

Decision Notice

Decision 169/2014 Mr Paul Hutcheon and the Scottish Ministers

Scottish Edge awards

Reference No: 201400497

Decision Date: 31 July 2014



Scottish Information
Commissioner

Summary

On 21 November 2013, Mr Hutcheon asked the Scottish Ministers (the Ministers) for information on the development and setting up of the Scottish Edge awards. Following a review, in which the Ministers disclosed some information, Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold some of the information. She required the Ministers to disclose the remainder to Mr Hutcheon.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests and the economy); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles, Part I: the principles) (the first data protection principle) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (conditions 1 and 6)

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

Background

1. On 21 November 2013, Mr Hutcheon wrote to the Ministers requesting the following information:
"...all communications between the Scottish Government and Entrepreneurial Spark (both ways) on the development/setting up of the Scottish Edge awards. Please also include all minutes and notes of meetings on the same subject."
2. Having received no response, Mr Hutcheon wrote to the Ministers on 14 January 2014, requesting a review of their failure to respond.
3. The Ministers carried out a review and notified Mr Hutcheon of the outcome on 11 February 2014. They provided some information, but withheld information which they considered to be exempt from disclosure under FOISA.
4. On 4 March 2014, Mr Hutcheon wrote to the Commissioner 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.
5. The application was validated by establishing that Mr Hutcheon made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 6 March 2014, the Ministers were notified in writing that an application had been received from Mr Hutcheon and were asked to provide the Commissioner with the information withheld from him. The Ministers provided the information and the case was allocated to an investigating officer.
7. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
8. On 15 April 2014, the Ministers disclosed more information to Mr Hutcheon, but continued to withhold information from the documents under the exemptions in sections 30(b)(ii), 30(c), 33(1)(b) and 38(1)(b) of FOISA.
9. Mr Hutcheon confirmed on 16 April 2014 that he still wished a decision in relation to the information still being withheld.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Hutcheon and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. The Ministers explained that Entrepreneurial Spark (ES) is "a private, not-for-profit accelerator/incubator business established to support early-stage enterprises that demonstrate growth potential." ES provides office space and intensive coaching/mentoring to clients without taking fees or equity shares. It receives support from "entrepreneurs-in-residence", and operational support from relevant local authorities. The Ministers explained that the Scottish Government does not provide any direct support to ES. It has engaged with ES as one of six core partners towards the delivery and development of the Scottish EDGE Fund, which is a Scottish Government initiative supporting business growth, delivered through Scottish Enterprise.

Section 30(b)(ii) – inhibition to the free and frank exchange of views

12. The Ministers told Mr Hutcheon that the exemption in section 30(b)(ii) of FOISA applied to some comments in the emails.
13. To rely on the exemption in section 30(b)(ii) of FOISA, the Ministers 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.
14. In applying the tests in section 30(b)(ii), the Commissioner expects public authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm should take the form of substantial inhibition. The word "substantial" is important: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
15. The Ministers provided detailed reasons explaining why, in each case, they considered that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. In some cases, the withheld information

represented a frank personal view; in other cases it related to proposals and options put forward without necessarily a serious intention to take all the options forward.

16. The Ministers concluded that release of the information would be likely to cause significant harm by inhibiting ES staff from providing frank views to the Scottish Government because ES would be concerned that information would be released and would harm their wider stakeholder and press management work. The Scottish Government would be less informed about the options and the opportunities ES was considering, and this would reduce the potential for Scottish Government staff and ES staff to develop work on enhancing entrepreneurial activity.
17. The Ministers also argued that disclosure of some of the information withheld under section 30(b)(ii) would be likely to significantly damage ES's relationship with a key supporter, and gave reasons for this conclusion.
18. The Commissioner has studied the information withheld under section 30(b)(ii) of FOISA, and accepts that it relates to ideas, proposals or suggestions which were not later used, or to views expressed in frank and personal terms.
19. The Commissioner accepts the arguments of the Ministers, and is satisfied that, in each instance, disclosure of the information withheld under section 30(b)(ii) would make it much less likely that those involved would, in future, make known their views so fully or frankly, or be so willing to communicate ideas at an early stage of development. She accepts, therefore, that the exemption in section 30(b)(ii) of FOISA applies.
20. Having found that the exemption in section 30(b)(ii) was properly applied to the information, the Commissioner must go on to consider the application of the public interest test to this information.

Public interest

21. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
22. In balancing the public interest, the Ministers acknowledged a public interest in releasing the withheld information in order to promote openness and transparency.
23. The Ministers submitted, however, that there was a strong public interest in ensuring staff at ES, and other individuals, were not deterred from providing free and frank views or quotes to the Ministers or to ES. If such individuals did not express all their views about projects such as the Edge Fund, the Ministers would be unable to help resolve any issues and also be less aware of what was happening - and less able to make Ministers aware of what was happening. In turn, Ministers would be less able to respond to queries or questions in Parliament about the subject. This would not be in the public interest, as it would reduce close partnership working between ES and the Ministers, and this would have a negative impact on the quality and thoroughness of their consideration of all options.
24. Therefore, on balance, the Ministers felt that the public interest in withholding the information - to avoid inhibiting officials from providing free and frank comments and to maintain effective partnership working - outweighed any public interest in releasing the information.
25. The Commissioner recognises that disclosure of the information withheld under section 30(b)(ii) would increase transparency: release of this information would allow the public to

see early views and all comments. There is some public interest in such increased transparency, but, in the circumstances, the Commissioner accepts that if disclosure would limit the scope or frankness or willingness to comment in future, this could diminish the quality of decision making, and this would be contrary to the public interest.

26. The Commissioner notes that the Ministers have disclosed a large proportion of the information and is of the view that the information disclosed makes a reasonable contribution towards satisfying the relevant public interests in favour of disclosure.
27. On balance, the Commissioner has concluded that, in this instance, the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure of the information withheld. She therefore concludes that the Ministers were entitled to withhold this information under section 30(b)(ii) of FOISA.

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

28. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." "Otherwise" is used to differentiate this exemption from the other varieties of substantial prejudice covered in other parts of section 30. Section 30(c) is a qualified exemption, and subject to the public interest test required by section 2(1)(b) of FOISA.
29. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The implications of the word "substantial" are discussed above in relation to the exemption in section 30(b)(ii).
30. The Ministers described the information withheld under section 30(c) of FOISA, as consisting of personal views. They argued that public disclosure of personal views, which offered no insight into policy development, would severely damage both the Scottish Government's and ES's relationships with current partners, and might put those partners off continued involvement in ES's work. This, the Ministers submitted, would significantly harm ES's effectiveness in promoting entrepreneurial activity in Scotland as ES relies heavily on support from these partners, and their well-known names and good reputations, to fund and secure wider interest in its work.
31. The Ministers submitted that disclosure of the information would also severely inhibit the potential future support for, and engagement with, entrepreneurial initiatives if entrepreneurs and companies felt that information about initial, informal exchanges with ES would be likely to get into the public domain, even if they did not become a supporter of ES's work; this would lead to them facing questions about their decisions in relation to ES.
32. Finally, the Ministers submitted that the Enterprise teams in the Scottish Government may have contacts with the same firms and entrepreneurs on other policy initiatives. They considered it was likely that these individuals and organisations would be more reluctant to work closely with the Scottish Government on other projects in future due to concerns about views provided informally or in confidence potentially being released into the public domain. This could significantly harm the Scottish Government's wider work on business policy and initiatives.
33. Having viewed the information withheld under section 30(c) of FOISA, the Commissioner acknowledges that some of the Ministers' submissions have substance and she accepts that it is likely that the information might not have been provided, if disclosure had been anticipated. The content (and context) of the communications are relevant. In this instance, the Commissioner accepts that there appears to have been an (understandable) expectation

that the information would not be publicly disclosed, but rather that it would only be used to inform the recipients.

34. In the circumstances, the Commissioner accepts the Ministers' view that disclosure of the withheld information at the relevant time would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs (the "public affairs" in question being, broadly, the Government's support for, and engagement with, entrepreneurial initiatives).
35. The exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Consideration of the public interest test

36. It was the Ministers' view that there was some public interest in release of the information to promote openness and transparency. However, they argued that there was a strong public interest in both the Scottish Government and ES maintaining good, close working relationships with existing supporters, and in ensuring that potential supporters were not deterred, in relation to ES's work, in order to help effectively promote the Scottish Government's objectives of enhancing entrepreneurial activity in Scotland. There was also a strong public interest in avoiding damaging the Scottish Government's wider relationships with the stakeholders involved as that could have a significant negative impact on the Scottish Government's ability to deliver its wider policy objectives.
37. On balance, the Ministers felt that the public interest in withholding the information outweighed that in its release as it was vital for ES to be able to play its role in delivering Scottish Government objectives on entrepreneurship and that it has good relationships with, and financial and other support from, high-profile companies and entrepreneurial figures.
38. When balancing the public interest, the Commissioner recognises the general public interest in public authorities being transparent and accountable. The Commissioner recognises that there is a significant public interest in ensuring that the Ministers can have good working relationships with the organisations and the persons involved here.
39. Having accepted that disclosure in this case would be likely to cause significant difficulty for ES in its relationships and activity, the Commissioner also finds there is substantial weight to the public interest in maintaining the exemption in this case. The Commissioner notes that the Ministers have disclosed a large part of the information covered by Mr Hutcheon's request, and is of the view that the information disclosed makes a reasonable contribution towards satisfying the relevant public interests in favour of disclosure.
40. On balance, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA was not outweighed by the public interest in disclosure of the withheld information.

Section 33(1)(b) – commercial interests and the economy

41. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and subject to the public interest test in section 2(1)(b) of FOISA.
42. When relying on this exemption, an authority must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by

disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear: in this connection, consulting the third party is generally advisable.

43. The Ministers confirmed that they relied on this exemption for information about three web domain names in an attachment to one of the documents covered by the request. The Ministers explained that the commercial interests involved were those of ES: ES had incurred costs to identify and hold three website domains on the basis that these domains might in future contribute towards the effectiveness of the Scottish EDGE Fund. The Ministers argued that these website domain names had a commercial value to ES.
44. The Ministers explained that if the website domains were not used in relation to the Scottish EDGE Fund, then ES would utilise these domains for its own purposes. Release of the domain names prior to their use would be likely to jeopardise any future gain that ES might have with the domains by allowing other companies to seek to take similar website names and use them for their own purposes. The Ministers argued that this “would be likely to significantly harm ES’s commercial interests by meaning the costs incurred would have been wasted and they would not be able to deliver commercial gain in terms of the support for business growth which could be delivered through an effective, well-publicised website.”
45. The Ministers also commented that ES considered that it was providing the information to the Ministers in confidence, and would not have provided the information if it knew it might be released.
46. Information will be exempt under section 33(1)(b) of FOISA where its disclosure would, or would be likely to, prejudice substantially a person's commercial interests. It is not necessary in every case to demonstrate that actual prejudice has occurred. On the other hand, the authority must at least be able to demonstrate a likelihood of prejudice - the anticipated harm must be probable and not simply possible. It must result from disclosure of the particular information requested, in the context of the particular request.
47. The Ministers gave no indication of the actual commercial value of the domain names to ES, and no indication of the scale of the commercial harm which ES might reasonably be expected to suffer, should the domain names be made public. Nor did the Ministers attempt to assess how likely it would be that another organisation might seek to take similar website names and use them for their own purposes.
48. The Commissioner does not accept the Ministers’ submission that disclosure of the domain names could impact on the commercial interests of ES to the extent required for the exemption in section 33(1)(b) to apply. The prejudice must be substantial, in other words of real and demonstrable significance. The Ministers’ submissions have not demonstrated this in respect of the potential harm to ES’s commercial interests, should the domain names be disclosed.
49. Although referring to the information being provided in confidence by ES to the Ministers, this is not evidenced in the attachment or its covering document, and the Ministers provided no other submissions on why this information should be withheld in terms of any other exemption in FOISA. As the information cannot be considered to be exempt under section 33(1)(b), the Ministers were not entitled to withhold the information under that exemption. In the circumstances, the Commissioner is not required to go on to consider the application of the public interest test.

Section 38(1)(b) - Personal information

50. The Ministers withheld some personal data under section 38(1)(b) of FOISA, on the basis that disclosure would breach the first data protection principle. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) (as appropriate), exempts personal data if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.
51. In considering the application of this exemption, the Commissioner will firstly consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she will go on to consider whether its disclosure would breach the first data protection principle.
52. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is the possession of, or is likely to come into the possession of, the data controller ..." (the full definition is in the Appendix).
53. The Ministers submitted that the withheld information was personal data as it included names, email addresses and phone numbers of individual members of staff in the Scottish Government, ES and partner organisations. The Ministers explained that those individuals can be identified from this information, and therefore it is their personal data.
54. The Commissioner has considered the withheld information and is satisfied that it is personal data: the withheld information identifies a living individual or individuals and the information relates to those individuals.
55. The Ministers submitted that disclosure of the withheld information would contravene the first data protection principle; it would be unfair to release the information because the staff concerned have a right to expect privacy. The Ministers said they had released to Mr Hutcheon the names and contact details of those staff involved in the correspondence who were Senior Civil Servants (SCS) and could therefore expect a degree of public scrutiny. The Ministers stated that they had released the personal data of the head of ES, and that this seemed to be what Mr Hutcheon was most interested in, in respect of the names of staff.
56. The Ministers submitted that staff below SCS level, along with other similarly non-senior staff in external organisations, should not have their personal data released without their permission. The Ministers said that staff have expressed concerns about release of their names as such names could then appear in a blog article. Such disclosure, the Ministers said, would be distressing for the individuals concerned, who would not have expected to be referred to by name. The Ministers also submitted that such naming was unnecessary, as the same point could have been made without referring to an official by name.
57. The Ministers stated that it would be unfair to subject non-senior officials to the risk of similar articles being written about them and therefore subjecting them to potential public scrutiny. The Scottish Government staff concerned in this case, the Ministers submitted, do not have any public profile and are not in the sort of jobs where they would expect their names to be in the public domain. Also, as none of the conditions in Schedule 2 are met, the Ministers considered it would be unlawful to release this information to Mr Hutcheon.
58. The first data protection principle states that personal data shall be processed fairly and lawfully. It also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. (The Commissioner is

satisfied that none of the withheld information constitutes sensitive personal data. Therefore, she is not required to consider whether any of the conditions in Schedule 3 can be met.)

59. The processing in this case would entail disclosing the personal data into the public domain in response to Mr Hutcheon's request. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner*¹, that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject (i.e. the person or persons to whom the data relate).
60. As noted above, the Ministers submitted that they did not consider that any of the conditions in Schedule 2 would apply. They said that conditions 2 to 5 were not applicable. In relation to condition 1, not all of the individuals concerned had been asked by the Ministers whether they consented to disclosure of their personal data. However, some of the "key staff whose names appear several times, and the more junior staff at ES," had been asked. The Ministers informed the Commissioner that none of those asked wanted their details released.
61. The Ministers confirmed that they had considered the application of condition 6, which the Commissioner agrees is the only condition which might be applicable in this case. Condition 6 allows personal data to be processed if that processing 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.

Is Mr Hutcheon pursuing a legitimate interest or interests?

62. There are tests which must be met before condition 6(1) can apply. These are:
- Is Mr Hutcheon pursuing a legitimate interest or interests?
 - If so, is the disclosure necessary for the purposes of that interest? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could the interests be met by means which interfered less with the privacy of the data subject(s)?
 - 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 data subject(s)? As noted by Lord Hope in the above judgment, there is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr Hutcheon must outweigh the rights and freedoms or legitimate interests of the data subject(s) before condition 6 will permit the personal data to be disclosed.
63. The Ministers acknowledged that Mr Hutcheon has some legitimate interest in the information given his occupation as a journalist. However, they were of the view that this interest was very limited given that it was easy to gather, from the information already released, which organisation is corresponding in each case. The Ministers stated that release of the personal data would not in any way add to Mr Hutcheon's understanding of

¹ 2008 UKHL 47: <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

the development of the Edge Fund, so any legitimate interest would be outweighed by the rights of the data subjects to expect privacy.

64. There is no definition in the DPA of what constitutes a "legitimate interest." The Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's guidance on section 38² of FOISA states:

In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.

65. In this case, the Commissioner accepts that Mr Hutcheon, given his occupation as a journalist, has a legitimate interest in the data; that is, an interest in knowing the identities and contact details (which often appear in the information in the same form, i.e. an email address) and the organisations involved in the communications of those involved in the correspondence at issue.

Is disclosure necessary for the purposes of these interests?

66. The Commissioner must now consider whether disclosure of the information is necessary for achieving the legitimate interests she has identified, and in doing so she must consider whether these interests might reasonably be met by any alternative means.
67. The Ministers believe that disclosure is not necessary, as the same points could have been made without referring to an official by name. Similarly, Mr Hutcheon would be aware that the emails had been sent to the Scottish Government without the individual names being disclosed for non-senior staff.
68. Having considered the actual information withheld, the Commissioner concludes that Mr Hutcheon's legitimate interests could not be met in any way, other than by the release of the information under consideration. The redacted information, as provided to Mr Hutcheon, does not always indicate the organisation to whom the email is addressed, nor those persons or organisations copied into an email. Mr Hutcheon's legitimate interest is in being fully aware of those involved in the correspondence: disclosure of the recipients' identities is necessary to understand fully the correspondence and the discussions between ES and public officials and any other partner organisations. In the circumstances, the Commissioner concludes that disclosure is necessary to meet those legitimate interests.

Would disclosure be unwarranted?

69. The Commissioner must, therefore, go on to consider the interests of the data subjects, and whether disclosure would be unwarranted by reason of prejudice to their rights and freedoms or legitimate interests. As noted above, this involves a balancing exercise between the legitimate interests of Mr Hutcheon and those of the data subjects. Only if the legitimate interests of Mr Hutcheon outweigh those of the data subjects can the information be disclosed without breaching the first data protection principle.
70. In her briefing on section 38 of FOISA, the Commissioner notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:

² <http://www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>

- 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);
- the potential harm or distress that may be caused to the individual by disclosure;
- whether the individual has objected to the disclosure; and
- the reasonable expectations of the individual as to whether the information would be disclosed.

71. All of the withheld information, with the possible exception of two mobile phone numbers, pertains to the data subjects' public lives.
72. The Commissioner finds it difficult to accept that the disclosure of the information requested by Mr Hutcheon would be a significant intrusion into the lives of the individuals concerned. In essence, the information would only identify the name of the recipients of the emails sent by ES – that is the member of staff receiving the emails, or copied into the emails. It would indicate the person and their employment, and possibly their position in an organisation. The information would give no indication of anything else about that data subject – not their views, how they dealt with the emails, or any other activity.
73. The Commissioner has looked at the UK Information Commissioner's (ICO) Guidance on the disclosure of personal data of public authority staff under the Freedom of Information Act 2000 (*Requests for personal data about public authority employees*)³. She acknowledges that the Ministers have released the details of senior staff and the withheld information relates to staff occupying less senior roles, and staff described as not occupying a public-facing role. The Commissioner also notes that the Ministers have indicated that certain staff have objected to the disclosure of their personal data. Whilst the Commissioner considers that this distress may have been somewhat overstated, she accepts that the fact that the individuals concerned have objected to disclosure is relevant to her balancing of the rights of Mr Hutcheon and the data subjects.
74. The Commissioner is of the view that the arguments for and against disclosure of the names of the recipients of the emails are weak on both sides. However, she has concluded that, where the redacted information contains a job title, disclosure of the job title would add to the understanding of the correspondence, without leading to unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. Similarly, disclosure of the domain part of the email address would allow Mr Hutcheon to be fully aware of the organisations involved in the correspondence, without requiring the names to be disclosed. The Commissioner finds that, in this case, condition 6 in Schedule 2 (to the DPA) can be met in relation to the disclosure of this personal data.
75. The Commissioner concludes, for the same reasons, that disclosure of the withheld information would not be unfair.
76. In the absence of any other reason for finding disclosure to be unlawful, and given that she is satisfied that condition 6 can be met, the Commissioner finds that disclosure would be lawful.
77. Having found disclosure of some of the withheld information to be both fair and lawful, and in accordance with condition 6(1), the Commissioner concludes that disclosure of the information identified in paragraph 74 would not breach the first data protection principle, and

that the Ministers were not entitled to withhold this information under section 38(1)(b) of FOISA.

78. However, where the names of identifiable individuals appear alone or within an email address, and where the personal data comprises a direct contact number, the Commissioner accepts that disclosure of the withheld information would prejudice the data subjects' rights and freedoms or legitimate interests to an extent unwarranted by the legitimate interests identified in its disclosure. The Commissioner is therefore satisfied that condition 6 of Schedule 2 is not met in this case for the majority of the information withheld under section 38(1)(b) of FOISA.

79. Having concluded that disclosure of some parts of the withheld information would lead to unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects, the Commissioner must also conclude that disclosure of this information would be unfair. In the absence of a condition permitting disclosure, she would also regard disclosure as unlawful. In all the circumstances, therefore, she finds that disclosure would breach the first data protection principle and that the majority of the information was properly withheld under the exemption in section 38(1)(b) of FOISA.

Steps required by the Commissioner

80. As the Commissioner has found that the Ministers were not entitled to withhold certain information in terms of sections 33(1)(b) and 38(1)(b), she requires the Ministers to disclose that information. The information is to be disclosed is:

- any job title that appears in the redacted information relating to the recipient/s of the emails – that is in documents 1, 3 and 5;
- any information relating to the recipient/s of the emails which identifies an organisation involved in the correspondence, including the domain name part of the email address– that is in documents 10 and 12;
- the domain names withheld from an attachment to document 2.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Hutcheon.

For the reasons set out above, the Commissioner finds that the Ministers were entitled to withhold information on the basis that it was exempt from disclosure under sections 30(b)(ii), 30(c) and 38(1)(b) of FOISA.

However, the Ministers were not entitled to withhold information in terms of sections 33(1)(b) and 38(1)(b) of FOISA. In withholding this information, the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to provide Mr Hutcheon with the information identified in paragraph 80 by 15 September 2014.

Appeal

Should either Mr Hutcheon or the Scottish Ministers (the Ministers) 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 Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement
31 July 2014

Appendix

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.

...

- (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
(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 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

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.

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

38 Personal information

- (1) Information is exempt information if it constitutes-
- ...
- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
- ...
- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles; or
- ...
- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.
- (5) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;
- "data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;
- ...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) 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;
- ...

Schedule 1 – The data protection principles

Part I – The principles

1. 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.

...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

- 1. The data subject has given his consent to the processing.

...

- 6. (1) The processing 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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info