



Scottish Information
Commissioner

It's public knowledge

Our Ref 201600533

Mr James McEnaney
By email: mrjmcenaney@gmail.com

22 April 2016

Dear Mr McEnaney

Information request – partial disclosure

1. I am writing in response to your email of 27 March 2016. You asked for the following information:
 - (i) Copies of any communication between the Scottish Information Commissioner, her staff and the Enforcement Officer regarding purdah rules or concerns that the release of information may compromise perceptions of SIC impartiality (request 1)
 - (ii) Copies of any communication between the Scottish Information Commissioner and the Scottish Government regarding purdah or concerns that the release of information may compromise perceptions of SIC impartiality (request 2)
 - (iii) Copies of any communication between any of the above-mentioned parties regarding case 201502194 (request 3)
2. In subsequent correspondence, you confirmed that request 3 should include all internal and external correspondence. You also confirmed that you were happy for your email address to be disclosed, but not your home address.

Summary

3. In summary, I have disclosed as much information as I am able to under the terms of the Freedom of Information (Scotland) Act 2002 (FOISA). Where information has been withheld, I have explained why.
4. **Whilst I cannot disclose some information, I can assure you that none of the withheld information includes correspondence with the Scottish Ministers (i.e. Government) seeking or receiving their views about postponing decisions, about the Commissioner's impartiality or about whether the Commissioner should comply with purdah.**
5. The information we hold is listed in the attached schedule. The schedule is in date order. Some of the information we hold is covered by more than one of your requests, so I thought

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this would be the easiest way to provide the information to you. The schedule describes the information we hold and, where necessary, gives some explanations of acronyms, etc. used in the information we are disclosing. Please get back to me if you need clarification of anything.

6. The information in the schedule can generally be split into the following:
 - general information which refers to elections and purdah (documents 1 to 3 and 12 to 14)
 - an exchange with the Scottish Ministers about a 2013 decision (documents 4 to 7)
 - internal discussions regarding the effect of the Scottish Independence Referendum Act 2013 (SIRA) on three of our cases in the run-up to the Independence Referendum. As you are aware, paragraph 26 of Part 4 of Schedule 4 to SIRA made it unlawful for the Commissioner, as a “Scottish public authority with mixed functions or no reserved functions”, to publish material which dealt with any of the issues raised by the referendum question or which was designed to encourage voting at the referendum (documents 8 to 11).
 - our casefile for your appeal 201502194 (documents 15 to 59) and
 - correspondence following my email of 16 March 2016 (document 60), some of which forms part of your casefile but which also covers other appeals and the enquiry we received from RISE (documents 60 to 101).

Withheld information and exemptions

7. Some of the information you asked for cannot be provided because it is exempt from disclosure. To provide you with as much information as possible, the documents being disclosed have been redacted to remove exempt information, while leaving the rest of the information in place. Wherever information has been removed, this is marked in the text, along with reference to the exemption(s) we are applying. Only in a very small number of cases, have I decided to withhold documents in full.
8. The Freedom of Information (Scotland) Act 2002 (FOISA) allows the Commissioner to withhold information in response to a request, where one or more of the exemptions listed in Part 2 of FOISA applies. In this case, the following exemptions apply to some of the information:
 - (i) Section 25(1) Information otherwise accessible
 - (ii) Section 30(b) Substantial inhibition to free and frank provision of advice or exchange of views
 - (iii) Section 30(c) Substantial inhibition to the effective conduct of public affairs
 - (iv) Section 38(1)(a) Personal data of the requester
 - (v) Section 38(1)(b) Third party personal data
9. I have set out below the reasons for applying these exemptions.

Section 25(1) Information otherwise accessible

10. Under section 25(1) of FOISA, information which you, as the person making the request, can reasonably obtain other than by requesting it under section 1(1) is exempt information. Unlike many of the exemptions in Part 2 of FOISA, the exemption in section 25(1) is absolute. This means it is not subject to the public interest test.
11. A lot of the information which I am disclosing is, in effect, exempt under section 25(1) because you already have copies (for example, your correspondence regarding file 201502194 with this office). Strictly speaking, I do not have to disclose it now but have done so to enable you to read the file more easily. Some of these documents have been redacted. This is because, although you personally already have access to this information, I need to take account of the fact that disclosing information under FOISA has the effect of placing the information in the public domain.
12. I have applied the exemption in section 25(1) to the information which the Scottish Ministers disclosed to you in response to your information request of 3 September 2015. Withholding that will not affect your reading of the file.

Section 30(b) Substantial inhibition to free and frank provision of advice or exchange of views

13. Under section 30(b) of FOISA, information is exempt information if disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemptions in section 30(b) are subject to the public interest test.
14. I have applied the exemptions in section 30(b) to a draft email prepared by one of the Commissioner's members of staff and to the draft responses to the press enquiry made by RISE. It is important that the Commissioner and her staff are able to have free and frank discussions and the freedom to explore options and give and accept advice, without being restricted by the knowledge that the discussions may be disclosed further. Disclosure would make officers more wary of setting thoughts down or of suggesting responses, if they knew that the drafts would, in the same situation, be disclosed in future.
15. This would mean that the final response (which has been disclosed) would not be as thorough or as well thought out in future.
16. The exemptions in section 30(b) are subject to the public interest test in section 2(1)(b) of FOISA. This means that I can only withhold the information if the public interest in maintaining the exemptions outweighs the public interest in giving you the information.
17. I recognise that there is a public interest in the role of the Commissioner and, in particular, in information which would demonstrate the Commissioner's approach to the possible delay in the publication of decisions. However, I also consider that there is a strong public interest in the Commissioner being able to receive informed advice and to discuss matters within her Office in order to enable her to make an informed response to such enquiries.
18. Therefore, while disclosure would increase transparency and give a wider understanding of the issues involved, I am not persuaded that this outweighs the public interest in withholding the information. I am therefore satisfied, on balance, that the public interest in withholding the information outweighs that in disclosing the information.

Section 30(c) Substantial inhibition to the effective conduct of public affairs

19. Under section 30(c) of FOISA, information is exempt information if disclosure would (otherwise than under section 30(a) or section 30(b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test.
20. I have applied the exemption in section 30(c) to exchanges with the Scottish Ministers about your, and other, appeals. This includes the information which the Ministers have withheld from you and which we are actively considering in our investigation into to whether they were correct to do so.
21. You should be aware that it is a criminal offence, under section 45 of FOISA, for the Commissioner or a member of her staff to knowingly or recklessly disclose information which has been obtained by, or furnished to, the Commissioner for the purposes of FOISA if the information is not available to the public from another source, unless the disclosure is made with lawful authority. "Lawful authority" can exist where, for example, disclosure is necessary for the discharge of the Commissioner's functions.
22. Section 45 of FOISA is not, in itself, an exemption, and it does not always prevent us disclosing information in response to a request. However, the existence of a criminal sanction illustrates the importance which the Scottish Parliament places on confidentiality surrounding the Commissioner's investigations.
23. I have concluded that disclosing the information in question would, or would be likely to, prejudice substantially the formal processes surrounding the consideration of applications under section 47(1) of FOISA, by disclosing detailed exchanges with the Commissioner. This is particularly the case where the matter is still under consideration or where we are in the period where the public authority or applicant can appeal to the Court of Session.
24. Public authorities provide submissions in confidence and in the expectation that the information will not be disclosed. The Commissioner must be allowed to conduct her investigations independently. Authorities must have the confidence to provide submissions in the knowledge that the information is confidential and that, only where lawful and necessary, will it be referred to in any decision issued by the Commissioner (see the references to section 45 of FOISA in paragraphs 21 and 22 above).
25. The disclosure of the information you requested could lead to a loss of confidence in the processes followed by the Commissioner and would prejudice substantially future investigations. Scottish public authorities would be less likely to provide full submissions to the Commissioner for the purposes of her investigations. This would have a negative effect on the quality of the investigations and, ultimately, on the decisions issued by the Commissioner. This in turn could impact on the effectiveness of FOISA and citizen's exercising of their right to information.
26. I have withheld some information in relation to one closed case from 2013. This is no longer within the appeal period. However, given the subject matter of the decisions (which I am unable to share with you here), I remain satisfied that disclosing the discussions in full would, or would be likely to, inhibit substantially our relationships in the future with the Scottish Ministers or with other public authorities. Again, authorities must have the confidence that

they can be open with the Commissioner about specific cases. If not, this will have a damaging effect on the investigations carried out by the Commissioner.

27. In the circumstances, I consider disclosure would be likely to prejudice substantially the effective conduct of public affairs.
28. The exemption in section 30(c) of FOISA is subject to the public interest test. Therefore, even where information has been found to be exempt, it must be disclosed unless the public interest in withholding the information is outweighed by the public interest maintaining the exemption.
29. I recognise that there is a strong public interest in understanding the way in which the Commissioner's decisions are reached. Disclosing submissions in full would enable this understanding.
30. However, I also consider that there is a strong public interest in ensuring that the formal processes followed by the Commissioner are unhindered, and in ensuring that future investigations are not prejudiced. Disclosure of the information could lead to a loss of confidence in the processes followed by the Commissioner and would substantially prejudice future investigations.
31. In all the circumstances, and in the light of section 45 of FOISA, I have concluded that the public interest in maintaining the exemption in section 30(c) of FOISA outweighs that in disclosure the information.

Section 38(1)(a) Personal data of which the applicant is the subject

32. Under section 38(1)(a) of FOISA, personal data of which the applicant is the data subject is exempt from disclosure under FOISA.
33. "Personal data" is defined in section 1(1) of the Data Protection Act 1998 (the DPA) as data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, 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.
34. This exemption is not subject to the public interest test.
35. You will appreciate that a lot of the information, particularly in request 3, is your personal data. Again, while we could withhold this information, given that you are the person making the request, and are happy for the data to be disclosed, I have only applied this exemption to your home address.

Section 38(1)(b) Third party personal data

36. Third party personal data is exempt if disclosure would contravene any of the data protection principles set out in the DPA (section 38(1)(b) as read with section 38(2)(a)(i)). This exemption is not subject to the public interest test.
37. The definition of personal data is set out in paragraph 33 above.
38. I have applied this exemption to the personal data of:

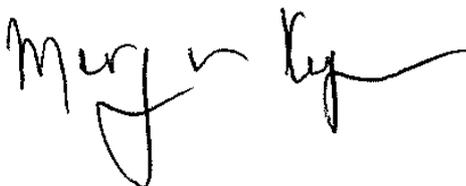
- (i) Other applicants who have made appeals to the Commissioner where no decision has been issued and the fact of them having made an appeal is not public knowledge
 - (ii) Members of the Scottish Ministers' staff who were involved in responding to your request or in your investigation or in investigations involving other applicants
 - (iii) The name of one junior civil servant named in the 2006 meeting note (document 1)
 - (iv) Members of the Commissioner's staff (below the level of managers) who are involved in investigating your appeal and who are, or were, involved in investigating the appeals of other applicants
 - (v) The person who contacted us from RISE.
39. I am satisfied that disclosing this personal data would breach the first data protection principle. This states 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. I have not been able to identify any condition in Schedule 2 which would allow me to disclose the information.
40. Condition 6 is the only condition in Schedule 2 which might permit me to disclose the personal data to you. In practice, there are three tests which need to be considered when looking at condition 6. These are:
- (i) Do you have a legitimate interest in obtaining the personal data?
 - (ii) If you do, is the disclosure of the personal data necessary to achieve those legitimate interests?
 - (iii) Even if disclosure is necessary for those purposes, would it nevertheless be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the people whose personal data I have withheld?
41. In the circumstances, I am satisfied that you do have a legitimate interest in obtaining the personal data. During an investigation you were told, albeit prematurely, that a decision involving your case may be delayed. I can understand you would want to know the background to that decision and whether other individuals are affected.
42. I am also satisfied that disclosure of the personal data would be necessary to achieve those legitimate interests. I cannot identify any other way of meeting them other than disclosing the personal data.
43. I have considered whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. This involved a balancing exercise between your legitimate interests and those of the data subjects. Only if your legitimate interests outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
44. In the circumstances of this case, I do not believe that any of the applicants involved would have a reasonable expectation, particularly where an investigation is ongoing, or in the absence of a decision, that their correspondence with the Commissioner (or even the fact that they have made an appeal to the Commissioner) would be placed into the public domain. I am concerned, particularly given the media interest, that disclosure would cause distress.

45. I have also withheld the names of some members of staff from the Commissioner's office and from the Scottish Ministers. You already know some of the names, etc. but I need to take account of the fact that disclosing the personal data in response to your information request would entail putting the personal data into the public domain.
46. The officials whose details have been withheld are not senior members of staff. However, that is not the only reason why I concluded their personal data should be withheld. Your correspondence with officers has received a lot of attention in the national media. As a result, I am concerned that identifying the officers would lead to an unwarranted focus on them and could result in (in some cases, further) distress to them.
47. Unusually, perhaps I have also withheld the name of the person who contacted us from RISE. You obviously know the name, but, as I have mentioned elsewhere, I need to take account of the fact that disclosing information in response to your information request has the effect of placing the information in the public domain.
48. We did not name them we issued our correspondence with them on 30 March. Although a lot of media coverage came about as a result of the enquiry, I have been unable to find anything in the public domain which links them to it. As a result, I have concluded that they would not have a reasonable expectation that their personal data would be disclosed.
49. On balance, I am satisfied that disclosure would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As such, I find that condition 6 cannot be met and that the personal data is exempt from disclosure under section 38(1)(b) of FOISA.

Right to seek review

50. I appreciate that this decision may be disappointing for you. Under FOISA, you have the right to ask the Commissioner to review the handling of your request. If you wish to do this, you should make your request for review to the Commissioner (contact details at the foot of this letter), within 40 working days of receiving this letter. Your request must be in permanent form (letter, email, audio tape, etc.), and should state:
 - (i) that you are asking for a review of this decision and
 - (ii) why you are unhappy with the response you have received.
 - (iii) We will issue a full response to your request for review within 20 working days of our receiving it.

Yours sincerely



Margaret Keyse
Head of Enforcement