



Scottish Information
Commissioner

it's public knowledge

Our Ref 201600535

Your Ref

[Name and email address redacted]

22 April 2016

Dear [Name redacted]

Information request

1. I am writing in response to your email of 27 March 2016. You asked for information about the Commissioner's decision to adopt 'purdah' in relation to decisions about the Scottish Government or the SNP and, in particular, the possibility of decisions being delayed. (I have not repeated your request in full.)
2. As you are aware from the [statement](#) issued by the Commissioner on 30 March 2016, the Commissioner has not decided to adopt purdah in relation to decisions involving any Scottish public authority. To that extent, we do not hold the information you have asked for.
3. However, in order to be helpful, I am disclosing the information we hold on matters such as purdah and on the possibility of decisions being delayed. In doing this, I may have interpreted your request too widely. I am sorry if that is the case.
4. I enclose the information listed in the attached schedule. 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)
 - 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 will be aware from the Commissioner's statement, 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 10)
 - correspondence following my email of 16 March 2016 (document 60) covering a small number of appeals and the enquiry we received from the political party, RISE (documents 60 to 101)

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5. When you look at the schedule, you will see that the numbers are not consecutive and that there are some large gaps (for example, between 14 and 60). Your request forms part of a separate, wider information request made to us and I have retained the numbering from the schedule used to respond to the wider request.
6. We will be publishing our (anonymised) response to your request as well as to the wider request (and two other requests) later today, so you will be able to see all the information that has been disclosed [here](#).

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 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:
 - Section 30(b) Substantial inhibition to free and frank provision of advice or exchange of views
 - Section 30(c) Substantial inhibition to the effective conduct of public affairs
 - Section 38(1)(b) Third party personal data
9. I have set out below the reasons for applying these exemptions.

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

10. 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.
11. 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.
12. This would mean that the final response (which is included in the information being disclosed to you) would not be as thorough or as well thought out in future.
13. 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.

14. 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.
15. 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

16. 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.
17. I have applied the exemption in section 30(c) to information about certain appeals.
18. You may 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.
19. 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.
20. 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. 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.
21. 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 18 and 19 above).
22. 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.

23. I have withheld some information in relation to an exchange with the Scottish Government about a case from 2013. This is clearly no longer within the appeal period. However, given the subject matter of the decision (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.
24. In the circumstances, I consider disclosure would be likely to prejudice substantially the effective conduct of public affairs.
25. 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.
26. 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.
27. 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.
28. 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)(b) Third party personal data

29. 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.
30. The definition of personal data is set out in section 1(1) of the DPA. Personal data means data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. The definition 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.
31. I have applied this exemption to the personal data of:
 - Applicants who have made appeals to the Commissioner where no decision has been issued or the fact of them having made an appeal is not public knowledge
 - Members of the Scottish Ministers' staff who were involved in the cases covered by your request
 - The name of one junior civil servant named in the 2006 meeting note (document 1)

- Members of the Commissioner's staff (below the level of managers) who are, or were, involved in investigating the appeals covered by your request.
 - The person who contacted us from RISE.
32. 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.
33. 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:
- Do you have a legitimate interest in obtaining the personal data?
 - If you do, is the disclosure of the personal data necessary to achieve those legitimate interests?
 - 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?
34. In the circumstances, I am satisfied that you do have a legitimate interest in obtaining the personal data. During an investigation two applicants were told, albeit prematurely, that a decision involving their cases may be delayed. As someone with a clear interest in FOI, both north and south of the border, I can understand you would want to know the background to that decision.
35. 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.
36. 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.
37. In the circumstances of this case, I do not believe that any of the applicants whose names I have withheld under this exemption 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.
38. I have also withheld the names of some members of staff from the Commissioner's office and from the Scottish Ministers.
39. 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. Recent 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.

40. Unusually, perhaps, I have also withheld the name of the person who contacted us from RISE. We did not name them when we issued our correspondence with them on 30 March and, 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.
41. 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

42. 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:

- that you are asking for a review of this decision and
- why you are unhappy with the response you have received.

43. 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