# Decision Notice

Decision 177/2013 David Rule and the Scottish Ministers

Ministers' response to decision notice issued by Commissioner

Reference No: 201200877
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www.itspublicknowledge.info

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## Summary

On 7 February 2013, Mr Rule asked the Scottish Ministers for the information they held regarding a decision of the Commissioner which ordered them to disclose information about their local income tax policy. The Ministers appealed the decision in question to the Court of Session, but later abandoned the appeal.

The Ministers provided a wide range of information to Mr Rule, but withheld other information on the basis that it was exempt from disclosure. Following an investigation, the Commissioner found that the Ministers were entitled to withhold the remaining information in line with the exemptions in Part 2 of FOISA (in particular, sections 30 (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality)).

The Commissioner also found that the Ministers had failed to respond to Mr Rule's request within the timescale set down in FOISA.

## Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1), (2)(e)(ii) (Effect of exemptions); 10(1)(a) (Time for compliance); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 38(1)(b), (2)(a)(i) and (b), (5) (definitions of "data protection principles", "data subject" and "personal data")

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 The data protection principles, Part 1 Principles (the first data protection principle); Schedule 2 Conditions relevant for the purpose of the first principle: processing of any personal data (condition 6(1))

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 9 February 2011, the Commissioner issued *Decision 025/2011 Mr Simon Johnson of the Daily Telegraph and the Scottish Ministers*.[1] The decision ordered the Ministers to disclose information relating to revised local income tax revenue projections. The Ministers appealed the decision to the Court of Session, but abandoned the appeal in July 2011.

2. On 7 February 2012, Mr Rule wrote to the Ministers requesting all the information they held about *Decision 025/2011* on their central records database produced after 9 February 2011 (i.e. the day the decision was issued).

3. The Ministers acknowledged receipt of Mr Rule's request on 14 February 2012, and told him they would reply by 6 March 2012. However, by 11 March 2012, Mr Rule had not received a response and so wrote to the Ministers requesting that the Ministers review the way they had dealt with his request.

4. A review was subsequently carried out and the outcome notified to Mr Rule on 14 March 2012. The Ministers apologised for the delay in responding, explaining this was as a result of the quantity of information falling within the scope of the request, coupled with a period of staff illness. The Ministers disclosed a range of information to Mr Rule (the information has been published on the Ministers' website[2]), but withheld some information on the basis that it was exempt under a number of different exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA) (these are addressed in more detail below).

5. On 3 May 2012, Mr Rule 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. Mr Rule commented that, although he fully accepted the Ministers' apology for failing to respond to his initial request within the timescales set down by FOISA, he wished the Commissioner's decision to record the failure.

6. Mr Rule also questioned the Ministers' reliance on the exemptions in sections 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality – confidentiality of communications) of FOISA, arguing that they did not apply and that in each case the public interest lay in favour of releasing the information. However, Mr Rule did not question the fact that the Ministers had relied on the exemptions in sections 25 (Information otherwise accessible) and 37(1)(a) (Court records, etc.) (neither of which are subject to the public interest test in section 2(1)(b) of FOISA). As a result, the Commissioner will not consider these exemptions in this decision.

7. The application was validated by establishing that Mr Rule 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.

[1] http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/200901345.aspx
[2] http://www.scotland.gov.uk/About/Information/FOI/Disclosures/2012/LocalIncomeTax

## Investigation

8. On 4 May 2012, the Ministers were notified in writing that an application had been received from Mr Rule. The case was then allocated to an investigating officer.

9. 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.

10. The submissions from the Ministers highlighted that, in addition to the exemptions they had applied at review, they also wished to rely on the exemptions in sections 36(2) (Confidentiality – actionable breach of confidence) and 38(1)(b) (Personal data), although, in each case, only in relation to a small amount of information.

11. Mr Rule was given an opportunity to provide additional submissions during the investigation, as were the Ministers.

## Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both Mr Rule and the Ministers. She is satisfied that no matter of relevance has been overlooked.

**Section 36(1) – legal advice**

13. Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt from disclosure. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.

14. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.

15. The Ministers applied the exemption to most of the information withheld from Mr Rule. The information withheld under section 36(1) includes:

   - communications between legal advisers and policy officials in both directions (i.e. the seeking of advice and the clarification of the advice sought)
   - communications between the Ministers' legal advisers

- legal advice on the handling of the court case

16. The Commissioner is satisfied that all of the information which the Ministers have withheld under section 36(1) of FOISA is information in respect of which a claim to confidentiality of communication could be maintained in legal proceedings. As such, the information is exempt from disclosure.

*Public interest test*

17. The exemption in section 36(1) is, however, subject to the public interest test in section 2(1)(b). This means that, although the exemption applies, the information must be disclosed if, in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

18. The Court of Session, which hears appeals from the Commissioner's decisions, has not yet considered in any detail the public interest test in relation to the exemption in section 36(1) of FOISA. However, the equivalent test contained the (UK) Freedom of Information Act 2000 (FOIA) was considered by the High Court in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB).[3]

19. While not binding on the Commissioner, the Commissioner agrees with the reasoning set out by the High Court and has adopted that reasoning here.

20. In the High Court, Mr Justice Wynn Williams upheld a line of decisions from the Information Tribunal in which it was determined that there is a significant in-built weight of public interest in maintaining the equivalent of the section 36(1) exemption in FOISA (i.e. section 42 of FOIA). This is, according to Mr Justice Wynn Williams, because of the strong constitutional importance attached to legal professional privilege and, thereby, the protection of free and frank communications between lawyers and their clients. This was summed up, according to Mr Justice Wynn Williams, in the case of *R v Derby Magistrates Court ex parte P* [1996] 1 AC487, where Lord Taylor stated at page 507D:

> "Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

21. Mr Justice Wynn Williams stated at paragraphs 41 and 53 of his judgement:

> "It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b) [of FOIA, the equivalent of section 2(1)(b) of FOISA]. A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back door" to an absolute exemption. As [counsel for the Information Commissioner] submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of

[3] http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html

the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

...

The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption; in any event ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."

22. The Commissioner will now go on to consider the public interest arguments made by the Minsters and by Mr Rule.

23. The Ministers considered that, on balance, the public interest lies in favour of maintaining the exemption. While they recognise that there is some public interest in the release of legal opinion concerning matters of policy, the Ministers believe that this is outweighed by the public interest in protecting the confidentiality between lawyer and client, to ensure that Ministers and officials are able to receive legal advice and advice in relation to the conduct of litigation in confidence, like any other public or private organisation.

24. The Ministers commented that the courts have long recognised the strong public interest in maintaining the right to confidentiality of such communications on administration of justice grounds (e.g. *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48).

25. The Ministers believe that it is clearly in the public interest that decisions are taken by the Government in a fully informed legal context: Ministers and officials therefore need high-quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts. Without such comprehensive advice, the quality of the Government's decision-making would be much reduced since it would not be fully informed.

26. The Ministers also commented that the possibility of disclosure may increase the risk that lawyers and clients will avoid making a permanent record of legal advice, or only make a partial record. It is therefore in the public interest that the provision of legal advice is fully recorded, as part of a complete and accurate record of the decision-making process.

27. The Ministers argued that there is a public interest in ensuring that the Government's position on any issue is not undermined by the disclosure of legal advice. Legal advisers, including Parliamentary counsel and counsel instructed in court proceedings, need to be able to present the full picture to each other and to their clients. This not only includes arguments in support of their final conclusions, but also counter-arguments. It is the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a Scottish Government Directorate will often set out the perceived weaknesses of the Government's position.

28. Finally, the Ministers argued that there is a vital public interest in ensuring that the Government is able to defend its interests. Disclosure of legal advice has a significant potential to prejudice that ability – both directly, by unfairly exposing its legal position to challenge, and indirectly, by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. In the case Mr Rule is interested in, the legal action was abandoned, but the advice remains current and the risks outlined above remain "live."

29. Mr Rule, on the other hand, believes that the public interest in disclosing the legal advice outweighs the public interest in maintaining the exemption. Mr Rule's comments on the Ministers' reliance on section 30(b) and 36(1) were connected. They can be summarised as follows:

- the free and frank exchange of legal advice is valuable and should be protected, but it is also valuable for the public to be able to review decisions made by public officials in hindsight, so that transparency can be maintained and a better understanding of the functioning of government gained
- the passage of time means that there is less need to protect such exchanges
- there is public interest in understanding how public funds are spent

30. As noted above, the exemption in section 36(1) is not absolute. In determining where the balance of the public interest lies, the Commissioner must take into account that the public interest in maintaining the exemption commands significant weight.

31. There will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:

- the requirement for disclosure is overwhelming
- the privileged material discloses wrongdoing by/within an authority
- the material discloses a misrepresentation to the public of advice received
- the material disclosed an apparently irresponsible and wilful disregard of advice
- a large number of people are affected by the advice
- the passage of time is so great that disclosure cannot cause harm

32. The Commissioner is satisfied that none of these considerations apply here. The legal advice withheld here relates to an appeal by the Ministers against a decision of the Commissioner, something which the Ministers are entitled to do. The Commissioner recognises the very strong public interest in maintaining solicitor/client confidentiality and can find nothing, in all the circumstances of the case, which would bring her to the view that the public interest in the disclosure of the legal advice would outweigh that public interest.

33. Although Mr Rule argued that the passage of time in this case meant that there was less need to protect the exchanges between the Ministers and their legal advisers, the Commissioner does not agree that the passage of time was sufficient here. Only seven months passed between the Ministers abandoning their appeal and Mr Rule's information request, and in any case the advice could apply to current cases, not only the appealed case.

34. As such, the Commissioner finds that the Ministers were entitled to withhold the legal advice under section 36(1) of FOISA.

**Section 30(b) – free and frank provision of advice/exchange of views**

35. Under section 30(b) of FOISA, information is exempt information if its 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)). Public authorities must assess whether officials or other parties would be deterred from providing advice or views in future, if the information is disclosed, and consider whether this would cause significant harm to the way in which they carry out their business. Although it may be difficult to judge how likely it is that disclosure would cause officials to be inhibited from providing advice or views, the exemptions cannot be applied unless there are reasonable grounds for anticipating that disclosure would, or would be likely to cause, substantial inhibition.

36. The Ministers combined their arguments on section 30(b)(i) and (ii). As a result, the Commissioner will consider them together.

37. In the Ministers' view, the information which they withheld under section 30(b)(i) and/or (ii) can be separated into three categories. (During the investigation, Mr Rule was given an opportunity to comment on the Ministers' arguments regarding these three categories. His comments are included below.)

*Category 1: options re. Decision 025/2011, including grounds of appeal*

38. The redactions here freely and frankly discuss the Ministers' options in relation to *Decision 025/2011*, including the grounds for appealing the decision to the Court of Session and their implications.

39. In the Ministers' view, if these discussions were made public, it would substantially inhibit the ability of Ministers and officials to fully and freely exchange views and advice on the rare cases when a Court of Session appeal is considered, at least in a recorded form which could be put into the public domain. Disclosure of the various options considered and their implications could, in the Ministers' view, prejudice their ability to use some of these options in future, similar cases.

40. Mr Rule disagreed that the disclosure of this information would, or would be likely to, cause the substantial inhibition argued by the Ministers. He commented that the use of an argument, or giving of an opinion, is neither strengthened nor weakened by it having been used before. Lines of reasoning and opinions rejected in the *Johnson* case may, in Mr Rule's view, be relevant to and used in future cases regardless of whether they are made public or not. In Mr Rule's view, the disclosure of these opinions would merely demonstrate that the case was thoroughly thought through by the Ministers.

*Category 2: unused/draft press lines*

41. The second category of redactions are those made to draft press lines or handling plans to respond to press enquiries about the lodging of the Court of Session appeal which were incomplete or were never used.

42. These documents comprise proposed answers to various anticipated press questions relating to *Decision 025/2011* and the subsequent court appeal, none of which were actually used. However, in the Ministers' view, it is possible that at least some of these lines might need to be used again in future, e.g. if the local income tax proposal is revived or if the Ministers appeal a future decision of the Commissioner to the Court of Session. (The Ministers noted that they were asked about the *Johnson* case more recently in the context of another appeal.)

43. The Ministers commented that this type of briefing has to anticipate the most awkward questions, as well as the more obvious ones, and provide suitable answers for Ministers and/or ministerial communications staff. As a consequence, these lines are free and frank and, according to the Ministers, disclosure would substantially inhibit officials' ability to provide such lines in future as it could provide the media and others with questions they might not otherwise have thought of and would also reveal how the Ministers would answer questions if they were asked.

44. The Ministers recognised that part of the role of the media is to challenge them on important policy issues, but also argued that it is not appropriate for the Ministers to assist the media by providing a list of questions along with the likely answers. This could enable the media, and others, to ask questions designed specifically to embarrass or trip up Ministers, or misrepresent the policy on local income tax or the Ministers' position on the Court of Session appeal.

45. Mr Rule argued that disclosing this information would allow the Ministers to explain their reasons for appealing *Decision 025/2011* and would allow the media to challenge them on important policy issues. Mr Rule considered that the normal process of the media posing questions would not be obstructed by the Ministers posing their own questions and answering them. The media remain, in Mr Rule's view, free to put whatever questions they like to the Ministers.

*Category 3: drafts of documents already released to Mr Rule*

46. The third category comprises drafts of two documents, the final versions of which have been released to Mr Rule. The drafts are significantly different to the final versions and, in the Ministers' view, their development represents free and frank exchanges of views between officials on how to advise Ministers on the Court of Session appeal and on other matters, such as how to respond to a letter from an MP about the appeal.

47. The Ministers considered that disclosure of these drafts would substantially inhibit the ability of Ministers and officials to fully and freely exchange views and advice on the rare cases when a Court of Session appeal is considered, at least in a recorded form which could be put into the public domain. Disclosure of the various options considered and their implications could, in the Ministers' view, prejudice their ability to use some of these options in future, similar cases

*Commissioner's conclusion on sections 30(b)(i) and (ii)*

48. In assessing whether the disclosure of information would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views, the Commissioner will take account of matters such as the subject matter, the content of the information, the manner in which advice or an opinion is expressed and the timing of the disclosure. The Commissioner recognises, for example, that releasing advice or opinions while a decision is being considered, and for which further views are still being sought, might be more substantially inhibiting than after a decision has been taken and a matter is "closed."

49. There is no definition of "substantial" prejudice in FOISA, but the Commissioner takes the view that, in order to claim either of the exemptions in section 30(b), the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal, and that the damage would have to occur in the near future, and not at some distant time.

50. The Commissioner must consider the position as at March 2012, when the Ministers notified Mr Rule of the outcome of their review of his request (eight months after the Ministers abandoned their appeal to the Court of Session, although only two months after the date of the last item of correspondence withheld from Mr Rule).

51. It is clear to the Commissioner that official and Ministerial exchanges about whether to appeal a decision by the Commissioner to the Court of Session could be described as very sensitive, given the subject matter and the publicity which the Ministers would have known to expect when their intentions (both to appeal and then to abandon the appeal) became known. It is not only the fact of the appeal which is sensitive, but the subject matter of the appeal, i.e. local income tax, one of the Ministers' key policies. Mr Rule has argued that the time which passed before he made his request means that the information is no longer so sensitive. The Commissioner cannot accept that this is the case: the sensitivity of the subject matter is such that the information remains sensitive for longer than eight months.

52. Mr Rule does not agree that disclosure of the media briefings prepared for Ministers and/or ministerial communications staff would, or would be likely to, cause substantial inhibition. The Commissioner does not share the Ministers' concern about information being misrepresented (as Mr Rule has pointed out, it would be within their power to explain information in order to prevent it from being misrepresented). However, she does agree with the Ministers that disclosure of such free and frank "lines to take" would, or would be likely to, inhibit substantially the Ministers' ability to provide such lines in future. Mr Rule does not believe that disclosure would prevent the media from asking questions in the normal run of things. While this is, of course, true, the fact that the media can ask difficult questions does not mean that disclosing free and frank lines to take would not cause substantial inhibition in the future.

53. The Commissioner has also concluded that the disclosure of the two drafts in question would, or would be likely to, substantially inhibit the ability of Ministers and officials to fully and freely exchange views and advice on the rare cases when a Court of Session appeal is considered.

54. The Commissioner has therefore concluded that the exemptions in sections 30(b)(i) and (ii) have been applied properly by the Ministers. Given this conclusion, she is required to go on to consider the public interest test in section 2(1)(b) and whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemptions.

*The public interest test – the Ministers' views*

55. The Ministers recognised the public interest in disclosing information about important policy issues such as local income tax, but considered that, in this case, this public interest has largely been met by the information which has already been disclosed.

56. The Ministers' arguments in favour of maintaining the exemptions in section 30(b) can be summarised as follows:

- there is a public interest in ensuring that Ministers and officials are able to discuss and agree their options privately before reaching a settled public view, without those views being made public and possibly used to misrepresent the Ministers' eventual position on the *Johnson* case (the Ministers commented that some press coverage of the case has already given a misleading impression)

- there is little public interest in disclosing questions which were not asked and answers which were not given (the draft/unused press lines). However, there is a public interest in protecting the normal process of the media being able to put their own questions to Ministers, and in officials being able to brief Ministers so that they can respond to such questions in a way which accurately represents their policy and properly informs the public
- disclosing the draft documents would add nothing useful to public knowledge or understanding of the issues

*The public interest test: Mr Rule's view*

57. While Mr Rule recognises that the free and frank exchange of views and advice is valuable and should be protected, his arguments in favour of disclosing the information in the public interest can be summarised as follows:
    - the Ministers have placed too much weight on the importance of having private space; while it is important, the information which is the subject of his application is of particular public interest
    - the passage of time means that the need for the Ministers to have private space is outweighed by the need for transparency of government; enriching the public debate and making the Ministers' considered opinion on policy issues public is in the public interest
    - it is in the public interest for the public to be able to review decisions made by public officials, so that transparency can be maintained and a better understanding of the functioning of government gained
    - there is a public interest in understanding how public funds are spent
    - disclosure would allow the public and media to discuss the issue fully, leading to a more comprehensive debate on the issue

*The public interest test: the Commissioner's view*

58. The Commissioner has considered the public interest arguments put forward by both the Ministers and by Mr Rule.

59. It is useful to put these arguments into context. Mr Rule's request covers the period following the publication of *Decision 025/2011* to two months before he made his information request. This includes the period during which the Ministers decided to appeal the decision to the Court of Session, their subsequent decision to abandon that appeal and discussions with the Commissioner on expenses. The Commissioner has already made it clear that the information caught by Mr Rule's request remains sensitive, not only because the Ministers chose to appeal against a decision of the Commissioner, but because of the subject matter of the appeal.

60. The sensitivity of the information works two ways; while the Ministers have used the sensitivity of the information as the basis for maintaining the exemptions (arguing that Ministers and officials need to be able to discuss and agree options privately before reaching a settled public view), Mr Rule has argued that the sensitivity of the information (he describes the information as being "of particular public interest") means it should be disclosed

61. The Commissioner considers that there is a strong public interest in high quality policy- and decision-making and that Ministers require high quality advice, particularly in contentious areas. Substantial inhibition to these processes, brought about by the prospect of disclosure the near future, would be to the detriment of efficient, high quality decision-making.

62. Taking account of the sensitivity of the information withheld under sections 30(b)(i) and (ii) (and how closely aligned it is to the legal advice which the Commissioner has already found to be exempt from disclosure), the lack of time which passed between the appeal being abandoned and Mr Rule's request, the Commissioner accepts, in all the circumstances of the case, that the public interest in maintaining the exemptions in sections 30(b)(i) and (ii) outweighs the public interest in the disclosure of the information.

**Section 30(c): effective conduct of public affairs**

63. The Ministers also relied on the exemption in section 30(c) to withhold information in a small number of documents. Given that the Commissioner has already concluded that the information in those documents is exempt from disclosure under section 36(1) (and that, on balance, the public interest favours maintaining that exemption), the Commissioner is not required to go on to consider whether the exemption in section 30(c) also applies.

**Section 36(2) – actionable breach of confidence**

64. The Ministers applied this exemption to correspondence which the Ministers received from the Commissioner's solicitors in relation to the appeal against *Decision 025/2011.*

65. During the investigation, following a discussion with the investigating officer, Mr Rule decided not to contest the Ministers' reliance on section 36(2). As such, this exemption will not be considered further in this decision.

**Section 38(1)(b) – third party personal data**

66. The Ministers applied this exemption to the name of a junior official in the UK Government's Cabinet Office where it appears in one email.

67. Under section 38(1)(b) (read with section 38(2)(a)(i) or (b)), information is exempt information if it constitutes personal data as defined in section 1(1) of the Data Protection Act 1998 (the DPA) and disclosure would contravene any of the data protection principles set out in Schedule 1 to the DPA.

68. The exemption in section 38(1)(b) (read with section 38(2)(a)(i) or (b)) is an absolute exemption, so is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

*Is the information personal data?*

69. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).

70. Mr Rule has argued that the name of the junior official does not comprise personal data. Mr Rule commented that he understands that a name is usually personal data, although there are circumstances, e.g. where the person is simply the recipient of an email, where the name does not comprise personal data. He referred the investigating officer to *Decision 126/2009 Mrs Teresa Cleere-Martin and Glasgow City Council*,[4] where the name of the individual in question was found not to be personal data.

71. *Decision 126/2009* considered whether the names of individuals who had attended a meeting was personal data. The decision concluded that it was not; although the individuals could be identified from the information, it indicated nothing about them beyond their casual connection with particular meetings held on particular dates. By itself, the information said nothing about the individual's involvement in the meetings in question. As such, the Commissioner concluded that the names did not "relate to" the individuals and that, as a result, it could not be their personal data.

72. In *Information Commissioner v Financial Services Authority & Edem*[5] [2012] UKUT 464 (AAC), Mr Edem made a request to the Financial Services Authority (the FSA). The FSA refused to disclose the names of three FSA officials. The First-tier Tribunal (Information Rights) (FTT) decided that the names of the officials did not constitute their personal data and ordered disclosure on the basis that the disputed information was "not biographical in any significant sense" as it simply concerned transactions in which the individuals were involved. The FTT also found that the information did not have the individuals as its focus, but rather had as its focus the handling of Mr Edem's complaint.

73. However, the Upper Tribunal rejected that analysis, noting that the information identified not just the names, but other personal data such as the individual's role within the FSA and their involvement in Mr Edem's complaint. As such, the information related to them and was personal data.

74. While the Commissioner accepts that names will not always be personal data, she is satisfied, in this case, that the name of the junior member of staff is personal data. The information identifies the name of the junior member of staff and shows that member of staff's involvement in a particular piece of work; in the circumstances, the Commissioner is satisfied that the personal data relates to him/her.

[4] http://www.itspublicknowledge.info/UploadedFiles/Decision126-2009.pdf
[5] https://www.gov.im/lib/docs/odps/cl_uppertribunal_fsa_edem_2012.pdf

*Would disclosure breach the first data protection principle?*

75. The Ministers have not specifically stated that disclosure would breach the first data protection principle, but, given that their arguments cover issues such as the member of staff's expectations and the fact that the member of staff has refused consent to their name being disclosed, the Commissioner has proceeded on the basis that they are of the view that disclosure of the name would breach this principle.

76. The first data protection principle 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 and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure into the public domain in response to Mr Rule's information request. (The Commissioner is satisfied that the personal data in question is not sensitive personal data for the purposes of section 2 of the DPA, so it is not necessary for the Commissioner to consider the conditions in Schedule 3.)

77. The Commissioner will first consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, she must then consider whether the disclosure of this personal data would otherwise be fair and lawful.

*Can any of the conditions in Schedule 2 to the DPA be met?*

78. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner*[6] [2008] UKHL 47 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 to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.

79. The Ministers confirmed that the individual in question was asked to consent to his/her name being disclosed, but that consent was not given. In the absence of consent, condition 6 of Schedule 2 of the DPA would appear to be the only condition which might allow the name to be disclosed.

80. Condition 6 is set out in full in the Appendix. There are a number of different tests which must be satisfied before the condition can be met. These are:

    (i) Is Mr Rule pursuing a legitimate interest or interests?

    (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the disclosure proportionate as a means and fairly balanced as to its ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject?

[6] http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm

(iii) Even if the processing is necessary for the purposes of Mr Rule's legitimate purposes, is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

81. As there is no presumption in favour of the release of personal data under the general obligation laid down by FOISA, the legitimate interests of Mr Rule must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the name to Mr Rule.

*Is Mr Rule pursuing a legitimate interest or interests?*

82. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner considers 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 published guidance[7] on section 38 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."

83. In this case, Mr Rule has argued that he has a legitimate interest. He commented that knowing the name of the member of staff means that he can better understand meetings and communication and the working of government in general. The information would allow him to identify any individual who also takes part in other government activities.

84. Given the junior status of the official in question, it is difficult to conceive how his/her identification would allow Mr Rule to better understand meetings and communications and the working of government. The Commissioner notes that the remainder of the email exchange, as well as an attached letter to an MP, has been disclosed to Mr Rule. While the Commissioner accepts that Mr Rule has a legitimate interest in the other personal data in the email exchange and in the letter to the MP, she does not consider that he has a legitimate interest in the name of the junior member of staff.

85. Having concluded that Mr Rule is not pursuing a legitimate interest or interests, the Commissioner must find that disclosure of the information is not permitted by condition 6 and so would breach the first data protection principle. As such, she must find that the information is exempt under section 38(1)(b) of FOISA.

**Timescales**

86. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.

[7] http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx

87. Mr Rule made his request to the Ministers by email on 7 February 2012. The Ministers did not reply to this request within the 20 working days allowed by FOISA. The speed with which the Ministers replied to Mr Rule's request for review suggests that that work was underway to respond to the request. However, it is a matter of fact that Ministers did not respond within 20 days, so the Commissioner must find that the Ministers failed to comply with section 10(1) in responding to Mr Rule's request.

88. The Ministers apologised to Mr Rule for the slight delay, and Mr Rule accepted the apology. The Commissioner does not require the Ministers to take any remedial action in relation to this failure.

## DECISION

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

The Commissioner has concluded that the Ministers were entitled to withhold information from Mr Rule in line with the exemptions in section 30(b)(i) and (ii), 36(1) and 38(1)(b) of FOISA.

The Commissioner finds the Ministers failed to comply with Part 1 by failing to respond to Mr Rule within the timescales set down by section 10(1) of FOISA. The Commissioner does not require the Ministers to take any action in relation to this breach.

## Appeal

Should either Mr Rule 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.

**Rosemary Agnew**
**Scottish Information Commissioner**
**16 August 2013**

## 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.

…

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

…

(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.

**10 Time for compliance**

(1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

…

**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-

(i) the free and frank provision of advice; or

(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.

**36 Confidentiality**

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

…

**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**

...

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.

…