



Scottish Information
Commissioner

Decision 036/2005 Mr George Munro and Inverclyde Council

Request for number of Council employees in arrears with Council Tax

Applicant: Mr George Munro

Authority: Inverclyde Council

Case No: 200501896

Decision Date: 14 October 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 036/2005 – Mr George Munro and Inverclyde Council

Request for number of Inverclyde Council employees in arrears with Council tax – section 17(1)(b) notice issued – whether information held by authority – information not held

Facts

Mr Munro requested the number of Inverclyde Council employees in arrears of Council tax as at the date of his request and for the years 2004, 2003 and 2002. The Council indicated that the information requested was not available. Mr Munro was dissatisfied with this response and sought a review of this decision from the Council. He confirmed that he was looking for the information by numbers and not by name. On review, the Council advised that it did not hold the information requested. Mr Munro applied to the Commissioner for a decision.

Outcome

Inverclyde Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Munro's request for information. The Commissioner is satisfied that the Council does not hold the information requested and that it has complied with section 1(1) of FOISA. The Commissioner is also satisfied that the Council was correct to issue a notice in accordance with section 17(1)(b) of FOISA.

However, Inverclyde Council breached Part 1 of FOISA. In failing to include information about the rights of application to the authority under section 20(1) in its refusal notice, the Council failed to comply with section 19 of FOISA. However, the Commissioner is satisfied that the Council has since taken steps to address this matter and does not require it to take any remedial action.

Appeal

Should either the Council or Mr Munro wish to appeal against this decision, there is a right 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 26 April 2005 Mr Munro sent an e-mail to the Council requesting the following information:
 - How many Inverclyde Council employees are in arrears with the “subject” tax?
 - What are the figures for 2004, 2003, 2002 for council employees?
2. The Council responded to this request on 12 May 2005. The Council advised Mr Munro that the request was being refused under section 17(1)(b) of FOISA on the grounds that this information was not available.
3. Mr Munro responded to this reply on 12 May 2005. He indicated that he was dissatisfied with the response and indicated that this information had been available in the past and was put in the public domain. He stressed that he was seeking numbers and not the names of those employees in arrears.
4. The Council responded to Mr Munro’s request for review on 20 May 2005.
5. In its notice of review, the Council advised that it was assuming that Mr Munro’s reference to “subject tax” was in fact to “Council Tax”. The Council confirmed its original decision that in terms of section 17(1)(b) of FOISA the information requested was not held by it.
6. The Council advised Mr Munro that while the Council held a record of its employees, this record did not contain information relating to their personal financial circumstances, other than was necessary for employment purposes. The Council advised that it also held a record of residents within its area who were in arrears of Council Tax.
7. The Council indicated that no data matching exercise had been carried out in relation to those records and that such an exercise could only be carried out under very specific circumstances.
8. The Council went on to state that to create the information requested by Mr Munro would involve the Council processing data in a manner which would be incompatible with one or more of the data protection principles specified in the Data Protection Act 1998 (DPA).
9. The author of the review advised that to the best of her knowledge the Council had never made such information available to the media.
10. On 21 May 2005, Mr Munro made an application to the Commissioner for a decision as to whether his request for information had been dealt with in accordance with Part 1 of FOISA. He indicated that the information he requested was readily available as the Council had a record of those in arrears of Council Tax and had a record of Council employees. He argued that the merging of these records could be done easily and speedily by the Council’s IT Department.



Investigation

11. Mr Munro's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
12. The investigating officer contacted the Council on 15 June 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Council was asked to comment on the issues raised by Mr Munro's case and to provide supporting documentation for the purposes of the investigation.
13. The Council was asked whether it had a policy on Council employees who were in arrears of Council Tax and was asked to supply a copy if such a policy existed. The Council was also asked for details of any kind of data matching exercise that had been carried out in the past.
13. In addition, the Council was asked about its determination that the information was not held by the Council given that the Council held a list of employees and a list of those people in arrears of council tax.
14. The Council was asked for information about how its review was carried out, any internal correspondence relating to the consideration of Mr Munro's request and any guidance relied on by the Council in deciding that the information was not held.

Submissions from the Council

15. The Council advised that it did not have a policy on Council employees who were in arrears of Council Tax. It supplied a copy of the Council's "Code of Conduct for Employees," which includes a reference to employees and payments due to the Council in respect of various debts. The Code refers to an employee's duty to make any payment due to the Council in good time and also states that the Director of Resource Services will make regular checks to ensure that employees are not in arrears with payments.
16. The Council advised that neither the Director of Resource Services nor her successors, being the Director of Finance and, presently, the Director of Corporate Services had ever carried out any checks such as are referred to in the Code of Conduct for Employees. The Council advised that this was a direct result of the Council not having a Data Matching Policy nor having sought explicit consent from employees to process the data held in their personal records for the purpose of data matching.
17. In her submissions to my office, the Head of Legal Services advised that to the best of her knowledge no data matching exercise had ever been carried out by the Council. She had consistently advised Finance Services that such exercises could not be carried out without the necessary consents and, in line with advice previously issued by the then Data Protection Registrar, only when a data matching policy and relevant codes of practice were in place.



18. The Council reaffirmed that there was no data matching policy within the Council and no employee had a term or condition within their contract agreeing that their data was processed for the purposes of the collection of Council Tax. In all of the circumstances, the Council advised that it was not within its powers to match the relevant databases to create the information requested.
19. The Council submitted that the mere act of comparing the databases would involve the processing of employees' data and that such processing would be in breach of one or more of the data protection principles.
20. The Council advised that, on review, it had re-visited its decision as to whether it held the information requested or not. It appeared to the Council, initially, that there was a credible argument that the information requested was held by the Council, given that two databases were available which together might provide the information requested. However, having investigated the content of the databases and taking into account guidance from my Office on "Frequently Asked Questions," further consideration led the Council to conclude that in their present form, the databases could not provide the information, even when matched for the following reasons:
 - The employee database was not reliable in that employees frequently changed address without informing personnel or payroll.
 - The employee database was not held in the same format as the Council Tax records. While Council Tax records are available on a year by year basis, personnel records are not. They are held on a rolling basis. In other words, the record can indicate who is employed at a particular date, but cannot indicate who was employed between particular dates.
 - There was also the anomaly that a person with a particular name at a particular address may be revealed to be an employee of the Council. The same name and address may be contained on the record of Council Tax arrears. However, the person owing the Council Tax may in fact be a relative of the Council employee.
21. The Council submitted that collating the information requested involved more than simply compiling information from more than one source; it would also involve editing, checking and validating the information.
22. The Council asserted that it might be able to create the information requested by matching the databases and by carrying out an exercise whereby it validated and refined the information created. However, it submitted that creating the information was very different from holding the information. The Council indicated that in certain circumstances it might be reasonable for a public body to undertake such an exercise in the interests of freedom and openness. In other circumstances, however, where data protection principles would be compromised, as in the present situation, it was not reasonable.
23. In its submissions to my Office the Council acknowledged that it would have been preferable if a little more information had been given to Mr Munro in its initial response explaining why the Council was of the opinion that it did not hold the information requested.



24. The Council further acknowledged in its submissions to my Office that the original notice was defective in that no information was given with respect to the process of review. Since then, further advice had been issued to Council employees having a lead role in dealing with freedom of information requests, underlying the need to advise applicants of their right to appeal and how this should be exercised.

Submissions from the applicant

25. Mr Munro indicated that the information he was requesting had been published by the Council in the past.
26. I subsequently asked Mr Munro to confirm whether he had been able to trace the publication of this information. He advised that he had been unable to do so.

Analysis and Findings

27. FOISA only covers information held by a Scottish public authority. It does not oblige an authority to create new information where this does not already exist. Therefore, this investigation focussed on whether the Council held the information requested by Mr Munro. Only if I concluded that the information was held by the Council would I need to consider whether the information should be supplied to Mr Munro.
28. The Council has submitted that it does not hold the information requested because to extract the figures that Mr Munro wishes to see would necessitate a data matching exercise. The Council has further stated that the processing of that data without employee consent would be in breach of the data protection principles. It has also submitted that obtaining the information from the two databases would involve editing, validating and checking the data.
29. I have looked at the information provided by the Council. In particular, I have noted the "Code of Conduct for Employees" which refers to an employee's duty to make any payment due to the Council in good time.
30. I have also looked at relevant guidance from the Information Commissioner's Office (ICO), which has responsibility for data protection on a UK wide basis. In particular, I have looked at the advice from the ICO entitled "Data sharing between different local authority departments". The guidance indicates that for processing to be fair employees must be told the purposes for which their data are to be processed. They should also be provided with "any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair".
31. The guidance goes on to state that in simple terms this means that individuals should be aware of any "non-obvious" purposes for which the information about them may be used or disclosed. The guidance refers to the need for processing to be lawful.



32. The Council supplied me with a copy of a News Release (dated 15 July 1998) in which the then Data Protection Registrar (the predecessor to the Information Commissioner) warns local authorities and employees over data matching exercises. The Registrar expressed concerns about the use of local authorities' own payroll data within data matching exercises. While not ruling this out completely, she said that such exercises should only be conducted after full consultation with staff and, where necessary, after introducing appropriate terms in staff contracts.
33. The attached Notes for Editors states:

Many local authorities wish to conduct data matching exercises for purposes, for instance the identification of staff with rent or Council Tax arrears. If these are done without the knowledge and consent of staff then there is a substantial risk that the exercises will involve a breach of the duty of confidence owed to staff and that the processing of their data will therefore be unlawful. The solution is to conduct such exercises after consultation with staff and to introduce a relevant term into staff contracts.
34. The ICO has confirmed that its position on data matching exercises to determine Council employees in arrears of Council Tax has not really changed since 1998. It advised that in general terms, there is an argument that as council employees' salaries are funded by the public purse, it is not unreasonable for the employer to take steps to ensure that its employees are fulfilling their tax obligations. This is a particularly strong argument in respect of senior members of staff, for example a senior finance officer, where large tax arrears are incompatible with the role they are carrying out (and should be avoidable given their seniority) and might bring significant embarrassment upon the Council if it were to be reported in the local press.
35. However, the ICO advised that the Information Commissioner does consider it especially important that employees are consulted about such matters, and that trade unions can have an important role to play in communicating to members the terms of their employment and addressing other workplace issues. Any such consultation should ensure that the processing is fair in accordance with the fair processing requirements of the first data protection principle.
36. The duty on data controllers to process personal data fairly requires that individuals are advised of the purposes for which their personal data are processed, including details of who the data may be disclosed to.
37. I am satisfied that, in line with ICO guidance, the employees' data cannot be processed in this case until they have been consulted.
38. There may be cases where information in two separate lists or databases can simply be extracted to provide information to an applicant requesting certain information. However, particular considerations will undoubtedly apply where the information requested must be extracted or compiled from databases containing personal information.



39. As I understand it, in this particular case, the supply of the information requested by Mr Munro would require a two stage process:
- Carrying out the necessary consultation with staff and possibly obtaining their consent (by inserting a clause in their contracts) to the processing of their data in this way
 - Carrying out the data matching exercise.
40. I am satisfied that in this case the process required to extract this information would involve more than simply collating information from two lists or extract numbers from existing databases. The nature of the databases is such that it would not be possible simply to extract names and addresses from lists to create this information.
41. The Council has also stated that the employee database is not held in the same format as the Council Tax records. While Council Tax records are available on a year by year basis, personnel records are not. They are held on a rolling basis. In other words, the record can indicate who is employed at a particular date, but cannot indicate who was employed between particular dates.
42. The Council has also pointed out about the possible confusion where relatives share the same name; the person owing the Council Tax arrears may in fact be the brother/father/sister/mother of the Council employee.
43. The Council has submitted that collating the information requested involves more than simply compiling information from more than one source. I am satisfied that the process would involve editing, checking and validating the information.
44. It is also worth noting that Mr Munro is seeking the figures for 2002, 2003 and 2004. It is likely therefore that the exercise would involve contacting former employees to check addresses and to seek their views on the processing of their data in this way.
45. The supply of this information to Mr Munro would necessitate a two stage process involving a staff consultation and a complex data matching exercise. The nature of this two stage process and the complexities of extracting the information would, in my view, involve the Council in creating new information in response to the information request.
46. As I said earlier in this decision, FOISA does not require an authority to create new information. I am therefore satisfied that the Council does not hold the information requested.
47. Mr Munro indicated that the information he requested had been published by the Council in the past. However neither he nor my Office has been able to establish that this is the case. In any event, even if the Council had carried out such an exercise in the past, it does not follow that such an exercise would be sanctioned now under the terms of the DPA without the appropriate employee consultation.



Decision

I find that Inverclyde Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to Mr Munro's request for information. I am satisfied that the Council does not hold the information requested and that it has complied with section 1(1) of FOISA. I am also satisfied that the Council was correct to issue a notice in accordance with section 17(1)(b) of FOISA.

However, Inverclyde Council breached Part 1 of FOISA. In failing to include information about the rights of application to the authority under section 20(1) in its refusal notice, the Council failed to comply with section 19 of FOISA. However, I am satisfied that the Council has since taken steps to address this matter and I do not require it to take any remedial action.

Kevin Dunion
Scottish Information Commissioner
14 October 2005