

# Decision Notice



Decision 072/2008 Mr Michael Otter and the Scottish Ministers

Draft appeal reports

Reference No: 200701138  
Decision Date: 30 June 2008

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## Summary

Mr Otter requested from the Scottish Ministers (the Ministers) a copy of a draft agricultural subsidy appeal report. The Ministers withheld this information from Mr Otter and relied on the exemption in section 30(b)(ii) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, which upheld the Ministers' original decision in respect of the information, Mr Otter remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which the Ministers also applied section 30(c) of FOISA, the Commissioner found that the information was Mr Otter's personal data and therefore absolutely exempt under section 38(1)(a) of FOISA. He also concluded, however, that the Ministers would have been justified in withholding the information under section 30(c) in any event.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs; 38(1)(a) (Personal information).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 21 April 2007, Mr Otter wrote to the Ministers to request a copy of a particular version of an agricultural subsidy appeal report, which he understood to show the changes made to the report by each member of the appeal panel.
2. On 31 May 2007, the Ministers wrote to Mr Otter advising that they considered the report to be exempt under section 30(b)(ii) of FOISA.
3. Following further correspondence with the Ministers, Mr Otter wrote to them again on 19 June 2007, requesting a review of their decision.



4. The Ministers responded to Mr Otter's request for a review on 9 July 2007, confirming that a review had been carried out and that the original decision to withhold had been upheld.
5. On 20 August 2007, Mrs Otter wrote to the Commissioner's Office, on behalf of Mr Otter, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Otter had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 24 August 2007, the Ministers were notified in writing that an application had been received from Mr Otter and asked to provide my Office with copies of the information withheld from Mr Otter. The Ministers responded with this information on 30 August 2007 and the case was allocated to an investigating officer.
8. At this point, it became apparent that the Ministers were claiming the information withheld to be subject to section 30(c) of FOISA in addition to section 30(b)(ii). The investigating officer subsequently contacted the Ministers in line with section 49(3)(a) of FOISA, seeking their comments on the application and in particular their reasoning for applying the exemptions claimed.
9. A full response was received from the Ministers on 4 October 2007, providing background information on Mr Otter's case and arguments in support of the exemptions in section 30(b)(ii) and (c).
10. Within this response, the Ministers advised that they were relying on the exemption in section 30(c) in addition to the exemption in section 30(b)(ii) which they had already cited for withholding the requested information from Mr Otter.

## Commissioner's analysis and findings

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11. In coming to a decision in this case, the Commissioner has considered all of the submissions and other information that has been presented to him by both Mr Otter and the Ministers and the Commissioner is satisfied that no matter of relevance has been overlooked.
12. As indicated above, the Ministers relied on the exemptions in sections 30(b)(ii) and 30(c) of FOISA for withholding information from Mr Otter. It has come to the Commissioner's attention, however, that there is another characteristic of the information which he must consider before going on to examine the Ministers' use of these exemptions.



### Section 38(1)(a) of FOISA

13. The information withheld from Mr Otter in this case is information describing and deliberating on his activities and events with which he had a close personal association. He can be identified from that information, which is biographical of him in a significant sense and focuses on him. The information therefore relates to him. It meets all the requirements for being considered to be his personal data, as defined by section 1(1) of the DPA 1998 (see the Appendix below).
14. Section 38(1)(a) of FOISA exempts information which constitutes personal data of which the applicant is the data subject. This is an absolute exemption in terms of section 2(2) of FOISA and therefore is not subject to the public interest test. The Commissioner is satisfied that the information withheld is exempt under section 38(1)(a), being Mr Otter's personal data, and therefore that the Ministers would have been entitled to withhold it under this exemption. Data subjects have separate rights to seek access to their own personal data, by means of a subject access request under section 7 of the DPA.
15. While the Commissioner considers the information withheld to be absolutely exempt as the personal data of Mr Otter, and therefore is not required to consider the application of the exemptions claimed by the Ministers, he does consider it appropriate in this particular case to go on and consider whether the Ministers would have been entitled to withhold the information under either of the exemptions they claimed.

### Section 30(c)

16. Section 30(c) of FOISA exempts information if its disclosure under FOISA would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The exemption in section 30(c) of FOISA is a qualified exemption which means that it is subject to the public interest test laid down by section 2(1)(b) of FOISA. "Otherwise" in this context is intended to refer to the other exemptions in section 30.
17. As the Commissioner has said in his previous decision (see, for example, *Decision 017/2006 Mrs X and Angus Council* or *Decision 084/2007 Mr W Carle and the Scottish Prison Service*) he expects any public authority relying on this exemption to demonstrate what specific harm would be caused to the conduct of public affairs by release of the information. Any damage caused (or likely to be caused) by release of the information would have to be real or very likely, not hypothetical. The harm caused or likely to be caused must be significant and not marginal.



18. In justifying their reliance on the exemption in section 30(c) of FOISA, the Ministers explained that hearings of the kind under consideration in this case were carried out by a three person panel, to ensure that the hearing was balanced and objective. They argued that it was important for the effective conduct of the appeals procedure that members reached a united decision after proper deliberation. To release documents which recorded the process of reaching this common position would, they argued, prejudice the effective conduct of such hearings. Divisions between panel members could be exposed and the effectiveness of hearings would be reduced if panel members were seen to be disunited. The Ministers also argue that if panel members were concerned that their individual positions would be released to the public they might be less inclined to put their views forward in future.
19. Having considered the submissions that have been presented by the Ministers and the substance of the withheld information, the Commissioner agrees in this particular case that disclosure of the withheld information would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. He accepts that disclosure would have a significant inhibiting effect on future panels arriving at a full and considered decision.
20. Having established that the exemption applies the Commissioner must go on to consider the public interest. While there is a general public interest in enhancing scrutiny of the decision making process and thereby improving accountability, the Commissioner is not satisfied that there is anything in the withheld information which would further that public interest to any significant degree. He can identify no other potential public interest which would favour disclosure. Against that, he does accept the relevance in this case of the public interest in high quality decision making, as advanced by the Ministers, and the importance of a private space in which panel members can deliberate and reach their conclusions. On balance, therefore, the Commissioner concludes that the limited public interest in disclosure is outweighed by the public interest in maintaining the exemption and consequently that the information could legitimately be withheld under section 30(c) of FOISA.
21. In the circumstances, being satisfied that the information has in any event been properly withheld, the Commissioner is not required to go on to consider the application of the exemption in section 30(b)(ii) of FOISA.

## DECISION

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request from Mr Otter.

Decision 072/2008  
Mr Michael Otter  
and the Scottish Ministers



## Appeal

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Should either Mr Otter or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**30 June 2008**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (e) in subsection (1) of section 38 –
  - (i) paragraphs (a), (c) and (d); and

...

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

....

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.



## 38 Personal information

- (1) Information is exempt information if it constitutes-
- (a) personal data of which the applicant is the data subject;
- ...

## Data Protection Act 1998

### 1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...