



Scottish Information
Commissioner

**Decision 198/2007 Mr Simon Johnson and the
Scottish Ministers**

Details of Ministerial travel

**Applicant: Mr Simon Johnson
Authority: The Scottish Ministers
Case No: 200600771
Decision Date: 29 October 2007**

**Kevin Dunion
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Decision 198/2007 Mr Simon Johnson and the Scottish Ministers

Breakdown of journeys made in ministerial cars by Nicol Stephen whilst Transport Minister – sections 38(1)(b)(Personal information) and 39(1) (Health, safety and the environment) of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 16(1) and (2) (Refusal of request); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of “data protection principles”, “data subject” and “personal data”) (Personal information) and 39(1) (Health, safety and the environment)

Data Protection Act 1998 (DPA): section 1(1) (definition of “personal data”) (Basic interpretative provisions); Part 1 of Schedule 1 (The data protection principles – first data protection principle) and Schedule 2 (Conditions relevant for the purposes of the first principle: processing of any personal data – condition 6(1))

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

Facts

Mr Johnson requested a breakdown of journeys made in ministerial cars by Nicol Stephen when he held the post of Transport Minister. For each journey Mr Johnson requested the date and location of start and termination from the Scottish Ministers (the Ministers). The Ministers responded by confirming that they held relevant information, and some of this was supplied but other parts withheld. Mr Johnson was not satisfied with this response and asked the Ministers to review their decision. The Ministers carried out a review and, as a result, notified Mr Johnson that the information withheld was exempt from disclosure in terms of sections 38(1)(b) and 39(1) of FOISA. Mr Johnson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Johnson’s request for information wholly in accordance with Part 1 of FOISA. He required the Ministers to supply further information to Mr Johnson with respect to Mr Stephen’s journeys, subject to the redaction of some personal data.



Background

1. On 10 February 2006, Mr Johnson wrote to the Ministers requesting the following information: a breakdown of journeys made in ministerial cars by Nicol Stephen (Mr Stephen) and Lewis Macdonald when they held the posts of Transport Minister and Deputy Transport Minister respectively. For each journey Mr Johnson sought the date, and the location of start and termination.
2. On 10 March 2006, the Ministers wrote to Mr Johnson in response to his request for information. This advised that Mr Stephen held the position of Minister for Transport from May 2003 to June 2005 but there had been no Deputy Minister for Transport [and so no information was held in relation to the part of the request relating to Mr Macdonald].
3. The Ministers provided some information about Mr Stephen's ministerial journeys extracted from the Government Car Service (GCS) scheduling software. They explained that because this software is purged regularly, the information held only covered the part (between 1 April 2004 and June 2005) of the period specified in Mr Johnson's request. The information provided revealed the date and destination for a number of journeys, but it did not reveal the starting points for these as requested by Mr Johnson. The Ministers' response did not provide any reasons for this information being withheld.
4. On 14 March 2006, Mr Johnson wrote to the Ministers requesting a review of their decision. In particular, Mr Johnson drew the Ministers' attention to the failure to provide information about departure locations. He questioned whether withholding this information could be justified in terms of security, since the journeys took place some time ago.
5. On 10 April 2006, the Ministers wrote to notify Mr Johnson of the outcome of their review. Their response upheld the decision to withhold some of the information requested. The Ministers explained that the details of the journeys were withheld under sections 38 (Personal information) and 39 (Health, safety and the environment) of FOISA. The Ministers indicated that they avoided making available information which would allow patterns of movement to be easily pieced together. They also stated that the journey information in some cases would be personal information about Ministers or their families, and this was exempt under section 38(1)(b) of FOISA.
6. On 11 April 2006, Mr Johnson wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of FOISA.



7. The application was validated by establishing that Mr Johnson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

8. On 5 May 2006, the Ministers were notified in writing that an application had been received from Mr Johnson. They were invited to comment on the application in terms of section 49(3) of FOISA and were asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded on 4 August 2006 providing the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, seeking further information and clarification on particular issues raised by Mr Johnson's application.
10. To assist the investigation the Ministers provided tables of data showing ministerial journeys made by Mr Stephen between April 2004 and June 2005, presented in a number of ways.
11. The Ministers' submissions also provided detailed information on a number of matters. These were:
 - a) The nature and extent of information held that would fall under the scope of Mr Johnson's information request, and the limitations of this information.
 - b) The nature of the information that was provided to and withheld from Mr Johnson in response to his request, and the rationale that prompted this approach.
 - c) The Ministers' proposals regarding a revised approach to Mr Johnson's request, which would lead to more information being disclosed to him.
 - d) The Ministers' reasons for judging that some of the information was exempt from disclosure and so should continue to be withheld.

I will consider the Ministers' submissions on these various points in my analysis and findings below.
12. In the course of the investigation, the Ministers provided further information to Mr Johnson in line with their revised proposals. However, Mr Johnson remained dissatisfied and indicated that he still wanted a decision to be issued on this matter.



13. Mr Johnson's application stated several reasons for his dissatisfaction with the Ministers' response to his request. He questioned the extent to which disclosure of the information requested could be said to impact on the security of Mr Stephen or his family. Mr Johnson emphasised the age of the material and that it related to a ministerial post which Mr Stephen no longer held.
14. In respect of the public interest, Mr Johnson submitted that the extent to which a minister followed the view which he espoused during his ministerial tenure (in respect of the encouragement of use of public transport, and in particular in relation to any travel by Mr Stephen from his constituency in Aberdeen to Edinburgh) was a matter of public interest.

The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have considered all of the information and submissions that have been presented to me by both Mr Johnson and the Ministers and I am satisfied that no matter of relevance has been overlooked.
16. In what follows, I shall consider the following:
 - The nature and extent of the information held by the Ministers which falls within the scope of Mr Johnson's request;
 - The information which has been provided to Mr Johnson, and the information that has been withheld.
 - The application of the exemption in section 39(1) of FOISA to the information being withheld, and if necessary the public interest test;
 - The application of the exemption in section 38(1)(b) of FOISA to the information being withheld; and
 - The Ministers' more general technical compliance with Part 1 of FOISA.

Scope of the request

17. The Ministers stated that there had not been a Deputy Transport Minister and consequently no information was held in respect of the part of Mr Johnson's request that related to Lewis Macdonald MSP. Mr Johnson's dissatisfaction related to the Ministers' handling of the part of his request that related to Mr Stephen's ministerial travel and so I shall only consider this part of the request in what follows.



Information held falling within the scope of the request

18. The Ministers' submissions provided a detailed explanation of what information they hold that falls within the scope of Mr Johnson's request, and also highlighted the limitations of this information.
19. The Ministers explained that the GCS in Scotland provides and arranges transport for Scottish Ministers, Ministers of UK Government Departments (when in Scotland), some senior officials of the Scottish Government, visiting dignitaries and, where necessary, official documents.
20. Data about ministerial journeys are therefore held in and can be extracted from the GCS scheduling system. However, the Ministers noted that this information is intended as an itinerary rather than a log of all journeys, and so it should be considered a log of **planned** journeys. The Ministers also explained that among journeys recorded in the GCS scheduling system as involving Mr Stephen, there may be some where the Minister was not actually present in the ministerial car (e.g. journeys to or from airports). The Ministers advised me, therefore, that the data from the GCS scheduling system may not represent an absolutely accurate record of Mr Stephen's travel.
21. The Ministers indicated that, because of the limitations of the data contained within the GCS system, the exact information requested by Mr Johnson does not exist. They asserted that data extracted from this system (as provided to my Office as Table A) is the nearest to that which has been requested. This includes information on all journeys in date order extracted from the GCS system.
22. I accept the Ministers' submission that the information in Table A about the date of each journey, and its start and end point (but excluding the journey times, which were not requested by Mr Johnson) is the information that they hold for the purposes of this request.

Deleted information

23. However, the Ministers indicated that they did not hold information about Mr Stephen's GCS journeys covering the whole of the period covered by Mr Johnson's request. They explained that the GCS scheduling software is used to provide instructions to drivers and is purged regularly to enable it to operate at maximum efficiency. The only information held at the time of Mr Johnson's request covered the period from 1 April 2004 – 30 June 2005.
24. The Ministers were asked by my Office about the steps taken to establish if they held information from the period May 2003 – April 2004 in respect of Mr Stephen's ministerial car journeys, and to explain, if such material had been deleted from the GCS, whether the deleted material was recoverable.



25. The Ministers explained that they had sought expert help from their Motor Services Branch which had explained that once information was removed from the Phoenix system (i.e. the GCS) it could not be retrieved and that this was verified by an IT specialist who confirmed that no meaningful information could be retrieved.
26. Given the details provided to me about the GCS scheduling system and the information therein, I am satisfied that the Ministers no longer hold information within the GCS system about Mr Stephen's travel before 1 April 2004.

Other information

27. The Ministers were asked if they held any information other than that within the GCS scheduling system which fell within the scope of the request, for example within Mr Stephen's ministerial diary. In response, the Ministers explained that Mr Stephen's ministerial diary would not contain information from which travel arrangements could accurately be deduced, especially in respect of ministerial cars. The Ministers indicated that the diary would generally only provide evidence of Mr Stephen's engagements and not locations of departure or travel arrangements. The Ministers suggested that Mr Stephen's ministerial diary could be consulted to attempt to identify instances when Mr Stephen was not in the car, but where it is recorded by the GCS. I understand that the Ministers have now done this in respect of some of the entries in Table A, and the journeys so identified can now be excluded from the scope of Mr Johnson's request.
28. Having considered the information provided to me by the Ministers about other possible sources of information about Mr Johnson's use of Ministerial cars, I am satisfied that the information extracted from the GCS scheduling system represents the only accurate source (albeit not entirely accurate) of information about Mr Stephen's use of the GCS and its vehicles.
29. I accept that alternative sources, such as Mr Stephen's ministerial diary, would not allow accurate identification of instances of his use of GCS vehicles for the period May 2003-April 2004, or the information about such use requested by Mr Johnson. Having considered the Ministers' submissions I accept that no further information, other than the information submitted to my Office, is held which falls within Mr Johnson's request.

Information provided to Mr Johnson

30. Having established what information is held by the Ministers that would satisfy (at least partly) Mr Johnson's request, I now turn to consider what parts of this information have been supplied and withheld.



31. In their initial response of 10 March 2006 the Ministers provided Mr Johnson with some details of Mr Stephen's transport as contained within the GCS scheduling system for the period 1 April 2004 to end June 2005. This information provided specified pickup dates and destination points (224 entries). However, this omitted the departure points for each journey.
32. The Ministers' response also omitted a large number of journeys in their entirety, although this omission was not made clear to Mr Johnson. The Ministers explained to me that when disclosing information to Mr Johnson, they withheld destinations (and omitted to mention the journey at all) for:
 - a) The initial (or only) journey of any day; and
 - b) The final journey of a day, where this was the final business destination or was made to a personal address.
33. I wish to note at this stage that it is my view that by failing to advise Mr Johnson that a large number of journeys had not been disclosed to him, the Ministers provided misleading information to him. I will return to this point when I consider the technical aspects of the Ministers' response at the end of this decision.
34. In the course of my investigation, the Ministers proposed a new approach to this case, and released further information to Mr Johnson. The information disclosed at this stage was modified to correct any entries in the originally released information which had been identified as inaccurate. The information released during the investigation, though more comprehensive, still contained only dates and destinations of journeys, and it still omitted certain journeys in their entirety.
35. The information that the Ministers considered to be releasable at this stage, and which was released to Mr Johnson, included:
 - The first destination of the day if this destination was not a personal address;
 - Destinations during the working day (i.e. not initial or final destinations);
 - The last destination on GCS (when clear that the Mr Stephen's working day continued after this last destination e.g. if the last destination was Parliament); and
 - The date of the journey to each destination point disclosed.

Information withheld



36. The Ministers explained that they still were withholding part of the information falling under the scope of Mr Johnson's request to ensure that there could be no prediction of when Mr Stephen regularly was not present at certain addresses. Additionally, information was also withheld in order to protect private addresses and, to this extent, it was decided to withhold addresses of individuals, the starting point of all journeys and the final destination of any journey which ended the working day.
37. During the investigation the Ministers summarised that there were types of information they considered should not be released:
- The final destination of a particular day which was Mr Stephen's final business destination;
 - All departure points;
 - All personal addresses.
38. I shall therefore now turn to consider whether the Ministers were correct to withhold this information from Mr Johnson.

Application of Section 39(1) – Health, safety and the environment

39. Section 39(1) of FOSIA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This section is broad enough to cover harm which could foreseeably occur in the future as well as immediate harm. This exemption is also subject to the public interest test contained in section 2(1)(b) of FOISA.
40. The Ministers' arguments with respect to the application of this exemption (also used in respect of section 38(1)(b) (below)) relate to personal safety and in particular risk to the physical safety of ministers posed by persons who, for whatever reason, intend to harass or harm a public figure of this type. Inasmuch as the information requested contains patterns of movement, the Ministers submitted that disclosure would lessen the security of ministers.
41. The Ministers stated that their argument in respect of safety applied to all ministerial travel and was not specific to Mr Stephen. The Ministers submitted that it was not of relevance whether there was an actual threat to Mr Stephen. Rather, they argued that there is a general and ongoing possibility of attempts to target ministers in a threatening way.



42. The Ministers submitted that, where personal safety was concerned, a pre-emptive stance was required and that withholding any information which could reduce the possibility of such an attack would be reasonable, proportionate and rational. The Ministers suggested that to fail to adopt a pre-emptive approach in answering such requests, including that relating to Mr Johnson, would be undesirable and unprincipled.
43. In response to a suggestion made by Mr Johnson that any home address of Mr Stephen be anonymised as e.g. “Home, Aberdeen”, the Ministers argued that they did not feel this would deal with the concerns of personal safety since an individual, so determined, was likely to be able to obtain details of such an address.
44. The Ministers’ submissions drew my attention to patterns of movement by Mr Stephen which they regarded as ascertainable from the withheld information. They went on to suggest that were information revealing patterns of movement to be disclosed, the level of danger to which a Minister was exposed would be increased.
45. The central question when considering the application of this exemption in this case is whether disclosure under FOISA of the full details of Mr Stephen’s ministerial travel between April 2004 - June 2005 in the form requested by Mr Johnson would, or would be likely to, endanger the physical or mental health or the safety of an individual (in this case, Mr Stephen).
46. In my briefing on this exemption I noted that section 39(1) does not contain the usual harm test: instead of the “substantial prejudice” test, the section talks about the endangerment of health and safety. The harm test in section 39(1) has therefore been set a lower level, but there must still be an apprehension of danger before the exemption can be relied on.
47. As I have said in a previous decision – *Decision 178/2006, Mr John Rowbotham of the Hamilton Advertiser and the Chief Constable of Strathclyde Police* – the word “likely” is open to interpretation. It may mean “more probable than not”, or it may mean “more than fanciful”. The general legal principle was explained by Chadwick LJ (in *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210) when he said that “‘likely’ does not carry any necessary connotation of ‘more probable than not’. It is a word which takes its meaning from context.” In other judgements ‘likely’ has been taken to mean ‘may well’, or it has been held that ‘likely’ implies a substantial rather than a merely speculative possibility, a possibility that cannot sensibly be ignored.



48. I accept that certain patterns of movement appear to be ascertainable within the information requested by Mr Johnson. However, a further question must still be answered about the effect of disclosure of these patterns, and whether that effect would, or would be likely to be, that of endangering the safety of an individual (Mr Stephen).
49. As noted above, the Ministers did not point to a specific threat to Mr Stephen, but to the general threat ever present to persons in public life. Inasmuch as the Ministers have submitted that there is such an ever present danger or risk to those holding senior positions in public life, they have not argued that disclosure of the information withheld would create a threat to the health and safety of Mr Stephen (or any other person) where none had existed before. Rather, they have argued that the effect of disclosure would or would be likely to be that of increasing the level of any endangerment that generally exists.
50. Having considered the information withheld in this case and the submissions put forward by the Ministers, I am not persuaded that the disclosure of this information would or would be likely to add to the level of threat that the Ministers have argued to already exist. For this reason, I have therefore concluded that disclosure would not be likely to endanger the physical or mental health of any person, and so the exemption in section 39(1) has in this instance been incorrectly applied by the Ministers.
51. In reaching this conclusion, I have noted that any patterns discernible in the information requested by Mr Stephen relate to a period of time that was from 8 months to almost 2 years in the past at the time of Mr Johnson's request. During the period for which information is held, Mr Stephen held office as Minister for Transport. However, Mr Stephen became Deputy First Minister and Enterprise Minister in May 2005, and remained in this post at the time of the request. I would anticipate that patterns of movement by a minister would differ from post to post.
52. I also think it questionable whether any discernible patterns could be said to provide information (i.e. a pattern of movement) which could not be ascertained by other means: in terms of knowledge of Parliamentary times and ministerial functions, constituency surgery attendance, media publication of appearances, etc. I have also noted that Mr Johnson is not seeking times of departures or arrivals; the information requested would only indicate that a journey was taken on a specific day, and so would be of limited value in determining any pattern with accuracy.
53. Since I have decided that the exemption in section 39(1) does not apply I am not required to consider the public interest test contained in section 2(1)(b) of FOISA in terms of section 39(1).



Application of section 38(1)(b)- Personal information

54. I shall now decide whether the Ministers were entitled to withhold some of the information, requested by Mr Johnson, on the basis of section 38(1)(b) read in conjunction with 38(2)(a)(i) or 38(2)(b).
55. The Ministers submitted that information which tracks a person's movements in a way which could be used to endanger the person is capable of constituting personal data within the meaning of the Data Protection Act 1998 (DPA). The Ministers argued that such information clearly relates to the person and was sufficiently personal to be personal data, therefore meriting protection in terms of the first data protection principle (fair and lawful processing).
56. The Ministers suggested in particular that section 38(1)(b) of FOISA requires the exemption of the details of journeys to or from Mr Stephen's home and any personal destinations on the grounds that disclosure of these would be unfair.

Is the information personal data?

57. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b), exempts third party personal data if the release of the information would breach any of the data protection principles set out in Schedule 1 of the DPA.
58. Firstly, I must consider whether the information which has been withheld from Mr Johnson is personal data. Personal data is defined in section 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 in the possession of or is likely to come into the possession of, the data controller (see the full definition in the Appendix).
59. I am satisfied that the information both provided to, and withheld from, Mr Johnston in this case are Mr Stephen's personal data. Mr Stephen can clearly be identified from the information in question or from that and other information in the possession of the Ministers. The information also relates to Mr Stephen. Although ministerial journeys are undertaken in the course of professional and public life, information relating to Mr Stephen's journeys, and the terminal points of these clearly also relate to him personally in a significant sense.

Data Protection Principles

60. I must now go on to consider whether the release of the information withheld would breach any of the data protection principles.



61. In this instance the Ministers submitted that release of the information withheld would breach the first data protection principle, which requires that personal data be processed fairly and lawfully and that, in particular, it should not be processed unless at least one of the conditions in Schedule 2 is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
62. I have considered the definition of "sensitive personal data" in section 2 of the DPA and do not consider that the information sought by Mr Johnson falls into this category.
63. The Ministers' submissions with respect to the application of the exemption in section 38(1)(b) have focussed on the question of fairness with respect to disclosure. No case has been made to suggest that disclosure would be unlawful, independently of any breach of the first data protection principle on the grounds of fairness.
64. The Information Commissioner, who is responsible for enforcing the DPA, has provided guidance (Freedom of Information Act Awareness Guidance No 1) on the consideration of the data protection principles within the context of freedom of information legislation. This guidance recommends that public authorities should consider the following questions when deciding if release of information would breach the first data protection principle:
- would disclosure cause unnecessary or unjustified distress or damage to the data subject?
 - would the data subject expect that his or her information might be disclosed to others?
 - has the person been led to believe that his or her information would be kept secret?
65. Before a decision is taken to release personal data, the data controller should consider whether the individual concerned has been told that the information about them will be disclosed, or what their reasonable expectations about disclosure might be.
66. In respect of distress or damage, the Ministers provided submissions similar to those for section 39(1), i.e. that the disclosure of discernible patterns of movement would lessen the security of Mr Stephen. Although I have accepted that certain patterns of movement appear to be ascertainable within this information, I have not accepted that disclosure of the information withheld would be likely to endanger the health and safety of Mr Stephen (or any other individual) for the purposes of the exemption in section 39(1) of FOISA.
67. In respect of Mr Stephen's expectations as to whether his personal information might be disclosed to others, I noted that the guidance issued by the Information Commissioner provides:



“Information which is about the home or family life of an individual...is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.”

68. I am satisfied that disclosure of some personal information relating to Mr Stephen’s ministerial travel is fair, and such disclosure would be reasonably expected by him as a holder of high public office. In particular, I am satisfied that it is fair to disclose information about journeys undertaken in his ministerial capacity, where these were taken in the course of the working day and would not reveal information about Mr Stephen’s personal life.
69. The Ministers have explained, however, that the GCS is used for official ministerial business, but that departure and destination points can be personal when the minister is going to or returning from official business.
70. I am not convinced, however, that Mr Stephen would have (or should reasonably have) expected detailed information about his ministerial travel to be released to the extent that Mr Johnson is seeking. In particular, I am not satisfied that Mr Stephen would expect personal addresses, or information that would reveal details of his personal life rather than public activities to be disclosed.
71. Whilst the information withheld in response to Mr Johnson’s request relates to use of an official ministerial car, it also contains information that relates to Mr Stephen’s private life – for example, where he travels to or resides at the end of a working day. In some cases, this location may be necessitated by his ministerial duties, but there may be instances when his movement (in terms of his start or end to a working day) was governed by private interests (both of Mr Stephen and any third parties whose addresses he travelled to or from) and family life.
72. With this in mind, I do not regard it as fair processing (with respect to either Mr Stephen or any third parties concerned) to divulge personal addresses of Mr Stephen or other individuals which have been either the start or end point of his journeys.
73. In short, I have concluded that the Ministers were correct to withhold some of the information requested by Mr Johnson. However, I am unable to accept the Ministers’ proposed approach set out in paragraph 38 above. In what follows I will consider in more detail what information should be provided and which withheld in response to Mr Johnson’s information request.



74. Before doing this, however, I would note that the approach proposed by the Ministers in this case would entail that no information would be provided about journeys for which both departure and termination points were withheld. In the Ministers' responses to Mr Johnson so far, therefore, the existence of such journeys has not been confirmed. As I noted earlier, this has created a misleading impression about the number of journeys undertaken and the nature of the information supplied. I do not agree with this approach and (as will become clear from my consideration below of legitimate interests with respect to this information) I do not consider it to be unfair processing for the existence of every ministerial journey undertaken by Mr Stephen to be acknowledged, even if it were accepted that both start and end points for some should be withheld.
75. Therefore, I will require first of all that the existence and date of each relevant journey listed in table A (excluding any for which the Ministers have established that Mr Stephen was not present in the vehicle) should be confirmed in response to Mr Johnson's request. I now turn to consider the extent to which it would be fair to disclose information about the start and end points of these journeys.

Personal addresses

76. As set out above, I have concluded that it would be unfair for the purposes of the first data protection principle for personal addresses that are listed as start or end points of Mr Stephen's journeys to be disclosed. I have reached this conclusion where these are Mr Stephen's personal address, addresses of family members or other private individuals that he has visited.
77. Therefore, I find these addresses to be exempt from disclosure under the terms of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b).
78. Wherever a personal address is present as a start or end point of a journey in table A, I require the Ministers to provide details of this journey with the words "personal address" substituted for the actual address.

Legitimate interests in relation to the remaining information

79. Having concluded that it would be unfair to disclose personal addresses that were start or end points for Mr Stephen's journeys, I now turn to consider whether it disclosure of the remaining information withheld from Mr Johnson would be fair and lawful for the purposes of the first data protection principle. As noted above, the Ministers have made no submissions to suggest that disclosure of the information withheld would be unlawful, other than as a result of any breach of the first data protection principle on the grounds of unfairness.



80. Processing of (non-sensitive) personal data will be in accordance with the first data protection principle only where at least one of the conditions in Schedule 2 is met. In this case, the only condition within schedule 2 that I consider could be relevant is condition 6(1).
81. Condition 6(1) enables processing (for example, by disclosure) to be considered fair for the purposes of the first data protection principle where it is necessary for the purposes of legitimate interests pursued by the third party to whom information is 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.
82. I must apply a number of tests to establish whether condition 6 supports disclosure of personal data in this case. The first test is whether it can be established that the third party or parties to whom the data would be disclosed has/have a legitimate interest in the processing of the personal data (in this case by disclosure to a member of the public) to which the request relates. The second is whether the processing is necessary for the purposes of those legitimate interests. The third is whether that processing can be seen to be unwarranted in this particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. Both competing interests must then be balanced.
83. In considering the first test, it seems to me that there is a legitimate interest in disclosing information which would indicate the extent of use of a ministerial car.
84. In this case, I am satisfied that Mr Johnson and the wider public have a clear legitimate interest in information relating the use of ministerial transport. Mr Johnson has indicated that he was seeking to clarify the extent to which Mr Stephen had used public transport. Mr Johnson explained that he wished to assess whether there was congruence between Mr Stephen's public stance of encouraging public transport use and Mr Stephen's use of the ministerial car. I also recognise a wider and more general legitimate interest in accountability and transparency in the use of public funds on ministerial transport. This legitimate interest would be served, for example by the provision of information about the number of journeys undertaken, their duration, costs and so on.
85. I am satisfied that disclosure of the information requested by Mr Johnson is necessary for the purposes of the legitimate interests identified by him and for the wider legitimate interests of the general public. In reaching this conclusion, I have considered whether these interests might be met equally effectively by any alternative means. I have concluded that the legitimate interests in question cannot be met without disclosure of some of the personal data withheld and therefore disclosure of these data is necessary for the purposes of the legitimate interests.



86. However, whilst the information under consideration relates to use of a ministerial car, it does also provide certain details about Mr Stephen's private life – for example, where he resides at the end of a working day. As I said above I do not regard it as fair processing to divulge personal addresses.
87. However, I take the view more generally that the disclosure of other information about departure and arrival points would not entail an unwarranted intrusion into Mr Stephen's private life, given that the information relates also to his use of an official car in the course of his work as a Minister.
88. The Ministers have submitted that in this case processing would be unwarranted because it would prejudice the rights and freedoms or legitimate interests of the data subject, by exposing this individual to an unnecessary risk. However, no evidence was produced in which the data subject in question objected to the information being released and indicated why the prospect of the release of this specific data gave rise to specific concerns.
89. I stressed in my previous Decision 033/2005 *Paul Hutcheon and the Scottish Parliament Corporate Body* (concerning travelling claims made by David McLetchie MSP) that each case of this type has to be treated on its own merits and that I would not order release of information in future cases should the release of the information put a person at risk. Again, I stress this point. Whilst the Ministers provided arguments about patterns discernible in the data, I am not persuaded that disclosure would cause distress, damage or increased risk to Mr Stephen.
90. Having accepted that personal addresses should not be disclosed, the patterns of movement identified by the Ministers (the accuracy of which is already limited by the lack of additional information times of journeys and the passage of time to the point where Mr Johnson made his request) are further obscured. I had already decided that the patterns of movement identifiable in the information requested would not be likely to endanger Mr Stephen for the purposes of the exemption in section 39(1) of FOISA. I would argue that this is even more the case where there is no disclosure of personal addresses or times.



91. Having acknowledged Mr Johnson's legitimate interest in ensuring accountability and openness, particularly in relation to whether ministerial action is in congruence with ministerial public stance on the issue of transport. In all the circumstances of this case, I have concluded that the legitimate interests of the data subject do not outweigh the countervailing legitimate interests of the applicant and the wider public in the remaining information under consideration. Therefore, I conclude that (with the exception of any personal addresses that are either start or end points of Mr Stephen's journeys), condition 6(1) can be met with respect to the information requested by Mr Johnson. I also consider that the processing of the information would be fair, for the same reasons as I consider that condition 6(1) can be met and, in the absence of arguments from the Ministers on the question of lawfulness, I have concluded that disclosure of this information would not breach the first data protection principle (or, indeed, any of the other data protection principles). I therefore find that the Ministers misapplied the exemption in section 38(1)(b) to this information.
92. I therefore require that the Ministers disclose the information supplied to my Office in Table A (excluding journey times, which did not form part of the request, and omitting any journeys for which the Ministers have confirmed Mr Stephen was not present in the ministerial car) to Mr Johnson. This information should be provided with the words "personal address" substituted for any such address that appears as the start or end point of a journey. For the sake of clarity, I would add that I do not consider Mr Stephen's constituency office address to be a personal address.
93. The Ministers should supply to Mr Johnson this information in the same form as supplied to my Office as Table A – that is, with an entry for both collection point and termination point for each journey. No information other than private addresses should be withheld, and information should be provided in relation to each journey undertaken.

Technical breach

94. As I noted above, I have found that the Ministers' response to Mr Johnson's information request was misleading. This failed to provide any departure points for the journeys detailed but it also failed to make clear to Mr Johnson that information on a significant number of journeys had been entirely withheld from him. The Ministers' response did not acknowledge that any information had been withheld or provide any explanation as to which exemptions had been judged to apply.
95. Although the Ministers' review prompted some clarification of the reasons for some information being withheld, this still did not make clear to Mr Johnson the information which was held or which was being withheld.



96. Section 16(1) of FOISA requires an authority withholding information in response to a request because it believes it to be exempt from disclosure under the terms of a provision within Part 2 of FOISA, to give the applicant a notice in writing which specifies the exemption(s) that have been judged to apply; and states (if not otherwise apparent) why each exemption applies. If any of the exemptions being relied on is not absolute, the notice must also, in line with section 16(2), state why, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure.
97. The Ministers failed to provide a refusal notice in line with the requirements of section 16(1) and (2) of FOISA and consequently breached Part 1 of FOISA. However, I require no remedial action in respect of this breach.

Decision

I find that 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 Johnson.

I find that by releasing the information it did, the Ministers complied with Part 1.

However, I have found that the Ministers misapplied the exemption in section 38(1)(b) of FOISA to some of the information requested by Mr Johnson, and in so doing the Ministers failed to comply with section 1(1) of FOISA. I have also found that the Ministers misapplied the exemption in section 39(1) to all of the information withheld from Mr Johnson.

However, I have found that the exemption within section 38(1)(b) was correctly applied to all personal addresses that were the start and end points of Mr Stephen's journeys.

I now require the Ministers to provide the information withheld from Mr Johnson, subject to the substitution of the words "personal address" for each such address. I require the Ministers to take these steps within 45 days after the date of intimation of this decision notice.

I have also found that the Ministers failed to provide a refusal notice to Mr Johnson in line with the requirements of section 16(1) and (2) of FOISA. I do not require any steps to be taken in response to this technical breach.



Appeal

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

Kevin Dunion
Scottish Information Commissioner
29 October 2007



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.

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.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.



- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the 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
 - (ii) ...
 - (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

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.



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 1 - 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.