

Decision Notice



Decision 027/2009 Highland News Group and Highlands and Islands Enterprise

Severance Payment

Reference No: 200801077
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Summary

Highland News Group (Highland News) requested from Highlands and Islands Enterprise (HIE) the severance payment paid to a manager. HIE responded by refusing on the grounds that it constituted personal data which was exempt from disclosure. Following a review, Highland News remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that HIE had dealt with Highland News's request for information in accordance with Part 1 of FOISA, by correctly applying section 38(1)(b) to the severance payment.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 38(1)(b) and (2) (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 principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data - condition 6(1)).

Background

1. On 15 May 2008, Highland News wrote to HIE requesting details of the severance payment a manager had received on his departure from HIE.
2. HIE responded on 27 May 2008 indicating that the release of this personal information would contravene the Data Protection Act 1998 (DPA), specifically the first data protection principle, and therefore it was withholding the information in terms of section 38(1)(b) of FOISA.
3. On 29 May 2008, Highland News wrote to HIE requesting a review of how its request had been processed.
4. HIE notified Highland News of the outcome of its review on 11 June 2008. It upheld its decision not to release the information on the grounds that an exemption in section 38(1)(b) of FOISA applied.



5. On 17 July 2008, Highland News wrote to the Commissioner's Office, stating that it was dissatisfied with the outcome of HIE'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 Highland News 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 7 August 2008, HIE was notified in writing that an application had been received from Highland News and asked to provide the Commissioner with any information withheld from the applicant. HIE responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted HIE, 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. In particular, HIE was asked to justify its reliance on section 38(1)(b) of FOISA and why it was considered applicable to the information requested.
9. HIE responded on 10 October 2008 by commenting on the manager's role and place in the organisational structure, together with other information relating to the payment and the decision to withhold. This included related information which was already available to the public, and comment on the data subject's expectations and other aspects of the application of the first data protection principle.
10. The investigating officer contacted HIE for more detail, particularly as to how the severance package had been calculated. HIE confirmed which category applied to the manager and how the calculation had been performed.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Highland News and HIE and is satisfied that no matter of relevance has been overlooked.



Section 38 of FOISA – personal information

12. Highland News requested details of the severance package paid to a manager upon their departure from HIE. The exemption relied on by the Council was that contained in section 38(1)(b) of FOISA, on the grounds that the first data protection principle would be breached by disclosure.
13. Section 38(1)(b) of FOISA, read with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data and its disclosure to a member of the public other than under FOISA would contravene any of the data protection principles. In order for a public authority to rely on this exemption it must first show that the information which has been withheld is personal data as defined by section 1(1) of the DPA, and then that its release would contravene one or more of the data protection principles laid down in Schedule 1 to the DPA. The relevant provisions are set out in full in the Appendix to this decision.
14. This particular exemption under section 38(1)(b) of FOISA is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information under consideration personal data?

15. Personal data are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
16. Having considered the content of the withheld information, the Commissioner is satisfied that it comprises data relating to a living individual (the HIE manager who received the severance package), from which that individual can be identified. The information has that individual as its focus and is biographical about them in a significant sense, and consequently the Commissioner is satisfied that it relates to that individual, who is the subject of it.

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

17. Having satisfied himself that the withheld information is the personal data of the manager, the Commissioner must go on to consider whether its disclosure would contravene any of the data protection principles contained in Schedule 1 to the DPA. HIE has argued that to disclose the personal data in this case would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (as it would be in the event of the information being disclosed to Highland News), unless at least one of the conditions in Schedule 2 (to the DPA) is met. If the information were sensitive personal data, as defined by section 2 of the DPA, at least one of the conditions in Schedule 3 to the DPA would also require to be met: having considered the information, the Commissioner is satisfied that it does not fall into any of the categories of sensitive personal data listed in section 2.



18. In the circumstances of this case, the Commissioner has first considered the application of the conditions in Schedule 2. Condition 6 would appear to be the only one which might permit disclosure in the circumstances of this case. Condition 6 is met where:

"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."

19. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- i) Does the applicant have a legitimate interest in obtaining this personal data?
 - ii) If yes, 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(s)?
 - iii) Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject(s)? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subject(s) can the personal data be disclosed.

Legitimate interests of the applicant

20. Highland News advised that the information withheld in this case had been requested as part of a "follow-up" to a previous story on severance payments by HIE, which it believed had attracted considerable public interest and reaction locally and nationally. It submitted that in the light of concerns about public spending and packages which appeared to be available to public service employees (as opposed to those in the private sector) there would be considerable interest in the fact that another HIE employee had been given what it believed to be a considerable severance package. As the information related to a management position, Highland News argued that the severance deal should be made available for public scrutiny.
21. Highland News appears to have genuinely held concerns about the level of spending by HIE on individual severance packages, which it believes to be a matter of legitimate public interest. In the circumstances, the Commissioner accepts that Highland News has a legitimate interest (as a publisher of newspapers) in gaining access to information relating to the amounts of these individual packages.



Necessity

22. Moving on to the second test set out above in paragraph 19, the Commissioner has considered whether disclosure of the withheld information is actually required to achieve the legitimate aims he has identified. In its submission, HIE indicated that it had publicly disclosed information relating to the total cost of its voluntary severance programme (of which the payment in question formed part), as well as the number of staff that left the organisation under it: it believed the release of this information to have satisfied the legitimate public interest in its recent restructuring.
23. Having acknowledged Highland News's legitimate interest in access to information on individual severance payments, however, the Commissioner cannot regard this existing disclosure as meeting that interest. In the circumstances, he can identify no viable means of doing so which would interfere less with the privacy of the relevant data subject(s) than obtaining the information requested.

Legitimate interests of the data subject

24. The third test must consider the rights and freedoms or legitimate interests of the data subject (the individual to whom the data relate) and balance them against the identified legitimate interests of the applicant. In its submission, HIE commented in particular on the data subject's right to privacy, which it did not believe to be outweighed by the legitimate interest of the public in disclosure. Referring to the Information Commissioner's then current *Freedom of Information Act Awareness Guidance No 1*, it argued that releasing information on the manager's severance package (and consequently on his former salary) would reveal specific details of that individual's former and current finances which were clearly linked to their private life and therefore required protection
25. HIE referred the investigating officer to biographical information about the former manager which was already available publicly. While this information was not all entirely accurate, HIE argued that it could be used, in conjunction with the amount of severance package paid and generally available information about how the relevant packages were calculated, to make known the exact amount of salary paid to this particular individual on departure from HIE. During the investigation HIE also confirmed that while the salary band relating to the post would be placed in the public domain when the vacancy was advertised, the exact salary paid to the manager would not be made known. The investigating officer also asked if an exact salary for this manager (as opposed to the applicable band) had ever been published and HIE confirmed that it had not.
26. HIE was asked to provide the investigating officer with a detailed explanation of how the salary of the individual could be determined from the disclosure of the severance payment given the biographical information which was generally available. Having considered the explanation provided the Commissioner is satisfied that although there are inaccuracies in the biographical information, it can still be used (along with the severance figure and other public information about the severance scheme) to arrive at an accurate calculation of the salary paid.



27. While agreeing that in general senior staff and those carrying out public functions should expect more information about them to be disclosed, HIE asserted that this post was below the level of HIE's senior management team, which at the time of the request comprised the Chief Executive, group directors and local enterprise company chief executives. This being the case, HIE had disclosed details on the remuneration and severance packages of its directors, as they held responsibility for the overall leadership, direction and management of the organisation. In this particular case, however, the manager did not hold one of these senior positions and therefore had no equivalent decision-making powers. On this basis HIE argued that the individual in question, unlike the directors, would have had no reasonable expectation that information about their personal finances would become publicly available and could have been caused unnecessary and unjustified distress by disclosure.
28. Additionally, HIE argued that there was a degree of confidentiality implicit when providing details of redundancy settlements to individuals as the correspondence relating to voluntary severance settlements was marked "Personal and confidential" so there would be a strong implicit expectation of privacy. HIE commented that the individual in question had in this case been advised of Highland News's request and had chosen not to consent to disclosure. Disclosure in the circumstances would, it argued, be unfair and would lead to a considerable infringement of the manager's right to privacy in a case where there was little public interest in the specific information being known.
29. In *Decision 191/2007 Mr David Ewen and Aberdeen City Council*, the Commissioner has already considered the details of an individuals' remuneration. He observed that while the salary band for one post was in the public domain, the actual payments received by the individuals concerned were not. The Commissioner was satisfied that such "fine-grain" detail of actual earnings related to the personal finances of these individuals and was therefore more likely to be a private matter. In determining whether the scrutiny and accountability of the individuals' salaries was warranted in this case, the Commissioner also took into account the seniority and the level of responsibility held by the employees in question. That these remain highly relevant factors in this area is underscored by guidance produced by the Information Commissioner, most recently the guidance note *When should salaries be disclosed?* http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salaries_v1.pdf.



30. While noting HIE's assertion that the manager's post was not sufficiently senior for there to be a reasonable expectation of disclosure, the Commissioner is not persuaded that it is necessarily only those with responsibility for overall leadership, direction and management of the organisation as a whole who should be considered to have such an expectation. In *When should salaries be disclosed?*, for example, another relevant factor cited is whether the individual in question has a public profile or public-facing role. This guidance asks authorities to consider the individual's expectations as to both public scrutiny in relation to their role and disclosure of their salary (taking account, for example, of whether salaries for that type of post are generally made public), and also the level of intrusion that would follow from disclosure (which may be less, for example, where the scale in question is relatively narrow, but which should also take account of particular intrusion deriving from the salary in question or the individual's own circumstances). It concludes, however, that it will only be appropriate to disclose an exact salary in exceptional circumstances, for example where there are legitimate concerns about corruption or mismanagement or where the individuals concerned have significant control over setting their own or others' salaries.
31. In this case, the Commissioner accepts that (at the time HIE dealt with the request) there was no reasonable expectation that information of this kind in respect of managers below the level of the senior management team would be made known. Having taken account of the submissions of both parties along with relevant decisions and guidance, overall he accepts the arguments made by HIE as to intrusion into the privacy of the individual concerned (although not necessarily that distress would result). While noting the concerns put forward by Highland News, he is not satisfied in the circumstances that any of these are sufficiently exceptional to outweigh that intrusion. Therefore, on balance the Commissioner must conclude that disclosure of the information requested would in this case be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. He must therefore conclude that condition 6 is not met.
32. Having accepted that disclosure of the information requested would lead to unwarranted intrusion into the privacy of the individual concerned, the Commissioner must also conclude that disclosure would be unfair. As condition 6 is not met, he would also regard disclosure as unlawful. In all the circumstances, therefore, the Commissioner's conclusion is that the first data protection principle would be breached by disclosure and therefore that the withheld information was properly withheld under section 38(1)(b) of FOISA.

DECISION

The Commissioner finds that Highlands and Islands Enterprise acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Highland News Group.



Appeal

Should either Highland News Group or Highlands and Islands Enterprise 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
06 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

...

- (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.
- ...

Data Protection Act 1998

1 Basic interpretative provisions

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

...

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.

...