

Decision Notice 039/2020

Handwritten notes: Workforce Pay and Benefits Review

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 201900062



Scottish Information
Commissioner

Summary

The Council was asked for handwritten notes it held related to the planning/implementation of its Workforce Pay and Benefits Review. The Council argued that this was a repeated request and that, in any case, the information was exempt from disclosure.

The Commissioner did not accept that this was a repeated request, but accepted that some information was exempt from disclosure as it was subject to legal professional privilege.

However, he did not accept that exemptions applied to the remaining withheld information and ordered the Council to disclose the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(ii) (Effect of exemptions); 14(2) (Vexatious or repeated requests); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 38(1)(b), (2A), (5) (definitions of "the data protection principles", "data subject", "the GDPR", "personal data" and "processing") and (5A) (Personal information); 57(1) and (1A) (The expression "historical record"); 58(1) (Falling away of exemptions with time)

General Data Protection Regulation (the GDPR) Articles 4(1) and (11) (definition of "personal data" and "consent") (Definitions); 5(1)(a) (Principles relating to processing of personal data); 6(1)(a) and (f) (Lawfulness)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (4)(d), (5) and 10 (Terms relating to the processing of personal data)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 10 August 2018, the Applicant made a request for information to Glasgow City Council (the Council). With reference to a previous request, the Applicant requested a copy of handwritten notes regarding the planning/implementation of its Workforce Pay and Benefits Review (WPBR) from October 2005 to November 2006.
2. The Council responded on 7 September 2018. It told the Applicant that it held a substantial volume of handwritten notes and that complying with the request would exceed the cost threshold in section 12(1) of FOISA (Excessive cost of compliance). The Council also indicated that the handwritten notes contained third party personal data and legal advice which would require to be redacted before disclosure.
3. On 11 September 2018, the Applicant emailed the Council requesting a review of its decision. He highlighted that, in response to a previous request, he had been told that providing all of the information in relation to the WPBR would cost approximately £677.34 (the cost threshold is currently set at £600). He stated that his current request was for a subset of that information and therefore disputed that it would cost more than £600 to provide the information.

4. The Council notified the Applicant of the outcome of its review on 21 December 2018. It withdrew its reliance on section 12(1) of FOISA. However, it stated that the information was exempt from disclosure under sections 38(1)(b) (Personal information), 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality) of FOISA.
5. On 9 January 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because he did not consider that the exemptions in section 30(b)(ii) and (c) and 38(1)(b) applied. He also argued that disclosing the notes was crucial to understanding what happened in the Council's job evaluation scheme.
6. On 6 March 2019, the Applicant confirmed that, in addition to his dissatisfaction with the application of sections 30(b)(ii) and 30(c), he did not accept the Council's application of section 36(1). In his view, as the Council had discontinued the WPBR scheme, there could be no "legal privilege" left to defend.
7. On the same date, the Applicant confirmed that he was only dissatisfied with the application of section 38(1)(b) to the extent that the information related to senior officials of the Council.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 15 January 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 7 March 2019, the Council was invited to comment on this application and to answer specific questions on the provisions of FOISA it considered applicable to the information requested.
11. The Council responded on 26 March 2019. It stated that it considered the request to be repeated, in line with section 14(2) of FOISA. The Council also confirmed that, if the Commissioner concluded that the section 14(2) of FOISA did not apply, then it still considered that the handwritten notes were exempt under sections 30(b)(ii), 30(c), 36(1) and 38(1)(b) of FOISA.
12. The Council was asked for, and provided, submissions on its reliance on section 14(2) of FOISA. These submissions are considered below.
13. During the investigation, the Council reviewed the information withheld and confirmed that a number of documents fell out with the scope of the request, either because they fell outwith the stated date parameters or did not relate to the subject matter of the request. Again, this is dealt with below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

The WPBR

15. In 2006, the Council adopted a job evaluation scheme with the aim of ensuring that men and women received equal pay for jobs of the same value.
16. Many local authorities in Scotland adopted the "Red Book" scheme (the Scottish Joint Council for Local Government Employees Job Evaluation Scheme¹). However, Glasgow City Council opted for a bespoke solution, i.e. the WPBR scheme.
17. There have been claims made against the WPBR since 2009. In 2017, the Court of Session² [found that the Council had failed to discharge the burden of proving that WPBR was compliant with section 1(5) of the Equal Pay Act 1970. The case was remitted to the employment tribunal to consider the question of equal value.]
18. The Council subsequently announced (January 2018) that it planned to reach a negotiated settlement with the claimants. Agreement in principle was reached in January 2019 and formally approved in February 2019.
19. Therefore, at the time the Applicant made his request (August 2018), the Council was in the midst of on-going negotiations with claimants. (Settlement was negotiated to the end of March 2018, but negotiations for the period from March 2018 to the implementation of the new pay and grading scheme will take place once the new scheme has been implemented and further sums will be due.)
20. In October 2018, the Council stated that it would adopt the Scottish Joint Council Job Evaluation Scheme³.

The subject of the request

21. In response to an earlier request from the Applicant, the Council told the Applicant that it held a copy of handwritten notes. The request is for those notes.
22. The notes are a photocopy of a notebook or notebooks, around 350 pages long. The Council is unable to confirm the author (the handwritten notes are from 2005 and 2006), but considered it likely that they were written by a former member of the Council's senior management team.

Information excluded from consideration

23. On review of the withheld information, the Council identified information it considered fell outwith the scope of the request, either because of the time period or the subject matter.

¹ http://publications.fifedirect.org.uk/c64_SJCJobEvaluationScheme3rdEdition.pdf

² <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017csih56.pdf?sfvrsn=0>

³

<http://www.glasgow.gov.uk/councillorsandcommittees/viewSelectedDocument.asp?c=P62AFQDN2U81NTDXDN>

24. The Commissioner has considered this information, and is satisfied it does not fall within the scope of the request.
25. During the investigation, the Council identified information which it no longer considered exempt and which it was content to disclose to the Applicant. In the absence of submissions from the Council explaining why this information is no longer considered to be exempt from disclosure, the Commissioner must find that the Council failed to comply with section 1(1) of FOISA in failing to provide this information at the time of the Applicant's request.
26. The Commissioner requires this information to be disclosed to the Applicant.

Section 14(2) of FOISA – Repeated request

27. The Council considered the Applicant's request to be a repeated request in terms of section 14(2) of FOISA. Authorities are not required to comply with repeated requests.
28. For section 14(2) of FOISA to apply (see Appendix 1), the following need to be considered:
 - (i) whether the Applicant's request is identical or substantially similar to a previous request(s)
 - (ii) whether the Council complied with the Applicant's previous request(s) and, if so,
 - (iii) whether there was a reasonable period of time between the making of the previous request(s) and the making of the subsequent request
29. The Council submitted that the Applicant's request of 10 August 2018 is a repeat of the following:
 - a request made on 5 June 2018 in which he asked for a description of the information contained within three filing cabinets; and
 - a request made on 14 May 2018, in which he asked for all the information held by the Council relating to the establishment of the WPBR over a two year period.
30. On 11 July 2018, the Applicant asked the Council for a description of the contents of the top drawer of a particular filing cabinet. The Council informed the Applicant, on 8 August 2018, that the drawer contained handwritten notes of the planning/implementation of WPBR from October 2005 to November 2006. The Applicant asked for a copy of the handwritten notes on 10 August 2018.
31. The Council said that the request for the handwritten notes is not strictly a request for the same information as that requested on 5 June 2018 and 14 May 2018. However, by breaking his requests into both the individual drawers within the filing cabinet and to specific documentation (the handwritten notes), the Council argued that the Applicant was attempting to circumvent the Council's decision that it was not required to comply with the 5 June 2018 request on the basis of excessive costs (section 12 of FOISA).
32. The Commissioner acknowledges that the Applicant has been requesting information about WPBR for a considerable time. (The Council told the Commissioner that the Applicant has made approximately 100 FOI requests to the Council, most of which relate to WPBR.) Between 14 and 24 August 2018, the Applicant made eight requests for information contained within the filing cabinet. Over time, the Applicant has restructured and narrowed his requests with the aim of obtaining specific information about WPBR. It is clear that the Council's responses have informed the Applicant's subsequent requests for information held in specific locations.

33. The Commissioner accepts that the information requested on 10 August 2018 was a subset of the information requested on 14 May 2018 (all information held by the Council about WPBR). The Commissioner also notes that, at this date, the Applicant would not have known that the handwritten notes existed: he was only informed of their existence on 8 August 2018.
34. The Applicant's request of 5 June 2018 asked the Council to describe the information contained in the three filing cabinets by describing the names and titles of individual and generic documents. The Commissioner notes that, although the handwritten notes were held in the filing cabinets, the Applicant did not ask for a copy of the notes, but for a description of the documents in the cabinets. Again, he only found out that the handwritten notes existed on 8 August 2018.
35. In the circumstances, the Commissioner concludes that the Applicant's request of 10 August 2018 is not identical or substantially similar to the requests of 5 June 2018 or 14 May 2018.
36. The Commissioner considers it reasonable for the Applicant to use the information obtained from the Council to inform further requests, particularly where previous wide-ranging requests have been refused on grounds of costs. This information has justifiably been used by the Applicant to ascertain the nature and extent of the information held by the authority and to inform subsequent requests.
37. In coming to this conclusion, the Commissioner has taken into account the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs⁴ (the Section 60 Code). This states (section 5.3.1):
- The authority should remember that applicants cannot reasonably be expected to always possess identifiers such as file reference numbers or the description of a particular record. Applicants should not be expected to always have the technical knowledge or terminology to identify the information they seek.*
38. Section 9.4.3 of the Section 60 Code also states:
- When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit.*
39. The Council submitted that, if the Commissioner concluded that the request was not a repeat request for the purposes of section 14(2) of FOISA, it wished to rely on the exemptions in sections 30(b)(ii), 30(c) and 38(1)(b) to withhold the information requested. Given that the Commissioner has found that the request is not a repeated request, he will go on to consider whether the information is exempt from disclosure.

Section 38(1)(b) - Personal information

40. The Council withheld the names and job titles of those individuals who contributed to the discussions recorded in the handwritten notes.
41. The Applicant told the Commissioner that he was content for personal data to be redacted unless it related to the most senior officials (past or present) of the Council. He argued that it was important for the public to know who was responsible for key decisions regarding WPBR.

⁴ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

42. Section 38(1)(b) of FOISA, read in conjunction with section 38(2A)(a) or (b), exempts information from disclosure if it is "personal data" (as defined in section 3(2) of the DPA 2018) and its disclosure would contravene one or more of the data protection principles set out in Article 5(1) of the GDPR or (where relevant) in the DPA 2018.
43. The exemption in section 38(1)(b) of FOISA, applied on the basis set out in the preceding paragraph, is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
44. To rely on this exemption, the Council must show that the information withheld is personal data for the purposes of the DPA 2018 and 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 Article 5(1) of the GDPR.
45. The Council submitted that disclosure would breach the first data protection principle, which requires the processing of personal data to be lawful and fair (Article 5(1)(a) of the GDPR).

Is the information personal data?

46. The first question for the Commissioner to consider is whether the withheld information is personal data for the purposes of section 3(2) of the DPA 2018, i.e. any information relating to an identified or identifiable living individual. "Identifiable living individual" is defined in section 3(3) of the DPA 2018 – see Appendix 1. (This definition reflects the definition of personal data in Article 4(1) of the GDPR, also set out in Appendix 1.)
47. The Council submitted that, as the information withheld under section 38(1)(b) consists of names (and, on occasion, unique job or position titles such as the Chief Executive or Head of HR), the information is personal data.
48. The Commissioner accepts that the information in question is personal data. It names and/or identifies (e.g. by initials) individuals who provided input into WPBR, whether they attended a meeting, made a comment in a meeting or were identified as individuals to be contacted about a matter. The names and identified roles are clearly related to identifiable living individuals. The Commissioner therefore accepts that the information is personal data as defined in section 3(2) of the DPA 2018.

Would disclosure contravene one of the data protection principles?

49. The Council argued that disclosing the personal data would breach the data protection principle in Article 5(1)(a) of the GDPR. This requires personal data to be processed "lawfully, fairly and in a transparent manner in relation to the data subject."
50. Disclosure is a form of processing (section 3(4)(d) of the DPA 2018). In the case of FOISA, personal data is processed when it is disclosed in response to a request.
51. The Commissioner must consider if disclosure of the personal data would be lawful. In considering lawfulness, he must consider whether any of the conditions in Article 6 of the GDPR would allow the data to be disclosed.
52. The Commissioner considers conditions (a) and (f) in Article 6(1) are the only conditions which could potentially apply in the circumstances of this case.

Condition (a): Consent

53. Condition (a) states that the processing will be lawful if the data subject has given consent to the processing of his or her personal data for one or more specific purposes.

54. "Consent" is defined in Article 4 of the GDPR as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".
55. In terms of Article 7(1), the data controller (in this case, the Council) must be able to demonstrate that the required consent exists.
56. It is clear from the Council's submissions that the Council does not have the consent of the individuals to disclose the personal data. The individuals concerned no longer work for the Council and, therefore, it was unable to contact them.
57. In the circumstances, the Commissioner is satisfied that condition (a) cannot be met.

Condition (f): legitimate interests

58. Condition (f) states that processing shall be lawful if it "...is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data"
59. Although Article 6 states that this condition cannot apply to processing carried out by a public authority in the performance of their tasks, section 38(5A) of FOISA (see Appendix 1) makes it clear that public authorities can rely on Article 6(1)(f) when responding to requests under FOISA.
60. The tests which must be met before Article 6(1)(f) can be met are as follows:
 - Does the Applicant have a legitimate interest in obtaining the personal data?
 - If so, would the disclosure of the personal data be necessary to achieve that legitimate interest?
 - Even if the processing would be necessary to achieve that legitimate interest, would that be overridden by the interests or fundamental right and freedoms of the data subjects?

Does the Applicant have a legitimate interest in obtaining the personal data?

61. The Applicant argued that it was important to understand who was making the key decisions and offering specific advice regarding WPBR. He considered that the legitimate interests in publication vastly outweigh any "privacy rights" of the senior individuals involved, given that WPBR had a huge and detrimental impact on the lives and livelihoods of thousands of low paid workers in the Council. The Applicant also stated that WPBR had incurred excessive costs to the public purse before it was scrapped.
62. The personal data identifies senior staff or other senior individuals who had a pivotal role in the discussions about WPBR. Disclosing the personal data would allow the Applicant (and the wider public) to understand who was involved in the discussion of WPBR and would create transparency and accountability in relation to the development of WPBR and in relation to the decision-making process related to its development and implementation. The Commissioner considers that the scrutiny of Scottish public authorities, including actions taken by senior individuals, is an important facet of FOISA. He is therefore satisfied that the Applicant has (and, indeed, the wider public would have) a legitimate interest in the disclosure of the personal data.

Is disclosure of the personal data necessary?

63. Having accepted that the Applicant has a legitimate interest in the personal data, the Commissioner must consider whether disclosure of the personal data is necessary for the Applicant's legitimate interests. In doing so, he must consider whether these interests might reasonably be met by any alternative means.

64. The Commissioner has considered this carefully in the light of the decision by the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55⁵. In this case, the Supreme Court stated (at paragraph 27):

... A measure which interferes with a right protected by Community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less...

"[N]ecessary" means "reasonably" rather than "absolutely" or "strictly" necessary.

65. Therefore, when considering whether disclosure would be necessary, public authorities should consider whether the disclosure is proportionate as a means and fairly balanced as to the aims to be achieved, or whether the requester's legitimate interests can be met by means which interfere less with the privacy of the data subject.

66. In this instance, the internal discussions about WPBR that fell within the handwritten notes are unique and not accessible through any other means. Consequently, the Commissioner concludes that there is no other published source of information that meets the Applicant's legitimate interests and that disclosure is necessary.

The data subjects' interests or fundamental rights and freedoms

67. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not *reasonably* expect that the information would be disclosed to the public under FOISA in response to the request, or if such disclosure would cause *unjustified* harm, their interests or rights are likely to override legitimate interests in disclosure. Only if the legitimate interests of the Applicant outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.

68. The Council submitted that it would be unfair on the individuals for their details to be released in connection with this matter: the individuals involved in the implementation of WPBR no longer work for the Council and they would have no expectation that their information would be disclosed.

69. The Council also appears to be arguing that the work carried out by the individuals on the WPBR was not part of their usual day-to-day roles, meaning that they would have even less expectation that the information would be disclosed.

70. The Commissioner notes that the Council's normal practice is to disclose information about staff on leadership grades (grade 9 and above), on the basis that staff on those grades would reasonably expect that their identities will be disclosed. However, in this case, the Council had not applied this approach because the staff in question no longer worked for the Council.

⁵ <http://www.bailii.org/uk/cases/UKSC/2013/55.html>

71. The Commissioner's guidance⁶ on section 38 of FOISA notes that Recital (47) of the GDPR recognises that much will depend on the reasonable expectations of the individuals. The guidance also sets out factors that should be taken into account in balancing the interests of parties. These factors include:
- (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - (ii) the potential harm or distress that may be caused by the disclosure
 - (iii) whether the individual objected to the disclosure
72. The personal data in question relates to the individuals' public life, their senior role in the Council and their contribution to WPBR. The Commissioner acknowledges that information relating to an employee's actions or decisions in carrying out their job is still their personal data, but there must be some expectation of disclosure on the grounds of accountability and transparency, even if that senior employee no longer works for the Council. Senior employees, such as those at grade 9 or above in the Council, have a greater level of accountability, since they are likely to be responsible for major policy decisions and must have a greater expectation that, in certain circumstances, their personal data will be disclosed.
73. The Council stated that, given the nature and the context of the information contained within these notes, the individuals concerned would have had an expectation that such discussions would have remained confidential. However, given the age of the notes, it was not aware of any assurances being given that personal data would be withheld from disclosure.
74. Furthermore, the Council was concerned that the information would be misinterpreted, potentially to the detriment of the individuals named, given the media criticism of the WPBR. The Council referred the Commissioner to blog posts the Applicant had published following a meeting with the Council in 2018 and expressed concern that the Applicant would use the information to target the individuals concerned. Consequently, the Council did not consider it reasonable or fair to disclose the personal details of staff or former staff members.
75. The Commissioner accepts these arguments would hold some merit with reference to junior (and former junior) staff members. However, he cannot accept these arguments in relation to senior (or former senior) employees, who were acting in a professional capacity and who would have a reasonable expectation that information relating to their role could be subject to disclosure. The Commissioner considers, not only that these individuals would have an expectation of disclosure, but would also have a reasonable expectation that they would be subject to a degree of public criticism in some circumstances in their role. The Commissioner cannot accept, nor has he been provided with any evidence or arguments which would suggest, that these expectations would dissipate entirely on leaving employment and, while the information is relatively old, the notes were prepared when FOISA was already in force, so the members of staff in question would have been aware that it was possible that the information could be disclosed in response to an information request at any time.
76. Having carefully balancing the legitimate interests of the individuals concerned against those of the Applicant, the Commissioner finds that the Applicant's interests are not overridden by the interests or fundamental rights and freedoms of the data subjects.

⁶ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

77. The Commissioner is therefore satisfied that, in terms of Article 6(1)(f) of the GDPR, processing the information (jn this case disclosing the information to the Applicant) is necessary for the purposes of the Applicant's legitimate interests which, in the circumstances of this case, outweigh the interests or fundamental rights and freedoms of the data subjects. In the absence of other arguments from the Council as to why disclosure of the information would be unlawful, he therefore finds that the disclosure would not be unlawful.

Fairness

78. Processing of personal data must be fair as well as lawful (Article 5(1)(a) of the GDPR). Fairness means public authorities should only handle personal data in ways that people would reasonably expect and not use it in ways that have unjustified adverse effects on them.

79. In determining whether disclosure is fair, the Commissioner will take into account matters such as:

- (i) whether the individual expects their role to be subject to public scrutiny
- (ii) whether any distress or damage would be caused to the data subject as a result of the disclosure
- (iii) any express refusal by the data subject
- (iv) whether the information relates to the data subject's public or private life.

80. As stated above, the Commissioner is satisfied that the personal data under consideration relates to the data subjects' public life and that they would have a reasonable expectation that personal data relating to their role in a decision-making processes, for the purposes of transparency and accountability would be disclosed. He is also satisfied that there would have been a reasonable expectation that they would be subject to some degree of public criticism and that neither of those would dissipate entirely at cessation of employment.

81. The Council has not provided any evidence of express refusal by the data subjects or provided with sufficient evidence to conclude that distress or damage would be caused to the data subject as a result of disclosure. In reaching this conclusion the Commissioner has taken account of the content of the withheld information. In the circumstances, the Commissioner is satisfied that disclosure would be fair.

Conclusion on the data protection principles

82. Having found that the disclosure would be fair and lawful, the Commissioner is satisfied that disclosing the personal data would not contravene the data protection principle in Article 5(1)(a) of the GDPR. This means that the personal data is not exempt from disclosure under section 38(1)(b) of FOISA.

83. The Commissioner therefore requires the Council wrongly withheld personal data senior officials (grade 9 or above) under section 38(1)(b) of FOISA. The Commissioner requires this information to be disclosed to the Applicant.

Section 30(b)(ii) – Prejudice to effective conduct of public affairs

84. In order for the Council to rely on the exemption in section 30(b)(ii), it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemption is subject to the public interest test in section 2(1)(b) of FOISA.

85. In applying the exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
86. As with other exemptions featuring a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring.
87. The Commissioner's guidance⁷ states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
- (i) the identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day-to-day professional functions, for example, the risk of substantial inhibition may well be diminished.
 - (ii) the circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) the sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken.

The Council's submissions

88. As noted above, the Council was unable, due to the passage of time, to identify the author of the notes. Given the level of detail contained in the notes, the Council considered it likely that the notes belonged to a former member of the Council's senior management team.
89. The Council told the Commissioner that the information requested was last frequently accessed in 2013 by a former Council employee in relation to equal pay litigation. More recently, the filing cabinet (within which these notes were stored) has primarily been accessed in order to respond to the Applicant's requests.
90. The Council described the papers as providing significant details of the Council's senior management team's planning approach to the development of WPBR; the monitoring of the allocation process (together with the development of associated issues such as the employee development commitment); the appeals process and the approach to be taken in dealing with leadership grades.
91. The information documents the Council's thought process and ideas around how the pay and grading structure would work in practice. The Council commented that there would have been various iterations of different ideas and models prior to an agreed process being adopted, with some of these early workings noted within minutes. It submitted that the notes

⁷ <http://itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=2582&sID=117>

remain in draft and contain conceptual information about the proposed structure rather than being factual in nature and reflecting an agreed scheme.

92. The Council stated that the views were not intended to be published, and were not communicated as part of the individual's day to day professional duties, but as part of the early development of a major Council policy. The officers were engaging in free and frank discussions about the new pay grading structure, which is indicative that discussions were not about an agreed process, but deliberation on the planning and implementation of WPBR.
93. The Council was of the view that disclosure of this information would undermine the effectiveness of its decision making within the Council's senior management team, and that such candid discussion would be inhibited if the information of this type were to be routinely released, to the substantial prejudice to the quality of the decision making process and, in consequence, to the free and frank exchange of views for the purposes of deliberation.
94. While the Council acknowledged that the information is historical in nature, it is of the view that its release would inhibit substantially the free and frank exchange of views with respect to new policies and procedures being implemented by the Council at senior level. The Council submitted that senior officers' ability to make fully informed decisions would be inhibited without the ability to have a free and frank exchange of views. Officers would be less inclined to speak candidly about important issues if there is a real chance that what they said would be disclosed into the public domain. Given the sensitive nature of the withheld information, the Council was also concerned that there is a real risk or likelihood that actual inhibition would occur in relation to the development of the Council's new pay and grading structure.

The Applicant's submissions

95. The Applicant submitted that the handwritten notes are crucial to understanding what went on with the WPBR in 2005 to 2007, and disagreed with that the exemption applied. He considered that the Council's arguments were not justified and had been used to protect officials from proper public scrutiny. He did not consider disclosure would have the detrimental effect identified by the Council.

The Commissioner's findings

96. Each request must be considered on a case-by-case basis. Relevant considerations include the content of the withheld information (its nature, subject matter, etc.) and when the request was made: disclosing views when a decision has not yet been made may cause more harm than disclosing it after a decision has been reached.
97. The Council's submissions largely relate to the effects of disclosure on officials being more reticent in future, including in relation to the formulation and implementation of its new system.
98. The Commissioner does not accept that disclosing any advice or views makes it inevitable that officials will conclude that other internal communications will probably have to be disclosed, thereby inhibiting the way in which advice or views are given in future. As noted above, each request must be considered on a case-by-case basis. Nor does the Commissioner accept that disclosing advice or views in one case will have a substantially inhibiting effect in all others.

99. As stated in his guidance⁸, the Commissioner believes officials are capable of understanding that some information of a particular type may be disclosed, while other information of the same type may be withheld, depending on the circumstances.
100. The Commissioner notes the Council's concerns, and is cognisant of the effect of disclosure of information about WPBR and would be cautious in ordering disclosure of discussions of junior members of staff or at a point where the system was still under development. However, in this instance, WPBR was led by senior officials (and by employed consultants). By the time the request was made, the WPBR had been implemented [(and, as noted above, the Court of Session had found that the Council had failed to discharge the burden of proving that WPBR was compliant with section 1(5) of the Equal Pay Act 1970 and had remitted the case to the employment tribunal to consider the question of equal value.)]. Consequently, the same concerns do not apply.
101. The Commissioner accepts that it is possible that disclosure might lead officials to take care when providing their views, and to pay careful attention to the manner in which their views are expressed. However, if the effect of disclosure was simply to increase the care taken by officials when exchanging views, to ensure they are justifiable and measured and provide an accurate representation of the issues being addressed, it is difficult to see how this could be views as causing substantial inhibition.
102. The Council has not provided any evidence to support its assertion, and so it is difficult for the Commissioner to accept that this is a likely outcome, should the withheld information in this case be disclosed. The Commissioner considers that the senior officials involved in WPBR were involved as part of their professional duties (even if this was not part of their day-to-day responsibilities), and would have provided their comments which were noted down on the basis of their considered view of the situation. Without evidence to back up the Council's assertion, the Commissioner has concluded that it is highly unlikely that senior officials, either now or in the future, would change their practices and fail to be so open, simply because there was a possibility that the information could be disclosed at a later date..
103. The age of the information is also relevant. The Commissioner cannot accept that an individual's views, expressed well over ten years ago, would have the detrimental impact claimed on individuals currently involved in the new pay and grading structure or in other similar work. The exemptions in section 30(b) cannot be applied to a record which is more than 15 years old (sections 57(1A) and 58(1)). While information which is almost 15 years can still be exempt under section 30(b), the 15 years "cut-off" underlines that the Scottish Parliament considered that any harm or inhibition would substantially decrease as a record approached 15 years old.
104. The Commissioner also notes that the Council stated that it would adopt the SJC job evaluation scheme and cannot identify how disclosure of the discussions on a legacy, bespoke scheme would result in the harm envisioned by the Council.
105. Having considered all of the above, and having taking account of the circumstances of the request and the content of the withheld information, the Commissioner finds that the Council has failed to provide adequate submissions to satisfy him that the disclosure of the information would (or would be likely to) substantially inhibit the free and frank exchange of views of the purposes of deliberation.

⁸ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

106. The Commissioner therefore finds that the Council incorrectly applied the exemptions in section 30(b)(ii) of FOISA to the withheld information considered under this category.
107. As the Commissioner is not satisfied that the exemptions in section 30(b) (ii) of FOISA has been engaged, he is not required to go on to consider the public interest test in section 2(1)(b).
108. As some of the information withheld under section 30(b)(ii) has also been withheld under s30(c), the Commissioner must now go on to consider whether that exemption applies to this information and other information exempted under this exemption.

Section 30(c) – Prejudice to effective conduct of public affairs

109. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
110. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

The Council's submissions

111. The contents of the notes are described earlier in the decision.
112. The Council commented that the majority of the notes comprise early draft materials which would eventually inform the establishment of WPBR. Due to the nature of the notes, the Council argued that they would be open to misinterpretation and could easily be taken out of context.
113. As noted above, at the time of the Applicant's request, the Council was in the midst of on-going negotiations with the claimants. The negotiations had not yet concluded. Settlement had been negotiated to the end of March 2018. However, negotiations for the period from March 2018 to the implementation of the new pay and grading scheme will take place once the new scheme has been implemented and further sums will be due.
114. The Council considered that the disclosure of the information, and any misrepresentations of that information, could cause serious reputational damage for the Council, and would have a substantially prejudicial impact on the effective conduct of public affairs including the negotiations.
115. The Council considered it was essential that its officials are able to communicate fully and frankly in order to identify issues, negotiate, discuss and debate issues arising, in order to effectively plan and manage new Council processes, including the new pay and grading structure. Disclosure of information about WPBR would, in its view, substantially prejudice the Council's ability to plan and effectively manage the implementation of new policies due to

the concern of publishing information before an agreed process has been adopted, and the Council's ability to make fully informed decisions including in relation to future negotiations.

116. The Council also noted that some of the information contained within the papers has been provided by external consultants. The Council submitted that it should be able to receive such information and advice without the potential adverse effect of public scrutiny especially in the early stages of policy development. Disclosure of such information could substantially inhibit the quality of advice provided to the Council and could negatively impact on-going relationships with external consultants. It is important that the Council is able to develop collaborate working relationships with such parties. The Council noted that it instructed the external consultants with regard to its new pay and grading structure.
117. The Council acknowledged that the passage of time normally diminishes the sensitivity around information. (As with the exemptions in section 30(b) of FOISA, the exemption in section 30(c) cannot apply to a historical record more than 15 years old.) However, given the very current nature of Equal Pay, WPBR, the new grading structure and the continuing negotiations, the Council considered that the information contained within the notes remains sensitive.
118. The Council was asked, and provided reasoning why, in relation to randomly selected pages of information, considered exempt under section 30(c) of FOISA. The Commissioner has taken these submissions into consideration in reaching a conclusion.

The Applicant's submissions

119. While the Applicant considered the handwritten notes to be "enormously important historical documents", he rejected the Council's assertion that disclosing notes from 2005 to 2007 would have a detrimental effect on the Council's decision-making processes in 2019.
120. He also commented that the conduct of public affairs can only be improved if the public understands what led Scotland's largest council to introduce an "unfit for purpose" pay which has since proved to be "an enormously costly and unprecedented error of judgement".

The Commissioner's conclusions

121. As with section 30(b)(ii), each request must be considered on a case-by-case basis. Relevant considerations include the content of the withheld information (its nature, subject matter, etc.) and when the request was made: disclosing views when a decision has not yet been made may cause more harm than disclosing it after a decision has been reached.
122. In this instance, the notes were written in the early stages of the WPBR process, and the officials were brought together to discuss and debate how WPBR should be implemented. The officials involved the process were senior employees within the Council and external organisations (such as the external consultants).
123. The Commissioner has considered the Council's argument that disclosure of the withheld information would impact the discussion and implementation of the new pay and grading system. The Commissioner notes that the Council's arguments are heavily related to the impact disclosure would have on its ability to implement its new system effectively (similar to those arguments made under its consideration of section 30(b)(ii)).
124. The Council also submitted that the release of the notes, without any context or explanation, could lead to information being misinterpreted, causing reputational damage to the Council potentially having a negative impact on the continuing equal pay negotiations in light on on-going negotiations.

125. However, the Council has not explained why it considers this to be a likely consequence of disclosure. The Council has failed to demonstrate to the satisfaction of the Commissioner why the content of this information and the timing of this request, in all of the circumstances, correlates with the harm suggested.
126. The Commissioner is not persuaded that disclosure of the withheld information would prejudice officials' ability to discuss and debate the implementation of the new pay and grading scheme. The reasons given by the Council are that disclosure would lead to discussions being hindered or hampered with officials reticent to provide their views over the concern that such discussions would be disclosed immediately following the discussions. Even if these were consequences of disclosure, the Commissioner does not accept that they would be likely to prevent or seriously hinder the discussion on such an important subject. It was for the Council to argue and evidence that disclosure would result in substantial prejudice to the effective conduct of public affairs, and in this respect the Commissioner finds the Council's submissions fell short.
127. The Commissioner notes the Council's concerns about the information being misunderstood. In many instances, as to be expected from personal notes, the information is non-attributable and is lacking in a coherent sequence of connection to any particular subject matter. In any event, the status of the handwritten notes – and their age – will be clear to the Applicant and to anyone else who reads them.
128. The Commissioner has not been provided with any cogent argument why personal notes relating to a redundant pay and grading system by an individual no longer working for the Council written more than ten years ago, would have the detrimental impact submitted by the Council.
129. As the Commissioner is not satisfied that the handwritten notes were withheld correctly under section 30(c) of FOISA, he is not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA in relation to this group of documents. The Commissioner requires the Council to provide this information to the Applicant.

Section 36(1) of FOISA - Confidentiality

130. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
131. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) the legal adviser must be acting in their professional capacity; and
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.
132. The Council identified pages from the notes which it described as including notes of meetings between its solicitor and other members of the senior management team. The Council considered it evident from the notes that the Council's solicitor was acting in his

capacity as legal adviser to the Council and was providing legal advice to senior Council officers. In addition, there are also references to notes of meetings with external solicitors and counsel.

133. The Council said that the notes provide insight into the advice that was given and/or sought in meetings between legal advisers and the Council on matters such as WPBR and the associated equal pay litigation.
134. The Council submitted that the solicitors providing the advice were acting in their professional capacity and their communications were in the context of their legal adviser's professional relationship with their client, i.e. the Council.
135. The Commissioner notes that the Council identified all pages of the handwritten notes as containing legal advice whenever it appears that the Council's solicitor attended a meeting.
136. As a result, the Commissioner asked the Council to reconsider the information to which this exemption was applied, highlighting that it appeared to him that the exemption had been applied in a blanket fashion, for example without considering whether the information constituted legal advice.
137. The Council remained of the view that all of the pages to which it had applied section 36(1) contained legal advice, but did not give further details. Given the lack of submissions from the Council explaining why each page of the notes in question constitutes legal advice, the Commissioner has, to a certain extent, had to second guess the context in which the notes were recorded. This is clearly unsatisfactory. It is clear that some of the information highlighted by the Council does constitute legal advice, but it is not at all clear why other information should be considered to be legal advice. In any event, having reviewed the information in detail, the Commissioner does not accept that all of the information in question constitutes legal advice.
138. The presence of the Council's solicitor at a meeting does not automatically mean that information is subject to legal professional privilege. The information must have the quality of legal advice; it must concern legal matters such as legal rights, liabilities, obligations or remedies and not simply commentary on financial or administrative matters.
139. The mere presence of the Council's solicitor or external solicitors/counsel at the meetings does not qualify all notes taken at that meeting as legal advice. The information must relate to communications with a legal adviser. In many instances, the Commissioner does not accept the information withheld relates directly or indirectly to communications with a legal adviser.
140. The handwritten notes are ambiguous, are non-attributable in many cases and do not correlate with any particular subject matter – as is to be expected from personal notes of a meeting. In other cases, it is not clear whether the solicitor made any contribution to the meeting or, indeed, was even in attendance.
141. Furthermore, the legal adviser must be acting in their professional capacity and the communications must occur in the context of their professional relationship with their client. The Commissioner is not satisfied, in relation to much of the information identified as containing legal advice, that this was the case. He notes that the solicitor in question would have other professional duties at the Council (e.g. as a manager of a department) and that contributions will have been made in that or another capacity.

142. In other instances, the Council's solicitor appears to provide factual comments on the matter of interest. The Council has not provided any specific explanations as to why the information could be attributed to the provision of legal advice.
143. The Commissioner has reviewed the information to which the exemption in section 36(1) of FOISA was applied. In respect of the 49 pages to which this exemption has been applied, the Commissioner has identified some information within a few pages of the handwritten notes where the legal advice was provided by the Council's solicitor in his capacity as the Council's solicitor and where the information is clearly attributable to him in that role.
144. With respect to the remaining information, the Commissioner does not accept that it attracts legal advice privilege. He therefore finds that the Council was incorrect to rely on section 36(1) of FOISA in respect of remaining pages.
145. Before information can attract legal advice privilege, the document must have been – and must continue to be – confidential between a legal adviser and their client. It is a precondition to a claim for privilege that the information in question is confidential, and therefore loss of confidentiality can accordingly equate to loss of privilege.
146. The Council explained that although WPBR itself has been well publicised, the information within these notes has not been shared outwith these meetings. The Council was therefore of the view that the information was confidential information at the time of the Applicant's request and remains confidential now.
147. The Council noted the Applicant's comments that as the Council has now agreed to "scrap its discredited WPBR pay scheme" this means that there can be no "legal privilege" left to defend because the legal fight regarding the WPBR is over'.
148. It considered these comments irrelevant in determining whether or not the information is covered by legal advice privilege. The Council submitted that that legal advice privilege continues to operate even after the professional relationship between the solicitor and client has ended. The Commissioner agrees that this is the case.
149. Having considered the submissions, the Commissioner is satisfied, in respect to the legal advice in question, that privilege has **not** been lost: the information was still confidential and is exempt in terms of section 36(1) of FOISA.

The public interest

150. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.
151. The Council recognised that all communications between officers in a public authority should be open to the public in order to ensure transparency. However, it considered that there is a strong and competing argument that public interest lies in ensuring that officers are able to communicate with their legal advisers, fully and frankly, in confidence in order to finalise their position in relation to legal issues and potential litigation.
152. The Council considered that it was in the public interest for this legal advice to remain confidential as its disclosure would have the effect of substantially prejudicing the Council's ability to rely on legal advice. It is also in the public interest that such legal advice can be provided without public scrutiny where arguably it could easily be misinterpreted, taken out of context or selectively quoted. On balance, the Council were of the view that the public interest in maintaining the principal that communications between a solicitor and their clients are privilege outweighs the public interest in release of the information.

153. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
- the privileged material discloses wrongdoing by or within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
154. After careful consideration, the Commissioner is satisfied that none of the considerations set out above (or any others of comparable weight) apply here.
155. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and accepts that disclosure of the information would go some way to providing that transparency and accountability.
156. However, as the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)⁹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
157. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. A parallel might be drawn with the wider law of confidentiality, where the courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, or where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. The Commissioner is satisfied that this is not the case here.
158. In this particular case, the Commissioner understands the Applicant's interest in the withheld legal advice, and why WPBR continued to be discussed, when many other authorities had adopted the SJC job evaluation scheme. While he also acknowledges the general public interest in transparency and accountability, the Commissioner is not satisfied (having considered the withheld information) that this public interest can outweigh the strong public interest in maintaining confidentiality between client and legal adviser in this case.
159. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining confidentiality of communications between legal adviser and client. Consequently, he accepts that the Council correctly withheld the information to which it applied section 36(1) of FOISA.

⁹ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

160. Along with this decision, the Commissioner will provide the Council with a marked up copy of the information within the pages of the handwritten notes to which he considers section 36(1) of FOISA applies.

Decision

The Commissioner finds that Glasgow City Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that some of the information in the handwritten notes is subject to legal professional privilege and is exempt from disclosure under section 36(1) of FOISA.

However, the Commissioner finds that the Council failed to comply with Part 1 of FOISA by:

- treating the request as a repeated request in terms of section 14(2) of FOISA
- initially withholding information which, during the investigation, it considered could be disclosed
- withholding the personal data of senior officials under section 38(1)(b) of FOISA and
- applying the exemptions in sections 30(b)(ii), 30(c) and 36(1) to the remaining information

The Commissioner requires the Council to disclose the non-exempt information by **Monday 20 April 2020**.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

4 March 2020

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

...

- (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.

...

14 Vexatious or repeated requests

...

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

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.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and the first, second or third condition is satisfied (see subsections (2A) to (3A);

...

- (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -

- (a) would contravene any of the data protection principles, or
- (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

....

- (5) In this section-

"the data protection principles" means the principles set out in –

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

"the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4), (10), (11) and (14) of that Act);

...

- (5A) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

57 The expression “historical record”

(1) For the purposes of this Part, a record becomes a “historical record” in accordance with subsections (1A) to (1C).

(1A) A record becomes one at the end of the period of 15 years beginning with 1st January in the calendar year following the date on which the record is created.

...

58 Falling away of exemptions with time

(1) Information contained in a historical record cannot be exempt by virtue of any of sections 28 to 30, 33(1), 36, 37 and 41(a).

...

General Data Protection Regulation

Article 4 Definitions

For the purpose of this Regulation:

1 ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

...

11 ‘consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;

...

Article 5 Principles relating to processing of personal data

1 Personal data shall be:

- a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”)

...

Article 6 Lawfulness of processing

1 Processing shall be lawful only if and to the extent that at least one of the following applies:

- a. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- ...
- f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

Data Protection Act 2018

3 Terms relating to the processing of personal data

...

- (2) “Personal data” means any information relating to an identified or identifiable living individual (subject to section 14(c)).
- (3) “Identifiable living individual” means a living individual who can be identified, directly or indirectly, in particular by reference to –
 - (a) an identifier, such as a name, an identification number, location data or an online identifier, or
 - (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
- (4) “Processing”, in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as –

...

- (d) disclosure by transmission, dissemination or otherwise making available,

...

- (5) “Data subject” means the identified or identifiable living individual to whom personal data relates.

...

- (10) “The GDPR” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

...

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