

**Decision 054/2006 - Ms X and Investors In People
Scotland**

*Request for a copy of a record of a meeting between a
representative of Investors In People Scotland and an employee of
Scottish Borders Council*

**Applicant: Ms X
Authority: Investors in People Scotland
Case No: 200503042
Decision Date: 27 March 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

Decision 054/2006 Ms X and Investors in People Scotland

Request for a copy of a record an interview held between a representative of Investors In People Scotland and an employee of Scottish Borders Council as part of that organisation's assessment process – section 16 refusal of request – section 19 content of certain notices – section 38(1)(b) personal data relating to 3rd parties

Facts

Ms X emailed Investors in People Scotland and requested a copy of the record of an interview held between an employee of Scottish Borders Council and a representative of Investors in People Scotland as part of the organisation's assessment of the Council. Investors in People Scotland responded, stating that the interview record was not available to third parties. As Ms X was dissatisfied with Investors in People Scotland's refusal to disclose the information requested, she requested that the authority review its response to her request. Investors in People Scotland responded to Ms X's request, upholding its decision not to provide her with the information requested. Ms X remained dissatisfied and applied to the Commissioner to investigate the matter.

Outcome

The Commissioner found that Investors in People Scotland had breached part 1 of the Freedom of Information (Scotland) Act 2002 in so far as it had not complied with the requirements for responding to a request for information as required by sections 16, and 19 of that Act. As Ms X's rights were not prejudiced by the omissions, the Commissioner did not require Investors in People Scotland to take any action as a result.

The Commissioner was satisfied that the information requested by Ms X was exempt from disclosure under the Freedom of Information (Scotland) Act 2002 by virtue of section 38(1)(b).

Appeal

Should either the Investors in People Scotland or Ms X wish to appeal against this decision, there is a right to 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 15 August 2005 Ms X emailed Investors in People Scotland (Investors in People) requesting a record of an interview which had taken place between herself and a representative of Investors in People, and also copies of interviews which had taken place between an employee of Scottish Borders Council (the Council) and Investors in People. The interviews were carried out as part of Investors in People's assessment of the working practices of the Council.
2. On 24 August 2005 Investors in People responded to Ms X, stating that in order to access notes of the interview which had taken place between her and the representative of Investors in People, she should put her request in writing and post it to the organisation. It also refused to disclose a copy of the record of the meeting between the employee of the Council and the representative from Investors in People as the individual concerned had not consented to the disclosure of the information.
3. Ms X responded on the same day by email, querying why she could not email Investors in People to gain the record of the interview in which she had participated, and requesting again the minutes of the meeting involving the employee of Scottish Borders Council.
4. Investors in People emailed Ms X the next day, informing her that record of the interview which she participated in was not available through the Freedom of Information (Scotland) Act 2002 (FOISA), but through the Data Protection Act 1998 (the DPA) (under which it required receipt of a written request from the data subject).
5. Ms X emailed Investors in People again on 2 September 2005, stating that an emailed request for information was regarded as a valid request for information under both FOISA and the DPA, and requested that Investors in People review its response to her request for information in respect of the employee's interview notes.

6. In its response, Investors in People upheld its decision not to release the record of the interview between the representative of Investors in People and the Council's employee, as the information was not available through the authority's publication scheme under FOISA.
7. Ms X remained dissatisfied with the authority's decision to withhold the information requested, and on 23 October 2005 applied to me to investigate whether it had complied with FOISA in the way in which it handled Ms X's request for the employee's interview notes .

The Investigation

8. Ms X's appeal was validated by establishing that she had made a request for information to a Scottish public authority, and had appealed to me only after asking the authority to review its response to her request. Investors in People Scotland, being a company wholly owned by Scottish Enterprise and Highlands and Islands Enterprise, is a publicly owned company (and therefore a Scottish public authority) for the purposes of section 3(1)(b) of FOISA.
9. A letter was sent to Investors in People on 24 November 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. Investors in People was asked for its comments on why it had not cited exemptions contained within FOISA in its responses to Ms X, and why it had not included information relating to Ms X's right of review and appeal to me in its response to her request for information. Investors in People was also asked to provide copies of other information relevant to Ms X's request, including the information withheld.
10. Investors in People responded on 6 December 2005 giving its comments on the case. It acknowledged that the responses given to Ms X had not complied with the technical requirements of FOISA in describing her rights of review and appeal to me. It acknowledged that it was, at that point, unaware of its obligations under FOISA, and stated that it was sourcing training on FOISA. It stated that it was in the process of adopting policies and guidelines on FOISA.
11. Investors in People argued that section 38(1)(b) of FOISA applied to the information requested because the information contained personal data (as defined by section 1 of the DPA) relating to the personal experience and views of an employee of the Council, and the participant had been informed that the information given by him to Investors in People would not be disclosed to third parties other than on a non-attributable basis.

12. The authority also suggested that section 30(c) of FOISA may apply, in that disclosing the information requested might substantially prejudice the effective conduct of its affairs.
13. Finally, the authority provided a copy of the document requested by Ms X, and a copy of the guidance issued to employees of organisations seeking Investors in People recognition, which stipulates information given to representatives of Investors in People by employees of an organisation will not be disclosed to third parties.

The Commissioner's Analysis and Findings

14. The investigation centred around 2 issues; whether Investors in People complied with the technical requirements of FOISA in responding to Ms X's request, and whether it had applied FOISA correctly in withholding the information requested from Ms X.

The technical requirements of FOISA

15. Section 16(1) of FOISA states that if an authority claims that information is exempt from disclosure under FOISA, that authority must give the applicant notice in writing which:
 - a) Discloses that it holds the information;
 - b) States that it claims the information is exempt;
 - c) Specifies the exemption in question; and
 - d) States (if not otherwise apparent) why the exemption applies .
16. In this case, Investors in People did not comply with the requirements set out in section 16(1) of FOISA.
17. Investors in People also failed to comply with the requirements of Part 1 of FOISA in that it failed to advise Ms X under section 19 of that Act of her rights to ask for a review of its decision and apply to me for a decision.
18. I acknowledge that Investors in People has accepted it did not comply with the requirements set out in sections 16(1) and 19 of FOISA in responding to Ms X's request for information, and note that it is in the process of adopting training, procedures and guidelines for dealing with requests made to the organisation under FOISA. I also note that on this occasion, the applicant was not prejudiced in the exercise of her rights by the authority's failure. Therefore I do not require it to take further action as a result of my decision.

The application of section 38(1)(b) of FOISA

19. Section 38(1)(b) of FOISA states that information is exempt if it constitutes personal data of an individual other than the applicant and disclosure of the information to a member of the public would contravene any of the data protection principles contained in schedule 1 to the DPA. Section 38(5) of FOISA states that the definition of “personal data” is that contained in section 1(1) of the DPA. Personal data, as defined by section 1(1) of the DPA, are:
”Data which relate to a living individual who can be identified from those data... 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.”
20. The applicant is seeking information about the personal experience of an employee and their views of their employer. In my view, this information is the personal data of the individual concerned. The definition of what amounts to “personal data” for the purposes of the DPA was 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 data subject as its focus. In my view, a record of a meeting such as the one produced by Investors in People falls within this definition.
21. Personal data relating to a third party can only be released under FOISA if disclosure would not breach any of the data protection principles. I am satisfied that disclosure of the personal data of the individual concerned would breach the first data protection principle in that it would be unfair.
22. 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 guidance issued by Investors in People to those taking part in interviews with a representative of Investors in People states that information given by the employee within those interviews will not be disclosed to third parties. Given that expectation, I am satisfied that it would be unfair to disclose the information requested.
23. Schedule 2 of the DPA sets out a number of conditions, at least one of which must apply if the processing is to be fair and lawful. I have considered the conditions set out on Schedule 2 of the DPA and concluded that none of them would permit disclosure of the information requested by the applicant.

24. The applicant is of the view that information about the assessment process used by Investors in People in relation to the Council should be in the public domain. I am satisfied, however, that Investors in People applied section 38(1)(b) correctly to the information it held in respect of this matter and must conclude there. The public interest in disclosure does not fall to be considered in this case.
25. As I am satisfied that section 38(1)(b), an absolute exemption, applies to the information withheld, I will not consider Investors in People's suggestion that section 30(c) of FOISA might apply to the information.

Decision

I find that Investors in People Scotland breached Part 1 of the Freedom of Information (Scotland) Act in so far as it did not comply with the requirements for responding to a request for information set out by sections 16(1) and 19 of the Freedom of Information (Scotland) Act 2002. As Ms X's rights were not prejudiced by this, I do not require Investors in People Scotland to take any action in response to these breaches.

I am satisfied that the information requested by Ms X is exempt from disclosure under the Freedom of Information (Scotland) Act 2002 by virtue of section 38(1)(b).

Kevin Dunion
Scottish Information Commissioner
27 March 2006