

# Decision Notice



Decision 136/2012 Paul Hutcheon of the Sunday Herald and the University of Abertay Dundee

Compensation for loss of office paid to the former Principal

Reference No: 201200832  
Decision Date: 14 August 2012

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## Summary

Paul Hutcheon of the Sunday Herald asked the University of Abertay Dundee (the University) for details of the payment made to its former Principal in retirement and compensation for loss of office. The University directed Mr Hutcheon to published information relating to the former Principal's pension. It withheld details of the compensation paid for loss of office.

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

## Relevant statutory provisions

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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

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1. On 6 February 2012, Mr Hutcheon asked the University for the total figure paid to its former Principal in retirement and compensation for loss of office within a £5,000 banding. He also asked for a breakdown of all elements of that package, with each element also broken down into £5,000 bands.
2. The University responded on 29 February 2012. It directed Mr Hutcheon to published information relating to the remuneration and pension of the former Principal. However, it withheld details of the compensation paid for loss of office, on the basis that this was personal data, exempt from disclosure under section 38(1)(b) of FOISA.



3. On 9 April 2012, Mr Hutcheon wrote to the University requesting a review of its decision. In particular, he maintained that the former Principal's seniority and the controversy surrounding his departure were reasons enough to warrant release of the information within £5,000 bandings.
4. The University notified Mr Hutcheon of the outcome of its review on 27 April 2012, upholding its previous decision without amendment.
5. On 30 April 2012, Mr Hutcheon 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 Hutcheon 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

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7. On 18 May 2012, the University was notified in writing that an application had been received from Mr Hutcheon and was asked to provide the Commissioner with the information withheld from him. The University responded with the information requested and 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 specific questions regarding its application of the exemption in section 38(1)(b) of FOISA to the withheld information. The University's response was received on 6 July 2012.
9. Following this, the investigating officer wrote to Mr Hutcheon to update him on her investigation and to ask whether he still wished to receive a decision in this case. If he did, he was invited to provide submissions to inform the Commissioner's consideration of the legitimate interest test in this case.
10. Mr Hutcheon responded by confirming that he still wished to receive a decision, but he provided no further comments to inform the Commissioner's decision.
11. The relevant submissions received from both the University and Mr Hutcheon will be considered fully in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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12. 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 Hutcheon and the University and is satisfied that no matter of relevance has been overlooked.

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

13. 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.
14. 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?*

15. 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).
16. 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. This information clearly relates to the former Principal, and identifies him, since it would be disclosed in response to a request relating solely to payments made to him. The Commissioner considers that the information would be personal data for the same reasons when presented in bandings of £5,000.

#### *Would disclosure breach the first data protection principle?*

17. 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 Hutcheon's information request.
18. 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.



19. 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 fair and lawful.

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

20. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47<sup>1</sup> 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.
21. 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.
22. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
- Does Mr Hutcheon 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 Hutcheon's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject?
23. 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 Hutcheon 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 Hutcheon.

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



*Does Mr Hutcheon have a legitimate interest?*

24. There is no definition within the DPA of what constitutes a “legitimate interest”, but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner’s published guidance on section 38 of FOISA states:
- In some cases, the legitimate interest might be personal to the applicant – e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.*
25. In this case, Mr Hutcheon has indicated in his request for review and application to the Commissioner that he considers there is a strong public interest in the information under consideration, adding that he believed the former Principal’s seniority and the controversy surrounding his departure warranted release of the information within £5,000 bandings.
26. When asked during the investigation to comment specifically in relation to the legitimate interest test relevant to the first data protection principle (which differs from the separate public interest test that needs to be considered when certain exemptions in FOISA apply), Mr Hutcheon did not provide any further submissions.
27. When notifying Mr Hutcheon of the outcome of its review, the University accepted that there was some (in its view, limited) level of legitimate interest on Mr Hutcheon’s part in the withheld information, particularly in his capacity as a journalist. It recognised that this was primarily in terms of accountability for the use of public funds, governance and remuneration to a chief executive officer.
28. Given his role as a journalist, and the general legitimate interest in scrutinising the expenditure, governance and remuneration (including severance payments) to senior employees of public authorities, the Commissioner accepts that Mr Hutcheon has a legitimate interest (which in this case is aligned with the public interest) in accessing the withheld information.

*Is disclosure of the personal data necessary for Mr Hutcheon’s legitimate interests?*

29. The Commissioner must now consider whether disclosure is necessary for those legitimate interests, and in doing so she must consider whether these interests might reasonably be met by any alternative means, or which would interfere less with the privacy of the complainants.
30. The University has argued that Mr Hutcheon’s legitimate interests are very substantially or wholly satisfied by the information already published in its accounts, by scrutiny of the information disclosed to him, and also by rigorous external scrutiny and audit arrangements.
31. 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 Hutcheon’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.



32. 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.
33. In the circumstances, while the Commissioner recognises that other disclosures and external scrutiny go some way towards meeting the legitimate interest identified by Mr Hutcheon, that legitimate interest cannot be met fully without public access to the particular information under consideration.
34. For these reasons, the Commissioner finds that disclosure of the withheld information is necessary for the purposes of Mr Hutcheon's legitimate interests.

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

35. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject (the Principal). As noted above, this involves a balancing exercise between the legitimate interests of Mr Hutcheon and those of the former Principal. Only if the legitimate interests of Mr Hutcheon outweigh those of former Principal can the information be disclosed without breaching the first data protection principle.
36. In the Commissioner's briefing on section 38 of FOISA<sup>2</sup>, 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.
37. As noted above, Mr Hutcheon has argued that the seniority of the former Principal, and the controversy surrounding his departure from the University justified disclosure of the sum paid in £5,000 bands in this case.

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



38. The Commissioner recognises that where payments or income are made by a public authority to an employee, information about those payments relate both to that person's private and public life. Guidance from the Information Commissioner on how and when to disclose information about public sector salaries<sup>3</sup> 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.
39. 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.
40. However, the University explained (and provided evidence) that the sum paid to the former Principal in compensation for loss of office was set out in a compromise agreement, 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.
41. The University referred to the previous Commissioner's *Decision 134/2010 Mr Hugh Henry and Transport Scotland*, concerning the departure of an individual, also in high profile circumstances. In that case, the Commissioner had given 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.
42. 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.
43. On balance, while the Commissioner accepts that disclosure of the withheld information would be necessary to fulfil Mr Hutcheon's legitimate interests, she does not agree that those legitimate interests outweigh the prejudice that would be caused to the former Principal's rights, freedoms and legitimate interests. 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.
44. The Commissioner has reached the same conclusion with respect to both the actual sum paid, and that sum (and its breakdown) presented within £5,000 bands.

<sup>3</sup> [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/practical\\_application/salary\\_disclosure.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf)





45. Having concluded that disclosure of the withheld information would lead to unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject, 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 Paul Hutcheon.

## Appeal

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Should either Mr Hutcheon 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

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### 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.

...