



Scottish Information  
Commissioner

**Decision 052/2005 Balfour & Manson Solicitors and the  
Scottish Executive**

*Request for Counsels' fees*

**Applicant: Balfour & Manson Solicitors  
Authority: Scottish Executive  
Case No: 200502019  
Decision Date: 9 December 2005**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## **Decision 052/2005 – Balfour & Manson Solicitors and the Scottish Executive**

**Request for Counsels' fees – whether disclosure would breach data protection principles under section 38(1)(b) – whether information is personal data – held that disclosure would not breach the data protection principles**

### **Facts**

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Balfour & Manson Solicitors applied to the Scottish Executive for details of all fees rendered and/or paid to all Counsel instructed by the Scottish Ministers in relation to an appeal in the House of Lords. The Scottish Executive refused to supply this information on the basis that it was exempt by virtue of section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive indicated that the information requested constituted personal data and that its disclosure would breach the first data protection principle. Balfour & Manson were dissatisfied with this response and requested a review. The Executive upheld its original decision on review. Balfour & Manson applied to me for a decision.

### **Outcome**

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I find that the Scottish Executive failed to comply with Part 1 of FOISA in failing to provide details of Counsels' fees instructed by the Scottish Ministers paid or rendered in the House of Lords Appeal *Scott Davidson v the Scottish Ministers*. The total figure for each Counsel should be provided to Balfour & Manson.

### **Appeal**

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Should either the Scottish Executive or Balfour & Manson wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.



## Background

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1. Balfour & Manson, a firm of solicitors, act on behalf of Taylor & Kelly, another firm of solicitors. Taylor & Kelly act on behalf of a Mr Davidson in the matter of Scott Davidson v the Scottish Ministers. This matter proceeded to the House of Lords in July 2003 and was determined in July 2004 in favour of Mr Davidson. Mr Davidson was awarded expenses. A judicial account was prepared on behalf of Mr Davidson. The Scottish Executive lodged objections to the account as they are entitled to do. Those objections included objections to Balfour & Manson's Counsel's fees on the basis that they were excessive.
2. In order to deal with this issue at Taxation (i.e. the auditing of accounts), Balfour & Manson requested the following information from the Executive on 21 March 2005:
3. Details of all fees rendered and/or paid to all Counsel instructed by the Scottish Ministers in relation to the Appeal in the House of Lords case of Scott Davidson v Scottish Ministers.
4. The Executive responded to this request on 13 April 2005. The Executive refused to supply the information requested, indicating that it was exempt by virtue of section 38(1)(b) of FOISA. It advised that the information was personal data and that disclosure of this information would be in breach of the first data protection principle.
5. The Executive advised that disclosure of this information would be unfair. It indicated that the information requested was contained in their Counsels' fee notes and that this information had been provided by Counsel for the sole purpose of arranging payment for their services in this case. There would be no expectation that the details would be disclosed to any particular third party or member of the public.
6. The Executive advised that both of their Counsel (Senior and Junior Counsel) had since confirmed that the Executive's understanding accorded with their expectations of how details of their fee notes would be treated.
7. The Executive also argued that disclosure would be in breach of the second data protection principle on the basis that the information had been supplied to them for the sole purpose of processing payment of Counsels' fees on behalf of their client.



8. Balfour & Manson were dissatisfied with this response and on 19 April 2005 sought a review of the Executive's decision. Balfour & Manson accepted that the information was "personal data" but disputed that disclosure of the information would amount to a breach of the first and second data protection principles.
9. Balfour & Manson sought clarification on the objection to disclosure of this information by Senior Counsel. It indicated that it understood that Senior Counsel had no personal objection to disclosing his fee notes to Balfour & Manson.
10. Balfour & Manson also challenged the assertion that Counsel would not expect these details to be disclosed to a third party or member of the public. It pointed out that after this case had been the subject of a decision in the Inner House, a question was asked in the Scottish Parliament about the level of the same Counsels' fees. A further question as to the level of Counsels' fees in another case (but including those of the present Senior Counsel) was asked and answered in the Scottish Parliament in May 2004.
11. Balfour & Manson also pointed out that instructions were accepted and fees rendered in the full knowledge that Counsel were acting for a major government department engaged in a controversial and high profile public law case. Therefore, it challenged the assertion that there could have been an expectation that the fees would remain private and that the information would for all time remain a matter between Counsel and the Ministers.
12. Balfour & Manson challenged the statement that it would be incompatible with the second data protection principle to provide them with the information requested. They confirmed that they were seeking this information in order to provide it to the Taxing Master so that he could fix the appropriate level of fees for Mr Davidson's Counsel. They did not consider that this was incompatible with the purpose for which this information had been obtained.
13. In particular, Balfour & Manson asserted that it intended to process the data further by and only by advising the Taxing Master of the level of fees charged and paid to Ministers' Counsel in the context of its claim that its Counsel's fees were reasonable and not excessive.
14. An interim letter from the Scottish Executive disputed the fact that Senior Counsel had no objection to his Fee Notes being disclosed. The Executive indicated that Senior Counsel did not want the fees he charged for this case to be disclosed and would take the same approach irrespective of who his client was. The Executive further indicated that if the Taxing Master did require the information requested then the Executive would co-operate with him by supplying it.



15. In its notice of review, the Executive confirmed that both parties accepted this information to be personal data. It reaffirmed its view that release of this information would breach the first data protection principle because it would be unfair. It advised that the fee notes in question had been submitted on an agent/client basis and both Junior and Senior Counsel had confirmed that they considered the information was provided for the purpose of arranging payment for their services by the Scottish Ministers. The Executive did not consider it relevant as to whether Counsel might have different expectations in different circumstances as to what use might be made of their fee notes.
16. Secondly, the Executive concluded that the provision of this information to the Taxing Master in the circumstances set out by Balfour & Manson would not make the processing of the data compatible.
17. Balfour & Manson applied to my Office for a decision on 15 June 2005. They provided information on the background to this matter and supplied my Office with copies of the correspondence setting out both parties' arguments. They advised that the sole purpose for which this material was required was for Taxation purposes.
18. The case was assigned to an Investigating Officer.
19. I was subsequently informed that some agreement had been reached between the parties on the issue of expenses. Balfour & Manson confirmed, however, that they still wished to proceed with their application for a decision.

## Investigation

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20. Balfour & Manson's appeal was validated by establishing that they had made a request to a Scottish public authority (i.e. the Executive) and had appealed to me only after asking the authority to review its response to the request.
21. The Investigating Officer contacted the Executive on 28 June 2005 giving notice that an appeal had been received and that an investigation into the matter had begun. The Executive was asked to comment on the issues raised by this case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
22. The Executive was asked to provide any internal correspondence discussing this matter and any correspondence with Senior and Junior Counsel. This correspondence was provided.



23. Given the full submissions set out in the correspondence between the Executive and Balfour & Manson dealing with the initial request for information and the subsequent request for information, I did not seek further information from the parties on the application of the exemptions to the information requested.
24. In correspondence with my Office, Balfour & Manson confirmed that they were seeking the total level of fees paid to/rendered by each Counsel in the House of Lords appeal, although they would be prepared to accept the total combined amount.

## Analysis and findings

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25. I have looked carefully at the correspondence between the two parties to this application. The Executive has relied on section 38(1)(b) of FOISA which states, in conjunction with section 38(2)(a)(i) of FOISA, that information is exempt information if it constitutes personal data and disclosure of the information to a member of the public would contravene any of the data protection principles.
26. Before I examine the application of this exemption, I consider it appropriate to address a matter that arose in the course of the correspondence between the two parties.
27. This relates to the relevance of the identity of the recipient and the use of that data by that recipient in the context of freedom of information legislation. In its correspondence with the Executive, Balfour & Manson indicated that they only required the information to pass to the Taxing Master to assist with the calculation of expenses in relation to a specific court case.
28. Under FOISA, an authority cannot take into account the identity of the applicant or how he or she intends to use the information requested. In other words, FOISA is recipient blind. Therefore the Executive could only consider whether the information should be released to “a member of the public” (see section 38(2)(a) of FOISA). In effect, it is considering whether the information requested can be put into the public domain because the authority has no control over what happens to that information once it has been disclosed (subject to copyright).
29. It is possible that an authority will decide in a particular case that although the information should not be released to “a member of the public” under FOISA, the information could be disclosed to a particular applicant under the specific terms of, e.g., the Data Protection Act 1998 (DPA).



30. I mention this because Balfour & Manson seemed to be of the view that the disclosure of this information was justified because they intended only to pass this information to the Taxing Master. This point could not be taken into account by the Executive when considering this request under FOISA.
31. Section 38(5) of FOISA states that “personal data” has the meaning assigned to it in section 1(1) of DPA. That is, the information must be data which relate to a living individual who can be identified from those data.
32. The Executive has argued that the details of Counsels’ fees requested in this case are personal data. This was accepted by Balfour & Manson.
33. Despite the views of both parties to this case, however, I am not convinced that Counsels’ fees in this case constitute “personal data”. The fees paid to Counsel in any given case are simply payment for services rendered. I would not regard the amount paid to a company providing services to a local council to be personal data. The difference in this case, of course, is that Counsel is an individual rather than a company or firm and essentially is working as a sole trader.
34. However, in most cases Counsels’ fees in any given case will not represent his or her total annual income. It will simply be payment received from one particular source for one specific case. Further, in addition to fees that Counsel may receive as advocate, Counsel may also receive income from other work such as writing legal articles for newspapers and periodicals, lecturing and editing textbooks.
35. In the case of Mr AAZ and the Department of Enterprise, Trade and Employment Case Number 98073, 2 OIC. 42, 47-48 (1999) the Irish Commissioner stated that “as a general proposition, I accept that much information about the business affairs of a sole trader will not constitute personal information about the individual concerned.” He noted some exceptions, however, where that information disclosed the individual’s income.
36. The Irish Information Commissioner went on to distinguish between information about an income which revealed personal information about the recipient such as family circumstances or inadequacy of means. For example, where the information was derived from social welfare payments then this information would constitute personal data. That is not the case here.
37. Although, clearly, the Irish Commissioner’s decision was not made under the Data Protection Act 1998, I agree with the statements made in the decision.





38. Even if this payment did represent the total amount of fees that Counsel had received in one year (because it was the only case he had undertaken, for example) I would still question whether information about his fees represented personal data. The final amount would not, it seems to me, represent Counsel's "take home" salary. Presumably he would have expenses to deduct from this amount such as IT equipment costs, secretarial costs, administration costs such as postage and photocopying costs and commission to Faculty Services Ltd, the business arm of the Faculty of Advocates.
39. In short, it seems to me that the fees Counsel receives in any given case will be only one source of the total gross income he receives from which disbursements will have to be made.
40. In their correspondence with the Executive, Balfour & Manson pointed to the publication of the Scottish Legal Aid Board (SLAB) payments made to each advocate. On its website SLAB publishes the annual figure paid out in legal aid to each named advocate. The Executive indicated that this simply provided the annual figure rather than the amount received in any given case. However, presumably if an advocate is undertaking purely legal aid work this figure will represent the total payment received from fees for any year. This information has apparently not been withheld, however, on the basis that it is personal data.
41. Therefore I have reservations about whether the information in this case even meets the threshold of the definition of personal information.
42. However, even if this information constitutes personal data I am not satisfied that its disclosure would breach the data protection principles.
43. As mentioned above, the Executive has relied on the exemption contained in section 38(1)(b) of FOISA to withhold the information from Balfour & Manson. The effect of section 38(1)(b), read in conjunction with section 38(2)(a)(i), is to exempt from release third party personal data if the release of the data would breach any of the data protection principles. The Executive has argued that the release of the information would breach the first and second data protection principles.
44. The first data protection principle states that:  
*"personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*
  - a. *at least one of the conditions in Schedule 2 is met, and*
  - b. *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*





45. I am satisfied that the information requested by Balfour & Manson does not constitute sensitive personal data (as defined by section 2 of the DPA).
46. The first data protection principle therefore consists of two elements which public authorities must adhere to. Personal data must be processed fairly and lawfully and must not be processed unless at least one of the conditions for processing in Schedule 2 of the DPA is satisfied.
47. The Executive has argued that release of this information would be in breach of the first data protection principle in that it would be unfair to release the information. It submitted that the information contained within the fees note was supplied by Counsel for the purpose of payment for a service rendered. The Executive has argued that there was no expectation that this information would be released to a third party or member of the public.
48. There seems to be some disagreement between the two parties as to Counsels' views on release of this information. Balfour & Manson indicated in correspondence with the Executive that it understood Senior Counsel did not personally object to the release of this information. The Executive subsequently advised Balfour & Manson that Senior Counsel did object to the details of his fees in this case being released.
49. In any event, I am of the view that although Counsels' views are relevant in this case, they are by no means determinative. The Executive made this clear in its correspondence with Counsel. The Executive advised that even if Counsel did not object to the release of the information the Executive might still choose to withhold this information.
50. The consent of both Counsel to the release of this information would be pivotal if the Executive was arguing that without this consent disclosure would be unlawful (and therefore in breach of the first data protection principle.) However, this is not the argument being submitted by the Executive. Rather, the Executive is arguing that disclosure would be unfair. Counsels' consent or the lack thereof to the release of this information is still a consideration when considering whether disclosure of this information would be unfair. However, the Executive's key contention appears to be that release of this information would be unfair because Counsel would not have expected this information to be released to a third party or member of the public.
51. I am unable to accept that Counsel would have expected their fees in this case never to be disclosed to another third party or to a member of the public. I consider this for a number of reasons.



52. In its correspondence with the Executive, Balfour & Manson pointed to two occasions where the level of Counsels' fees was the subject of a Parliamentary Question. In the first case in November 2002, the question related directly to the same matter and requested the level of Counsels' fees after the matter had gone to the Inner Court. The total figure was supplied in a response by Jim Wallace, then Minister for Justice.
53. In May 2004, another Parliamentary Question sought the level of Counsels' fees in the case of *Napier v Scottish Ministers* in which the same Senior Counsel appeared. Again, this information was supplied. For this reason alone, I am unable to accept that Counsel would have expected their level of fees in this case to remain a private matter between themselves and their clients. I accept, however, that in both of these cases the figure was supplied as a total figure and not broken down to the individual amounts paid to each Counsel.
54. However, I consider that Counsel must have reasonably expected that the individual amounts might be publicised at some point in the future. I take this view because of the nature of the case in which the two Counsel were appearing. *Scott Davidson v the Scottish Ministers* is a high profile public law case. The case concerned the practice of slopping out at Barlinnie Prison and whether that practice breached Mr Davidson's human rights. The House of Lords considered a number of key legal points including whether a Scottish judge was debarred because of bias for sitting judicially when a case raised issues on which he had previously expressed his views. A secondary issue aired by the case was the extent to which the Scottish Ministers are protected by the Crown immunity preserved by the Crown Proceedings Act 1947.
55. The profile of a case seems to be very relevant when considering the expectations of individuals involved in the case and information supplied by or concerning them. There must be an expectation that there will be higher level of public scrutiny of the way public funds are used to defend such actions.
56. Finally, I consider that with the arrival of the new freedom of information regime the expectations of private bodies or individuals contracting with or performing services for public authorities regarding the privacy of information supplied by or concerning them must have changed. In Scotland, FOISA received Royal Assent in May 2002. From that date onwards, public authorities and commercial organisations involved in the public sector were on notice that any information supplied by or concerning them might be subsequently disclosed under the Act, particularly where that information concerned the use of significant public funds.
57. I do not accept that Counsel would never have expected the fees paid to them in this case to remain a private matter between themselves and their clients, the Scottish Ministers. This is an important use of public funds the disclosure of which would not, in my view, reveal the annual income of Counsel.



58. With reference to the condition in Schedule 2 of the DPA, I am satisfied that the Executive can satisfy the sixth condition in Schedule 2, which refers to processing which is “necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.” There is a legitimate interest in details of the cost of Counsels’ fees being made available in a high profile public law case such as this and I am satisfied that disclosing the information would not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of Counsel.
59. The Executive also argued that disclosure would be in breach of the second data protection principle on the basis that the information had been supplied to them for the sole purpose of processing payment of counsels’ fees on behalf of their client.
60. The second principle states that personal data should not be processed in a manner incompatible with the purposes for which the data were obtained. There is a strong link to the first principle in this in that it is difficult to see how if processing is fair, it can be at the same time incompatible. I have already indicated that I do not consider that the processing of this data would be unfair. Therefore I am satisfied that disclosure under FOISA would not be incompatible with the purposes for which the data were obtained.
61. I am satisfied that disclosure of this information would not be in breach of the data protection principles.

## Decision

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I find that the Scottish Executive (the Executive) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in failing to provide details of Counsels’ fees instructed by the Scottish Ministers paid or rendered in the House of Lords Appeal *Scott Davidson v the Scottish Ministers*. In failing to do so, the Executive has breached section 1(1) of FOISA. The total figure for each Counsel should be provided to Balfour & Manson.



I require the Executive to supply the figures to Balfour & Manson within six weeks of receipt of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**9 December 2005**