

Decision Notice



Decision 082/2009 Mr Jamie Hepburn MSP and North Lanarkshire Council

Correspondence received from individual elected representatives

Reference No: 200900375
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Summary

Mr Jamie Hepburn MSP (Mr Hepburn) requested from North Lanarkshire Council (the Council) the numbers of correspondence items received from individual MSPs, MPs and MEPs over a specified period of time. The Council withheld the information under the exemption in section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA), which allows public authorities to withhold personal data if the disclosure of the information would breach any of the data protection principles contained in the Data Protection Act 1998 (the DPA). Following a review, Mr Hepburn remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Hepburn's request for information in accordance with Part 1 of FOISA, by wrongly withholding the information under section 38(1)(b). He required the Council to provide Mr Hepburn with the information he had requested.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions) and 38(1)(b), (2)(a)(i) and (b) (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(1))

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

1. On 20 November 2008, Mr Hepburn wrote to the Council requesting the numbers of items of correspondence received by North Lanarkshire Council from each MSP, MP and MEP, in each month from 1 May 2007 to the date of the request.



2. The Council responded on 23 December 2008 releasing the aggregate details of the number of items of correspondence received each month from MPs, MSPs and MEPs. However, it did not supply details of the number of items received from each individual elected representative.
3. Mr Hepburn acknowledged this response in a letter dated 13 January 2009. However, he noted that his request had indicated that he wanted to access the number of items of correspondence received from *each* representative, rather than the total number received from each type of representative. He asked the Council to now supply this information.
4. On 16 January 2009 the Council responded again, stating that the names of individual parliamentarians along with the number of items of correspondence received from each one was personal data in respect of which disclosure would contravene the data protection principles. As such, the Council stated that this information was exempt in terms of section 38(1)(b) of FOISA.
5. Mr Hepburn wrote to the Council on 22 January 2009 requesting a review of its decision. In particular, he stated that he did not believe that any personal information protected by data protection principles would be made available as a result of his request and that he felt the actions of elected members should be in the public domain and subject to political and electoral scrutiny. He reiterated that he wanted the information broken down by individual parliamentarian and emphasised that he was not interested in the content of the correspondence, merely the volume of received from each person. In addition he stated his understanding that at least one other local authority in Scotland had made similar information available in response to a freedom of information request from one of his colleagues.
6. The Council notified Mr Hepburn of the outcome of its review on 23 February 2009, which was to uphold the decision in full and provide fuller explanation of its decision to apply the exemption in section 38(1)(b) of FOISA.
7. On 24 February 2009, Mr Hepburn wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Hepburn 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

9. On 2 March 2009 the Council was notified in writing that an application had been received from Mr Hepburn and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.



10. The investigating officer subsequently contacted the Council, 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, the Council was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. The Council's response referred the Commissioner to its letter of 23 February 2009 to Mr Hepburn (its response to his review request) to explain its reasoning with respect to the exemption in section 38(1)(b). The Council also confirmed that it had considered both electronic and paper correspondence when identifying the information sought by Mr Hepburn. It also confirmed that it had not sought the consent of the individual elected representatives to the release of the information.
12. Mr Hepburn was also contacted by the investigating officer for his comments to inform the Commissioner's consideration of the legitimate interest test set out in Condition 6 of Schedule 2 of the DPA. Mr Hepburn provided his comments, and also supplied a copy of a response to another information request he had made to a different public authority. This letter confirmed that the other public authority had recently disclosed details of the number of items of correspondence received from the individual elected representatives by that public authority.

Commissioner's analysis and findings

13. 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 Mr Hepburn and the Council and is satisfied that no matter of relevance has been overlooked.

Consideration of 38(1)(b)

14. The Council has applied the exemption in section 38(1)(b) of FOISA to the information requested by Mr Hepburn.
15. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
16. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.



Is the information under consideration personal data?

17. Personal data is 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 (the definition is set out in full in the Appendix).
18. The Council has argued that the information allows identification of each representative. The Council also noted that, by detailing the number of items of correspondence each had sent, it clearly related to them and their activities.
19. In this case, the Commissioner is satisfied that the withheld information relates to living individuals (i.e. the individual MSPs, MPs, and MEPs) who can be identified from that information. Notwithstanding that the relevant correspondence is undertaken in the capacity as an elected representative, the requested information clearly relates to each of the representatives, by providing details of activity they have undertaken in their role. .
20. The Commissioner is therefore satisfied that the information constitutes personal data.

Would disclosure of the information breach the first data protection principle?

21. The Council has argued that the release of the information would breach the first data protection principle.
22. The first data protection principle requires that the processing of personal data (here, the disclosure of the data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.
23. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
24. 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, he must then consider whether the disclosure of this personal data would be fair and lawful.

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

25. The Council has argued that of all the conditions in Schedule 2 of the DPA, only the sixth may be potentially applicable in this case.



26. The Commissioner has considered all of the conditions in Schedule 2 of the DPA, and shares the view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered to apply in this case.

Condition 6

27. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued 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.
28. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does the applicant (Mr Hepburn) have a legitimate interest in obtaining this personal data?
 - 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)?
 - 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.

Does the applicant have a legitimate interest?

29. Mr. Hepburn was asked for his views on what legitimate interest he had in the disclosure of this personal data, i.e. the numbers of items of correspondence received by the Council from each individual representative. In his response he pointed out that he was not asking for the contents of any of the items of correspondence, nor was he asking for any details of the constituents on behalf of whom the representatives may have been acting in their correspondence. He stated that as the Council had already provided him with the information broken down by group for MPs, MSPs and MEPs he could see no reason why they could not provide this broken down per individual.
30. Mr Hepburn went on to argue that while the content of the communications may be confidential, that the quantity of such correspondence may be of wider legitimate interest in the same way as the number of questions or motions lodged in parliament, or indeed the number of expenses claims on Parliamentary business have been accepted as of public interest. He also highlighted the fact that he had obtained similar information from another public authority in response to an identical information request.



31. The Commissioner would emphasise that one public authority's disclosure of information to Mr Hepburn in response to a similar information request does not set any legal precedent for another to do likewise. Each public authority is responsible for reaching its own decision about the applicability or otherwise of any exemption, taking into consideration the particular information concerned and all the circumstances of the case.
32. In coming to his decision the Commissioner will consider that case on its merits, regardless of another authority having taken the decision to disclose apparently similar information.
33. The Council submitted that, taking account of the fact that Mr Hepburn is himself an MSP, it could appreciate that the activities of one Parliamentary representative may be of interest to another. However, it could not conclude that such interest equates to a legitimate interest necessitating the disclosure of the information.
34. Having considered the submissions made by both Mr Hepburn and the Council, the Commissioner accepts that Mr Hepburn has a legitimate interest in gaining insight into the activities of elected members through the amount of correspondence they exchange with the Council. While Mr Hepburn is an MSP, the Commissioner recognises his legitimate interest reflects a wider legitimate interest shared by the general public in accessing information relating to the activities of MPs, MSPs and MEPs. Several public sources of information allow members of the public to find out about activities of elected representatives, and so to assess their work on behalf of their constituents. The information requested by Mr Hepburn is of a similar type, and he has identified that there is a legitimate interest in accessing this for the same purpose of public scrutiny.
35. The Commissioner therefore concludes that Mr. Hepburn has a legitimate interest in obtaining the information under consideration.

Is disclosure of the information necessary to achieve those legitimate interests?

36. The Commissioner must now consider whether disclosure is necessary for the legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.
37. The Commissioner has concluded that disclosure is necessary, because Mr Hepburn would not be able to satisfy his interest in the activity of elected representatives with respect to the Council without access to the information requested. The Council has already supplied aggregate information about correspondence received from different types of representative each month. While this disclosure avoided any intrusion into the activities of individuals, it did not allow insight into the activities of individual representatives. The Commissioner can envisage no alternative way of satisfying the legitimate interest identified by Mr Hepburn.
38. The Commissioner has noted that Mr Hepburn has not sought information about the content of the correspondence and that statistical information of a similar type is already publicly available about other types of activity (e.g. parliamentary questions, attendance at Parliament) by elected representatives. In this context, the Commissioner is satisfied that disclosure would not be disproportionate as a means to achieving Mr Hepburn's legitimate interest.



Would disclosure cause unwarranted prejudice to the legitimate interests of the data subject?

39. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individual representatives concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Hepburn and those of the elected representatives. Only if the legitimate interests of Mr Hepburn outweigh those of the representatives can the information be disclosed without breaching the first data protection principle.
40. The Commissioner has recently issued updated guidance on the interpretation of the exemptions in section 38¹, and notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to 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 by the disclosure.
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information would be disclosed.
41. The Council was invited to present its submissions as to why it felt disclosure would cause unwarranted prejudice to the legitimate interests of the representatives but put very limited arguments in this respect. The Council's response to Mr Hepburn's request for review stated that it could find no basis to conclude that there was an express or implied unequivocal consent by each individual representative to the information being made available. The Council stated that it could not conclude that the interest of one parliamentary representative in the activities of another was equivalent in the legitimate interest necessitating the process of data as envisaged by the DPA.
42. In considering the balance of legitimate interests in this case, the Commissioner has considered all of the points made by the Council and Mr Hepburn, and has noted the following points in particular:
- He has taken account of the fact that the information requested relates to the data subjects' public lives in respect of activities undertaken their capacity as elected representatives. The information reveals nothing about the individuals' private or family lives.
 - He has noted that the Council did not ascertain whether the representatives felt that any potential harm and/or distress would result from the disclosure of the information, and that it did not put forward any evidence to suggest that (a) any harm and/or distress would be likely to arise, or (b) what form such harm and/or distress might take.

¹ "Personal information"- <http://www.itspubliknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=1333>



- He has considered the fact that no objections by the representatives to the disclosure of such information have been brought to his attention by North Lanarkshire Council.
 - It is his view that, as public figures familiar with the types of information available to the public about their activities, the elected representatives could reasonably expect information such as that requested by Mr Hepburn to be potentially disclosed in the course of the fulfilling a freedom of information request. The Commissioner considers it reasonable that they should expect their activity as elected members in the public domain to be subject to such public scrutiny, and recognise that this relates to their public rather than their private life. The Commissioner believes that elected representatives will expect and recognise that personal data that relates to their private life would be granted a greater degree of protection than personal data relating to their public activities.
 - He appreciates that elected members would not necessarily expect that the content of their correspondence to be disclosed, but also notes again that disclosure in this case would not reveal anything other than the number of times an elected representative had contacted the Council over a series of months.
43. Having balanced the legitimate interests of Mr Hepburn with those of the individual representatives in this case, the Commissioner is satisfied that any prejudice to the rights, freedoms and legitimate interests of the data subjects (i.e. MSPs, MPs and MEPs) is outweighed in this instance by the legitimate interests of the requestor and the wider public. As such, he has concluded that disclosure would be in line with condition 6(1) within schedule 2 of the DPA.

Is the processing otherwise fair and lawful?

44. In the absence of any submissions by the Council which suggest that disclosure of the information requested by Mr Hepburn would be unlawful, other than by contravening the first data protection principle, and having considered the question carefully, the Commissioner can find no reason to find that the disclosure would be unlawful. He will therefore go on to consider the issue of the fairness of such disclosure.
45. The Commissioner is satisfied generally that the processing of the information in question (i.e. by disclosure) should not be considered to be unfair, for similar reasons to those outlined in paragraph 42 above. In reaching this view he considers that the specific roles and responsibilities which are undertaken by elected members are such that they might reasonably expect such information as to their activities in public office to be released into the public domain.
46. Having found disclosure to be both fair and lawful, and in line with condition 6(1), the Commissioner therefore does not accept that disclosure of the information under consideration would breach the first data protection principle, and so does not accept that this information is exempt under section 38(1)(b).



47. The Commissioner therefore concludes that the exemption in section 38(1)(b) has been wrongly applied by the Council, and so it acted in breach of section 1(1) of FOISA by withholding this. He now requires that the numbers of items of correspondence received by the Council from individual MSPs, MPs and MEPs over the relevant period should be disclosed.

DECISION

The Commissioner finds that North Lanarkshire Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Jamie Hepburn MSP. By wrongly withholding the information in terms of the exemption set out in section 38(1)(b), the Council failed to comply with section 1(1).

The Commissioner therefore requires North Lanarkshire Council to provide Mr Hepburn with the information requested, by 31 August 2009

Appeal

Should either Mr Hepburn or the Council 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
16 July 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
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (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

- (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.
-