (by that time) been rejected.

Conclusions on the application of section 30(c)

36. Before continuing, the Commissioner would point out that he has considered (as he is required to do in any decision) the application of exemptions to the information under consideration and (where this test is relevant) the balance of public interest in the circumstances that existed at the time when the Council notified Mr Bradley of the outcome of its review, and disregarding any developments since that time (and in particular, the completion by the Council of the first stage of consideration of appeals under the JE Scheme).



37. The Commissioner has noted carefully all of the Council's comments on this exemption. He recognises that the information requested by Mr Bradley would not be relevant evidence in the JE Scheme's appeal, and that an appeal that was not based on factual evidence relating to the factor levels allocated to a particular post would potentially be inadmissible. However, in considering the application of the exemption in section 30(c), the Commissioner's task is not to consider whether the information would be helpful for any person (who may or may not be an appellant in the JE process), but whether disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs, as a result of harm to the effective implementation of the JE process and to employee relations, as described by the Council.
38. The Commissioner first considered the effect of the pay band information becoming known to Appeal Panel members, or of the pay band and/or the factor level information becoming known to an appellant whose focus may shift from challenging the factual basis of the evaluation to achieving a particular points score, or challenging the score via comparison with other posts.
39. While the Commissioner accepts that both of these scenarios would be possible following disclosure, he does not accept that this would, or would be likely to, prejudice substantially the appeal process in the way suggested by the Council. He notes that the JE Scheme already makes it clear which grounds of appeal are admissible, and each appellant will have to make a case on the basis of those grounds of appeal. He believes that the Appeal Panel could take steps to ensure that evidence regarding the position of any particular job's score within the pay bands was ruled as inadmissible, and that decision making was based only on the relevant and admissible evidence put before it.
40. While the Commissioner recognises the importance of the Appeal Panel basing its decisions only on admissible evidence, the Commissioner is of the opinion that the Panel Members, given the clear guidance available in the JE scheme, should be able to distinguish between a case made on the basis of factual evidence and one which lacks factual basis, but is motivated by a desire to increase the points score above a grade boundary. Similarly, the Scheme makes clear that the onus is on appellants to present their appeal in relevant terms, and to provide factual evidence in support of their case. This remains the case whether or not additional information is available to them. While it may be detrimental to a particular appellant's case to base their appeal on different and potentially inadmissible grounds, he does not accept that this would, or would be likely to, amount to substantial prejudice to the effective conduct of that appeal process.
41. For similar reasons, the Commissioner does not accept that disclosure of this information would be likely to lead to skewed results and anomalies between posts. Success or otherwise in any appeal should depend on whether compelling factual evidence could be marshalled in support of the appellant's case. The JE Scheme provides a robust framework for such an appeal to take place, and for the exclusion of any inadmissible evidence from the decision making process.



42. In the circumstances, the Commissioner is not persuaded that the Council has demonstrated how or why disclosure in this case would be likely to result in major difficulties and delays in completing a robust equal pay scheme; or how it would increase the cost of doing so, or in future settlements or salary costs.
43. The Commissioner then considered the Council's argument that disclosure of factor level information for all posts would divert resources from the appeal process itself. In this case, Mr Bradley has asked for the factor levels for a small number of posts. The resource implications of this request would therefore be minimal and the Commissioner has concluded that this is not a relevant consideration in this particular case. The Commissioner recognises that the resource implications of further disclosures of a similar nature might be more significant, but this would have to be considered on a case by case basis.
44. The Commissioner has finally considered the Council's argument that releasing the withheld information would result in unnecessary confusion and consternation amongst different groups of employees, and harm its employee relations as a consequence.
45. The Commissioner recognises that such disclosure would enable staff to compare factor levels between posts, to understand how close their posts score was to a grade boundary. He also recognises that some employees may ask why such information was not made available to staff sooner. However, he is aware that the JE process is already a challenging one for all involved, and he does not accept that employee relations would, or would be likely to, be harmed to the level required by the exemption in section 30(c) (in terms of the Council being able to either perform its functions or in relation to the JE scheme) as a result of disclosure of the withheld information.
46. It seems to the Commissioner to be equally likely that the open and transparent provision of JE scores and associated salary grade levels would diminish disquiet as every employee would see exactly how they scored and how that related to their grade and salary. Particularly if the Council chose to provide explanatory material alongside such information, this could be an opportunity to create understanding not confusion.
47. Having considered the information withheld (both the pay band information and the factor levels) and considered all of the submissions from the Council, the Commissioner is not persuaded that the disclosure of the withheld information would, or would be likely to, prejudice substantially the effective conduct of public affairs in the ways suggested by the Council.
48. The Commissioner has therefore found that the exemption in section 30(c) of FOISA does not apply to the information withheld from Mr Bradley and so is not required to go on to consider the public interest test in relation to this information.



Section 38(1)(b) – Personal information

49. The Council has also relied upon the exemption in section 38(1)(b) to withhold both the pay band information and the factor levels requested by Mr Bradley. The Council submitted that this information constituted personal data, disclosure of which would contravene the first and second data protection principles.
50. Section 38(1)(b), read in conjunction with either section 38(2)(a)(i) or (b), exempts personal data from disclosure if the release of the information would contravene any of the data protection principles set out in Schedule 1 of the DPA. The Commissioner therefore has considered whether the information in question is personal data and, if so, whether disclosure of the information would breach any of the data protection principles.

Is the information under consideration personal data?

51. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in Appendix 1).
52. Having considered the pay band information, the Commissioner is unable to accept that this constitutes personal data as defined by the DPA. As detailed above, this information specifies the Council's current pay bands, the salary ranges for each band and associated JE points boundaries. Although it contains additional information with respect to the points boundaries, this information takes the same basic form as any other salary grading structure.
53. This information does not relate to any particular post or any specific post holder. Rather, it shows the range of salary that the Council applies to groups of posts across its entire staff. The Commissioner recognises that this information might be combined with knowledge of the grade to which a particular post applies to determine in broad terms the range within which the salary of a person holding that post falls. However, this information considered alone does not relate to any individual, and so it cannot be considered to be personal data in terms of section 1(1) of the DPA. Since the Commissioner does not accept that this information is personal data, he must find that it is not exempt from disclosure in terms of section 38(1)(b) of FOISA.
54. However, the Commissioner is satisfied that the factor levels are the personal data of the post holders concerned. While he has noted that the JE process is clearly intended to evaluate posts rather than the individuals who hold these posts, he is aware that the evaluation process is informed by evidence supplied in interviews with post-holders. The Commissioner is also aware that there was only a single post-holder for four of the posts specified by Mr Bradley. Where this is the case, the JE score, although relating to the post concerned, can also be seen to relate to the holder of that post, by providing details of the nature of the work their role involves. The Commissioner is also satisfied that the individuals concerned could be identified by their colleagues or clients with whom they came into contact.



55. For posts with more than one post-holder (the other three specified in Mr Bradley's request), the Council advised the Commissioner that the evaluation process involved interviews with a representative sample of jobholders from each post. Consequently, the factor levels associated with the three roles cannot be linked directly to a single individual within the Council.
56. While it might reasonably be argued that this information therefore does not relate to the individual post holders, the Commissioner has proceeded on the basis that it does, albeit in a less direct fashion than where there is only a single post-holder. The Commissioner accepts that the factor levels for these posts also relate to the multiple individuals who hold these posts, revealing the nature of the work they undertake and the "value" (in terms of the factor scores) placed upon each aspect of that person's role by the Council. Again, the Commissioner recognises that the Council, colleagues and clients of the post holders concerned would be able to identify the individuals holding the relevant posts, and so he accepts that this information relates to living individuals who can be identified.
57. The Commissioner has therefore concluded that the factor levels requested by Mr Bradley (but not the pay band information) are personal data. However, FOISA does not exempt information from release simply because it is the personal data of a third party. Personal data is exempt from release under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)) only if the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA.
58. As noted above, the Council has stated that the first and second data protection principles will be breached if this information is released. The Commissioner will now go on to consider whether these principles would in fact be breached by disclosure of the information.

First data protection principle – Personal data shall be processed fairly and lawfully

59. The first data protection principle states that personal data shall be processed fairly and lawfully. It also states that personal data 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 of the DPA is also met. The Commissioner is satisfied that the information withheld is not sensitive personal data and so he is not required to consider whether any of the conditions in Schedule 3 to the DPA can be met.
60. The Commissioner considers that only condition 6(1) of Schedule 2 of the DPA might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed into the public domain in response to Mr Bradley's information request) if disclosure of the data 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.



61. There are a number of tests which must be considered before condition 6(1) can apply:
- Does Mr Bradley have a legitimate interest in having this personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? (In other words, is disclosure proportionate as a means and fairly balanced as to ends or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?)
 - Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of Mr Bradley and those of the data subjects. Only if the legitimate interests of Mr Bradley outweigh those of the data subjects can the personal data be disclosed.
62. The Council has argued that, since the information withheld from Mr Bradley would not be taken into account in the appeals process, he did not have a legitimate interest in this case.
63. In his comments to the Commissioner, Mr Bradley has explained that he has sought the information (both the pay band information and the factor levels) to better understand the mechanisms employed to implement wide reaching and important changes to local government pay and conditions. He emphasised that this matter was not simply of limited personal interest, but is shared by colleagues across local government.
64. Having considered Mr Bradley's comments, the Commissioner is satisfied that Mr Bradley has demonstrated that he has a legitimate interest in seeking information that will assist him in fully understanding the JE process, and that this interest is shared by other employees across the public sector. Indeed, he recognises that there is an overarching public legitimate interest achieving understanding of the single status process and how local authorities have gone about the task of ensuring that jobs are fairly and equitably evaluated.
65. The Commissioner would also note that he accepts that Mr Bradley holds a legitimate interest in the information withheld notwithstanding the fact that the information could not be used as a basis of or in support of any appeal. The legitimate interests can be identified independently of any role such information may or may not have in the appeals process.
66. The second test is whether disclosure is necessary for those legitimate interests. In this case the Commissioner, in taking account of the specific information requested by Mr Bradley, is satisfied that disclosure is proportionate and that the aims of Mr Bradley cannot be achieved by any other means which would interfere less with the privacy of the employees in question. The Commissioner notes that the information under consideration is explicitly held for the purposes of evaluating a post rather than an individual, and Mr Bradley has requested no information about the performance of any individual in their post. As such, the Commissioner would note at this stage that the level of intrusion which would be prompted by Mr Bradley's request would be minimal, and so it is difficult to see how Mr Bradley could pursue his interests in a way that is less intrusive than the approach he has taken.



67. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the employees in relation to the information withheld. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Bradley and those of the employees. Only if the legitimate interests of Mr Bradley outweigh those of the employees can information about their job titles be disclosed without breaching the first data protection principle.
68. In a briefing recently published by the Commissioner¹, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a. whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).
 - b. the potential harm or distress that may be caused by the disclosure.
 - c. whether the individual has objected to the disclosure
 - d. the reasonable expectations of the individuals as to whether the information would be disclosed.
69. The Council argued that the release of the information in question would be unfair to the individuals who were interviewed to obtain the JE factor rating for their job. It maintained that these individuals would be entitled to assume that the information provided by them and the evaluation of their job would be held as confidential and they had no expectation that such information would be released.
70. The Commissioner accepts that employees may have had a certain expectation that the contents of their interviews regarding their posts would not be disclosed, but he would note that this is not the information requested by Mr Bradley. The factor levels represent the outcome of the evaluation process, not simply the comments made by an individual. The withheld information does not contain the individual's submissions about the work they had undertaken or the evaluation of this information and it does not include information as to how the factor levels were reached.
71. Nonetheless, the Commissioner does accept that the process followed by the Council thus far, might have given rise to the expectation that factor level scores for a particular post would not be disclosed to individuals other than the post-holders.
72. However, given that the JE Scheme makes clear that it is the post rather than the employee who is being evaluated, and that factor levels can only reveal information about what a post holder does in their working life, the Commissioner considers the level of intrusion and the potential for harm to individual employees that would follow from disclosure in this case to be minimal.

¹ "Personal information" - <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&sID=133>



73. After balancing the legitimate interests of Mr Bradley against the rights, freedoms or legitimate interests of the Council employees, the Commissioner is satisfied that the processing of the data would not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the post-holders concerned.
74. The Commissioner, being satisfied that the three tests as set out at paragraph 61 above are fulfilled, finds that the processing is permitted by condition 6(1) of Schedule 2 to the DPA.
75. The Commissioner must, in addition, consider whether the disclosure is otherwise unfair or unlawful. The Commissioner is satisfied that the disclosure of the information would not be unfair, for the reasons outlined above in relation to condition 6(1).
76. The Council did not put forward any arguments as to why the disclosure of the information would be unlawful other than in terms of a breach of the first and second data protection principles. Section 4(4) of the DPA imposes a duty on data controllers to comply with the data protection principles, and so a breach of the second principle would also lead to a breach of the first data protection principle. Since the Council has claimed that disclosure in this case would also breach the second data protection principle, the Commissioner will consider this principle before reaching a final conclusion on the question of the lawfulness of the processing.

Second data protection principle – Personal data shall be obtained for one or more specified and lawful purposes

77. The second data protection principle provides that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be processed in any manner incompatible with that purpose or those purposes.
78. The paragraphs on the interpretation of the second data protection principle (in Part II of schedule 2 of the DPA) further provide that, in deciding whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, consideration will be given to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.
79. The Council has argued that disclosure of the factor scoring levels would not be consistent with the employment purposes for which the Council gathered the information and to disclose it without the consent of the post holders would go beyond the purposes for which this information was gathered.
80. The Commissioner has considered this argument along with comments made in decisions from the Information Commissioner (who is responsible for the enforcing the DPA throughout the UK as well as for enforcing the Freedom of Information Act 2000 [FOIA]) which address the interpretation of the second data protection principle in the context of requests made under freedom of information law.



81. In his decision reference FS50087443 (Maldon District Council), the Information Commissioner briefly considered whether the second data protection principle would be breached by release of certain personal data in response to a request under FOIA. In this case, Maldon District Council had argued that because disclosure of information in response to freedom of information requests had not been specified in a fair collection notice issued to the data subjects concerned, disclosure of the information gathered in response to a request under FOIA would breach the second data protection principle. The Information Commissioner commented on this argument as follows:

“The [Information] Commissioner considers that this is not a correct interpretation of the Data Protection Act. If [Maldon District] Council were correct in its interpretation, no disclosures of third party data would be permitted in response to FOI requests except where data subjects had been given prior notice. This would include cases where requests for information identified individuals acting in a public or official capacity in addition to information relating to their private lives.

The [Information] Commissioner considers that the correct interpretation of Principle 2 in this context is that the disclosure of third party data in response to a request submitted in accordance with other statutory rights is not inherently incompatible with any other lawful purpose for which information may be obtained. Principle 2 may, however, restrict the purposes for which a third party to whom personal data are disclosed may subsequently process those data.

The [Information] Commissioner considers that the central issue in considering whether or not [FOIA] requires the disclosure of personal data is not the second data protection principle, but rather the first principle.”

82. The Commissioner is aware that in this case the Council has not made any arguments in relation to a fair processing notice, only that the disclosure was clearly inconsistent with the purpose for which the information was obtained. However, the Commissioner accepts the view set out by the Information Commissioner above that disclosure under freedom of information legislation which is otherwise compatible with the data protection principles will not contravene the second data protection principle.
83. The second data protection principle provides that data controllers must specify the purposes for which they are processing personal data. This can be achieved either through a fair processing notice provided directly to data subjects (as discussed above) or by including the purpose on its entry on the Register of Data Controllers, a public register available for inspection on the Information Commissioner’s website.
84. The Commissioner recognises that public authorities need to collect personal data in order to pursue their business objectives. It is only these purposes which the public authority has to specify. Public authorities do not obtain personal data so that they can then provide it in response to a request made under section 1 of FOISA. This is not one of their business purposes. It follows, therefore, that there is no requirement to specify that disclosures may be made under FOISA in either a fair processing notice or the Register of Data Controllers.



85. However, even although public authorities are not required to specify that they may disclose personal data under FOISA, the second principle still prohibits them from further processing personal data (including in response to information requests), in any manner which would be incompatible with the public authority's business purposes.
86. The Commissioner considers that account needs to be taken of the ethos behind FOISA which aims to promote the public's understanding of, and confidence in, the public authorities that serve them, which in turn will drive up standards within the public sector.
87. On this basis, it is difficult to see how a disclosure of personal data which would not breach any of the remaining data protection principles, and would not involve the disclosure of information which is covered by another exemption under FOISA, could possibly be incompatible with the public authority's business purposes. In fact, such a disclosure should actually support the specified business purpose by promoting confidence, driving up standards, etc.
88. Further support for this approach can be taken by consideration of the second data protection principle in the broader context of the DPA, i.e. the protection of the privacy of individuals. There may be an argument that the Commissioner should interpret the second data protection principle in a way which focuses on whether any further processing would be incompatible with the privacy rights of the data subjects rather than on the business purposes of the data controller, despite this approach straying away from a literal interpretation of the principle. Such an approach would mean that if, in all other respects, the disclosure is compatible with the remaining data protection principles then it would not contravene the second principle.
89. Whichever approach is taken, the Commissioner is satisfied that disclosure of the factor levels would not be incompatible with the purpose for which the information was originally obtained. As a result, he finds that the disclosure of the information would not breach the second data protection principle.
90. As he has found that disclosure would not breach the second data protection principle, it follows that disclosure of the information would not be unlawful in terms of the first data protection principle. Consequently, he must find that disclosure of the information would not breach the first data protection principle.
91. The Commissioner has therefore concluded that the exemption in section 38(1)(b) of FOSIA was misapplied in this case to both the factor levels and the pay band information.

Technical breaches of FOISA – Section 21

92. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt by it of the requirement. The Council responded to Mr Bradley's request for review after an Information Notice was issued by the Commissioner, almost three months after receipt of the request for review.
93. Therefore the Commissioner finds that the Council breached Part 1 of FOISA and section 21(1) of FOISA in this case.



94. Since the Council provided its response, albeit belatedly, the Commissioner does not require the Council to take any action in respect of this particular breach in response to this decision.

DECISION

The Commissioner finds that West Lothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Bradley. He found that the exemptions in sections 30(c) and 38(1)(b) of FOISA did not apply to the information withheld from Mr Bradley and that, in withholding the information from Mr Bradley, the Council failed to comply with section 1(1) of FOISA.

The Commissioner also finds that the Council failed to comply with the timescales set down in section 21(1) of FOISA.

The Commissioner now requires the Council to disclose the information withheld from Mr Bradley to him by 4 May 2009.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
18 March 2009



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 –

...

(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.

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(...)

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



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
- (ii) ...
- (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.

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

...

4 The data protection principles

...

- (4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.

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.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.



PART II INTERPRETATION

The second principle

- 5 The purpose or purposes for which personal data are obtained may in particular be specified—
 - (a) in a notice given for the purposes of paragraph 2 by the data controller to the data subject, or
 - (b) in a notification given to the Commissioner under Part III of this Act.
- 6 In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, regard is to be had to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.

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.