



Scottish Information
Commissioner

Decision 006/2005 Mr Q and the Scottish Executive

*Request for information relating to an unsuccessful application to the
Scottish Local Authorities Remuneration Committee*

Applicant: Mr Q
Authority: Scottish Executive
Case No: 200500855
Date of Decision: 30 June 2005

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Request for information relating to an unsuccessful application to the Scottish Local Authorities Remuneration Committee – information supplied under section 38(1)(a) – information withheld under section 38(1)(b)

Facts

Mr Q asked for the following information from the Scottish Executive (the Executive) relating to his unsuccessful application for membership of the Scottish Local Authorities Remuneration Committee (SLARC):

1. details of where he failed to meet the person specification;
2. where his experience and referees fell short and
3. details of other candidates being interviewed in order to match their suitability for interview.

Mr Q was dissatisfied with the response he received from the Executive to his initial request and to his subsequent request for review. Mr Q lodged an application with the Commissioner to obtain the information he had requested.

Outcome

The Commissioner found that the Executive had dealt with Mr Q's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

Appeal

Should either the authority or the applicant wish to appeal against the Commissioner's 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 of receipt of this notice.



Background

1. On 10 January 2005 the applicant, Mr Q, asked for the following information from the Executive relating to his unsuccessful application for membership of SLARC:
 1. details of where he failed to meet the person specification;
 2. where his experience and referees fell short and
 3. details of other candidates being interviewed in order to match their suitability for interview
2. The Executive responded to the applicant's request for information on 26 January 2005. The Executive identified questions 1) and 2) as requests for the applicant's own personal data and indicated that, as a result, they had dealt with these requests under the Data Protection Act 1998 (DPA). The Executive indicated that the Interview Panel had recorded that his application was sifted out because of "lack of relevant experience." It indicated that no further information was held on the applicant apart from his original application form. (Although the Executive referred to DPA it did not refer explicitly to section 38(1)(a) of FOISA in its response. Section 38(1)(a) of FOISA exempts information which constitutes personal data of which the applicant is the data subject. Instead, such requests should be dealt with under the DPA. Public authorities should ensure that where information requested is the applicant's own personal data, that section 38(1)(a) is cited in the refusal notice.)
3. The third part of the applicant's request for information was considered by the Executive under FOISA. The Executive indicated that in this instance the applicant was requesting personal information about other individuals and that such information was exempt from disclosure under section 38(1)(b) of FOISA. This exemption applied, the Executive explained, because disclosure of the personal data provided by the other candidates on their application forms would breach the data protection principles as set out in the DPA 1998.
4. The applicant sought a review of this decision on 9 February.
5. The review was carried out on 28 February within 20 working days of the applicant's request. On review, the Executive confirmed its view that the exemptions at section 38(1)(a) and section 38(1)(b) had been correctly applied. It confirmed that the only information relating to the applicant's own performance was the statement "lack of relevant experience". It indicated that as the document referring to the selection panel's assessment of his application included the assessment of other candidates, the information had been provided in summary form.



6. The review also confirmed the original refusal to provide information about the candidates selected for interview. The Executive indicated that application forms are marked “in confidence” and that the Executive is of the view that this sends an explicit message to potential candidates that the information will only be used to assess them for the appointment in question. Moreover, the Executive advised, the information pack sent to potential candidates clearly states that the only information that will be used for purposes other than the selection process is:
 - the political activity declaration, which covers information to be placed in the public domain only if the candidate is offered and accepts the appointment;
 - information on gender, disability and ethnic origin, which will only be used for statistical purposes and is presented in grossed-up form thus ensuring anonymity.
7. The Executive therefore believed that, notwithstanding the DPA, it would be inappropriate to release information on other candidates to a third party. The Executive was also concerned that release of this type of information to a third party would discourage candidates who might object to such a proposal.
8. On completion of the public appointments process the Executive advised the applicant of the names of those appointed to the Committee by Ministers, once that announcement had been made. The News Release sent to the applicant provided brief details about the background of the members of the Committee.
9. On 4 March 2005 the applicant applied to the Scottish Information Commissioner for a decision. He was dissatisfied with the response he had received to his requests for information.
10. The case was allocated to an investigating officer.

The Investigation

11. The applicant’s appeal was validated by establishing that he had made a request to a Scottish public authority, and had sought a decision from the Commissioner only after requesting the authority to review its decision to withhold information.
12. A letter was sent from my Office on 4 April to the Executive informing it that an appeal had been received and that an investigation into the matter had begun.
13. The Executive was asked to provide:
 - Confirmation that the only personal information about the applicant held by the Executive was the statement “lack of relevant experience”;
 - A copy of the applicant’s application for membership of the Committee;



- Any notes and/or internal correspondence concerning the applicant's application for membership of the Committee;
- A copy of the application form (or CV/letter) for each candidate applying for membership of the Committee;
- A copy of any notes made about each candidate, including any comparative tables and/or assessment sheets made during the recruitment process;
- A copy of the Executive's recruitment policy;
- Information about documentation usually produced during the recruitment process (for example, use of assessment sheets or comparative tables);
- Further information about the application of the exemption contained in section 38(1)(a) of FOISA. (For example, how did the Executive decide that certain information requested by the applicant was covered by this exemption? What criteria did the Executive apply?);
- Further information about the application of the exemption contained in section 38(1)(b) of FOISA. The Executive was asked to provide a detailed analysis of the use of the exemption in relation to each document withheld. In particular, the Executive was asked to cite the data protection principles that would be breached if the information was disclosed. The Executive was also asked to provide details of the application of the public interest test (where appropriate), again in relation to each document withheld;
- Further information about how the authority's review was carried out, including analysis of the exemptions applied and the public interest test (where appropriate) in relation to each of the documents withheld;
- Any internal correspondence relating to the consideration of the applicant's request;
- Any guidance relied on by the Executive in deciding whether the information requested should be disclosed or withheld; and
- Any other information which the Executive considered might be relevant.

Submissions from the Scottish Executive

14. In its submissions to my Office the Executive provided information about the recruitment process to explain the kind of information that it held about the applicant and the candidates invited for interview.
15. The applicant applied for membership of a new public body, the SLARC. In expectation of SLARC becoming a body which would be regulated by the Commissioner for Public Appointments in Scotland, the Commissioner for Public Appointments in Scotland allocated one of the Independent Assessors appointed by her to confirm that the appointments process followed the principles of her Code of Practice.



16. An assessment panel was set up to recommend to Ministers candidates suitable for appointment. Consideration of all applications was carried out by that Panel, as were the interviews of those short-listed candidates who met the essential criteria and who the Panel considered to be the strongest.
17. A sifting process was carried out by the Panel. The process initially sifted out applications for Convenorship and for membership where applications were considered weak, incomplete, lacking in evidence or detail or where the applicant presented a conflict with the independence of the Committee. A second sift was carried out in which further candidates were sifted out on the grounds of relatively limited or narrow experience, or relatively weak supporting evidence. The applicant was one of these candidates. All applications that were sifted out at this stage had the reasons for doing so recorded by way of a brief comment. No further information was recorded on these candidates.
18. The Panel then agreed a scoring system, re-examined the remaining applications, and scored each against the selection criteria set in the application forms. This sifted out a further number of candidates for Convenorship and for membership.
19. The remaining candidates were invited to interview. It was details of these candidates that formed the basis of the applicant's number 3) request.
20. The Executive reported that the independent assessor was fully involved throughout as a member of the Panel and agreed the approach taken at each stage of the process. On completion of the process she provided a validation certificate to confirm that the process had been carried out in accordance with the principles of the Commissioner for Public Appointments in Scotland's Code of Practice.

Request for the applicant's own personal data

21. In its submissions to my Office, the Executive confirmed that the statement "lack of relevant experience" was the only information the Executive held in respect of Mr Q's application for membership of SLARC, in addition to his own application form. The Executive provided my Office with a copy of Mr Q's application form.
22. The Executive indicated that there were no notes or internal correspondence concerning the applicant's application for membership. It indicated that there was correspondence with the application starting with the rejection letter, then correspondence relating to Mr Q's subsequent complaint. Copies of this correspondence were provided to my Office for the sake of completeness.



23. The Executive also set out how the review of these parts of the applicant's request had been carried out. The official carrying out the review confirmed that she had looked at all the papers covering the appointments process to establish what information the Executive held on file which referred to the applicant. She confirmed that the only paper which mentioned the applicant was the statement by the assessment panel which stated that he had a "lack of relevant experience". The reviewing officer also sought assurance from the Local Democracy Team at the Executive that everything it had on the selection panel's assessment of the applicant was on the file maintained by the Team. Finally, the reviewing officer looked at Mr Q's application form to check that no notes had been made on the form during the assessment process which were relevant to his request.

Request for the information about the other candidates invited for interview

24. The Executive provided the following information to assist with the investigation of the third part of the applicant's request:
- a sample copy of an application form which was partially anonymised; the name, addresses, phone numbers and date of birth of the candidate and the names of the referees had been redacted. This showed the sort of information that each candidate would provide in respect of the application. The application form contains detailed information supplied by the candidate about his or her experience and how this matches the job criteria. The Executive indicated that it did not consider it appropriate to provide a full copy of each application form for data protection reasons unless it was considered that this information was relevant to, and required for, the investigation. The application form provides clear information about the sort of information submitted by each candidate. I consider it unnecessary for the purposes of this investigation to see each application form submitted by each candidate or those submitted by the candidates invited for interview;
 - a sample copy of the assessment form used by the panel to assess which candidates should be invited for interview. This form sets out a list of criteria and a marking system of high, good, fair and poor. The name from the sample has been redacted;
 - a copy of a minute dated 20 October 2004 to members of the assessment panel summarising their assessment of all applicants;
 - a sample of the interview assessment form; and
 - a copy of a minute dated 15 December 2004 including records of interviews carried out and the outcome of the interview process
25. The Executive also provided a copy of the guidance on public appointments. The Commissioner for Public Appointments in Scotland's Code of Practice and Cabinet Office guidance on making public appointments were also supplied.



26. In its submissions to my Office the Executive expanded on its reliance on section 38(1)(b) of FOISA in withholding information about the candidates invited for interview. The Executive indicated that it had applied section 38(1)(b) to the application forms and score sheets as these documents all contained personal data relating to candidates other than the applicant. In its view, the disclosure of this information would breach the first data protection principle of the DPA. The first data protection principle requires that personal data shall be processed fairly and lawfully. The Executive took the view that disclosure of the personal data of these other candidates to the applicant would not be fair.
27. In arriving at this decision the Executive took account of how the information from applicants was obtained and whether they would have any expectation that the personal data relating to their application for membership of the Committee would be disclosed. In its view, applicants provided personal data to the Executive in the expectation that it would only be used in relation to the consideration of their application and that this data, together with any other data relating to the consideration of their application, would not be disclosed outwith the Executive. By disclosing this personal data to the applicant, the Executive indicated, it would effectively have been placing the personal data of all candidates into the public domain. The Executive considered that this clearly would have been an unfair use of the personal data relating to all candidates for membership of the Committee and therefore in breach of the first data protection principle of the DPA.

Submissions from the applicant

28. Following his application for membership of SLARC the applicant contacted the Executive to ascertain why he had been unsuccessful. I understand that the applicant was frustrated with the feedback he received. He requested information under FOISA to find out why his experience was apparently insufficient to enable him to be invited for interview.
29. He has indicated that his request for details about the candidates invited for interview was to find out about the experience of those candidates so that he could see why he “lacked relevant experience”. He has confirmed that he was not seeking information about the candidates’ qualifications.
30. The applicant is of the view that the relevant experience of those who sit on public committees should be in the public domain.

Analysis and findings

31. As mentioned above, the applicant requested the following information from the Executive, relating to his application for membership of the SLARC:



1. details of where he failed to meet the person specification;
 2. where his experience and referees fell short and
 3. details of other candidates being interviewed in order to match their suitability for interview.
32. Given that this is one of my first decisions under FOISA, I consider it appropriate to set out the limits of my powers when investigating these kinds of requests for information.
33. Under FOISA, I cannot require an authority to create new information. Therefore, in this case I cannot ask the Executive draw up information about why the applicant failed to meet the person specification or indicate where his experience and referees fell short if this information does not already exist. I also cannot comment on the feedback the Executive should be providing to applicants applying for positions on public committees.
34. I can only look at the recorded information held by the Executive and consider firstly, whether this information provides a response to the applicant's requests and secondly, where such information exists, whether it should be released to the applicant. In deciding whether the information should be disclosed under FOISA, I am taking into consideration not only whether the information should be released to the applicant personally but also whether it would be appropriate for the information to be released into the public domain.

The applicant's request for his own personal data

35. The Executive considered that questions 1) and 2) of the applicant's request related to information about the applicant, that is, his personal data held by the Executive. A request for an individual's own personal information is exempt under FOISA under section 38(1)(a). Such requests should, instead, be dealt with under the DPA. This was the process followed by the Executive in relation to questions 1) and 2).
36. I agree with the Executive that questions 1) and 2) are requests for information about the applicant and therefore are exempt under section 38(1)(a) of FOISA. Responsibility for enforcing the DPA lies with the Information Commissioner based in Wilmslow rather than my Office. As a result, I have limited powers to investigate these aspects of the applicant's request. However, as part of the investigation my Office sought to:
- seek confirmation from the Executive that the information released in response to questions 1) and 2) was all the personal information that the Executive holds about the applicant and
 - ensure that the information provided in response to questions 1) and 2) and considered under the DPA falls within the definition of personal data.



37. In my view, the Executive was correct in the way in which it handled these parts of the applicant's request. I have received confirmation from the Executive that the only information held about the applicant apart from his original application form is the statement "lack of relevant experience". I have looked at the information supplied by the Executive and can confirm that the only recorded information which relates to the applicant is the comment "lack of relevant experience" which appears beside the applicant's name in a copy of a minute of 20 October 2004 to members of the assessment panel. This document summarises the panel's assessment of all applicants. The names of the other candidates have been redacted but the applicant's name appears alongside this comment.
38. The Executive also provided my Office with a copy of Mr Q's application form and I have found no additional comments or notes made on this form relating to the applicant. The Executive has indicated that there were no notes or internal correspondence concerning Mr Q's application for membership. The only correspondence held by the Executive is the correspondence with the applicant which starts with the letter of rejection. I have looked at this correspondence and can confirm this is the case.
39. In my view, the comment "lack of relevant experience" amounts to the applicant's personal data as it is information relating to the applicant of which the applicant is the focus. In my view, therefore, the Executive correctly dealt with the applicant's requests in questions 1) and 2) under the DPA.

The applicant's request for information about candidates invited for interview

40. Question 3) of the applicant's request for information asked for:
 - Details of other candidates being interviewed, in order to match their suitability for interview
41. The applicant has indicated that he was seeking information about the experience of the other candidates to enable him to understand why he was considered to "lack relevant experience." I understand this to mean information about their employment experience and other relevant experience, such as Committee membership.
42. From the information supplied by the Executive, a number of documents seem to be relevant to this request and I will deal with each one in turn.

Information on the application form

43. The Executive provided a sample copy of the application form which was partially anonymised (the name, addresses, phone numbers and date of birth of the candidate and the names of the referees had been redacted). This showed the sort of information that each candidate would provide in respect of the application. Not surprisingly, the application form contains detailed information supplied by the candidate about his or her experience and skills and how these match the job criteria.



Assessment form

44. The Executive provided a sample copy of the assessment form used by the panel to assess which candidates should be invited for interview. The form lists the job criteria and sets out a marking system of high, good, fair and poor. This form was used in relation to individuals who had survived the initial sift. The individual documents do not actually provide information about the candidates invited for interview. They simply show the score each candidate received against each job criterion.

Summary of the views of the assessment panel

45. The Executive provided a copy of a minute of 20 October 2004 to members of the assessment panel which summarises the panel's assessment of all applicants (referred to above). This document lists those candidates removed after the first sift with a comment as to why they had not been successful. The minute also lists the candidates who survived the first sift with the marks they were given in relation to each job criterion as well as the total of the points awarded. This document does not provide actual information about the candidates invited for interview, only the scores they received.

Interview assessment form

46. The Executive provided a sample of the interview assessment form. This includes the candidate's name and then lists the job criteria. In each case the interview panel were required to give a mark from a scale of 1 to 4. Again this document does not provide actual information about the candidates (apart from the name of the candidate), but simply the score awarded by the panel.

Records of the interviews and outcome of interviews

47. The Executive provided a copy of a minute dated 15 December 2004 which includes a record of the outcome of the interview process and a note of the interviews. This lists the candidates invited for interview for the posts of Convenor and Committee membership. This document provides a brief summary of the background of each candidate, a summary of the panel's views on each candidate and records the panel's views on each candidate's suitability.
48. From the information supplied by the Executive, the only information providing details about the candidates invited for interview are the individual application forms submitted by each candidate, the note on the outcome of interviews and the record of the panel's assessment of each candidate. I am assuming that information about the applicant's employment experience contained in these latter documents was derived from the application forms or from information provided by the candidate during the interview. In either case, it seems to me, the same considerations will apply in that it is information supplied by the applicant as part of the recruitment process.
49. I note from the application form that the two nominated referees will be approached if the applicant is selected for interview. Recorded information about the experience of the candidates may also be derived from these sources.



50. As stated above, the Executive considered this part of the applicant's request for information under FOISA. The Executive indicated that in this instance the applicant was requesting personal information provided by the other candidates on their application forms and that such information was exempt from disclosure under section 38(1)(b) of FOISA. This exemption applied, the Executive explained, because disclosure of the personal data provided by the other candidates on their application forms would breach the data protection principles as set out in the DPA.
51. In essence, section 38(1)(b) of FOISA states that information is exempt if it constitutes personal data and disclosure of the information to a member of the public would contravene any of the data protection principles. Section 38(2) of FOISA states that the definition of "data" is that contained in section 1(1) of the DPA. Personal data, as defined by section 1(1), are:
- Data which relate to a living individual who can be identified from those data
52. The applicant is seeking information about the employment experience and other relevant experience of those candidates invited for interview. In my view, this information is the personal data of those candidates. The definition of what amounts to "personal data" for the purposes of the DPA 1998 was recently considered in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746 Court of Appeal (Civil Division). In that case the court held that whether or not data constituted "personal data" for the purposes of the legislation depended on the relevance or proximity of the data to the data subject. The court considered that the information required to be biographical in a significant sense and that the information should have the subject as its focus. In my view, information about employment experience and other relevant professional experience falls within this definition.
53. Personal data relating to a third party can only be released under FOISA if disclosure would not breach any of the data protection principles. The Executive has argued that disclosure of the personal data of those candidates invited for interview would breach the first data protection principle in that it would be unfair.
54. The first data protection principle requires personal data to be processed fairly and lawfully. Disclosure would be unlawful, for example, if it would be a breach of confidence. The concept of "fairness" is harder to define, although in practice it may not be difficult to judge whether it would be unfair to someone to pass on their information without consent. The assessment of fairness involves looking at whether the third party would expect that his or her information might be disclosed to others and/or whether the person had been led to believe that his or her information would be kept secret. In my view, information that is included on an application form submitted to a specific organisation in response to a job advertisement is supplied in the expectation that it will be seen by only those involved in the recruitment process. Applicants would not normally expect this information to appear subsequently in the public domain.
55. Further, the application forms indicate that personal information provided by the applicant will not be disclosed by the Executive to third parties.



56. I also consider that applicants would not expect information supplied and noted as part of the interview to appear in the public domain or the content of their references.
57. In my view, given the assurances to candidates concerning the use of information provided on their application forms, disclosure of this information would be unfair and disclosure of personal information about third party candidates without the candidate's consent would be in breach the data protection principles.
58. Even where an authority considers that a document contains exempt information, it should always consider whether the exempt information could be excised so that as much of the document as possible can be supplied to the applicant. In this case, I have considered whether the application forms and/or the note of the assessment panel could be edited so as to provide the applicant with some information about the candidates. The very nature of the documents, however, means that most of the information they contain is personal information. To edit all identifiable personal information from these documents would leave them virtually meaningless.
59. Limited information about the experience of the successful candidates has been made available in the public domain and this has already been disclosed to the applicant. In my view, information about the experience of candidates ultimately selected contained in the application forms of those candidates or recorded in the interview notes amounts to personal data. Disclosure of information which is not already in the public domain would be in breach of the data protection principles.
60. I understand that the applicant is frustrated at the feedback he received following his unsuccessful application for membership of the Committee. However, as I stated earlier, I am unable to require the Executive to create information or comment on the feedback provided to unsuccessful candidates.
61. The applicant is of the view that information about the background and experience of members of public committees should be in the public domain. It is not open to me, however, to consider whether the public interest requires certain information about successful candidates to be in the public domain. In this case, the only consideration was whether disclosure of the information held by the Executive would breach any of the data protection principles. In my view, disclosure of information about individual candidates derived from the recruitment process would be unfair, and as a result, breach the first data protection principle.



Decision

I find that the authority has dealt with the applicant's requests for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

Kevin Dunion
Scottish Information Commissioner
30 June 2005