

Decision Notice



Decision 192/2011 Rebecca Gordon-Nesbitt and Culture and Sport Glasgow
(Trading) CIC (trading as Glasgow Life)

Correspondence and minutes of meetings between Glasgow Life and various
Trade Unions

Reference No: 201002017
Decision Date: 21 September 2011

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Rebecca Gordon-Nesbitt (Ms Gordon-Nesbitt) asked Culture and Sport Glasgow (Trading) CIC (Glasgow Life) for information pertaining to discussions with trade unions surrounding its review of staff terms and conditions and other matters. Glasgow Life provided some information to Ms Gordon-Nesbitt, but withheld the remainder on the basis that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views (section 30(b)(ii)). Following a review, Ms Gordon-Nesbitt remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, Glasgow Life disclosed additional information to Ms Gordon-Nesbitt, but sought to rely on two further exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA) to withhold the remaining information (substantive prejudice to the effective conduct of public affairs) (section 30(c)) and personal data (section 38(1)(b)).

The Commissioner found that some of the information which had been withheld was not exempt from disclosure under FOISA and he ordered the Glasgow Life to disclose this information to Ms Gordon-Nesbitt.

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); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 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 conditions – definition of "personal data"); 2(d) (Sensitive personal data); Schedule 1 (The data protection principles, Part I - The principles) (the first data protection principle); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 1 and 6(1)) and Schedule 3 (Conditions relevant for purposes of the first principle: processing of sensitive personal data (condition 1)

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Recital 26

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. The information sought by Ms Gordon-Nesbitt relates to negotiations between Glasgow Life and various trade unions, some of which had taken place and some of which were still ongoing at the time of the request, regarding changes to the terms and conditions of employment of Glasgow Life employees which were implemented in April 2010. Industrial action took place on several occasions during the summer of 2010 and, at the time of Ms Gordon-Nesbitt's request, the issues were still unresolved.
2. On 6 August 2010, Ms Gordon-Nesbitt wrote to Glasgow Life requesting the following information:
 - i. the minutes of meetings which had taken place between Glasgow Life employees/board members and trade union representatives since the start of 2010, and copies of other correspondence (letters, emails, telephone calls) exchanged;
 - ii. a copy of the Company's Budget Plan submitted by the Chief Executive to the Board at the 31 March 2010 meeting and
 - iii. further details of the latest planned name change, i.e. what stage discussions were at with Glasgow City Council (the Council) and whether a rebranding process had been/would be embarked upon.
3. On being asked by Glasgow Life to clarify the scope of her request, Ms Gordon-Nesbitt narrowed her request by stating that she was particularly interested in the review of staff terms and conditions and any discussions thereof, within Glasgow Life and with the trade unions.
4. Glasgow Life responded on 8 September 2010, providing the information requested at points ii. and iii. of Ms Gordon-Nesbitt's request, but withholding the information at point i. under section 30(b)(ii) of FOISA (substantial inhibition to the free and frank exchange of views).
5. On 15 September 2010, Ms Gordon-Nesbitt wrote to Glasgow Life, requesting a review of its decision. Ms Gordon-Nesbitt considered that it was in the public interest for the information which Glasgow Life had withheld to be made available. She also requested some clarification in respect of the information provided in response to point iii. of her request.
6. Glasgow Life notified Ms Gordon-Nesbitt of the outcome of its review on 8 October 2010 and provided clarification in respect of point iii. of her request. In respect of point i., Glasgow Life upheld the application of the exemption at section 30(b)(ii) of FOISA.
7. On 21 October 2010, Ms Gordon-Nesbitt wrote to the Commissioner, stating that she was dissatisfied with the outcome of Glasgow Life's review in respect of point i. of her request and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Ms Gordon-Nesbitt 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 26 October 2010, Glasgow Life was notified in writing that an application had been received from Ms Gordon-Nesbitt and was asked to provide the Commissioner with the information withheld from her. Glasgow Life provided the information and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted Glasgow Life, 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. Glasgow Life was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
11. On 17 December 2010, Glasgow Life advised that, as a result of changing circumstances, it was now releasing some of the withheld information to Ms Gordon-Nesbitt. (Glasgow Life disclosed information which had come into the public domain following the proposal put to the trade union members; statutory notices relating to industrial action and information which, given the change in circumstances, Glasgow Life now believed could be released without the likelihood of substantial inhibition to the free and frank exchange of views between the parties.) However, Glasgow Life also advised the Commissioner that it wished to apply on two additional exemptions to withhold the remaining information, i.e. section 30(c) (substantial prejudice to the effective conduct of public affairs) and section 38(1)(b) (personal data) of FOISA.
12. Ms Gordon-Nesbitt was given an opportunity to make comments or submissions and she did so. She confirmed that she wished the scope of the investigation to cover only the information still being withheld from her.
13. In addition, in respect of the exemption at section 38(1)(b) of FOISA, Ms Gordon-Nesbitt stated that she had no objections to the personal details of those mentioned in the documentation being withheld, but that she would like job titles/roles/positions disclosed in order to make sense of the discussions. She confirmed that she did not require the disclosure of names, signatures, email addresses, fax numbers or telephone numbers within the correspondence, with the exception of the names of those redacted from the minutes of the meetings between Glasgow Life and the trade unions, on the grounds that disclosure of these names would help to make sense of the discussions.

Commissioner's analysis and findings

14. 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 Ms Gordon-Nesbitt and Glasgow Life and is satisfied that no matter of relevance has been overlooked.



The scope of the investigation

15. Glasgow Life grouped the information withheld from Ms Gordon-Nesbitt into four separate bundles:
 - (1) Industrial Dispute Notification
 - (2) Budget and Service Plan Correspondence
 - (3) Budget and Service Plan Notes of Meetings and
 - (4) Conditions of Service.
16. Some of the documents in these bundles had been disclosed in a redacted form. Ms Gordon-Nesbitt, having had an opportunity to consider the redacted versions of documents disclosed from Bundle (1), confirmed that she did not want the Commissioner to consider whether any of the information which had been redacted should be disclosed to her. However, where documents had been withheld in their entirety, she wished the Commissioner to consider the documents in full in his investigation.
17. The Commissioner will therefore consider all of the documents in Bundles (2), (3) and (4) along with documents 12 and 30 and the appendices to documents 1, 2, 9, 10, 14, 15, 19, 20, 27, 28 and 29 in Bundle (1).
18. Glasgow Life cited the exemption in section 38(1)(b) of FOISA in respect of information which the Commissioner has grouped in the following way:
 - (1) job titles/designations of Glasgow Life staff and trade union staff, contained in correspondence throughout the documentation;
 - (2) listings of the named trade unions to which correspondence was circulated, throughout the documentation;
 - (3) appendices containing trade union membership information attached to documents 1, 2, 9, 10, 14, 15, 19, 20, 27, 28 and 29 in Bundle (1);
 - (4) the names and initials of persons attending meetings in documents contained in Bundles (3) and (4);
 - (5) the first and second attachments to document 37 and the second attachment to documents 42 and 43 in Bundle (2);
 - (6) documents 24 and 40 and the first attachments to documents 42 and 43 in Bundle (2); and
 - (7) a single sentence contained in document 20 in Bundle (2) (duplicated in document 21).
19. The exemptions in sections 30(b)(ii) and 30(c) of FOISA were cited by Glasgow Life in respect of the information contained in documents 12 and 30 in Bundle (1) and various information made up of correspondence and notes of meetings between Glasgow Life and the trade unions, contained throughout Bundles (2), (3) and (4).



20. Glasgow Life applied the exemption in section 30(b)(ii) of FOISA with the caveat that, should the Commissioner not find this exemption to apply, it wished him to go on to consider the exemption in section 30(c). The Commissioner will therefore, in the first instance, consider part 30(b)(ii).

Section 30(b)(ii) - free and frank exchange of views for the purposes of deliberation

21. In order to rely on the exemption in section 30(b)(ii), Glasgow Life must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
22. Glasgow Life stated that the subject matter of Ms Gordon-Nesbitt's request was a live issue at the time the request was made (6 August 2010). It explained that the discussions centred on changes to workers' terms and conditions in areas such as enhanced payments and overtime payments. Following a failure to reach agreement with the trade unions, changes were imposed on 1 April 2010. The trade unions were opposed to the changes and balloted members on industrial action. Subsequent strikes took place across all Glasgow Life venues between April and July 2010. In addition, a number of localised strikes took place, and a ban on overtime by certain employees commenced on 21 May 2010. In September 2010, following a request by the trade unions, Glasgow Life and the trade unions agreed to problem solving discussions at the Advisory, Conciliation and Arbitration Service (ACAS) and these took place in October/November 2010. A subsequent proposal was put to members by the trade unions, but was not accepted.
23. In its letter to the Commissioner of 17 December 2010, Glasgow Life submitted that the matter still remained a live issue, with the trade unions considering their position, albeit that there was no current mandate for industrial action.
24. Glasgow Life explained that the purpose of its meetings with the trade unions was to discuss and debate the proposed changes and consider any additional or alternative proposals. It submitted that the discussions, and any record taken of them, along with the contents of correspondence between the parties, clearly constituted an exchange of views.
25. Furthermore, Glasgow Life submitted that, whilst it was not explicitly stated, it is understood between the parties that such exchanges would be confidential in order that views may be exchanged freely. Glasgow Life pointed out that this was evidenced by the fact that the Joint Trade Unions Conference confirmed on behalf of the various trade unions involved that they strongly objected to the disclosure of the information and believed it should remain confidential.
26. Glasgow Life stressed that it was of the view that releasing any of the information which it continued to withhold would have a substantial inhibiting effect on the relevant trade unions and on Glasgow Life itself. Given the current financial difficulties in the public sector, Glasgow Life submitted, it would be likely that the same parties would be required to discuss similar measures in the near future and disclosure of the information in question would substantially inhibit such discussions.



27. It was the view of Glasgow Life that, if such exchanges were released, it would be likely that the parties would be criticised for some of these views and opinions expressed, or for changing position on certain matters. As such, the participants would be extremely unlikely to give opinions freely or consider compromises in the future if they considered it likely that these would be made public. Glasgow Life asserted that the inhibiting effect was neither remote nor hypothetical.
28. The Commissioner has considered the information withheld from Ms Gordon-Nesbitt carefully in light of Glasgow Life's submissions. He notes that the information consists of views and opinions put forward by Glasgow Life and by the trade unions, both in the course of meetings and through correspondence. He is also aware that Glasgow Life has released some of the information relating to its own views and opinions expressed during the negotiation process on the basis that it does not consider this particular information to be sufficiently sensitive or controversial as to invoke the exemption. However, the Commissioner notes that no information relating to the views and opinions of the trade unions has been released as Glasgow Life considers that all such information is sufficiently sensitive as to invoke the exemption.
29. Having examined the content of the information, the Commissioner is satisfied, for the reasons put forward by Glasgow Life, that the disclosure of the minutes of the meetings and the correspondence between Glasgow Life and the trade unions would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. He considers that such inhibition would be likely to affect those participants in future negotiations, within the discussions themselves as well as in recording and sharing their recollections of the discussions and opinions on the outcomes of such discussions.
30. As a result, the Commissioner finds that the exemption in section 30(b)(ii) was correctly applied by Glasgow Life to the information withheld from Ms Gordon-Nesbitt.

The public interest test

31. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where the exemption is found to apply, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).

Public interest submissions from Ms Gordon Nesbitt

32. Ms Gordon-Nesbitt considered that due regard should be paid to the number of employees transferred from the Council to Glasgow Life under TUPE legislation, who have been affected by the review, and who would have an interest in the content of the information which had been withheld. In addition, she commented that Glasgow Life had been set up as part of a new model of devolution separate from the Council on the understanding that it would be democratic and transparent. She believed that disclosure of the information would assist in the processes of democracy and transparency.



Public interest submissions from Glasgow Life

33. While accepting that there is a public interest in making information available in order to improve accountability, and that the proposed changes affected a large number of employees who would therefore have an interest in the information, Glasgow Life was of the view that the release of the information would make it much less likely that agreement would be reached between itself and the trade unions on this topic (or on a similar topic) in the future, which would in turn worsen industrial relations and make industrial action more likely.
34. Glasgow Life asserted that, whilst the information may be of interest to the public, it would not be in the public interest to release the information, and that the public would be better served by improved relations between Glasgow Life and its employees and the trade unions, which would in turn lessen the likelihood of industrial action affecting the provision of services to the public.
35. In relation to the employees themselves, Glasgow Life submitted that it is in their interests that the information be withheld. It stated that the disclosure of the information would make it less likely that the trade unions and Glasgow Life would negotiate freely, in turn making compromise and agreement far less likely, which would not be in the employees' interest. Glasgow Life noted that discussions with trade unions take place with a view to reaching agreement on proposals to be put to employees, who then have the opportunity to consider them.
36. Glasgow Life pointed out that it had considered the effect of the passage of time on the sensitivity of some of the information and had selected the information it felt it could be released without inhibiting the future exchange of views (this was the information which it disclosed to Ms Gordon-Nesbitt during the investigation). If required to release any further information, Glasgow Life argued, it would have a serious and detrimental effect on relations with the trade unions, who are of the view that the process was, and should remain, confidential.

The Commissioner's conclusions on the public interest

37. In past decisions, the Commissioner has stated that, in instances where deliberations have ended, the public interest in openness and accountability would generally tend towards release of the information. However, in this particular case, the Commissioner is mindful of the fact that sensitive negotiations were still ongoing at the time of Ms Gordon-Nesbitt's request and her request for review (the Commissioner must consider the position as at the time the review was carried out). Even had this not been the case, he is of the view that where disclosure of past negotiations could reasonably be expected to prejudice current or future negotiations or cause some other harm, then this would also weigh heavily in the balance in applying the public interest test.



38. The Commissioner accepts that there is a public interest in the employees of Glasgow Life having an insight into what is being discussed. Those who are members of the trade unions and who entrust this negotiating role to their representatives may have a particular interest in knowing whether the position adopted by the negotiators reflects their mandate. A wider public interest could be argued for the taxpayer in monitoring the efforts made by the employer to secure efficiencies or restrain costs.
39. However, the Commissioner must also give weight to the fact that there is a strong public interest in withholding the information in order to allow individuals who are involved in such negotiations to be left free to consider all options without being constrained by concerns over presentational issues or being overshadowed by the risk of potential industrial unrest.
40. The Commissioner considers that the views of the trade unions involved in the negotiations also require to be taken into account; he notes that the trade unions' representative was provided with copies of all the information under consideration by Glasgow Life and that the representative expressed his concern that information provided to Glasgow Life by the trade unions on a confidential basis may be disclosed into the public domain.
41. The Commissioner recognises that there is a real danger that disclosure of Glasgow Life's negotiating positions or those of the trade unions could lead to pressure on these parties to adopt particular positions on specific issues in anticipation of the information becoming public knowledge, and that this could harm or seriously impede the negotiation process itself. The likelihood of significant harm to the negotiating process on such a sensitive issue as workers' terms and conditions leads the Commissioner to conclude that disclosure of the redacted and withheld information contained in the correspondence between and the notes of meetings between Glasgow Life and the trade unions would not be in the public interest in this instance.
42. It is the view of the Commissioner that the interest in knowing what had been discussed up until the time of Ms Gordon-Nesbitt's review request does not overturn the harm which would be caused by disclosure of information relating to both the ongoing negotiations and to future negotiations.
43. Taking into account the information which has already been supplied to Ms Gordon-Nesbitt by Glasgow Life (including a lot of its own views and comments from the minutes of meetings with the trade unions), the Commissioner does not accept that there are sufficiently strong public interest arguments to justify the disclosure of the remaining information in the interests of transparency and public participation in the decision-making process when to do so would, or would be likely to, prejudice substantially Glasgow Life's ability to conduct such negotiations in the future with trade union representatives.



44. The disclosure of the remaining information concerning the ongoing discussions over workers' terms and conditions, containing exchanges of views about sensitive issues and in which potentially contentious matters are debated and considered in a free and frank manner, could consequently serve to undermine the confidence of those involved in such negotiations. The Commissioner accepts that there is a real and significant risk that disclosure of such information could seriously impede Glasgow Life's ability to engage in free and frank deliberations with trade union representatives on matters as sensitive as enhanced payments and overtime payments if it was expected that their deliberations would be made available to the public at large.
45. The Commissioner concludes that, on balance, the public interest lies in allowing Glasgow Life and the trade unions to carry out any negotiations concerning pay arrangements without undue concerns over disclosure endangering the negotiation process itself. Consequently, the Commissioner finds that, in this case, the public interest in disclosing the remaining information in Bundles (1)-(4) withheld under section 30(b)(ii) of FOISA is outweighed by the public interest in maintaining the exemption.
46. Given his conclusions on section 30(b)(ii) of FOISA, the Commissioner is not required to consider whether section 30(c) applies.
47. The Commissioner will now go on to consider the exemption in section 38(1)(b) of FOISA.

Section 38(1)(b) - personal information

48. Glasgow Life has applied the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i), to the withheld information contained in the groups noted at paragraph 18 above.
49. Section 38(1)(b) (read with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)) of FOISA exempts information from disclosure if it is "personal data" as defined in section 1(1) of the DPA and its disclosure would contravene one or more of the data protection principles contained in Schedule 1 to the Data Protection Act 1998 (the DPA). This particular exemption is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA.
50. In order to rely on this exemption, therefore, Glasgow Life must show firstly that the information being withheld is personal data for the purposes of the DPA, and secondly that disclosure of the information into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.
51. Glasgow Life has submitted that all of the information it has withheld under section 38(1)(b) of FOISA is personal data, disclosure of which would contravene the first data protection principle on fair and lawful processing.



Is the information personal data?

52. As noted in paragraph 13 above, Ms Gordon Nesbitt has agreed that the personal details (e.g. names and contact details) of individuals can be withheld in certain cases. However, the Commissioner must consider whether, even with such details redacted, disclosure of the remaining information would allow individuals to be identified. He must also consider whether the names, etc. of individuals in minutes of meeting between Glasgow Life and the trade unions comprise personal data.
53. "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). The DPA gives effect to Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (the Directive) and so this has a bearing on how the DPA should be interpreted.
54. In interpreting "personal data", the Commissioner has also taken account of the opinions delivered by the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2007] 1 WLR 1550 and the opinion of the High Court of England and Wales in *Department of Health v Information Commissioner* [2011] EWHC 1430 (Admin). In the *Common Services Agency* case, the Lords concluded that the definition of "personal data" in the DPA must, in terms of recital 26 of the Directive (recital 26 is set out in full in the Appendix) be taken to permit the disclosure of information which had been rendered fully anonymous in such a way that individuals were no longer identifiable from it, without having to apply the data protection principles.
55. Recital 26 also makes it clear that, when determining whether a person is identifiable, account should be taken of all the means likely reasonably to be used to identify the data subject. As noted by the Court of Session in the case of *Craigdale Housing Associations and others v The Scottish Information Commissioner* [2010] CSIH 43, the test is whether disclosure of the information would lead to the identification of an individual or what other information when taken with the information would reasonably allow for such identification.
56. The Commissioner therefore considered whether the information requested by Ms Gordon-Nesbitt, together with other information already in the public domain (or as a result of action likely to be taken by a determined person to identify the individuals) would reasonably allow the individuals who are the subject of the information to be identified. If it would, then the information will be personal data, provided that it relates to the individual(s) in question. If it would not, the information is not personal data for the purposes of section 1(1) of the DPA, and the exemption in section 38(1)(b) will not apply.
57. The Commissioner will consider each of the information groups highlighted in paragraph 18 in turn.



Group 1- job titles/designations of Glasgow Life staff and trade union staff, in correspondence throughout the documentation

58. Glasgow Life submitted that where job titles are contained in the information, they have been redacted on the basis that they are sufficiently specific that, if disclosed, the relevant individuals could be identified by that data together with other information which is in, or may come into, the possession of the person receiving the data. Glasgow Life argued that if the job title of a person within a specific organisation and/or location was referred to, and that person was the only one or one of a small number of people who had that title, it would be possible to deduce the identity of the individual concerned using other information obtained with minimal research. Glasgow Life offered the example of an internet search potentially allowing the searcher to find out the name of an individual with a specific title in Glasgow Life or a trade union.
59. The Commissioner accepts that job titles/designations, together with other information already in the public domain (or as a result of action which is likely to be taken by a determined person to identify the individuals), would reasonably allow the individuals who are the subject of the information to be identified. The job titles/designations clearly relate to the individuals and he is therefore of the view that they comprise the personal data of individual staff members.

Group 2 - listings of the named trade unions to which correspondence was circulated, throughout the documentation

60. On certain documents, Glasgow Life has listed the names of the trade union representatives and the unions to which the information contained in the documents was circulated. As Ms Gordon-Nesbitt has stated that she does not require the names of individuals, it is solely the names of the unions which are being considered here. The Commissioner does not accept that the names of the trade unions which appear here constitute personal data as the names do not relate to living individuals.
61. The Commissioner has therefore concluded that the names of the unions are not exempt under section 38(1)(b) of FOISA.

Group 3 - appendices containing trade union membership information attached to documents 1, 2, 9, 10, 14, 15, 19, 20, 27, 28 and 29 in Bundle 1

62. The appendices in question contain either the names of Glasgow Life employees who are trade union members or those members' job titles coupled with their places of employment. Ms Gordon-Nesbitt request encompasses all of this information. The Commissioner accepts that disclosure of this information would reasonably lead to the identification of the individuals, either from the data alone or from the data combined with other information already in the public domain (or as a result of action which is likely to be taken by a determined person to identify the individuals). The data clearly relates to the individuals and he is therefore satisfied that the information is the personal data of the individuals.



Group 4 - the names and initials of persons attending meetings, in documents contained in Bundles 3 and 4

63. The Commissioner accepts that disclosure of the names and initials in question would reasonably lead to the identification of the individuals, either from the data alone or from the data combined with other information already in the public domain (or as a result of action which is likely to be taken by a determined person to identify the individuals). The Commissioner is also satisfied that the information relates to the individuals in question, given that disclosure of the names and initials would also disclose the individuals' involvement in the meetings in question. As a result, the Commissioner is satisfied that the information relates to the individuals in question and that it is their personal data.

Group 5 - the first and second attachments to document 37 and the second attachment to documents 42 and 43 in Bundle (2)

64. The first attachment to document 37 consists of a standard form to be completed by employers when redundancies are proposed. The second is a paper appended to that standard form. The Commissioner considers it necessary to address these together as the information in both is intertwined.
65. The Commissioner considers that the only personal data in these documents are the names of the four individuals named in the standard form. However, Ms Gordon-Nesbitt has made it clear that she does not require these names to be disclosed to her.
66. The standard form sets out the number of possible redundancies against the total number of employees in certain occupational groups (e.g. manual workers), but the Commissioner is not persuaded that this comprises personal data. The focus is on types of occupational groups as opposed to individuals. There is nothing to suggest that a decision has been made as to whose posts could be made redundant and, as a result, the figures do not relate to any individuals.
67. Similarly, the information in the paper appended to the standard form does not focus on individuals, but instead gives information about certain categories of posts affected by the proposals.
68. The second attachments to documents 42 and 43 consist of the same duplicated document containing a briefing note of information on staffing proposals being put forward by Glasgow Life.
69. The Commissioner does not accept that the contents of this briefing note constitute personal data. No individuals are identified in the briefing note and the Commissioner is of the view that the focus of the information is on the operational effects of the proposed new operational structure and not on individuals. As such, he does not consider that the information is personal data.



70. As the Commissioner has concluded that the relevant information in the attachments to document 37, and the information in the second attachments to documents 42 and 43 is not personal data, he must find that the information is not exempt from disclosure under section 38(1)(b) of FOISA.

Group 6 - documents 24, 40 and the first attachments to documents 42 and 43 in Bundle (2)

71. These contain tables of analyses of Glasgow Life sports operations broken down by employee roles and containing various figures outlining the current pay structure and the proposed pay structure for these employees. Unlike the documents referred to in paragraphs 66 to 70 above, the information is much more specific in relation to individuals, including details about the current grades of specific staff, their salary, etc. The Commissioner accepts that disclosure of the information in the tables would identify individuals; the figures, when coupled with other information already in the public domain (or as a result of action which is likely to be taken by a determined person to identify the individuals) is likely to lead to identification. The information clearly relates to the individuals in question and the Commissioner is therefore satisfied that it comprises personal data.

Group 7- a single sentence contained in document 20 in Bundle (2) (duplicated in document 21)

72. Documents 20 and 21 are letters from Glasgow Life to two trade unions and the sentence in question relates to the length of service of a particular Glasgow Life employee.
73. The Commissioner is of the view that the individual in question could be identified from this information together with other information already in the public domain (or as a result of action which is likely to be taken by a determined person to identify the individuals). The information clearly relates to the individual and, as such, the Commissioner is satisfied that it comprises the personal data of the employee.

Conclusion on personal data

74. Given that he has found that the exemption in section 38(1)(b) of FOISA does not apply to the relevant information contained in Groups 2 or 5, he requires Glasgow Life to disclose this information to Ms Gordon-Nesbitt with the redaction of the four names of individuals contained in Group 5 as this information falls outwith the scope of the request.
75. The Commissioner will now go on to consider, in relation to the information in Groups 1, 3, 4, 6 and 7, whether disclosure of the personal data would contravene the first data protection principle.



Would disclosure contravene the first data protection principle?

76. Glasgow Life has argued that disclosure would breach the first data protection principle, which requires that personal data be processed (in this case disclosed into the public domain in response to Ms Gordon-Nesbitt's information request) 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 to the DPA is also met.
77. 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. 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.
78. Glasgow Life submitted that the information in Group 3 comprises personal data consisting of information as to whether an individual is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992). The Commissioner agrees that this is sensitive personal data for the purposes of section 2(d) of the DPA. Given the additional restrictions surrounding the disclosure of sensitive personal data, it makes sense to look firstly at whether there are any conditions in Schedule 3 which would permit the sensitive personal data to be disclosed.

Can any of the conditions in Schedule 3 of the DPA be met?

79. There are 10 conditions listed in Schedule 3 to the DPA. One of these conditions, condition 10, also allows sensitive personal data to be processed in circumstances specified in an order made by the Secretary of State and, in addition to the conditions in Schedule 3, the Commissioner has also considered the additional conditions for processing sensitive personal data as contained in legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000.
80. Glasgow Life did not consider that any of the conditions in Schedule 3 could be met in relation to the information contained in Group 3.
81. The Commissioner's guidance¹ on the section 38 exemption identifies that generally there are only two conditions in schedule 3 that would allow sensitive personal data to be processed in relation to a request for information under FOISA, namely, condition 1 (where the data subject has given explicit consent to the release of the information) and condition 5 (where the personal data has been made public as a result of steps taken deliberately by the data subject).
82. The Commissioner has not been provided with any evidence indicating that the data subjects have either given their consent for the release of the information or have deliberately made the information public in any way. The Commissioner is therefore of the view that neither condition 3 nor 5 of Schedule 3 can be met.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>



83. Having also considered the other conditions in Schedule 3, the Commissioner has come to the conclusion that there are no conditions in Schedule 3 which would permit the sensitive personal data under consideration in this case to be processed via disclosure in response to Ms Gordon-Nesbitt's information request. He therefore finds that disclosure of the trade union membership information in question would breach the first data protection principle and that the information is therefore exempt from disclosure under section 38(1)(b) of FOISA.

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

84. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit disclosure of the personal data within Groups 1, 4, 6 and 7.
85. Where a Schedule 2 condition can be met he will then go on to consider whether the disclosure of this personal data would otherwise be fair and lawful.
86. Glasgow Life was asked by the investigating officer whether the data subjects had been asked to consent to the information being disclosed. In response, Glasgow Life stated that, whilst it had not had the opportunity to approach each individual whose personal data is relevant, it had been advised by the Joint Trade Unions Forum that the trade unions did not wish any of the information to be released.
87. The Commissioner has therefore accepted that condition 1 cannot be met in the circumstances of this case.
88. Glasgow Life asserted that none of the conditions in Schedule 2 could be met in relation to any of the relevant personal data and considered that the only condition which could possibly be considered relevant in this case was condition 6. The Commissioner is of the same view.
89. Condition 6 allows personal data to be processed 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 subjects (i.e. the individuals to whom the data relates).
90. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- Does Ms Gordon-Nesbitt have a legitimate interest in obtaining the personal data?
 - If yes, is the disclosure necessary to achieve these legitimate interests? In other words, is the disclosure proportionate as a means and fairly balanced to its ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for Ms Gordon-Nesbitt's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?



91. There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Ms Gordon-Nesbitt must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to disclose the personal data to Ms Gordon-Nesbitt.

Does Ms Gordon-Nesbitt have a legitimate interest?

92. When asked about her interests, Ms Gordon Nesbitt indicated that she was particularly interested in the review of staff terms and conditions and any discussions thereof within Glasgow Life and the trade unions.
93. As noted elsewhere in the decision, Ms Gordon-Nesbitt considers that regard should be paid to the number of employees transferred from the Council to Glasgow Life under TUPE legislation, who have been affected by the review of staff terms and conditions and who, she believes, would have an interest in the content of the information which had been withheld.
94. The Commissioner is of the view that, in respect of the information contained in Group 1 (job titles/designations of Glasgow Life staff and trade union staff, throughout the documentation), Ms Gordon-Nesbitt has a legitimate interest in disclosure of this information insofar as it would allow her to make sense of the ongoing discussions between Glasgow Life and the trade unions, whether in written correspondence or in notes of meetings. She, and many other individuals, are clearly affected by the review of staff terms and conditions and by the content and outcome of negotiations relating to these.
95. For the same reason, the Commissioner is also of the view that Ms Gordon-Nesbitt has a legitimate interest in obtaining the information contained in Group 4 (the names and initials of persons attending meetings, in documents contained in Bundles 3 and 4).
96. The Commissioner will now consider the information contained in Group 6 (documents 24, 40 and the first attachments to documents 42 and 43 in Bundle 2 - tables of analyses of Glasgow Life sports operations broken down by employee roles and containing various figures outlining the current pay structure and the proposed pay structure for these employees).
97. Ms Gordon-Nesbitt wishes to access information concerning the review of staff terms and conditions. The information contained within these tables refers clearly to the financial effects that the review would have on staff, and the Commissioner accepts that Ms Gordon-Nesbitt has a legitimate interest in obtaining this information.
98. Finally, the Commissioner will consider the information contained in Group 7 - documents 20 and 21 from Bundle 2, containing one redacted sentence within letters from Glasgow Life to two trade unions, with the sentence in question relating to the length of service of a particular Glasgow Life employee.



99. Having taken into account the remit of Ms Gordon-Nesbitt's request, and noting that it focuses mainly on the review of staff terms and conditions and any discussions thereof within Glasgow Life and the trade unions, the Commissioner cannot see how information merely indicating the length of service of one particular employee of Glasgow Life could serve the interests of Ms Gordon-Nesbitt and as such he finds that Ms Gordon-Nesbitt does not have a legitimate interest in the disclosure of this piece of information. As such, he is satisfied that condition 6 does not apply to the information in Group 7 and that disclosure of this information would breach the first data protection principle. The information is therefore exempt from disclosure under section 38(1)(b) of FOISA.

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

100. The Commissioner will now consider whether disclosure of the information contained in Groups 1, 4 and 6 is necessary to achieve Ms Gordon-Nesbitt's legitimate interests.
101. It is the view of the Commissioner that disclosure of the information in Groups 1, 4 and 6 is necessary to achieve those legitimate interests. Ms Gordon-Nesbitt could not be expected to make full sense of correspondence or discussions without knowledge of the designations/job titles or the names/initials of those involved and disclosure is therefore necessary to meet those interests. Likewise, other than by disclosure, the Commissioner cannot see how Ms Gordon-Nesbitt could obtain the information contained within the tables of information in Group 6 and thus disclosure is necessary to meet her legitimate interests.

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

102. The Commissioner will first consider the information contained in Group 1. He notes that the information under consideration consists of the job titles/designations of the Glasgow Life Senior Management Team, and of senior officials from the various trade unions, engaging in correspondence with each other.
103. The Commissioner has considered the rights, freedoms and legitimate interests of the data subjects. He notes that the trade union officials in question are all senior organisers and also notes that on the Glasgow Life website the names and job titles of its Senior Management Team are already publicly available. It is the view of the Commissioner that the individuals whose job titles/designations have been withheld would have certain expectations that their personal data might find its way into the public domain given their seniority in their respective positions and the role they would be expected to play in the negotiations. He is therefore satisfied that any infringement on the data subjects' rights, freedoms or legitimate interests would be insignificant. Having balanced the respective interests, he is satisfied in this case that disclosure would not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. He is aware of no reason why disclosure should be otherwise unfair or unlawful and therefore has concluded that disclosure of the information would not breach the first (or, indeed, any other) data protection principle. As such, he finds that the information is not exempt under section 38(1)(b) of FOISA.



104. The Commissioner will now consider the information in Group 4 - the names and initials of persons attending meetings between Glasgow Life and the trade unions, in documents contained in Bundles 3 and 4.
105. The Commissioner can sympathise with Ms Gordon-Nesbitt's situation in that the redaction of the names and initials of those involved in the meetings makes it difficult to follow the thread of the discussions in question, particularly so as there are no job titles/designations available either to assist in identifying which party or parties has contributed which comments to the discussion.
106. However, the Commissioner gives weight to the sensitivity of the content of the discussions taking place. He notes Glasgow Life's submission that the topic of the discussions was highly emotive and sensitive, and the likelihood of individuals being subject to unwarranted personal criticism and distress if their comments were to be made public. The Commissioner accepts Glasgow Life's assertion that the individuals concerned were acting on behalf of their organisation and as such it is the organisation and not the individual who should be held to account.
107. While the Commissioner accepts that disclosure of the information would assist Ms Gordon Nesbitt greatly in her understanding of the discussions, he must take on board the fact that the parties involved in the discussions would likely be most reluctant to take part in future similar negotiations should they be of the view that they would be personally identified as the people making specific comments on the matters under discussion.
108. Having considered the matter carefully the Commissioner has reached the conclusion that, on balance, disclosure would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
109. The Commissioner therefore finds that condition 6 cannot be met in respect of the information contained in Group 4. This means that disclosure would breach the first data protection principle and that the information is therefore exempt from disclosure under section 38(1)(b) of FOISA.
110. The Commissioner will finally consider the information contained in Group 6 which is within documents 24, 40 and the first attachments to documents 42 and 43 in Bundle 2 - tables of analyses of Glasgow Life sports operations broken down by employee roles and containing various figures outlining the current pay structure and the proposed pay structure for these employees.



111. The information contained in the main body of the tables, the Commissioner notes, is made up of figures indicating the current and proposed payment details for Glasgow Life employees. Disclosure of this information would effectively place a wide range of details about the salaries (including actual salaries and proposed overall salaries) of a wide range individuals who could be identified should the job titles be disclosed into the public domain. The majority of the individuals in question cannot be viewed as holding senior posts and cannot have any expectation that such details would be put into the public domain. The Commissioner is of the view that disclosure of this information would impact upon the privacy of those individuals concerned. Although he can understand Ms Gordon-Nesbitt's for wanting to have this information, he must conclude that, on balance, the disclosure of the information within the main body of the tables would, in this case, be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the Glasgow Life employees. He must therefore conclude that condition 6 is not met in respect of this information. As a result, he finds that disclosure would breach the first data protection principle and that the information is exempt from disclosure under section 38(1)(b) of FOISA.
112. However, the Commissioner can see no reason why the information contained in the column headings and the job designation rows of the tables should not be disclosed to Ms Gordon Nesbitt. He is of the view that there would be no unwarranted prejudice to the rights and freedoms or legitimate interests of the Glasgow Life employees by the disclosure of this information, as it does not reveal any salary related information. He is not aware of any reasons as to why disclosure of the information would be either unfair or unlawful and he therefore finds that disclosure would not breach the first data protection principle. As such the information is not exempt under section 38(1)(b) of FOISA.



DECISION

The Commissioner finds that Culture and Sport Glasgow (Trading) CIC (trading as Glasgow Life) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Gordon-Nesbitt.

The Commissioner finds that it was entitled to withhold information under section 30(b)(ii) of FOISA and that it was also entitled to withhold some information under section 38(1)(b) of FOISA.

However, the Commissioner finds that some or all of the information in Groups 1, 2, 5 and 6 (as defined in paragraph 18) is not exempt from disclosure under section 38(1)(b) and that, by withholding non-exempt information, Glasgow Life failed to comply with Part 1 of FOISA

The Commissioner therefore requires Glasgow Life to disclose the following information to Ms Gordon-Nesbitt: the information contained in Groups 1 and 2 in full; the information contained in Group 5, subject to the redaction of the four names in question and the information contained in Group 6, subject to the redaction of the information in the main tables.

The information must be disclosed by 8 November 2011.

Appeal

Should either Ms Gordon-Nesbitt or Glasgow Life 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
21 September 2011



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.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

(b) would, or would be likely to, inhibit substantially-

...

(ii) the free and frank exchange of views for the purposes of deliberation; or

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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;

...

2 Sensitive personal data

In this Act, "sensitive personal data" means personal data consisting of information as to –

...

(d) whether he is a member of a trade union (within the meaning of the M1Trade Union and Labour Relations (Consolidation) Act 1992),

...



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.

Schedule 3 – Conditions relevant for purposes of the first principle: processing of sensitive personal data

- 1 The data subject has given his explicit consent to the processing of the personal data.

...

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Recital 26

Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;