

Decision Notice



Decision 203/2010 Mr Paul Hutcheon of the Sunday Herald and the Scottish Ministers

Ministers' interests

Reference No: 201000779

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www.itspublicknowledge.info

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Summary

Mr Hutcheon asked the Scottish Ministers (the Ministers) for information provided by each Minister since May 2007 on all interests which might be thought to give rise to a conflict.

The Ministers withheld the information under section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). After review, the Ministers confirmed this decision in relation to some of the information covered by the request. They advised that other parts of the information were available from the Register of Interests on the Scottish Parliament website, and therefore exempt from disclosure under section 25(1) of FOISA. Mr Hutcheon subsequently applied to the Scottish Information Commissioner for a decision.

The Commissioner found that the Ministers had correctly withheld the information covered by Mr Hutcheon's request under section 25(1) and section 38(1)(b) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a), (2)(a) and (2)(e)(ii) (Effect of exemptions); 25(1) (Information otherwise accessible); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information).

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

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



Background

1. On 29 December 2009, Mr Hutcheon made the following information request to the Ministers:
regarding 11.3 of the Ministerial Code, please provide me with all information in each list provided by each Minister since May 2007 of "all interests which might be thought to give rise to a conflict."
2. On 4 February 2010, the Ministers advised Mr Hutcheon that his request had been refused, as the information was considered exempt from disclosure under section 38(1)(b) FOISA, on the grounds that the disclosure of this personal data would contravene the data protection principles.
3. On 9 February 2010, Mr Hutcheon asked the Ministers to carry out a review of their decision. He pointed out that Ministers in the UK Government had already published their own lists, and argued that disclosure would be in the public interest.
4. On 12 March 2010, the Ministers provided their response to Mr Hutcheon's request for review, upholding the decision to withhold some of the information under section 38(1)(b) of FOISA. Additionally, the Ministers applied the exemption in section 25(1) to information which was available from the online Register of Interests of Members of the Scottish Parliament, and apologised for not advising Mr Hutcheon previously that some of the information was available in this way.
5. Mr Hutcheon remained dissatisfied with the Ministers' response, and applied for a decision from the Commissioner on 13 April 2010.
6. The application was validated by establishing that Mr Hutcheon had made a request for information to a Scottish public authority and had applied for a decision from the Commissioner only after asking the authority to review its response to that request.

Investigation

7. On 16 April 2010, the Ministers were notified in writing that an application had been received from Mr Hutcheon, and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer contacted the Ministers on 13 May 2010, providing them with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions.



9. The Ministers were asked to confirm which of the data protection principles would (in their view) be contravened by disclosure of the information withheld, and to give their reasons. They were asked if Ministers had been consulted on whether they would object to disclosure of the information they had provided. They were also asked to send copies of some associated correspondence in order to allow better understanding of the context around the withheld information.
10. The Ministers eventually responded on 27 July 2010, with apologies for the length of time taken to reply. The Ministers' response is considered in detail (insofar as relevant) in the next part of this Decision Notice, and in summary below.
11. In summary, the Ministers provided information about changes to the Ministerial Code, and the Permanent Secretary's correspondence with Ministers on this matter. The Ministers commented on the scope of the request, and the list of Ministerial interests published by the UK Government. They confirmed that neither the Ministers nor their family members had been asked if they would consent to full or partial disclosure of the information withheld. Finally, the Ministers provided further arguments and comments on the exemptions in sections 25(1) and 38(1)(b) of FOISA.
12. The Ministers provided the Commissioner with extracts from the Ministerial Code 2003 (section 9) and the Ministerial Code 2008 (section 11), and a copy of the letter sent to each Minister from the Permanent Secretary on 22 May 2007 in which he asked Ministers to provide him with a note of relevant private interests, including interests of those close to them.
13. The Commissioner noted that the Permanent Secretary's letter advised Ministers that, should a request for this information be made under FOISA, they would be consulted and their views taken into account before a decision on disclosure was made. The Commissioner asked for such a consultation to be carried out, in order to establish the Ministers' views.
14. On 21 October 2010, it was confirmed that the Ministers had been consulted as requested. None of the Ministers wished any of their personal information to be disclosed in response to Mr Hutcheon's request. It was noted that all Ministers who were Members of the Scottish Parliament had ensured that "any relevant interests" were included in the MSPs' Register of Interests.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the information withheld and the submissions which have been presented to him and is satisfied that no matter of relevance has been overlooked.



The scope of the request

16. Mr Hutcheon asked for information provided by Ministers since May 2007, and referred to paragraph 11.3 of the Ministerial Code. The Ministers have pointed out that the Ministerial Code introduced in 2003 was updated in June 2008, paragraph 11.3 being the relevant paragraph in the 2008 version; prior to that date, paragraph 9.3 was the equivalent paragraph in the Ministerial Code. The paragraphs are almost identical, although the revised version excludes “mortgaged property in which a Minister is currently resident” from the list of information which should be provided to the Permanent Secretary.
17. The Ministers initially considered that the scope of Mr Hutcheon’s request covered those replies stating that the Minister had no interests to declare, or nothing to add to interests previously notified to the Permanent Secretary (documents 6, 9, 14, 22, 24, 25, 26, 27, 29 and 30). In their letter of 27 July 2010, the Ministers advised that they now considered the information in these documents to fall outwith the scope of the request. They also suggested that information provided prior to the introduction of the revised Code, but no longer required thereafter, also fell outwith the scope of the request.
18. The Commissioner takes the view that the Ministers were correct in their initial interpretation of the scope of the request. Where Ministers provided a negative return to the Permanent Secretary, this information was supplied in order to demonstrate compliance with the Ministerial Code. Also, given the timeframe of Mr Hutcheon’s request, he cannot accept the exclusion of information required prior to, but not after, the introduction of the revised Code.

Section 25(1) of FOISA

19. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
20. As the Commissioner has said in his published guidance¹, section 25 has a different focus from other exemptions in FOISA. It is not about withholding information from the public but instead recognises that where information is already available to the applicant, there is no need to provide an alternative right of access through FOISA.
21. In this case, the Ministers have argued that some of the information covered by Mr Hutcheon’s request is publicly available in the online Register of Interests of Members of the Scottish Parliament, and that such information is exempt from release under section 25 of FOISA.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2663&SID=107>



22. The Commissioner notes that the Code of Conduct for MSPs² requires them to register financial interests “which might be thought to influence a member’s actions, speeches or votes in the Parliament”. The information in the MSPs’ Register has therefore been collected for a slightly different purpose from the information specified in Mr Hutcheon’s request, as the Ministerial Code requires Ministers, on appointment, to notify the Permanent Secretary of “all interests which might be thought to give rise to a conflict”. However, the Commissioner accepts that it is highly likely that interests declared in the MSPs’ Register of Interests would also be relevant to declare in respect of Ministerial duties. He therefore accepts that those parts of the information provided to the Permanent Secretary which are duplicated in the MSPs’ Register of Interests comprise information which is generally accessible, and is exempt from disclosure under section 25(1) of FOISA.
23. The Commissioner will go on to consider the remaining withheld information, to which the exemption in section 38(1)(b) of FOISA was applied.

Section 38(1)(b) of FOISA

24. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles laid down in Schedule 1 to the DPA.
25. This particular exemption is an absolute exemption and is not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

26. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (see the Appendix for the full definition).
27. The information withheld relates to financial and other interests put forward by individual Ministers in relation to the notification requirements of the Ministerial Code, or alternatively confirms that the Minister does not have any interests to declare. In all cases, it relates to the individuals whose interests are referred to, who can be identified from the information. The Commissioner accepts, therefore, that in either case the information withheld is the personal data of (as the case may be) the individual Minister, their partner and/or their family members.

Information published about UK Ministers’ interests

28. In his request for review (9 February 2010), Mr Hutcheon pointed out that a list of UK Ministers’ interests is published³, while no such list is available for Scottish Ministers. The Ministers were asked to comment on this point during the investigation of Mr Hutcheon’s case.

² <http://www.scottish.parliament.uk/msp/conduct/index.htm>

³ http://www.cabinetoffice.gov.uk/media/135065/ministers_interests.pdf



29. The Ministers advised that Scottish Government Ministers operate under a Scottish legislative framework and that the Scottish Ministerial Code differs from the equivalent UK Ministerial Code in not requiring an annual statement of Ministers' interests to be published.
30. The Ministers advised that the information published about UK Ministers' interests is approved for publication by the Minister concerned. In contrast, they submitted, the information covered by the terms of Mr Hutcheon's request is information which the Scottish Ministers provided with a view to discussion with the Permanent Secretary and with an expectation that it would be treated confidentially.
31. The Commissioner accepts that the Scottish and UK Ministers operate under different legislative frameworks. While he considers that the Scottish legislative framework would not prevent Scottish Ministers from publishing a list of interests similar to that published annually by UK Ministers, he accepts that Scottish Ministers are not currently required to do so and have not chosen to do so. Because information about the interests of Ministers or their families and/or partners is personal data, it can be disclosed lawfully only if this is permitted under the terms of the DPA; in other words, if disclosure would not contravene any of the data protection principles.

Would disclosure of the information contravene the data protection principles?

32. The Ministers argued that disclosure of the information would breach the first data protection principle. The first data protection principle requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed (in this case, disclosed) unless at least one of the conditions in Schedule 2 to the DPA is met, and, in the case of sensitive personal data at least one of the conditions in Schedule 3 to the DPA is also met. The Commissioner is satisfied that the withheld information does not fall into any of the categories of sensitive personal data listed in section 2 of the DPA.
33. The Ministers did not consider that any of the conditions in Schedule 2 could be met.
34. Given that the Ministers have withheld consent for disclosure (paragraph 14 above), the Commissioner takes the view that only condition 6 (the application of which the Ministers considered) could potentially be applicable in this instance.
35. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or 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. It is clear from the wording of this condition that each case will turn on its own facts and circumstances.
36. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - Does Mr Hutcheon have a legitimate interest in obtaining these personal data?



- If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects?
 - Even if the processing is necessary for the legitimate purposes of Mr Hutcheon, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? This will involve a balancing exercise between the legitimate interests of Mr Hutcheon and those of the data subjects. Only if (or to the extent that) the legitimate interests of the Mr Hutcheon outweigh those of the data subjects can the personal data be disclosed.
37. The Ministers did not consider that disclosure of the information was necessary for the purposes of legitimate interests. They took the view that the public interest was served by arrangements which ensured that potentially relevant Ministerial interests were disclosed fully and frankly (to the Permanent Secretary) and that any conflict of interest was identified and, where necessary, managed. They argued that the present system allowed Ministers to be very open and frank, in the knowledge that the information they provide could not be put into the public domain without their approval.
38. The Ministers considered it was also relevant to recall that the information put forward by Ministers was provided with a view to discussion with the Permanent Secretary, rather than providing finalised list of interests which might be thought to give rise to a conflict. They pointed out that much of the information provided by Ministers exceeded the terms of the request from the Permanent Secretary; it appeared that Ministers were keen to err of the side of caution and show full engagement with the process to ensure that any conflicts were avoided. The Ministers took the view that putting this information into the public domain would not improve the existing system and could undermine confidence and trust in the process.
39. Mr Hutcheon argued that his legitimate interest was in transparency in relation to information about Ministerial interests, and that this was an interest shared by the general public. He argued that Ministers should have to disclose their interests in the same way that MSPs were required to do. He acknowledged that some of the information covered by his request might already be disclosed on the Scottish Parliament's Register of MSPs' interests, but he believed that all declared interests at a Ministerial level should be disclosed, because Ministers clearly had a vital role in Government. Mr Hutcheon referred again to the published list of Ministerial interests available for UK Government Ministers.

Does the applicant have a legitimate interest?

40. The Commissioner accepts that both Mr Hutcheon and the public in general have a legitimate interest in the disclosure of information which would allow public scrutiny of the interests and actions of the Ministers. While accepting this principle, the Commissioner believes it is also important to bear in mind that a significant amount of the information withheld in this case is not a finalised list of interests capable of causing a conflict, but consists of the type of correspondence described by the Ministers in paragraph 38 above.



Is disclosure of the information necessary in order to meet those legitimate interests?

41. The Commissioner must now consider whether disclosure of the withheld personal data is necessary in order to satisfy the legitimate interests identified above. In doing so, he must consider whether these interests might reasonably be met by any alternative means.
42. The information withheld is, in some cases, much more detailed and extensive than might be assumed from the wording of Mr Hutcheon's request ("all information in each list provided by each Minister"), going far beyond the level of detail provided in the UK Government's published list of Ministerial interests. Mr Hutcheon was asked whether he would be satisfied with disclosure of information similar to that available for UK Ministers. He indicated that he would prefer to receive all information provided by Ministers to the Permanent Secretary. The Commissioner has considered both full disclosure and disclosure of information at the level of detail available for UK Ministers in weighing up whether disclosure of the withheld personal data is necessary to meet the identified legitimate interest.
43. The Commissioner notes that some of the information is already available on the Scottish Parliament's Register of MSPs' interests. However, the proportion of the withheld information appearing in the Register varies from Minister to Minister. (There are, of course, no entries for the two Ministers who are not MSPs.) There is also some lack of consistency in what has been registered, so that something listed as an interest for one Minister is omitted from another Minister's entry.
44. The Commissioner finds that the information already in the public domain would not be sufficient to meet the legitimate interest identified in paragraph 40, and that this could only be achieved by disclosure of some or all of the withheld information.

Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

45. The Commissioner accepts that disclosure of the information withheld would be likely to cause prejudice to the legitimate interests of the data subjects (i.e. the Ministers and, where relevant, their partners and/or family members), particularly in those cases where detailed financial or other personal information was provided by the Minister in order to obtain the Permanent Secretary's advice on whether or not those interests might be thought to give rise to a conflict. Disclosure of such information would undoubtedly lead to a loss of privacy.
46. The Commissioner also accepts that disclosure of the personal data provided in these circumstances would be likely to undermine the confidentiality of the notification process, noting that Ministers are likely to have a strong expectation that their correspondence with the Permanent Secretary will remain confidential. Paragraph 11.5 of the Ministerial Code (2008 version) provides that: "The personal information which Ministers disclose to those who advise them is treated in complete confidence and may not be disclosed without their permission." Although this is qualified to some degree in the letter sent out to new Ministers from the Permanent Secretary, which discusses the possibility of disclosure under FOISA, Ministers were advised: "There is no question of such disclosure being automatic... Should such a request be received, you would, of course, also be consulted and your views taken into account before a decision would be made on disclosure."

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47. The Commissioner notes that the Ministers were asked for their views on disclosure, and did not give consent.
48. In the circumstances, the Commissioner takes the view that the loss of privacy which the data subjects would experience on disclosure of their personal data, without consent, would be likely to undermine Ministers' confidence in the process by which potentially conflicting interests are notified and managed. The Commissioner notes once again that the information withheld was in several cases provided with the intention of seeking guidance from the Permanent Secretary, rather than providing formal notification of potentially conflicting interests.
49. The question for the Commissioner is whether the disclosure required in order to meet the legitimate interest identified in paragraph 40 would cause "unwarranted" prejudice to the rights and freedoms or legitimate interests of the data subjects. In other words, the Commissioner must decide whether the legitimate interest in transparency is sufficiently strong to warrant the loss of privacy and loss of confidence which would be experienced by those individuals.
50. As noted by Lord Hope in the case *Common Services Agency v Scottish Information Commissioner 2008 UKHL 47*, there is no presumption in favour the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr Hutcheon would have to outweigh the rights, freedoms or legitimate interests of the data subjects before condition 6(1) 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 personal data to Mr Hutcheon.
51. In this case, the Commissioner acknowledges that there is a strong case to be made for disclosure of information about Ministers' interests, as put forward by Mr Hutcheon. However, the Ministers have withheld consent for disclosure of the withheld personal data, apart from the information provided in the Scottish Parliament Register of MSPs' interests. For the reasons given above, the Commissioner finds that the Ministers (and other affected data subjects) would have a reasonable expectation in the circumstances that this information would not be disclosed. Having considered the competing interests, he finds Mr Hutcheon's legitimate interest in obtaining all or part of the withheld information is evenly balanced with the prejudice which Ministers (and where relevant, their family members and/or partners) would experience as a consequence of the disclosure of their personal data. On balance, therefore, he must find that the requirements of condition 6 cannot be met.
52. The Commissioner must therefore find that none of the conditions in Schedule 2 of the DPA can be met. For the same reasons, he finds that disclosure would be unfair and, in breaching the first data protection principle, unlawful. That being so, the Ministers were entitled to withhold the information under section 38(1)(b) of FOISA.

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DECISION

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

Appeal

Should either Mr Hutcheon 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
3 December 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and

...

- (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 –

- (a) section 25;

...

- (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.

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) 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

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.