



Scottish Information
Commissioner

**Decision 191/2007 – Mr David Ewen of the Evening
Express and Aberdeen City Council**

*Request for details of retirement and severance packages of former
Directors of Council Services and their further employment by the
Council*

Applicant: Mr David Ewen of the Evening Express

Authority: Aberdeen City Council

Case No: 200601267

Decision Date: 22 October 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 191/2007 – Mr David Ewen of the Evening Express and Aberdeen City Council

Request for details of retirement and severance packages of former Corporate Directors of the Aberdeen City Council and their further employment by the Council – information refused under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) (General entitlement) and section 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); Schedule 1 (The data protection principles: the first principle)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Ewen, a reporter with the Aberdeen Evening Express, requested a range of information relating to payments made to seven former Aberdeen City Council Corporate Directors upon their early retirement or redundancy. The Council responded to Mr Ewen, refusing the information and citing section 38(1)(b) with reference to 38(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), on the basis that the information was personal information, the disclosure of which would contravene the first data protection principle set out in the Data Protection Act 1998 (the DPA).

Following an investigation, the Commissioner found that the Council partly dealt with Mr Ewen's request for information in accordance with Part 1 of FOISA, in that it applied section 38(1)(b) of FOISA correctly to some of the information requested. However, the Commissioner found that the Council had breached the requirements of Part 1 by withholding some information requested by Mr Ewen. This information was disclosed in the course of the investigation and so the Commissioner did not require any steps to be taken in response to this decision.



Background

1. On 17 May 2006 Mr David Ewen applied to Aberdeen City Council (the Council) for the amount of each severance payment made to seven former Aberdeen City Council Corporate Directors (Directors); details of the severance packages; copies of any correspondence between the Council and the former Directors in connection with the severance deal; and details of any employment relationship that had since been entered between the Council and the Directors, the relevant job title, period of employment and remuneration involved.
2. On 5 June 2006, the Council issued Mr Ewen with a notice in terms of section 16 of FOISA, stating that the information he had requested was exempt under section 38(1)(b) of FOISA. A template letter (which formed the basis of correspondence between the Council and each of the relevant directors) was provided, but the actual correspondence sent was withheld.
3. On 16 June 2006 Mr Ewen wrote to the Council requesting a review of the decision to withhold the information.
4. On 14 July 2006, the Council advised Mr Ewen that the review confirmed and upheld the original decision taken by the Council.
5. On 24 July 2006 Mr Ewen applied to me for a decision as to whether the Council had dealt with his information request in accordance with Part 1 of FOISA.
6. The application was validated by establishing that Mr Ewen had made a valid information request to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

The Investigation

7. On 18 September, my Office contacted the Council in terms of section 49(3)(a) of FOISA inviting its comments on Mr Ewen's application and requesting further background information in relation to this case. The Council responded on 6 October 2006 providing copies of sample correspondence, background papers, and some of the information withheld from Mr Ewen.
8. The Council also advised that relevant information was not held relating to all of the former Directors named in Mr Ewen's request.



9. The case was then allocated to an investigating officer, who subsequently contacted the Council, to seek further background information to inform my consideration of this case.

Submissions from the Council

10. The Council initially stated that all information requested by Mr Ewen had been withheld under the exemption conferred by section 38(1)(b) of FOISA, on the basis that it was personal data relating to a third party, disclosure of which would breach the data protection principles.
11. The Council added that it considered severance and redundancy payments were exempt because they are attached to an individual (rather than, say, to the post or the position of Director) and, as such, could vary depending on a number of factors such as the age of the employee, their length of service (both within the public sector in general and the Council in particular) additional contributions, absences from employment, top-up to pension etc.
12. The Council added that the Directors' severance was part of a planned early retirement / redundancy strategy which formed part of the Council's restructuring of its services.
13. In the course of the investigation, the investigating officer contacted the Council to note that the submissions received appeared to address the circumstances surrounding the severance packages, but not concerning any further employment of the individuals concerned. The Council was asked to provide the information held relating to this aspect of Mr Ewen's request, and further comments on its consideration of this.
14. Following further discussions, the Council disclosed to Mr Ewen details of the further employment of two of the individuals named in the request. The information provided:
 - a) Job titles
 - b) Nature of the work undertaken
 - c) Period of employment
 - d) Whether this was full or part time (and the number of hours worked)
 - e) For one individual, the salary band paid.
15. With respect to the actual salary paid to the former Directors, however, the Council continued to maintain that the exemption in section 38(1)(b) applied on the basis that disclosure would breach the first data protection principle.



Submissions from Mr Ewen

16. Mr Ewen stated that he believed that the exemption in section 38(1)(b) of FOISA did not apply to the information he had requested. Mr Ewen argued that, as the Council already makes public Directors' salaries – presumably in the spirit of accountability in spending public money – severance deals should be considered an integral part of remuneration and that too should be open to public scrutiny.
17. Mr Ewen also supplied details of a UK Information Commissioner decision (FS50062124) which he felt was relevant and set a precedent which should be considered in this case.

The Commissioner's Analysis and Findings

18. I have considered both the Mr Ewen's and the Council's submissions in determining this case. I am satisfied that no matter of relevance has been overlooked.
19. This investigation focussed on whether the Council's decision to withhold the information requested by Mr Ewen, on the grounds that the exemption in section 38(1)(b) read in conjunction with 38(2)(a)(i) or (b) applied, was in compliance with the requirements of Part of FOISA.

Section 38 of FOISA – Personal information

20. The exemption relied on by the Council was that contained in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b).
21. Together these sections provide that personal data is exempt information if its disclosure to a member of the public would breach any of the data protection principles set out in Schedule 1 of the DPA. In considering this exemption, I must therefore decide whether the information which has been withheld from Mr Ewen is personal data.
22. Personal data is defined in section 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 Appendix 1).



23. The information which was requested by Mr Ewen, and which was initially withheld in full by the Council is:-
- a) the amount of each severance payment made to six former Directors;
 - b) details of the severance package for each Director (e.g. statutory redundancy pay, pension, lump sums etc.);
 - c) copies of correspondence between the Council and each of the Directors in connection with the severance deals;
 - d) details of any employment relationship since entered into between the Council and the former Directors (including job title, nature of work, period of employment and remuneration for that work).
24. In relation to point d), above, the Council decided no longer to rely upon the exemption in section 38(1)(b) to withhold most of the relevant information in the course of my investigation. It disclosed all of the information sought except for the actual salaries paid to the two former Directors concerned. In relation to one of these former Directors, the salary banding was already in the public domain and was provided to the applicant. The Council maintained that the actual remuneration for both of the former Directors should be withheld as this constituted personal information, disclosure of which would breach the first data protection principle.
25. I am satisfied that all of the information that the Council continues to withhold in this case relates to the former Directors, and their financial and contractual arrangements with their employer. They can be identified from this information. This information relates to their private lives in a significant sense. Given these observations, I am satisfied that the information sought by Mr Ewen is personal data.
26. I must now go on to consider whether release of this information would breach any of the data protection principles. The Council has argued that release of this information would contravene the first data protection principle.
27. 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 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 of the DPA is also met.
28. Having examined the information requested I am satisfied that none of the personal data is "sensitive personal data" as defined by section 2 of the DPA. I am therefore only required to consider whether the release of the information to Mr Ewen would be fair and lawful and whether the release is permitted by a condition contained in Schedule 2 of the DPA.



Fairness

29. In considering the question of whether the release of this information would be fair to the data subjects, I have taken into account guidance issued by the Information Commissioner, who is responsible for regulating and overseeing the DPA and, in particular, his guidance note "Freedom of Information Act Awareness Guidance No 1.
30. As I have noted in previous decisions, this guidance suggests that, in thinking about fairness, it is likely to be helpful to ask whether the information relates to the private or public lives of the individual. It also suggests that information which is about the home or family life or an individual, his or her personal finances, or consists of personal references is likely to deserve protection. By contrast, information which is about someone acting in their official or work capacity could be provided on request.

Evidence submitted by Mr Ewen

31. As mentioned previously, Mr Ewen submitted evidence which he felt set a precedent in releasing the information in relation to the Directors' severance deals.
32. Among the evidence was a decision by the Information Commissioner (FS50062124.) This was in relation to a complaint made under the Freedom of Information Act 2000 (FOIA) in which a request for information made to Corby Borough Council was refused under the terms of section 40 of FOIA (the equivalent of section 38 of FOISA.) In that case the Information Commissioner decided that the information should be released and provided reasons for that decision.

Evidence submitted by the Council

33. The Council submitted that, while there was no formal compromise agreement entered into between the parties in relation to items a), b) and c), it was custom and practice for the terms, conditions and details of severance payments to be kept private and confidential. This was underlined by all correspondence in relation to the redundancy settlement being posted to the individuals' home addresses and being marked "Personal." The Council contended that there was an implied obligation of confidentiality.
34. The Council added that it had consulted the former Directors for their views on disclosing the severance and pension details. In all cases the former Directors had refused to give consent to the release of the information.



35. The Council also advised me that the redundancy payments made to the Directors were calculated on the basis of: the employee's current wage/salary as at the time of redundancy; the date of entry into continuous local authority service; the number of years of continuous service (calculated as an expression of pensionable service) and the employee's age at leaving employment. As such, the information related more to an individual's totality of service, financial contributions and personal circumstances, than to any seniority or position of authority they enjoyed due to their post.

Whether it would be fair to release items a), b) and c) (regarding severance)

36. In general, I find the reasoning set out within the Information Commissioner's decision in case FS50062124 (Corby Borough Council) to be persuasive and also agree with the general principle that there is a legitimate public interest in details of the amount of money spent on employing senior staff being made available in order to increase accountability and transparency.
37. I further agree that there should be a reasonable expectation that senior officials acting in their professional capacity are open to increased scrutiny and that this may be extended to include their salaries, expenses and terms or employment.
38. However (and though I am not familiar with the full circumstances of that case) I do not necessarily find this reasoning to be directly applicable in the current case. I note that in that decision the Information Commissioner considered specifically the salary and expenses of the officer concerned and was not required to consider pensions or redundancy packages. As such, although I have considered FS50062124, I am not persuaded that it is entirely relevant to the case currently before me.
39. I have also taken into consideration Awareness Guidance on section 40 of FOIA produced by the the Information Commissioner's Office. In that guidance the Information Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.



Conclusions

40. I am inclined to accept the Council's contention that there is a degree of confidentiality implicit when providing details of redundancy settlements to individuals. This, combined with the Directors' stated refusal when asked by the Council to release the information, leads me to conclude that there was little or no expectation on the part of the former Directors that this information would be otherwise made available and also to conclude that release of this information would cause distress to these individuals.
41. Having taken into account the information which has been withheld, I take the view that it is relevant in considering the seniority of the individuals concerned to consider how redundancy payments, pension lump sums and annual pension contributions are calculated and that the actual payments made to the individual in question reflect the totality of their working careers and the life choices made by those individuals.
42. To my mind there is an important distinction to be made between the salary, terms and conditions an individual currently enjoys as a senior public servant and those they have accrued over the period of their working life. In the former situation they are being held properly accountable in the senior position they currently hold. However, that individual may not have always been in that position of seniority and I must consider the fairness of releasing information that provides details of an individual's past employment history prior to any position of seniority.
43. On the basis of the submissions made by the Council I am persuaded that this information goes beyond that of benefits related to an individual's seniority - which is linked to the post they occupy (or occupied) - and steps into details of the employment history of individuals, insofar as it would also include employment details prior to any Directorship held.
44. As such I am satisfied that it would not be fair to release the information set out in a), b) and c) in paragraph 23, above, as the individuals have no expectation that such information will be released; and, to do so, will reveal details beyond those of seniority (e.g. of an individual's personal finances and home / family life.) I therefore need not consider whether the release of the information would be otherwise lawful or whether the disclosure of the information would be permitted under a condition in Schedule 2 of the DPA.
45. Having concluded that disclosure of this information would be unfair for the purposes of the first data protection principle, I am satisfied that the Council correctly applied the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) to this information.



Would it be fair to release actual salaries as requested in part d)?

46. As previously stated, the Council still maintains that the part of the information requested as set out in part d) of paragraph 23 above relating to the remuneration received by the former Directors for *re-employment* with the Council is also exempt from disclosure under section 38(1)(b) of FOISA. I am satisfied that the remuneration of these individuals also constitutes their personal information.
47. I am also persuaded that it would be unfair to release details of these individuals' remuneration. While the salary band for one post is in the public domain, the actual salary received by the individual is not. In the second case, an hourly rate was negotiated between the individual and the Council based upon that individual's experience, skills and knowledge. I am satisfied that such fine-grain detail of actual earnings relates to the personal finances of these individuals and is therefore more likely to be a private matter. The Council advised that individuals' specific earnings were not commonly released and both former Directors had stated their opposition to the specific sums they earned in their re-employment being released to Mr Ewen.
48. In my view, the two former Directors would have no expectation that details of their specific wage or salary would be released. In addition, they no longer occupy the position they once held within the Council. As such, I agree with the Council's position that the seniority, responsibility and therefore the scrutiny and accountability of these individuals' salaries is less warranted. I am persuaded that being employed on a temporary basis to undertake specific functions affords these individuals' personal data the same protection as any other employee of the Council below the level of Director or Head of Service. I am therefore satisfied that the release of the specific salary information in item d) would not be fair.
49. Having concluded that disclosure of this information would be unfair for the purposes of the first data protection principle, I am satisfied that the Council correctly applied the exemption in section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) to this information.

Information supplied in the course of the investigation

50. The Council has now supplied to Mr Ewen the remaining parts of the information he had requested under part d) of his request as set out in section 23 of this decision, although it had originally maintained that this information was exempt information under the terms of section 38(1)(b).
51. The Council no longer sought to rely upon this exemption once questioned on this specific information by my Office, and I am satisfied that the exemption was incorrectly applied when the Council first responded to Mr Ewen's request and conducted an internal review.



52. By misapplying the exemption and withholding this information, I therefore conclude that the Council failed to comply with the requirements of Part 1, and particularly section 1(1) of FOISA.
53. As the Council has provided this information to Mr Ewen in the course of my investigation, I do not require it to take any steps in response to this decision.

Decision

I find that Aberdeen City Council (the Council) acted partly in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Ewen's information request. I have found that the Council correctly applied the exemption in section 38(1)(b) of FOISA read in conjunction with 38(2)(a)(i) or (b) to the information sought by parts a), b), c) of the request (as described in paragraph 23 of this decision) and to the salary information sought in part d). Accordingly, the Council acted in accordance with Part 1 of FOISA by withholding the information in response to Mr Ewen's request.

However, I have found that the Council incorrectly applied the exemption in section 38(1)(b) of FOISA read in conjunction with section 38(2)(a)(i) or (b) to the remainder of the information sought in part d) of the request. By failing to provide this information, I have found that the Council breached Part 1, and specifically section 1(1), of FOISA. Given that the Council has now released the non-exempt information in part d) of the request to Mr Ewen, I do not require Aberdeen City Council to take any remedial action in response to this decision.

Appeal

Should either Mr Ewen or Aberdeen City 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 notice.

Kevin Dunion
Scottish Information Commissioner
22 October 2007



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.

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.