

Decision Notice



Decision 135/2012 Mr T and the University of Abertay Dundee

Compensation for loss of office and external fees paid to the former Principal

Reference No: 201201328
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Summary

Mr T asked the University of Abertay Dundee (the University) how much it paid to its former Principal as compensation for loss of office, and to reimburse legal fees or other costs. The University withheld that information on the basis that it was personal data, disclosure of which would breach the first data protection principle.

The Commissioner accepted that the University was entitled to withhold this information, having taken into consideration the compromise agreement between the University and the former Principal.

Relevant statutory provisions

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

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

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

Background

1. On 18 January 2012, Mr T emailed the University requesting (among other things):
 - the amount paid to its former Principal as compensation for loss of office, and
 - the amount reimbursed to the former Principal or his representatives in respect of legal or other costs incurred on his behalf in 2011.
2. The University responded on 21 February 2012, withholding the information on the basis that it was personal data, exempt from disclosure under section 38(1)(b) of FOISA.



3. On 3 April 2012, Mr T wrote to the University requesting a review of its decision. He provided detailed arguments to show why he believed the exemption in section 38(1)(b) of FOISA had been incorrectly applied.
4. The University notified Mr T of the outcome of its review on 27 April 2012. It upheld its previous decision to withhold the information without amendment.
5. On 9 July 2012, Mr T wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr T 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

7. On 10 July 2012, the University was notified in writing that an application had been received from Mr T. This letter advised the University that the withheld information was already in the possession of the Commissioner as a result of it being the subject of another application for decision. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the University, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to the particular points made by Mr T. The University's response was received on 3 August 2012.
9. Within his application for a decision, Mr T provided detailed submissions setting out his reasons for believing that the withheld information was not exempt from disclosure. The relevant submissions received from both the University and Mr T will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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



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

11. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would breach any of the data protection principles set out in Schedule 1 to the DPA.
12. The exemption in section 38(1)(b) is an absolute exemption, not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

13. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
14. The Commissioner accepts that the withheld information in this case is personal data. It is information about the payments made to a living individual to compensate him for loss of office and to reimburse costs he had incurred. This information clearly relates to the former Principal, and identifies him, since (in the context of this case) it would be disclosed in response to a request specifically naming him.

Would disclosure breach the first data protection principle?

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



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

18. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.
19. The University has confirmed that it has not received the former Principal's consent to the disclosure of the withheld information. In the circumstances, the Commissioner considers that condition 6 of Schedule 2 of the DPA would appear to be the only condition which might permit disclosure of the withheld personal data. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
20. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
 - Does Mr T have a legitimate interest in obtaining the personal data?
 - If he does, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?
 - Even if the processing is necessary for Mr T's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject?
21. There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr T must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the personal data to Mr T.

Does Mr T have a legitimate interest?

22. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's published guidance on section 38 of FOISA² states:

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

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



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.

23. In this case, Mr T has highlighted reporting in the press about the circumstances surrounding the former Principal's departure from the University. He explained that the reasons for his request were to enable public scrutiny of the way in which public funds have been used in controversial circumstances.
24. When notifying Mr T of the outcome of its review, the University accepted that there was some (in its view limited) level of legitimate interest on Mr T's part in the withheld information. It recognised that this was primarily in terms of accountability for the use of public funds, governance and remuneration to a chief executive officer.
25. The Commissioner considers that, in the circumstances of this case, Mr T has demonstrated that he holds a legitimate interest in scrutinising the circumstances, including the cost to the public purse, of the departure of the former Principal from his employment with the University. The Commissioner accepts that Mr T has a legitimate interest (which he shares with the general public) in accessing the withheld information.

Is disclosure of the personal data necessary for Mr T's legitimate interests?

26. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so he must consider whether these interests might reasonably be met by any alternative means, or which would interfere less with the privacy of the former Principal.
27. The University has argued that Mr T's legitimate interests are very substantially or wholly satisfied by the information already published in its accounts, and partly by scrutiny of the information that was disclosed to him, and also by rigorous external scrutiny and audit arrangements.
28. Although the Commissioner recognises that there is some information in the public domain about the Principal's departure and the University's overall expenditure under compensation arrangements, she notes that this information does not fulfil Mr T's information request, or enable him to pursue his legitimate interest in understanding the level of payment made to a particular senior employee who left his position in high profile circumstances.
29. While she acknowledges that the existence of external scrutiny and audit arrangements of the University provides some reassurance that the University's actions have been independently assessed, it does not enable public scrutiny of those actions.
30. In the circumstances, while the Commissioner recognises that other disclosures and external scrutiny go some way towards meeting the legitimate interest identified by Mr T, that legitimate interest cannot be met fully without public access to the particular information under consideration.



31. For these reasons, the Commissioner finds that disclosure of the withheld information is necessary for the purposes of Mr T's legitimate interests.

Would disclosure cause unwarranted prejudice to the legitimate interests of the former Principal?

32. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject. As noted above, this involves a balancing exercise between the legitimate interests of Mr T and those of the data subject, the former Principal. Only if the legitimate interests of Mr T outweigh those of former Principal can the information be disclosed without breaching the first data protection principle.

33. In the Commissioner's briefing on section 38 of FOISA³, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:

- whether the information relates the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
- the potential harm or distress that may be caused to the individual by the disclosure;
- whether the individual has objected to the disclosure; and
- the reasonable expectations of the individuals as to whether the information would be disclosed.

34. Mr T has argued that the information withheld relates solely to the former Principal's public life. He added that it would not be possible to derive any aspect of his financial affairs, previous remuneration or pension arrangements from that information.

35. The Commissioner is unable to accept this argument. She considers that where payments are made by a public authority to an employee, information about those payments relate both to that person's private and public life. The payments under consideration were paid from public funds in relation to matters arising in a public role, but the receipt of those payments relates to the financial affairs, and so the private life, of the individual concerned.

36. Guidance from the Information Commissioner on how and when to disclose information about public sector salaries⁴ indicates that individuals paid from the public purse should expect some information about their salaries to be made public. However, the guidance also recognises that salary information relates to personal and financial circumstances and so deserves some protection.

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

⁴ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf



37. In this case, the seniority of the role of the former Principal meant that his salary was disclosed within the University's annual accounts. The Commissioner recognises that his seniority is a relevant consideration in this case, and that his expectation of privacy with respect to any payments received from the University would, in general, be less than for more junior employees.
38. However, the University submitted (and provided evidence) that the information withheld from Mr T was set out in a compromise agreement between the University and the former Principal, which contained a confidentiality agreement that is binding on both parties. In the circumstances, it maintained that the former Principal held a strong and reasonable expectation that details of the compensation paid to him would be kept confidential.
39. The University also referred to the previous Commissioner's *Decision 134/2010 Mr Hugh Henry and Transport Scotland*, concerning a request for information on the departure of an individual, also in high profile circumstances. In that case, the Commissioner gave weight to the existence of a confidentiality agreement between the parties and accepted that, in the circumstances, disclosure of the withheld information would breach the first data protection principal.
40. Within his request for review and application for a decision, Mr T provided detailed submissions explaining why he considers that the expectation of confidentiality should be over-riden in this case. He also added that the former Principal would be aware of the Scottish Funding Council's (SFC's) requirements, of the fact that his salary and pension information was published, and that another Scottish university had recently published details of the amount paid in compensation for loss of office to its former Principal. In the circumstances, he argued that the former Principal's expectation that the information would not be disclosed into the public domain was not reasonable.
41. Mr T commented that the principle of disclosure of severance terms of chief executive officers and directors, whether in the public or private sector, is a matter of public policy. He highlighted that quoted companies, Non Departmental Public Bodies, and charities have all been required to disclose details of severance payments made to individual directors or trustees since at least 2005. He also added that, more recently, the Local Authority Accounts (Scotland) Regulations 1985 had been amended⁵ to require local authorities to disclose payments for compensation for loss of office made to senior staff.
42. Mr T noted that the University has stated publicly that the settlement with the former Principal complies with employment law and the SFC's guidelines on severance arrangements for senior staff. He drew the Commissioner's attention to paragraph 23 of this guidance, which indicates that, before agreeing a confidentiality clause (other than in relation to commercially sensitive information), the University must consult the SFC's Chief Executive. Mr T indicated that he understood that no such consultation had taken place.

⁵ <http://www.scotland.gov.uk/Resource/Doc/1070/0116807.pdf>



43. Mr T also highlighted that the SFC's guidance requires (at paragraph 27) that the institution's external auditors review severance settlements for senior staff, and report the facts in a management letter if they do not materially conform to the guidance. He highlighted that the relevant external auditor's report had referred to the confidentiality clause, and added that it was understood that these were agreed with the SFC. Mr T added that the University had seemed to allow its auditors to wrongly form the view that the SFC had approved the inclusion of the confidentiality agreement and report as such to its audit committee.
44. Accordingly, Mr T indicated that he believed that the University had not followed the SFC's guidelines when including the confidentiality agreement within the Compromise Agreement, contrary to public claims by the University's spokesman. In the circumstances, he argued that the case for disclosure to enable public scrutiny is strengthened, and outweighs any reasonable expectations of privacy of the former Principal.
45. The Commissioner has considered Mr T's arguments and the documents to which he has referred carefully. She acknowledges that his concerns regarding the process leading to the confidentiality agreement between the parties support an argument for his legitimate interest. However, it seems to her that this weight relates primarily to the legitimate interest in establishing whether a proper process was followed, rather than knowing the sums paid.
46. The Commissioner's role is solely to determine whether the University dealt with Mr T's information request in accordance with FOISA. It would be outwith her remit to determine whether the University's decision to reach a confidential agreement was appropriate or in line with the SFC's requirements.
47. She recognises that such a determination would be a matter of interpretation of guidance and the actions of the University. It is clear that the SFC guidance envisages that there will be circumstances where it is in the public interest to reach a confidential agreement of the type under consideration. The SFC has made public statements indicating that it was kept informed by the Chair of the University, as per the requirements of the financial memorandum, throughout the dispute with the former Principal.
48. Mr T has argued in effect that, because he believes there were flaws in the process by which it was reached, the confidentiality agreement should be set aside. For the reasons set out above, the Commissioner is unable to agree.
49. Having considered the withheld information, the Commissioner is satisfied that it falls within the scope of a legally binding compromise agreement, which contains a confidentiality clause applicable to that information. Consequently, the Commissioner is of the view that, having entered into a legally recognised formal agreement which places obligations of confidentiality on both parties, the former Principal would reasonably expect that the information would not be disclosed. Indeed, that expectation would be common in cases where the parties to a dispute agree to settle in this manner to avoid the risks, expense and publicity associated with an Employment Tribunal.



50. While there may be concerns about whether proper process was followed by the University in reaching that agreement, they do not change the effect of those provisions while the agreement remains in place. Given the existence of that agreement, the Commissioner considers that the former Principal's expectations would be based on that, rather than disclosure of similar information in other sectors, or in relation to individuals holding similar positions within universities.
51. On balance, while the Commissioner accepts that disclosure of the withheld information would be necessary to fulfil Mr T's legitimate interests, she does not agree that this outweighs the prejudice that would be caused to the former Principal's rights, freedoms and legitimate interests and she considers that such prejudice would be unwarranted in this case. The Commissioner is therefore satisfied that Condition 6 of Schedule 2 is not met in this case.
52. Having concluded that disclosure of the withheld information would lead to unwarranted prejudice to the rights, freedoms and legitimate interests of the former Principal, the Commissioner must also conclude that disclosure would be unfair. As condition 6 cannot be met, she would also regard disclosure as unlawful. In all the circumstances, therefore, she finds that disclosure would breach the first data protection principle and that the information was therefore properly withheld under section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that the University of Abertay Dundee complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr T.

Appeal

Should either Mr T or the University of Abertay Dundee 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.

Rosemary Agnew
Scottish Information Commissioner
14 August 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

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

...

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

...

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

...

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



38 Personal information

(1) Information is exempt information if it constitutes-

...

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-

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

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...



Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

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

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

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

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

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

...