

Decision Notice



Decision 237/2011 Mr Craig Muncie and the Board of Management of James Watt College

Voluntary severance payments

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Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



Summary

Mr Muncie asked the Board of Management of James Watt College (the College) to provide information about the voluntary severance payments made to former College employees.

The College provided the number of employees who had received severance payments, but withheld details of the individual payments and the number of employees who had received payments in excess of the scheme's requirements. The College advised that this was personal data protected by the DPA.

After review, the College advised that the information was also exempt from disclosure under certain exemptions in FOISA. Mr Muncie remained dissatisfied and applied for a decision from the Commissioner.

The College then advised that it did not hold some of the information requested, and that it considered Mr Muncie's request to be vexatious in terms of section 14(1) of FOISA.

The Commissioner was not satisfied with the College's arguments that it held no information about payments in excess of the scheme's requirements and did not accept that Mr Muncie's request was vexatious. He also found that the withheld information could not be withheld under any of the exemptions (relating to confidentiality, personal data and commercial interests) the College had applied, if provided in a form which Mr Muncie had indicated would be acceptable. He required the College to provide Mr Muncie with the withheld information in that form, and to reconsider its response in respect of the information it had claimed not to hold.

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); 14(1) (Vexatious or repeated requests); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality) and 38(1)(b), (2)(a)(i), (2)(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"); Schedules 1 (The data protection principles: Part 1 – the principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



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 22 December 2010, Mr Muncie asked the College to provide the following information:
 - the number of individuals granted a package under the Voluntary Severance Scheme currently operating, to date from the time when the current College Principal took up office.
 - the amount paid to each individual as part of their severance package.
 - how many of these individuals were granted a severance amount in excess of the scheme's requirements.
2. On 12 January 2011, the College responded to Mr Muncie's request. The College advised Mr Muncie that 69 individuals had been granted a package under the Voluntary Severance Scheme during the period specified in his request. However, the Council refused to provide the other information requested, advising that it fell under the DPA.
3. On 18 January 2011, Mr Muncie asked the College to review its response to his request. He took the view that information about the amount paid to each individual (and whether any of these had been paid in excess of the scheme's requirements) was not information which would identify any individual or breach their right to privacy.
4. On 14 February 2011, the College wrote to Mr Muncie to advise that, having reviewed his request, it was "claiming exemption" under sections 36(1) and 33(1) of FOISA. The College did not provide any reasons for this decision.
5. On 2 March 2011, Mr Muncie wrote to the Commissioner, stating that he was dissatisfied with the outcome of the College'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 Muncie 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 10 March 2011, the College was notified in writing that an application had been received from Mr Muncie. The College responded with a letter which highlighted some preliminary concerns about Mr Muncie's information request (which the College said it now considered to be vexatious) and about his application to the Commissioner and the Commissioner's handling of the case. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the College, responding to some of the concerns it had raised, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the College was invited to confirm which exemptions (or other provisions of FOISA) it wished to rely upon and to provide a detailed explanation of why each provision was considered to apply to the information withheld in this case.
9. On 28 April 2011, the College provided the Commissioner with further information and comments in relation to Mr Muncie's application. It advised that the College did not hold some of the information requested by Mr Muncie. It argued that Mr Muncie's application, read in context, was vexatious in terms of section 14(1) of FOISA. It confirmed its reliance on the exemption in section 36(2) of FOISA, and also advanced arguments relating to the College's commercial interests and the requirements of the DPA, but without explicit reference to sections 33(1)(b) and 38(1)(b) of FOISA.
10. Mr Muncie was advised by the investigating officer that the College did not now accept that it held information about payments in excess of the Voluntary Severance Scheme's requirements, because it did not accept that the scheme contained any "requirements". Mr Muncie confirmed that in this part of his request he had been seeking information about payments at a level over and above the terms of the Voluntary Severance Scheme (i.e. twice the gross weekly wage per week of service). Mr Muncie provided details of the Voluntary Severance Scheme to the Commissioner.
11. The College was asked to comment on Mr Muncie's clarification and responded on 10 June 2011, upholding its view that it did not hold the information.



12. On 27 July 2011, the investigating officer advised the College that Mr Muncie would be prepared to accept some additional anonymisation of the information about the payments. The format suggested was the number of payments made within a series of £5,000 bands, e.g. one payment between £0 and £5,000, three payments between £5,001 and £10,000 and so on (these figures are simply examples). The College was also advised that the Commissioner had issued a revised version of a decision (*Decision 014/2009*, relating to the definition of “personal data”) to which the College had made reference in its submission¹. The College was asked whether it would be prepared to reconsider its decision to withhold information about the voluntary severance payments made to employees.
13. The College offered to provide payment information in bands of £15,000, but this was not acceptable to Mr Muncie. The College then provided a further submission in relation to personal data, which considered issues raised by the revised *Decision 014/2009*.
14. The College’s submissions and those of Mr Muncie are (where relevant) summarised and considered in the Commissioner’s analysis and findings section below.

Commissioner’s analysis and findings

15. 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 Muncie and the College and is satisfied that no matter of relevance has been overlooked.

Section 14(1) – vexatious

16. Section 14(1) of FOISA states that a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
17. In this case, the College sought to apply section 14(1) in its submissions to the Commissioner, having responded to Mr Muncie’s initial request for information and his request for a review.
18. The Commissioner has noted the reasons put forward by the College to support its view that section 14(1) is applicable. The College has expressed concerns about the motivation behind Mr Muncie’s request for information, and his argument that there was a public interest in disclosure of information relating to “a potential misuse of public funds where funds may have been given to friends or enemies of the College management in excess of what they were entitled to”. It did not believe there to be any basis for this assertion and considered the language used to be inappropriate.

¹ Decision 014/2009 Dunbritton Housing Association, Craigdale Housing Association and Blochairn Housing Co-operative and the Chief Constable of Strathclyde Police

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



19. The Commissioner does not consider the fact that Mr Muncie's application for a decision refers to a potential misuse of public funds to be relevant to the question of whether the request made by Mr Muncie was vexatious in terms of section 14(1). Mr Muncie was entitled to raise with the Commissioner a matter which he believed to be of public interest. The College has now been given an opportunity to comment on Mr Muncie's application, as required by section 49(3)(a) of FOISA. The Commissioner will consider all arguments put forward in relation to the public interest in disclosure or non-disclosure of the withheld information when considering the exemptions cited by the College, to the extent that he is required to do so by FOISA.
20. The Commissioner acknowledges that it may be appropriate for a Scottish public authority to argue in submissions to the Commissioner that section 14(1) of FOISA is applicable to a request for information, where this has not been claimed in response to the applicant's request for information or requirement for review. He would still require to be satisfied, however, that the request was vexatious. In this case, the Commissioner is not satisfied that the request is vexatious. The College's argument appears to be based entirely on the applicant's submission to the Commissioner on the public interest (the relevance of which he has addressed above), together with inferences it has drawn about his motivation. The Commissioner has been made aware of nothing in Mr Muncie's dealings with the College which would support a conclusion that the request might reasonably be considered vexatious, and in the circumstances he can see no basis for considering this question further.

Information not held

21. As noted above, during the investigation of this case, the College advised the Commissioner that it did not hold information about the number of individuals who had been granted a severance amount in excess of the scheme's requirements, despite previously advising Mr Muncie that the information was exempt from disclosure. The reason put forward by the College was that the scheme did not impose any "requirement" to make an offer of voluntary severance to an employee, or, where an offer was made, to fix the level of that offer at a defined amount. The College took the view that no information could therefore be available "supporting the making of a so-called "excess" payment". Referring to the provisions of the scheme, it contended that those who administered it had an unfettered discretion to decide on both entitlement to a payment and the amount of the payment.
22. Mr Muncie explained that this part of his request related to a document entitled "James Watt College of Further & Higher Education: Voluntary Severance Scheme" and in particular to section 2, headed "Terms". This provides for payment of "Enhanced Voluntary Severance" on the basis of a ready reckoner for calculating the number of weeks' pay due, and goes on to state:

"The College's offer is to replace the statutory maximum of £350 per week with a payment which equates to twice gross weekly pay, based on the individual's salary".

The terms for pay in lieu of notice or, where appropriate, payment of pension are then set out.

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



23. The College was advised that Mr Muncie's reference to "a severance amount in excess of the scheme's requirements" was intended to be taken as a reference to the offer based on a weekly rate of twice gross weekly pay (as described in the previous paragraph). The College was asked to reconsider its view that it did not hold any information covered by this part of Mr Muncie's request.
24. The College argued that the scheme was couched in language which was inconsistent with the creation of mandatory elements, specific entitlement or specific expectations, and was provided purely on a discretionary basis giving rise to no contractual rights or entitlements. Referring to section 1 of the document referred to in the previous paragraph, it noted that the scheme "can be withdrawn partially or entirely or altered without notice at any time by the College and without liability". Accordingly, the College continued to maintain that no information existed about particular payments exceeding a requirement of the scheme, there being no relevant requirements.
25. The Commissioner finds the stance taken by the College to be unreasonable in the circumstances, for the following reasons. Payments have been made under the Voluntary Severance Scheme. It may be entirely at the College's discretion whether a payment is made under the scheme (subject, presumably, to the relevant requirements of administrative law), but it would appear to the Commissioner that where the College does agree to make a payment, the level of that payment is determined in accordance with section 2, as described in paragraph 22 above. In the context of Mr Muncie's request (and as clarified by Mr Muncie in the course of the investigation) it would appear entirely reasonable to interpret the provisions of section 2 as the scheme's "requirements". Presumably, that is what the College did in responding to Mr Muncie's initial request and request for review, when it appears to have understood what information was being sought under this part of the request (indicating that it was exempt from disclosure rather than not being held).
26. The Commissioner therefore believes that, on a reasonable interpretation of Mr Muncie's request, the College could hold information which would fall within the scope of the final part of the request. Indeed, it is difficult to conceive of circumstances in which that information would not be held, unless no payments exceeding the relevant requirements had been made. Consequently, the Commissioner requires the College to respond to this part of the request in accordance with Part 1 of FOISA, on the basis that there are requirements of the Voluntary Severance Scheme relating to the level of payment made.
27. The Commissioner will now go on to consider the exemptions cited by the College in relation to the remainder of Mr Muncie's request.

Section 36(2) - Confidentiality

28. 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.



29. Section 36(2) therefore contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first requirement is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
30. In this case, the Commissioner does not accept that the information withheld from Mr Muncie has been obtained by the College from another person, that information being the amount awarded to each individual as part of their severance package. The Commissioner cannot envisage the circumstances in which such information would be obtained by the College from another person: it is information which, by its nature, would be generated by or on behalf of the College. The College has made no submission on this point.
31. Because the College has not shown that the first test required by section 36(2) can be met, the Commissioner finds that the exemption was wrongly applied to the information withheld.

Section 38(1)(b) - Personal information

32. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would breach any of the data protection principles set out in Schedule 1 to the DPA.
33. The exemption in section 38(1)(b) is an absolute exemption, not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

34. In relation to information about the amount paid to each individual, the Commissioner has considered carefully whether this information is personal data as defined in section 1(1) of the DPA, in relating to living individuals who can be identified from that information.
35. Mr Muncie did not ask for the names of the individuals who received severance payments, only the amounts paid out. However, the Commissioner takes the view that within the College community it may be common knowledge that certain members of staff have accepted voluntary severance; in some cases this is likely to have been information which the departing member of staff has shared with their colleagues. The identity of some of the 69 members of staff who received voluntary severance payments is therefore likely to be known. It may also be known whether these individuals were on a relatively high or low salary grading, and whether they had been employed by the College for a short or long period: factors which might reasonably be expected to affect the amount of severance pay they received. The Commissioner accepts, however, that it is much less likely that the amount each individual received would already be public knowledge.

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



36. In this case, therefore, the issue under consideration is not the identities of the 69 individuals who received payments – as noted above, the Commissioner believes it likely that some of these individuals will already have been identified, generally through their own actions – but rather whether disclosure of the amounts paid to 69 unnamed individuals would, on its own or in conjunction with other available information, allow a third party to establish how much money any or each identifiable individual received. If it could be established that a certain payment was made to an identifiable individual, the amount paid would be their personal data.
37. The College advised that Mr Muncie, in his capacity as a trade union official, had access to “relevant knowledge” which a lay applicant would not and argued, therefore, that there was a significant risk that some of the individuals in question could be identified. As an official of the EIS-FELA trade union, Mr Muncie was likely to have access to a database containing the personal details of at least some of the 69 individuals who received severance payments; the College advised that approximately half of those persons were EIS members, and that it understood the EIS had discussed voluntary severance payments with staff members who were also EIS members. The College submitted that Mr Muncie might therefore already be aware of, or in a position to find out, the amounts paid to EIS members: alternatively, it conceded, those members might have elected to keep those amounts private.
38. The College believes that if Mr Muncie has means of identifying some of the individual recipients, he is more likely to be able to identify the other individuals, by a process of elimination. The College has also stated that, in its view, there remains a risk that individuals will be identified when other available information about the Voluntary Severance Scheme is taken into account. However, the College noted the test considered in paragraph 73 of the re-issued *Decision 014/2009*, namely “why disclosure *would* [their emphasis] result in the figures being unlocked and permit identification of any of the individuals represented in the statistical cohorts in these cases”. The College felt that while it could set out reasons why this *could* be the result, the threshold seemed to have been raised.
39. The Commissioner does not accept that the College has shown how disclosure of the financial data requested would, or could, permit identification of the any of the individuals who received the money. It has not shown how the identity of any recipient of voluntary severance pay could be established through disclosure of the amounts paid out to 69 individuals, or how the combination of information about the amounts paid and other available information could lead to the identification of any of the 69 individuals, where this was not already known.
40. However, the Commissioner has already acknowledged, in this decision, that the identities of some or all of the 69 individuals who accepted voluntary severance payments may well be known already. The issue for him to decide is not whether disclosure of the sums paid would lead to the identification of individuals who had received severance payments, but whether it would reveal the amount paid to any particular individual, which information would (in relating to them) be that person’s personal data.
41. In discussions with the Commissioner’s office during the investigation, Mr Muncie indicated that he would be satisfied if the information was presented as the number of severance payments falling within a series of £5,000 bands, e.g. £10,000 to £14,999, £15,000 - £19,999. The College was advised of this.



42. The Commissioner accepts that this information would still represent the personal data of any individual known to be one of the 69 recipients, by showing that they had received a payment between the bottom of the lowest band and the top of the highest band. The Commissioner acknowledges that it may be possible for persons with more detailed knowledge of one of the individual recipients (for example, their grade and length of service) to estimate which £5000 band was likely to represent the payment made to that person (while noting advice from the College that the precise terms of each voluntary severance offer are a matter for the sole discretion of the College).
43. The Commissioner has therefore found that the payment information requested by Mr Muncie is the personal data of the recipients of the payments. He will now go on to consider whether the personal data covered by Mr Muncie's request (whether the exact amounts paid, or the number of payments within bands of £5,000) are exempt from disclosure under section 38(1)(b) of FOISA.

Would disclosure breach the first data protection principle?

44. The College argued that disclosure of the information requested by Mr Muncie would be neither fair nor lawful, and would cause the College to breach the data subjects' rights pursuant to the DPA. The Commissioner accepts that, if this were so, disclosure would breach the first data protection principle, which 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 to the DPA is also met.
45. The Commissioner does not consider any of the personal data withheld in this case to be sensitive personal data, as defined in section 2 of the DPA. He will therefore consider only whether any of the conditions in Schedule 2 to the DPA would permit disclosure of the information.
46. The Commissioner has also noted the College's reference to disclosure breaching the data subjects' rights. He has considered whether this might be a reference to a potential breach of the sixth data protection principle, which requires that personal data shall be processed in accordance with the rights of the data subjects under the DPA. However, the interpretation provisions relating to the sixth principle make it clear that the principle is contravened only in the event of a contravention of certain specified provisions of the DPA. None of these has been identified specifically by the College, and in the absence of any relevant submissions the Commissioner is unable to identify how disclosure of the withheld information might lead to any of the provisions being contravened. In all the circumstances, therefore, the Commissioner does not find it necessary to consider the application of the sixth data protection principle further.



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

47. The Commissioner considers that condition 6 of Schedule 2 of the DPA would appear to be the only condition which might permit disclosure of the personal data requested by Mr Muncie. 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 subject.
48. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
- Does Mr Muncie have a legitimate interest in obtaining the personal data?
 - If he does, 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 subjects (the individuals to whom the data relate)?
 - Even if the processing is necessary for Mr Muncie's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
49. 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 Mr Muncie 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 College was correct to refuse to disclose the personal data to Mr Muncie.

Does Mr Muncie have a legitimate interest?

50. In his application to the Commissioner, Mr Muncie explained that he wished to ascertain whether the College had used its funds, the vast majority of which were provided by the Scottish Government, for a proper and lawful purpose. He was concerned at the lack of transparency regarding the distribution of voluntary severance payments, believing that these should be awarded fairly, and in accord with stated rules, amongst all College staff. He referred to a potential misuse of public funds relating to some severance payments potentially exceeding the recipient's entitlement, and argued that it was in the public interest for this issue to be clarified.
51. Mr Muncie was invited to explain in more detail how disclosure of the amounts paid out under the scheme to 69 un-named recipients would help ascertain whether there had been any improper or unfair payments.

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



52. Mr Muncie reiterated his view that it was a fundamental objective that funds allocated to public bodies should be spent on a proper purpose, and explained again that he had requested this information to ascertain how the College had used funds allocated by the Scottish Government for the provision of education facilities to post-16 year olds in the North Ayrshire and Inverclyde area. He believed that, in order to decide whether the purpose was proper or not, it was first necessary to establish the facts.
53. The Commissioner accepts that Mr Muncie has demonstrated a legitimate interest in information which would increase transparency and accountability in relation to public money spent on voluntary severance payments to College staff, reflecting a wider public interest in transparency and accountability in the expenditure of public funds.

Is disclosure of the information necessary for Mr Muncie's legitimate interests?

54. Having established that Mr Muncie does have a legitimate interest, the Commissioner must now go on to consider whether the disclosure of personal information is necessary for the purposes of the legitimate interest identified in the previous paragraph. He must consider whether disclosure is proportionate as a means and fairly balanced as to ends, or whether these legitimate aims could be achieved by alternative means which would interfere less with the privacy of the individuals in question.
55. The Commissioner does not accept that disclosure of the amounts paid to 69 un-named individuals, by itself, is likely to reveal whether Mr Muncie's concerns about excessive payments are justified. In order to establish whether excessive payments had been made, it appears to the Commissioner that much more information would be required about the personal circumstances of the individuals concerned, such as their length of service and pay grade (assuming that the identities of some of the employees receiving severance pay are known, or can be identified, by other means).
56. Mr Muncie may have access to additional information about recipients who are also trade union members, but on the evidence of the College this would only include around half of the recipients. The Commissioner has concluded that, even with such access, Mr Muncie would not be able to use the withheld information to establish whether his concerns about excessive payments were justified. To this extent, the Commissioner does not accept that disclosure of the information is necessary for Mr Muncie's legitimate interests.
57. The Commissioner does accept, however, that disclosure of this information would indicate how much the College had paid out in severance pay, and the range within which the payments fell. This information would increase transparency and accountability in relation to public spending. The Commissioner finds that, in this respect, disclosure is necessary for Mr Muncie's legitimate interests.

Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

58. The College has argued, with reasons, that disclosure would be a material breach of its duty of confidentiality towards its former employees.

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



59. The College also considered that, from the perspective of the individuals involved and the officers of the College who negotiated and agreed the Voluntary Severance payments, it would not be unreasonable to take into account that Mr Muncie was an active trade union member at the College, with stated purposes including an enquiry into an unsubstantiated allegation about potential misuse of public funds.
60. The Commissioner does not accept that Mr Muncie's status as an active trade union member, or his concerns (justified or not) about the potential misuse of public funds, have been shown to have any relevance to the question of whether disclosure, in the circumstances of this case, would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects.
61. The Commissioner accepts that the recipients of the severance payments would not expect the College to disclose the terms of their respective settlements to the public at large. However, the Commissioner notes that in its submission of 10 August 2011 the College offered to provide details of payments, within bands of £15,000, if this would enable Mr Muncie to withdraw his application for a decision from the Commissioner. While this was an offer of settlement, and therefore should not be taken to indicate that the College would be equally prepared to disclose this information under FOISA, the Commissioner believes it is reasonable to assume (given the tenor of its other submissions in this case) that the College did not consider disclosure of the information in this form would breach confidentiality, or otherwise be contrary to the rights, freedoms or legitimate interests of the data subjects.
62. Mr Muncie did not accept this offer of settlement, believing that the information offered by the College did not answer his original request. However, he had previously indicated that he would accept the information provided in bands of £5,000, and the College had been notified of this.
63. The difference (in terms of consequences) between disclosing the information in bands of £5,000 and bands of £15,000 has not been made clear to the Commissioner. The Commissioner is not satisfied in the circumstances that disclosure of the payment information in bands of £5,000 would breach the College's obligations of confidentiality towards the recipients, or otherwise cause unwarranted prejudice to their rights and freedoms or legitimate interests as data subjects.

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



64. The Commissioner has taken account of guidance from the Information Commissioner² regarding disclosure of public sector salary information, which includes the following:

“Disclosure should only be to the extent necessary to fulfil a legitimate public interest. This may involve narrowing down advertised scales, for example to the nearest £5,000. Only in exceptional circumstances is disclosure of exact pay likely to be justified.”

and:

“You should carefully balance the additional intrusion of releasing an exact salary against the additional value to the public. Where the additional intrusion would be unwarranted, you may still be able to release approximate salaries or salary scales.”

65. The Commissioner accepts, therefore, that disclosure of the exact amount paid to each of the 69 un-named individuals might be unfair, given their reasonable expectations in this regard, even though it would be difficult for a third party to be certain from such disclosure that a particular individual had received a particular sum. Condition 6 of Schedule 2 to the DPA would not be met, in relation to the disclosure of the exact amount paid to each individual, and such disclosure would therefore contravene the first data protection principle in the DPA.
66. In relation to the disclosure of personal data, the Commissioner notes the comments of Lord Rodger in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47:
- “... even if the information does constitute “personal data”, the [CSA] will still be obliged to supply it, if that can be done without contravening the data protection principles in Schedule 1 to the [DPA]. And, if supplying the information in one form would contravene those principles, in my opinion, section 1(1) of [FOISA] obliged [the CSA] to consider whether it could comply with its duty by giving the information in another form...”.
67. In this case, the Commissioner is satisfied that grouping the payments together in bands of £5,000 makes it impossible to establish the exact sum that any individual received.
68. He considers that, even if it were possible to link the identity of an individual who had received severance pay with one of the £5,000 payment bands, it would not be unfair to disclose that he or she had received a settlement within that band.
69. On balance, therefore, the Commissioner finds in this case (in respect of disclosure of the withheld information in £5,000 bands) that Mr Muncie's legitimate interests outweigh the rights and freedoms or legitimate interests of the data subjects. Consequently, he finds that condition 6 can be met in relation to disclosure of the information within these bands.

² Public sector salaries: how and when to disclose.

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf



70. Having reached this conclusion, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure (in £5,000 bands) would also be fair and lawful. He has already considered the question of fairness in the context of the legitimate interests of the data subjects and, for the reasons already outlined in relation to condition 6, finds that disclosure would be fair. The College has not put forward any arguments as to why the disclosure of the information would be unlawful in the context of section 38(1)(b), other than in the terms considered above in relation to condition 6. It did, however, argue that the information was confidential in nature (as stated in relation to the exemption in section 36(2) of FOISA) and that disclosure would constitute an actionable breach of confidence. The Commissioner has already determined that the exemption in section 36(2) does not apply. In the circumstances, the Commissioner can identify no reason why disclosure should be considered unlawful.
71. The Commissioner therefore finds that the College was not entitled to withhold information about the amounts of severance payments, presented within bands of £5,000, under section 38(1)(b) of FOISA (while accepting that the College was entitled to withhold information about the exact amounts paid to individual recipients, under section 38(1)(b), as condition 6 of Schedule 2 to the DPA could not be met in this respect).

Section 33(1)(b) of FOISA (commercial interests)

72. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
73. As the Commissioner's published guidance³ makes clear, there are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
74. Although the College has stated that disclosure of the information would prejudice its commercial interests, it has provided very little reasoning to explain or support its use of the exemption in section 33(1)(b). The Commissioner has identified certain parts of the submission from the College which appear to relate to its commercial interests (although for the most part this is not explicitly stated), and has considered these arguments in relation to the exemption in section 33(1)(b) of FOISA.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>



75. The College stated that, if the amounts of voluntary severance packages were made public, then the impression might be given that there was a minimum base level for every employee. Publication of the maximum figure could generate unrealistic expectations in the minds of employees contemplating acceptance of voluntary severance payments in the future. The ability of the College to negotiate voluntary severance packages would be significantly harmed if the maximum figure became public. Disclosure of the amounts paid would damage the public authority's ability to manage its business. Payments were discretionary and staff should not be given erroneous expectations that they would receive at least the lower figure or that they should hold out for the highest award received by another employee.
76. The Commissioner is not persuaded by this argument. Even if he were convinced that there were no limits placed on the sums payable under the scheme (an argument with which he has some difficulty given the terms of section 2 of the scheme, as described in paragraph 22 above), he finds the argument that staff negotiating voluntary severance terms in future would hold out for the highest reward received by another employee is unrealistic. Staff would be aware that certain factors relevant to their own specific circumstances, such as their length of service and pay grade, would be likely to affect (to some extent at least) the settlement they could hope for. In any event, although this was not apparent at the time the College dealt with Mr Muncie's information request or his requirement for review, the Commissioner notes that the College offered in the course of the investigation to provide this information to Mr Muncie, albeit within bands of £15,000: even banding the information in this way would disclose the upper and lower ends of the payment scale.
77. The College also argued that it had a strong commercial interest in maintaining the confidentiality of the amounts of payments made pursuant to the Voluntary Severance Scheme, with a view to encouraging employees to participate in the scheme. It noted the substantial number of its employees in the process of applying for voluntary severance packages and, describing voluntary arrangements of this kind as "self evidently highly sensitive and very private matters", submitted that the knock-on effect of deterring employees from taking such packages (because they thought the public would find out how much they had been offered) would be "highly significant". The College was facing a large cut in its budget and therefore required to be free to negotiate these payments on the best possible terms: if large numbers of employees were deterred from taking voluntary severance, it would have to fund its budget cuts from elsewhere. This would potentially impact upon the quality of service delivery and thereby damage the commercial interests of the College.
78. The Commissioner considers the argument that staff would be deterred from applying for voluntary severance packages, if details were disclosed, to be purely speculative. The College has not offered any evidence or made sufficiently convincing arguments to show that this would be a likely outcome of disclosure. In the absence of such evidence, it does not appear to the Commissioner that if the prospect of voluntary severance were sufficiently attractive to a potential applicant in all other respects, the mere prospect of disclosure of information such as that requested in this case would have a deterrent effect sufficiently strong to outweigh that attraction.

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



79. The Commissioner therefore finds that the exemption in section 33(1)(b) of FOISA was incorrectly applied by the College, in relation to the information about payments made to 69 un-named recipients.
80. The Commissioner returns to the point that the information he has found can be disclosed without breaching the first data protection principle (see his consideration of section 38(1)(b) of FOISA above) will to some extent have been anonymised, by listing the payment details in bands of £5,000. Disclosure at this level, where the amounts of individual payments will not be identified and there is no certainty that any individual recipient would even be known to fall within a particular payment band, is (in the Commissioner's view) unlikely to deter any College employee from seeking voluntary severance in future, should they wish to do so.
81. Given that the exemption in section 33(1)(b) has been found not to apply, the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA in relation to this exemption.

Conclusion on exemptions

82. The Commissioner has found that the information withheld from Mr Muncie was wrongly withheld under sections 33(1)(b) and 36(2) of FOISA. He accepts that the information was correctly withheld under section 38(1)(b) of FOISA, but finds that this exemption does not apply when the information is presented in bands of £5,000.
83. The Commissioner therefore requires the College to provide Mr Muncie with details of the payments made to the 69 individuals who had received severance payments at the time of his request, grouped into bands of £5,000.

DECISION

The Commissioner finds that James Watt College (the College) partially failed to comply with Part 1 (and in particular section 1(1)) of FOISA in responding to the information request from Mr Muncie.

The Commissioner does not accept the basis on which the College has claimed it did not hold certain information covered by the request: he requires the College to reconsider this part of the request and respond to Mr Muncie again in terms of Part 1 of FOISA.

The College withheld certain information under sections 33(1)(b) and 36(2) of FOISA, but the Commissioner finds that it was not entitled to do so.

The Commissioner accepts that the information covered by part 2 of Mr Muncie's request was correctly withheld under section 38(1)(b) of FOISA, but finds that this exemption would no longer apply if the information were to be presented in a different form (which Mr Muncie has indicated would be acceptable to him).

Decision 237/2011
Mr Craig Muncie and the Board of
Management of James Watt College



The Commissioner requires the College to provide Mr Muncie with the information detailed in paragraph 83 of this decision notice, and (as detailed in paragraph 26 above) to provide a response on the question of whether certain information is held by the College, by 9 January 2012.

Appeal

Should either Mr Muncie or the Board of Management of James Watt College 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
24 November 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 –

...

- (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.

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.



...

33 Commercial interests and the economy

(1) Information is exempt information if –

...

(b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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.

...