

Decision Notice



Decision 135/2010 Mr Alan Henderson and the Assessor of Ayrshire Valuation
Joint Board

Details of houses sold

Reference No: 200901464
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Summary

Mr Henderson requested from the Assessor of Ayrshire Valuation Joint Board (the Assessor) the addresses, selling prices and square metreares of houses sold between specified dates in a particular town. The Assessor responded by providing the addresses and withholding the remainder of the information, advising Mr Henderson that he considered it to be exempt from disclosure in terms of sections 25(1), 36(2) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review (in respect of the square metreares), in which the Assessor also applied the exemption in section 35(1)(d) of FOISA, Mr Henderson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Assessor had failed to deal with Mr Henderson's request for information in accordance with Part 1 of FOISA, by incorrectly withholding information under certain exemptions. He did not accept the Assessor's application of section 35(1)(d) of FOISA because he was not satisfied that disclosure would, or would be likely to, substantially prejudice the assessment or collection of any tax or duty. He did not accept the application of section 38(1)(b) because he was not satisfied that disclosure would breach any of the data protection principles. Given that the information in question had not been obtained from another person, neither did he accept that it was properly withheld under section 36(2) of FOISA. He required the Assessor to disclose to Mr Henderson the square metreares of the houses covered by his request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1), (2)(c) and (2)(e)(ii) (Effect of exemptions); 35(1)(d) (Law enforcement); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i) and (b), and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions - definition of "personal data") and 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 3 March 2009, Mr Henderson wrote to the Assessor requesting “the address, selling price and square metreage of all houses sold in Darvel between 1 October 1990 and 30 September 1991”.
2. The Assessor did not respond until 26 May 2009, apologising for the delay. He confirmed he held all the information Mr Henderson had requested, but provided only the addresses (with dates of sale). The remaining information was withheld under the exemptions in sections 25(1), 36(2) and 38(1)(b) of FOISA.
3. On 4 June 2009, Mr Henderson wrote to the Assessor requesting a review of his decision. Mr Henderson challenged the Assessor’s decision in respect of the square metreages, presenting reasons why he did not consider this information to be personal data.
4. The Assessor notified Mr Henderson of the outcome of his review on 30 June 2009, upholding his original position and also citing a further exemption under section 35(1)(d) of FOISA.
5. On 11 August 2010 Mr Henderson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Assessor’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 Mr Henderson 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 27 August 2009, the Assessor was notified in writing that an application had been received from Mr Henderson and was asked to provide the Commissioner with any information withheld from him. The Assessor responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Assessor, giving him an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking him to respond to specific questions. In particular, the Assessor was asked to justify his reliance on any provisions of FOISA he considered applicable to the information requested.
9. The submissions received from both Mr Henderson and the Assessor, insofar as relevant, will be considered fully in the Commissioner’s analysis and findings below



Commissioner's analysis and findings

10. 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 Henderson and the Assessor and is satisfied that no matter of relevance has been overlooked.

Scope of the application

11. As stated in paragraph 3 above, Mr Henderson's requirement for review related only to the Assessor's withholding, under various exemptions in FOISA, of the square metrages of the houses covered by his request. In his application to the Commissioner, however, he indicated at least an interest in knowing why the Assessor should not be required to provide the sale prices he had requested, notwithstanding that the information might be available elsewhere. This is not a matter the Commissioner can consider: the right of application to him under section 47(1) of FOISA depends on the applicant being dissatisfied with either the outcome of the public authority's review or its failure to carry one out when required to do so, and consequently he cannot consider matters not raised by the applicant in requiring a review. Therefore, the scope of Mr Henderson's application (and of this decision) must be confined to the question raised in his requirement for review, that is whether the Assessor was correct to withhold the square metrages.

Section 35(1)(d) – Law enforcement

12. Section 35(1)(d) of FOISA allows public authorities to refuse to disclose information to a person who requests it, if disclosure of that information would, or would be likely to, prejudice substantially the assessment or collection of any tax or duty (or of any imposition of a similar nature).
13. The exemption in section 35(1)(d) of FOISA is a qualified exemption. This means that, even if the authority considers the exemption applies, it can only withhold the information if, in all the circumstances, the public interest in maintaining the exemption (and therefore withholding the information) outweighs the public interest in disclosure.
14. Mr Henderson's request for information was made in the context of his ongoing query regarding the Council Tax banding of his house. He had been in correspondence with the Assessor on this matter for some time before making his information request, although his right to submit a formal appeal on the matter had expired.
15. The Assessor explained that he was extremely heavily committed to the performance of his statutory functions in connection with maintaining the Non-Domestic Valuation Roll, Council Tax List and Electoral Register. He considered this current workload to be fully absorbing in terms of available resources, particularly as there were many invalid Council Tax proposals outstanding (some more than a year old) and requiring investigation.



16. The Assessor also pointed out that, notwithstanding the absence of any valid right of appeal, he had investigated Mr Henderson's Council Tax band to ascertain whether it was in fact correct (which he had concluded it was) and believed he had taken all reasonable steps to explain to Mr Henderson the basis upon which the band was determined. He submitted that were a general principle to be established that further dialogue should be engaged in beyond that already undertaken, including the unfettered provision of the type of information Mr Henderson had requested, this would instigate considerable interest among the general body of Council Tax payers who were similarly outwith their time limits for appeal, but nevertheless desired to challenge their band. A significant number of these taxpayers, the Assessor contended, would be encouraged to pursue that challenge further by making information requests, albeit in the absence of any process by which the band could legally be challenged. The result, in the Assessor's view, would be a significant increase in the time and resources he would require to devote to such enquiries.
17. The Commissioner has considered the Assessor's arguments with respect to the exemption in section 35(1)(d) of FOISA, but he is unable to accept its application to the information withheld from Mr Henderson in this case. As in *Decision 035/2009 Councillor Danny Carrigan and the Assessor of Lanarkshire Valuation Joint Board* (which considered a request for the addresses and sale dates of certain properties whose sale prices had been used to determine the Council Tax banding of a particular property), the Commissioner acknowledges that access to this type of information might lead a person to make representations to the Assessor outwith the formal appeal process.
18. However, in line with his conclusions in *Decision 035/2009*, the Commissioner is unable to see how knowledge of the information withheld in this case necessarily would, or would be likely to, disrupt the assessment of properties for Non-Domestic Rates and Council Tax as the Assessor appears to have suggested. While he accepts that disclosure of that information would provide those interested in challenging their Council Tax banding with information that might be relevant to their case, he does not accept that disclosure would (or would be likely to) undermine the appeals process described by the Assessor, or otherwise create an additional avenue for challenge where none exists at present. As the Commissioner found in *Decision 035/2009*, in the event of banding questions being raised outwith the formal appeals process, it would be for the Assessor to determine whether it was appropriate to engage in further informal discussion on the matter.



19. Also, as in that previous case, the Commissioner does not believe that substantial prejudice to the relevant functions of the Assessor could be said to follow from any increased administrative burden deriving from having to disclose this information routinely, even if it were to be accepted that requests of this kind would become common should disclosure be required in this case. The Assessor is required to comply with FOISA as he is required to perform the statutory functions outlined in his submissions and must organise the resources available to him in such a manner as to enable him to fulfil all of his legal obligations effectively. While certain provisions of FOISA are designed to address the burden an authority might experience in responding to a particular request (for example, section 12 on excessive cost of compliance or section 14 on vexatious or repeated requests), the Commissioner does not in general believe this to be the function of the exemptions in Part 2 of FOISA. Neither does he consider that he has been presented with specific relevant arguments to persuade him that it would have been appropriate to use the exemption in section 35(1)(d) for such a purpose in the circumstances of this particular case.
20. In conclusion, the Commissioner does not uphold the application of the exemption in section 35(1)(d) of FOISA to the square metreages requested by Mr Henderson. As the Commissioner has not upheld the application of the exemption, he is not required to go on to consider the public interest test.

Section 36(2) (Confidentiality)

21. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but it is generally accepted in common law that an obligation of confidence cannot apply to information, the disclosure of which is necessary in the public interest.
22. There is, therefore, a two-stage test to be fulfilled for this exemption to apply. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and includes another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
23. The Assessor explained the process by which the square metreages had been obtained, which was by means of a physical survey of each property entered on the Council Tax List. In most cases, the property was measured by a qualified member of the Assessor's staff, although in some instances (where a house was of a particular type which had already been measured) it might be sufficient to check selected measurements, to ensure that the property was indeed the same size. This information was obtained by staff employed by the Assessor, in order that he might undertake a valuation to assist him in ascribing the property to the correct Council Tax band.



24. The Assessor argued that the information had been obtained from the owners of the houses in question, because his officers had obtained it by way of inspection and survey of those individuals' properties. Having considered the withheld information and the circumstances of its being obtained, however, the Commissioner cannot accept the information was obtained from another person.
25. In the Commissioner's view, this information has been created by the Assessor's staff. The measurements taken for the purposes of calculating the square metreages were taken from the properties of the individuals concerned, but it does not follow that those proprietors provided the information. The taking of the measurements (whether complete or more selective) and the subsequent necessary calculations relied on the skill and judgement of the Assessor's qualified staff and the Commissioner is not satisfied in the circumstances that they simply received information already held by the relevant proprietors.
26. Given that the first part of the test cannot be met, the Commissioner does not require to look at the second part. For the reasons given above, therefore, he concludes that section 36(2) of FOISA is not engaged in respect of the square metreages. He will, however, have to consider the question of confidentiality further below, in the context of section 38(1)(b) of FOISA.

Section 38(1)(b) - Personal Information

27. The Assessor has also submitted that the square metreages are personal data and that disclosure would contravene the first data protection principle on fair and lawful processing of personal data.
28. Under section 38(1)(b) of FOISA (read in conjunction with, as appropriate, section 38(2)(a)(i) or 38(2)(b)), information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in Schedule 1 to the DPA.
29. In considering this exemption, the Commissioner is required to consider two separate matters: firstly, whether the information under consideration is personal data and, if so, whether disclosure of the information would indeed breach any of the data protection principles.

Is the information under consideration personal data?

30. "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 (see the full definition in the Appendix).
31. The Assessor submits that he holds the withheld information on his Council Tax database, along with property addresses and technical details obtained from property surveys. He also holds name details for all qualifying residents at each address as Electoral Registration Officer and, having access to both sets of data in relation to each property, can identify individuals from any of the data held on the Council Tax database.



32. In support of his position that the withheld information is, therefore, personal data, the Assessor refers to a publication issued by the Information Commissioner's Office (ICO) entitled, *"Data protection technical guidance: determining what is personal data"*, available online at: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf . He refers in particular to the following, on pages 9 and 10 of this guidance:
- "Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual."*
- The Assessor notes that although data about a house may not, by itself, be personal data, it will become personal data as soon as it is linked to a particular individual or used in decisions and deliberations concerning an individual.
33. The Assessor further asserts that the square metreages withheld in this particular case are used to inform or influence decisions affecting living individuals, namely the determination of their Council Tax liability. In such circumstances, the Assessor submits that the information is personal data, as the data about each house are clearly linked to the individual or individuals concerned.
34. The Commissioner has considered the above guidance provided by the ICO, along with the Assessor's submissions, and in the circumstances is satisfied that the withheld square metreages, while not necessarily personal data if taken in isolation, should properly be regarded as such in the context in which it is held by the Assessor. Considered along with the address of the property and the other identifying information to which the Assessor has ready access, they comprise information relating to living individuals who can be identified from that information. It is clear in any event that the information is used to determine an individual's liability for Council Tax, which is a specific example used in the ICO's guidance of information about a property which is personal data because it is clearly linked to the individual concerned.

Would disclosure breach the first data protection principle?

35. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, to the DPA) is also met.
36. There are therefore 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. 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.
37. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data under consideration in this case does not fall into any of the relevant categories. It is therefore not necessary in this case to consider the conditions in Schedule 3 to the DPA.



38. 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 and 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?

39. The Assessor has argued that, of the conditions in Schedule 2 to the DPA, only condition 6 might be considered to apply in this case. The Commissioner agrees with this assessment.

40. Condition 6 allows personal data to be processed (in this case, disclosed in response to an information request made by Mr Henderson under section 1(1) of FOISA) if 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 (i.e. the person to whom the data relate).

41. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:

- Does Mr Henderson 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 subject(s). 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?

42. In his application to the Commissioner, Mr Henderson explains he is trying to establish whether the Council Tax banding for his own property is correct. Although time barred from the relevant appeal process, he understands that if he can demonstrate his house was placed in the wrong band the Assessor will review the banding. The Assessor, while disputing that Mr Henderson requires further information for this purpose, acknowledges that (in general terms) a Council Tax payer may have a legitimate interest in knowing the basis on which their property has been banded for Council Tax purposes.



43. In the circumstances, the Commissioner accepts that Mr Henderson has a legitimate interest in obtaining the withheld personal data. He is satisfied that Council Tax payers, and in particular those who (like Mr Henderson) are dissatisfied with the band in which their properties have been placed, have a legitimate interest in knowing the basis on which those properties have been banded for Council Tax purposes. Square metreage, while not the only relevant factor, is clearly a factor taken into account by the Assessor in valuing a property for these purposes.

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

44. Mr Henderson clearly believes the square metreages he has requested to be necessary if he is to pursue his legitimate interests effectively. The Assessor, on the other hand, does not believe disclosure of this information to be necessary for Mr Henderson's purposes. In this connection, he refers to *Decision 035/2009*, submitting that in that case the Commissioner found that an individual only required the addresses and sale prices of the properties used as comparators in order to form a view on whether the Assessor had correctly valued their property. There was no suggestion in that decision that further information would be required for that purpose. The Assessor has also asserted (as he believes Mr Henderson to accept) that the majority of the properties on which Mr Henderson has requested information are not comparable to his property and were not used as comparators in assessing the Council Tax band of that property, again leading to the conclusion that the withheld information is in no way relevant to achieving Mr Henderson's legitimate interest.
45. The Assessor contends that the valuation of properties for Council Tax purposes is an exercise of professional judgement by qualified or part qualified chartered surveyors, who form an opinion taking account of a range of factors. He points out that, under section 86(3) of the Local Government Finance Act 1992 (the 1992 Act), which governs the assessment and collection of Council Tax in Scotland, an assessor need not carry out an individual valuation of a property where it appears to him that a property falls clearly within a particular valuation band. He acknowledges that size is one factor to be taken into account in banding a property, but points out that there is also a range of other relevant factors and that it is not normal practice simply to apply a rate per square metre to arrive at a valuation. He asserts that this has been explained to Mr Henderson, adhering to the view that the items of information needed to satisfy any legitimate interest are the addresses and sale prices of the properties used as comparators: addresses and sale dates have already been provided to Mr Henderson and sale prices are readily accessible to him.



46. The Commissioner has considered the Assessor's submissions on this point, along with those received from Mr Henderson. He cannot accept the Assessor's interpretation of *Decision 035/2009* for these purposes. While acknowledging his conclusion in that case that an individual must know the addresses and sale prices of the properties used as comparators in order to arrive at a view on whether the Assessor valued their property correctly, he must also point out that he did not in that case consider the contribution which might be made to such an assessment by other categories of information: he was not in a position to do so, as neither party suggested that such additional information (for example, in relation to house size) was necessary for that purpose.
47. In this case, however, Mr Henderson believes the square metreages he has requested to be required, in addition to the information he accepts he has been provided with or has ready access to, if he is to make an effective submission to the Assessor on the correct banding of his property. There appears to be no doubt that house size is a relevant factor in banding a property for Council Tax purposes, even if it is not the only additional relevant factor. The Assessor may be correct in his view that Mr Henderson will not, even with the square metreages in his possession, be in a position to arrive at as reliable a view on valuation as a qualified or part-qualified surveyor, but the Commissioner also finds it difficult to argue that the view Mr Henderson would be able to form with the square metreages would not be a more informed one than if he did not have them.
48. There may also be substance in the Assessor's argument that not all of the properties in respect of which Mr Henderson has requested information are comparable to Mr Henderson's own property. Clearly, however, some parameters are required to define the appropriate sample for an exercise such as Mr Henderson is carrying out and he has chosen to do this by reference to the town in which his house is located. No alternative means of defining a more reliable set of comparators has been offered by the Assessor and, in the circumstances, the Commissioner does not consider this point to have any significant bearing on the question of necessity under consideration here.
49. In this case, Mr Henderson is seeking, for the purposes of making comparisons relative to the appropriate valuation of his own property, the square metreages of certain specific properties. The Commissioner has accepted that he has a legitimate interest in this information, which appears to be relevant for these purposes. In all the circumstances, the Commissioner can identify no viable means of meeting this particular legitimate interest which would interfere less with the privacy of the relevant data subject(s) than obtaining all of the information requested. Consequently, he accepts that disclosure of the withheld square metreages is necessary for the purposes of Mr Henderson's legitimate interests.



Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject(s)?

50. In this connection, the Assessor argues that the information he holds regarding the size and layout of dwellings is gained by inspection and survey of properties, conducted under his statutory powers of access. He considers the gathering of this information to carry with it an implied obligation of confidentiality. He does not believe Council Tax payers would have a reasonable expectation, nor does he consider it appropriate, that such information would be made available to the general public. To do so, he suggests, might cause distress to the individuals involved by infringing their rights to privacy concerning their home (and thus contravening article 8 of the European Convention on Human Rights, which governs respect for family life, home and correspondence). Therefore, he submits that disclosure would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects.
51. On the question of confidentiality, the Assessor argues that it is implied by 1992 Act that information obtained by him under the statutory powers it confers (including property details) will be retained on a strictly confidential basis, with the exception of information the 1992 Act expressly provides shall be made available to any person: this, he asserts, represents an extension of previous established practice in respect of both domestic rating and the Community Charge, and is inherent in the relationship between him and the Council Tax payer. He believes members of the public have a reasonable understanding that, apart from the Council Tax band for each individual address, information obtained by him under the 1992 Act will remain confidential. Information on the physical attributes of a property (including size) utilised by the Assessor for the purposes of arriving at the correct Council Tax band is retained by him on an internal database and there is no statutory requirement, he argues, that it be made public.
52. The Assessor also considers the square metrages under consideration here to have the quality of confidence, not being common knowledge or publicly available in another document. It is not, he asserts, the kind of information held on individual properties by the Registers of Scotland, nor is it information a member of the public would be able to produce from other information in the public domain without access to the properties in question and the skill and labour required to produce the relevant measurements.
53. In relation to distress, the Assessor suggests that disclosure might expose proprietors to unsolicited approaches from persons obtaining the information, and in particular to unsolicited direct marketing. He has also referred to considerable media comment in respect of the use of similar assessment powers in England and Wales, suggesting that disquiet regarding the availability of this kind of information might discourage proprietors from allowing their properties to be inspected for Council Tax purposes.
54. The Commissioner has considered these arguments carefully. He has taken into account the guidance on this point in his own briefing on the section 38 exemption¹, which identifies relevant factors as including:

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



- whether the information relates to the individual's public or private life
 - the potential harm or distress that may be caused by disclosure
 - whether the individual has objected to disclosure
 - the reasonable expectations of the individual as to whether their information would be disclosed.
55. In this case, clearly, the information relates to the individuals' private lives (i.e. their homes), rather than anything done by them in an official or work capacity. In principle, therefore, it will merit a higher degree of protection. As indicated above, however, there are also other factors to be considered. There is no evidence of any specific objections to disclosure of the withheld information and the Assessor has focused in particular on the reasonable expectations of the data subjects (in the context of what he believes to be an implied obligation of confidentiality) and the potential for distress being caused by disclosure.
56. The Commissioner finds it useful in this context to consider the three requirements for an actionable breach of confidence in Scots Law. Firstly, the information under consideration must have the necessary quality of confidence. As the Assessor has argued, it must not be common knowledge or otherwise accessible to the public, or be capable of being produced by a member of the public without the investment of skill and labour. The Commissioner accepts that it is at least arguable that the specific square metreauges requested by Mr Henderson would not have been readily available in 1990 or 1991 and have not been so available since then.
57. The information also must have been provided in circumstances importing an obligation of confidentiality. The Assessor acknowledges that there is no express obligation of confidentiality applicable in the circumstances, arguing that such an obligation should be implied from the 1992 Act in respect of all information obtained by him under the statutory powers conferred by that Act, with the exception of information he is under a specific obligation to publish. He considers the obligation of confidentiality to be inherent in the relationship between him and the Council Tax payer. The Commissioner considers this last assertion to be questionable. To accept it would be to attribute to the relationship broadly the same characteristics as the relationship between, say, doctor and patient or social worker and client, which appears to be far from the case: an individual does not, in the same way as in these other examples, establish a relationship with their local assessor. The Commissioner is prepared to accept, however, that information obtained by the Assessor in pursuance of his functions under the 1992 Act *may* be the subject of an implied obligation of confidentiality, depending on the circumstances in which it was obtained. Relevant factors in this connection will include the nature of the information and the reasonable expectations of the person to whom it relates.



58. Here, the Commissioner has some difficulty with the Assessor's arguments. Whatever expectations Council Tax payers might have in respect of certain information collected by the Assessor, the information under consideration here is basically the gross internal floor area of each of the properties falling within the scope of the request. Since 1 October 2008, this has been required information in the survey report to be made available to any prospective purchaser of a house under section 99(1) of the Housing (Scotland) Act 2006². The changes brought about by these provisions have generally been considered to be for the benefit of the public and the Commissioner is not aware of them having led to any significant public concern on grounds of invasion of privacy or misuse. While there has been a good deal of legislative change since 1990/91 (the timeframe for the sales covered by Mr Henderson's request), including the introduction of FOISA, the Commissioner does not believe public attitudes in relation to the availability of information of this kind to have changed significantly over that period. Even then, it was usual to sell properties using reasonably detailed particulars, including room measurements: this appears to have been accepted as a normal part of the sale and purchase of property and appears not to have given rise to any discernible concerns about such information being misused. Although the properties in this case are not being surveyed for the purposes of sale, the information is of a type which becomes available without adverse consequence or concern, and diminishes the argument that it is the type of information which the Council Tax payer would expect not to be disclosed.
59. In all the circumstances, therefore, the Commissioner cannot accept that Council Tax payers would have a reasonable expectation that the withheld information should be held by the Assessor in confidence – or, for that matter, any other expectation that it would remain outwith the public domain.
60. The third element of an actionable breach of confidence is that there must be unauthorised use or disclosure of the information to the detriment of the person from whom it originated. Assuming that person could in this case be said to be the data subject, the Commissioner must question what (if any) harm could reasonably be expected to follow from disclosure of the information under consideration here. Given what he has concluded as to the data subjects' reasonable expectations on disclosure, the Commissioner cannot accept any likelihood of their experiencing distress or considering their privacy rights to have been breached should disclosure take place. In particular, it is difficult to imagine what kind of unsolicited approaches would be attracted by the disclosure of overall floor areas, or (noting that this was not the real focus of the media comment referred to by the Assessor) why the disclosure of this information should lead to a withdrawal of co-operation with the assessment process. Consequently, the Commissioner is unwilling to accept any detriment as a consequence of disclosure.
61. Having balanced the two competing sets of interests in this case, therefore, the Commissioner concludes that any prejudice to the rights, freedoms and legitimate interests of the data subjects is outweighed in this instance by the legitimate interest in disclosure of the withheld information. Consequently, he is satisfied that disclosure is permitted by condition 6 in Schedule 2 to the DPA. Given further submissions made by the Assessor, however, he must go on to consider whether disclosure would be otherwise fair and lawful.

² Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008 (SSI 2008 No. 76) – the Act itself is 2006 asp 1.



Otherwise fair and lawful

62. The Assessor has argued that disclosure of the withheld personal data would be unlawful in various ways. In addition to the question of confidentiality (and related questions of privacy) considered above, he believes the processing of personal data outwith the specific statutory functions for which it was collected, and the publication of personal data other than that he is specifically required to publish, to be *ultra vires* and therefore unlawful. Disclosure in response to Mr Henderson's request would not, in the Assessor's view, fall into either of these categories.
63. On the question of fairness, the Assessor also refers to the Information Commissioner's view, expressed in his Legal Guidance on the DPA³, that the paramount consideration in assessing fairness relates to the consequences of processing to the interests of the data subject. Consequently, he suggests that processing for a non-obvious purpose will be unfair unless the data subject has been informed of that purpose: data held for a specific purpose can only be used for a different purpose with the consent of the data subject. Noting that data subjects would not reasonably expect disclosure of this information to third parties, he submits that such processing would be for a non-obvious purpose of which the data subjects have not been informed and to which they have not consented: consequently, he considers that processing would be unfair. In support of this view, he cites the decision of the Information Tribunal in the case of *Colin P England and the London Borough of Bexley v the Information Commissioner EA/2006/0060 & 0066*⁴.
64. These arguments on fairness and lawfulness are interrelated and the Commissioner will consider them together. Broadly the same issues were considered by the Commissioner in *Decision 032/2009 Mr Paul Bradley and West Lothian Council*, in the context of the second data protection principle (which provides that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes). In that case he took the view, in line with the position taken by the Information Commissioner, that a public authority was only required to specify its *business* purposes in a fair processing notice or in its notification to the ICO. Disclosure in response to a request under section 1 of FOISA was not a business purpose and therefore did not require to be specified.

³http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf

⁴ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i146/ENgland.pdf>



65. Also, in *Decision 032/2009*, however, the Commissioner noted that an authority was still prohibited from processing personal data, including in response to an information request, in any manner which would be incompatible with its business purposes. In this connection, he considered that account required to be taken of the ethos behind FOISA, which aimed to promote the public's understanding of, and confidence in, the public authorities serving them, with a view to driving up standards within the public sector. On this basis, he found it difficult to see how a disclosure which would not breach any of the remaining data protection principles, and which would not involve the disclosure of information covered by another exemption in FOISA, could possibly be incompatible with the public authority's business purposes. He also suggested that it was appropriate to consider the second principle in the broader context of the DPA, i.e. the protection of the privacy of individuals.
66. If the above reasoning is followed in this case, bearing in mind the considerations taken into account in the Commissioner's analysis of condition 6, it is difficult to see how disclosure of the withheld information could be regarded as either incompatible with the Assessor's business purposes or otherwise contrary to the data subjects' privacy rights. Given the Commissioner's conclusions on the data subjects' reasonable expectations, it is in any event questionable whether disclosure could genuinely be considered a "non-obvious" purpose. Whichever reasoning is followed, the Commissioner is not satisfied that the Information Tribunal's conclusions in the *England* decision were intended to apply to information of the character under consideration here: in that case, the information under consideration was of a far more sensitive character, namely whether certain residential properties were occupied.
67. The Commissioner also takes the view that he should adopt a similar position in relation to the Assessor's *vires*. While the Assessor may have a number of specific functions under the 1992 Act, he is also bound by a number of more general statutes, including FOISA and the DPA. None of his functions are excluded from the application of FOISA. The approach to his statutory functions outlined in paragraph 62 above would, however, all but negate the application of FOISA to him. This cannot have been the intention of Parliament in bringing assessors within the scope of FOISA and, particularly in the light of his conclusions on the application of the data protection principles and the compatibility of disclosure with the Assessor's business purposes, the arguments on *vires* set out in paragraph 62 are not ones the Commissioner can accept as sustainable.
68. The Commissioner is therefore satisfied that the disclosure of the withheld square metreares would be fair and lawful, in addition to being permitted by condition 6. Consequently, he is satisfied that disclosure would not breach the first data protection principle, and therefore cannot uphold the Assessor's reliance on section 38(1)(b) of FOISA in relation to this information.
69. Having found that the Assessor was not entitled to withhold the square metreares of the houses covered by Mr Henderson's request under any of the exemptions in sections 35(1)(d), 36(2) or 38(1)(b) of FOISA, the Commissioner has concluded that the Assessor breached Part 1 (and in particular section 1(1)) of FOISA in doing so. He therefore requires the Assessor to release this information to Mr Henderson.



DECISION

The Commissioner finds that (in the respects covered by Mr Henderson's application to him) the Assessor of Ayrshire Valuation Joint Board (the Assessor) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Henderson.

By incorrectly applying the exemptions in sections 35(1)(d), 36(2) and 38(1)(b) of FOISA to the square metrages of the houses covered by Mr Henderson's request, the Assessor failed to comply with Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner therefore requires the Assessor to disclose the square metrages requested by Mr Henderson, by 13 September 2010.

Appeal

Should either Mr Henderson or the Assessor of Ayrshire Valuation Joint Board 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
28 July 2010



Appendix

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 –

...

- (c) section 36(2);

...

- (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.



35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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.

...

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"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;

...

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.

...