

Decision Notice



Decision 090/2010 Mr Munro Ross and Highland Council

Disciplinary investigation

Reference No: 201000365
Decision Date: 14 June 2010

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Munro Ross requested from Highland Council (the Council) information pertaining to a disciplinary investigation. The Council disclosed some information but withheld one email. Following a review Mr Ross remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had been entitled to withhold the email from Mr Ross because it was his own personal data and, as such, was exempt from disclosure under section 38(1)(a) of Freedom of Information (Scotland) Act 2002 (FOISA). The Commissioner also found that the Council had failed to respond to Mr Ross's request and request for review within the timescales specified in sections 10(1) and 21(1) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); section 2(1)(a) and (2)(e)(i) (Effect of exemptions); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 38(1)(a) and (5) (Personal information) (definitions of "data subject" and "personal data")

Data Protection Act 1998 (DPA) section 1(1) (Basic interpretative provisions) (definition of personal data)

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 5 April 2009, Mr Ross emailed the Council requesting specified information in relation to a disciplinary investigation.
2. The Council responded on 22 May 2009. It indicated that some of the information requested was Mr Ross's own personal data and so exempt from disclosure under section 38(1)(a) of FOISA. However, the Council provided this information to Mr Ross in pursuit of his rights under section 7 of the Data Protection Act 1998 (DPA). The Council provided other information in terms of FOISA, and withheld one email from disclosure under section 36(2) of FOISA.



3. On 21 June 2009, Mr Ross emailed the Council requesting a review of its decision. Mr Ross's review expressed dissatisfaction only with the Council's decision to withhold the email in terms of section 36(2) of FOISA.
4. Mr Ross submitted an application to the Commissioner on 31 August 2009 as he had not received a response to his request for review.
5. After the intervention of the Commissioner, the Council carried out a review and notified Mr Ross of the outcome of the review on 27 January 2010. The Council upheld its previous decision without amendment.
6. On 15 February 2010, Mr Ross wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and the time taken for it to respond, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Ross 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

8. On 26 February 2010, the Council was notified in writing that an application had been received from Mr Ross 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.
9. The investigating officer contacted the Council on 24 March 2010, 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.
10. In response, the Council advised the investigating officer that it had decided to withdraw its application of section 36(2) of FOISA and was now withholding the requested email under section 38(1)(a) of FOISA, on the basis that this was Mr Ross's personal data. The Council indicated that the email also contained some personal data relating to a third party, which it also considered to be exempt in terms of section 38(1)(b) of FOISA.

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



Personal data – section 38(1)(a) of FOISA

12. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
13. This exemption exists under FOISA because individuals have a separate right make a request for their own personal data (commonly known as a “subject access request”) under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data. Therefore, section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
14. Personal data is defined in section 1(1) of the DPA as 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 (the full definition is set out in the Appendix).
15. Mr Ross’s request clearly concerns matters in which he was directly involved, and relates to him specifically. The Commissioner is satisfied that the information withheld from Mr Ross relates to him as an individual and that he can be identified from this data along with other information in the possession of the Council.
16. The Commissioner has therefore concluded that the information withheld is entirely Mr Ross’s personal data. He therefore finds that the Council was correct to apply the exemption in section 38(1)(a) of FOISA to this information.
17. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required to go on to consider whether the public interest lies in the information being released or withheld. As section 38(1)(a) applies to the requested information, it is not necessary for the Commissioner to consider whether the exemption in section 38(1)(b) also applies.

Failure to comply with timescales in FOISA

18. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
19. Mr Ross submitted his request to the Council on 5 April 2009 and the Council responded on 22 May 2009.
20. The Commissioner therefore finds that the Council failed to respond to Mr Ross’s request for information within the 20 working days allowed under section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA.



21. Section 21(1) of FOISA gives authorities a maximum of 20 working days following the receipt of the requirement to comply with a requirement for review subject to exceptions contained within Part 2 of FOISA.
22. Mr Ross submitted a requirement for review on 21 June 2009. The Council responded to Mr Ross's request for review on 27 January 2010 following the commencement of an investigation into the failure to respond by the Commissioner. In its response, the Council acknowledged that it had failed to respond within the timescales laid down in FOISA.
23. The Commissioner finds that the Council failed to respond to Mr Ross's request for review within the 20 working days allowed under section 21(1) of FOISA. In failing to comply with this timescale, the Council failed to comply with Part 1 of FOISA.

DECISION

The Commissioner finds that Highland Council (the Council) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Ross.

The Commissioner finds that the Council was entitled to withhold the email from Mr Ross under section 38(1)(a) of FOISA.

However, the Commissioner also finds that the Council failed to comply with the timescales laid down in sections 10(1) and 21(1) of FOISA in responding to Mr Ross's request and request for review, and in so doing failed to comply with Part 1 of FOISA.

The Commissioner does not require the Council to take any further action in relation to these particular breaches in response to this decision.



Appeal

Should either Mr Ross 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.

Margaret Keyse
Head of Enforcement
14 June 2010



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; ...

- (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 –

(i) paragraphs (a), (c) and (d); and

...

10 Time for compliance

- (1) a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...



21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject;

...

- (5) In this section-

...

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act; ...

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;

...