



Scottish Information
Commissioner

**Decision 008/2008 Mr Carlos Alba and the Scottish
Ministers**

*Documents arising out of correspondence with the family of
Christopher Cawley*

**Applicant: Mr Carlos Alba
Authority: Scottish Ministers
Case No: 200600441
Decision Date: 17 January 2008**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 008/2008 Mr Carlos Alba and the Scottish Ministers

Request for copies of all documents arising out of correspondence with the family of Christopher Cawley – withheld under sections 25, 38(1)(b), 30(b)(i) and 30(c) of FOISA – Commissioner partially upheld decision to withhold information

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) and (2)(a) and (e) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(b)(i) and (c) (Prejudice to effective conduct of public affairs); 38(1)(b) and 38(2)(a)(i) and (b) (Personal information) and 67 (Protections from actions for defamation)

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

The full text of these provisions is reproduced in Appendix 1 to this decision. Both Appendices 1 and 2 (Appendix 2 is referred to later in the decision) form part of this decision.

Facts

Mr Alba requested copies of all documents arising out of correspondence between the Scottish Ministers (the Ministers) and the family of Christopher Cawley. The Ministers refused to release any documentation on the basis of a number of exemptions under FOISA. Mr Alba was not satisfied with this response and asked the Ministers to review their decision. On review, the Ministers released four redacted sets of papers, but upheld the earlier decision to withhold some of the information. Mr Alba remained dissatisfied and applied to the Commissioner for a decision.



Following an investigation, the Commissioner found that the Ministers had been entitled to withhold some information from Mr Alba, particularly information which fell into the definition of sensitive personal data in the Data Protection Act 1998 (the DPA). The Commissioner was also satisfied that some of the information, if released, would or would be likely to substantially prejudice the free and frank provision of advice and was therefore exempt from release.

However, taking into account the circumstances of the case, the Commissioner considered that the Ministers had been wrong to withhold other information from Mr Alba.

He therefore ordered the Ministers to release some of the information it had withheld to Mr Alba.

Background

1. On 16 September 2005, Mr Alba wrote to the Ministers requesting copies of all documents arising out of correspondence between the Ministers and officials and the family of Christopher Cawley.
2. By way of background, Mr Cawley was murdered on 8 September 2001. The charges against one of the accused were dropped during the trial. The charges against the other accused were found to be not proven. The case attracted considerable press attention. Mr Cawley's uncle, Mr Patrick Cawley, had been assaulted in a separate incident. The Cawley family subsequently met with the Lord Advocate to call for an inquiry into the way in which Christopher Cawley's case had been dealt with and to call for an inquiry into the matter. The family also expressed a number of concerns about the treatment of victims and their families in such cases.
3. The Ministers responded on 1 December 2005, but refused to release any documentation on the basis of exemptions in sections 29 (Formulation of Scottish Administration policy etc), 30 (Prejudice to effective conduct of public affairs) and 38 (Personal information) of FOISA. The response also noted that, in considering the exemptions in sections 29 and 30, the Ministers on balance considered that the public interest lay in maintaining the exemptions.
4. On 6 December 2005, Mr Alba wrote to the Ministers requesting a review of their decision.



5. In January 2006, the Ministers notified Mr Alba of the outcome of their review. The Ministers found that the decision to withhold the information was correct with the exception of four sets of papers. The Ministers upheld the decision to withhold the remaining information on the basis of a combination of exemptions in sections 25 (Information otherwise accessible), 30 and 38 of FOISA.
6. On 21 February 2006, Mr Alba 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. Mr Alba's application was validated by establishing that he 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 1 March 2006, the Ministers were notified in writing that an application had been received from Mr Alba and were asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, asking them to provide comments and to respond to specific questions on the application. In particular, the Ministers were asked to provide copies of the information which fell within the scope of Mr Alba's request, with a clear indication as to what information had been released and what information had been withheld, along with full analysis of any exemptions they considered applicable to the withheld information and of the application of the public interest test, as appropriate.
10. The Ministers responded on 28 March 2006, enclosing copies of the information which they had released and withheld, their statements on the case and other supporting documentation. They also clarified the exemptions they were relying on to withhold the information from Mr Alba.



11. The Ministers initially submitted that press cuttings from the News of the World (dated 14 and January 2001), were exempt under section 25 on the basis that they could be reasonably obtained other than by requesting them under FOISA. However, they later advised me that they considered that the press cuttings fell outwith the scope of the request. I agree with the Ministers that the press cuttings are not documents arising out of correspondence between the Ministers and the family of Christopher Cawley and that they are outwith the scope of the request. As a result, they have not formed part of my investigation.
12. In addition, the Ministers confirmed that a press release (which forms part of item 8 in Appendix 2, which summarises the outcome of my decision) was available from the (then) Scottish Executive website and was, therefore, also exempt under section 25. They apologised for not referring Mr Alba to the web address in their initial response, but later argued that the press release also fell outwith the scope of Mr Alba's request. However, I consider that it is within the scope of request for reasons set out in paragraph 23 below.
13. The Ministers indicated that they had relied on the exemption in section 38(1)(b) to withhold information in all of the remaining documents, with the exception of item 1. They also considered that all of the remaining information was exempt under section 30(c) and that some of the information was also exempt under section 30(b)(i).
14. In January 2007, the Ministers wrote to my Office, with additional arguments in relation to their reliance on the exemption in section 30(c). They also supplied me with an updated schedule, with five additional documents which they now considered to fall within the scope of Mr Alba's request and which they had now released to Mr Alba, with the redaction of home addresses.
15. Further, general arguments on the application of section 30(b) (of relevance to this case and others) were provided by the Ministers on 2 May 2007.
16. During the course of the investigation, the investigating officer also contacted the Ministers, asking them to respond to specific questions concerning the application.
17. I will comment in detail on the Ministers' arguments in my analysis and findings below.



The Commissioner's Analysis and Findings

18. On 16 September 2005, Mr Alba wrote to the Ministers requesting copies of all documents arising out of correspondence between the Ministers and their officials and the family of Christopher Cawley. The Ministers released some information in response to the request relating to the fact that Mr Patrick Cawley had raised concerns about the handling of two court cases as outlined at paragraph 2 above. The documents released question the treatment of victims and their families in such cases. The release also confirms that a meeting had taken place with the Lord Advocate, that a dossier of questions had been handed to the Lord Advocate and that, whilst the Minister of Justice had declined a personal meeting, a future meeting had not been ruled out: in the first instance, however, a meeting would take place with departmental officials to discuss the concerns of the family. The documents also discuss judicial appointments.
19. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both the applicant and the Ministers and I am satisfied that no matter of relevance has been overlooked.
20. With the exception of item 1, the Ministers relied on section 38 (1)(b) for all items withheld. In addition to this they relied on section 30(c) for all the withheld information and section 30(b)(i) and (ii) in connection with items 6, 8, 9, 11 to 13 inclusive, 15, 17 and 18. As noted above, with regard to the press release (item 8), the Ministers initially argued that it was exempt under section 25(1), then later argued that it was outwith the scope of Mr Alba's request.
21. Initially, the Ministers supplied a schedule of documents showing 26 items of which items 3, 5, 7, 10, 25 and 26 had been released with redaction of home addresses. They later supplied a further schedule which added items 3a, 27, 27a, 28 and 28a, all of which had been released to Mr Alba, but again with redaction of home addresses.
22. I will first consider whether the press release contained within item 8 falls within the scope of Mr Alba's request and then the use of the exemption in section 25(1) in relation to it. After that, I will go on to consider the exemption in section 38(1)(b). Finally, I will go on to consider the exemptions in section 30 only where I do not find that the information is otherwise exempt.



23. Item 8 consists of two emails and the press release which the Ministers consider does not come within the scope of Mr Alba's request. The second of the two emails refers to the press release and I consider it to be intrinsically linked to that email. I am satisfied that the press release is a document arising out of correspondence between the Ministers, their officials and the family of Christopher Cawley, given that it would not have been prepared had no such correspondence taken place. For that reason, I consider that it does fall within the scope of Mr Alba's request.

Section 25 – Information otherwise accessible

24. Section 25 exempts from release information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA. 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.
25. As noted above, the Ministers initially refused to disclose the press release under section 25. In their response to my Office, the Ministers indicated that this press release was available at [www.scottishexecutive.gov.uk /News/Releases/2002/11/2499](http://www.scottishexecutive.gov.uk/News/Releases/2002/11/2499) and was therefore already in the public domain. I have verified this and am satisfied that Mr Alba can obtain the press release which forms part of item 8 other than by requesting it under section 1(1). I am therefore satisfied that the press release is exempt under section 25(1) of FOISA.

Section 38(1)(b) – Personal information

26. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate) exempts personal data from release if its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles. In most cases, the first data protection principle will be the most relevant and, indeed, this is the one cited by the Ministers. The first data protection principle says 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 is met, and in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.



27. In considering the application of this exemption, I will therefore consider whether the information in question is personal data as defined in section 1(1) of the DPA and, if it is, whether disclosure of the information would breach the first data protection principle. I will also consider whether any of the information is sensitive personal data as defined in section 2 of the DPA and, if it is, the implications of its status as sensitive personal data for the application of the first principle.
28. In terms of section 2(h) of the DPA, “sensitive personal data” includes personal data consisting of information as to any proceedings for any offence committed or alleged to have been committed by a data subject, the disposal of such proceedings or the sentence of any court in such proceedings. Given the subject matter of the correspondence, it is not surprising that much of the information which has been withheld by the Ministers falls into the definition of sensitive personal data.
29. As noted above, a number of documents have been released to Mr Alba with the personal addresses of the individuals who had written to the Ministers redacted and I will deal with the question of personal addresses first of all.
30. I am satisfied that the information which has been redacted (i.e. the home addresses of the Cawley family) is personal data. Members of the Cawley family can clearly be identified from this information (or from that information and other information in the possession of the Ministers) and the information relates to them in that it has them as its focus and is biographical in nature. The Ministers consider that to release the home addresses would be unfair to the individuals concerned and that the disclosure of the information would breach the first data protection principle. I consider that there would have been no expectation on the part of the Cawley family that these addresses would be put into the public domain. I therefore agree that the release of the home addresses in all of the documents withheld from Mr Alba would be unfair, that the disclosure of the information would breach the first data protection principle and that the addresses were therefore correctly withheld in terms of section 38(1)(b) of FOISA.
31. The Ministers made specific arguments in relation to documents at items 2 and 4 and a more generic argument for the remaining documents. I will therefore consider item 2 first.



32. Information contained in items 2 was withheld on the basis that it included private, detailed expressions of the families' views and that it was not provided with the expectation that the information would be put into the public domain.
33. Item 2 appears to be the dossier of questions prepared by the Cawley family which is referred to in paragraph 18 above. Much of the information contained within this dossier falls within the definition of personal data contained in section 1(1) of the DPA, whether the personal data of the family (in expressing their opinions about individuals, such as those who were involved in handling the case)) or personal sensitive data concerning the persons who were accused of murdering Christopher Cawley. I must now go on to consider whether disclosure of this personal data would breach the first data protection principle.
34. I will consider, first of all, the sensitive personal data in the dossier. Most of the personal data within item 2 is sensitive personal, as defined by section 2(h) of the DPA. As noted above, this type of personal data cannot be disclosed unless there is a condition in each of schedule 2 and 3 of the DPA which can be fulfilled. The conditions in schedule 3 (see the Appendix) are the more restrictive. I have therefore considered these first and am unable to find any condition in this schedule which would permit the processing of this data in this case. I am therefore satisfied that the disclosure of the sensitive personal data would breach the first data protection principle and that its disclosure is therefore exempt under section 38(1)(b) of FOISA.
35. The remaining personal data contained in the dossier is non-sensitive personal data, focussing on the opinions of the Cawley family on perceived failings of the justice system, support for victims' families etc. I will now consider whether disclosure of this information would be fair and lawful and whether any of the conditions in schedule 2 of the DPA (see the Appendix) can be met).
36. I consider that condition 6(1) is likely to be the only condition which can be met and I will go on to address that now.



37. I consider that Mr Alba has a legitimate interest with regard to the release of the information, in that, as a journalist, he has a legitimate interest in terms of reporting a story of interest to the public. The information relates to a murder which was witnessed by a large number of people, but which did not lead to a conviction. The “story” is not one in which the public will simply take a prurient interest, given that it questions the way in which our justice system deals with such serious cases and also with the victims of crime and the families of the victims. The importance of this case was underlined by the fact that the Lord Advocate agreed to meet with the family to discuss their concerns – the concerns being those raised in the dossier in question here. I am therefore satisfied that Mr Alba – and, indeed, the public in general – have a legitimate interest with regard to the release of the non-sensitive personal data in the dossier.
38. Clearly, this legitimate interest needs to be balanced against the legitimate interests of the other data subjects in the dossier. Having already excluded the sensitive personal data, the personal data left is that of the Cawley family, some officials who were involved in the case and, additionally, some of the officials who later dealt with correspondence on matters raised by the Cawley family. I will consider these separately.
39. In considering the legitimate interests of the Cawley family, I have taken into account the fact that references to the Cawley family are also contained within the documents already released by the Ministers, and within a similar context as the withheld information. Indeed some of the withheld information is also contained in documents previously released to Mr Alba. In releasing those documents, the Ministers commented that “given the public campaign run by the family it was considered that it would not be unfair to reveal their names in the present case.” The Cawley family have taken steps to make their concerns public and I therefore agree with the Ministers that the fact of their public campaign means that it is legitimate to disclose information about them which, in other cases, is likely to be legitimately withheld.
40. I also consider that disclosure of the information is necessary to achieve the interests of the applicant and, by extension, for the purposes of transparency and accountability.



41. I have considered whether disclosure would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects, but on balance I have found any such prejudice to be outweighed by the legitimate interest in disclosure of the information in this case. In all the circumstances of this case, and having weighed the competing interests, I am therefore satisfied on balance condition 6 can be met.
42. In the circumstances, and for the same reasons, I am satisfied that the disclosure of the information would be fair and lawful. (The Ministers did not provide any other submissions as to why the disclosure of the information would be unlawful other than by reason of there being no condition in schedule 2 which would permit the processing of the data.)
43. In passing, I would note that the Ministers considered there may be some implications in defamation law in publicly airing some of the representations contained within the documents. They did not clarify which of the representations they were referring to but later indicated that whilst their principle concerns regarding defamation law related to the advocate, it is possible that it might also apply to comments about the accused. Given that I have found that the disclosure of any of the sensitive personal data relating to the accused, would breach the first data protection principle (and, so, is exempt under section 38(1)(b) of FOISA), this will no doubt allay any fears the Ministers may have on this point. In any event, I would note that section 67 of FOISA protects public authorities disclosing information in response to an information request from actions for defamation.
44. I will now go on to consider whether it would be fair and lawful to disclose the personal data of the officials who had some involvement with the Cawley family and who are named or referred to in the dossier.
45. On this occasion, I will begin by considering the question of fairness. In doing this, I have taken account of guidance from the Information Commissioner, who is responsible for regulating the DPA. The guidance (i.e. Data Protection Technical Guidance: access to information about public authorities' employees) notes that public sector employees working in an official capacity should, depending on their seniority and the nature of their jobs, expect to be identified in relation to their professional activities.



46. The same guidance note from the Information Commissioner considers the question of the circumstances in which disclosure might be fair: for instance, whether disclosure would cause unnecessary distress or damage to the person who is the focus of the information, and whether that person would have an expectation that his or her information would be disclosed to others or kept secret.
47. I have considered the seniority of the officials involved in this case and consider that it would be unfair to disclose the personal data of a particular person who was not senior, but who was involved with the family in a particular aspect of the case. Given that I have found that the disclosure of information about this particular individual (who must, for obvious reasons, remain unnamed in this decision), I find that the disclosure of the information would breach the first data protection principle and is, accordingly, exempt under section 38(1)(b) of FOISA.
48. I will now go on to consider whether disclosure of one particular senior official would be permitted in terms of condition 6(1) of schedule 2 to the DPA. Again, for obvious reasons, this person must remain unnamed in this decision notice.
49. For the same reasons as I have set out above, I consider that Mr Alba (and, indeed, the public) has a legitimate interest in obtaining information about this individual. Again, I am satisfied that disclosure of the information is necessary to achieve these interests and, by extension, for the purposes of transparency and accountability.
50. I will therefore go on to weigh these legitimate interests.
51. The dossier contains comments on the performance of one individual in particular, who is a high profile, senior official. Some of the information in the dossier about this individual has already been released to Mr Alba in response to his information request. The comments are about the individual in his professional capacity, rather than focusing on his personal life. Given his seniority, I consider that he would have an expectation that information about his professional life would not be released. Given the information which has already been released, I do not consider that the disclosure of the information would cause unnecessary distress or damage to the official in question. As a result, I do not consider that disclosure of his personal data would be unwarranted by reason of prejudice to his rights and freedoms or legitimate interests.



52. A number of other officials are mentioned “in passing” in the dossier. Again, given the legitimate interest in the information, the fact that any reference to these individuals is in a purely professional capacity, and the fact that I do not consider that disclosure would cause any unnecessary distress or damage, I do not consider that disclosure of their personal data would be unwarranted by reason of prejudice to their rights and freedoms or legitimate interests.
53. I am satisfied for the same reasons that disclosure of the information would not be unfair. Again, in considering whether it would be unlawful to disclose the personal data of the officials referred to in the dossier, I note that the Ministers have not argued that the disclosure of the data would be unlawful, except to the extent that, in their view, there is no condition in schedule 2 to the DPA which would permit the data to be disclosed. I am therefore of the view, that, except for the circumstances narrated in paragraph 46 above, the disclosure of the personal data relating to the officials would not breach the first data protection principle and is not, therefore, exempt under section 38(1)(b) of FOISA.
54. To summarise my findings so far, I have found that the disclosure of sensitive personal data would breach the first data protection principle on the basis that there is no condition in schedule 3 to the DPA which would permit the processing of the data. While I have found that information which would identify the home addresses of the Cawley family members should also be withheld on the basis that it would be unfair for it to be released, I have also found that much of the additional personal data which relates to the Cawley family should be released on the basis that it would be fair and lawful for the information to be released, given the public campaign pursued by the family. As for the naming of individuals who were involved in a professional capacity, except for the circumstances set out in paragraph 46 above, I find that it would be fair and lawful for their personal data to be released.
55. As noted above, the Ministers applied the exemption in section 38(1)(b) to all of the information which had been withheld except for document 1. The same section 38(1)(b) issues arise in the remaining documents. I therefore do not intend to repeat the arguments for each of the documents, although I have taken them into account in deciding which parts of the documents should and should not be released and in preparing Appendix 2 to the decision.



56. I should make it clear that I consider that the names of officials involved in the preparation and circulation of the remaining documents should be dealt with in the same way as the officials named “in passing” (as referred to in paragraph 51 above). Although, in their submissions, it was unclear whether the Ministers wished to apply the exemption in section 38(1)(b) to these names, I have done so. In line with the arguments set out above, I consider that disclosure of this personal data would not breach the first data protection principle and that the information is therefore not exempt under section 38(1)(b) of FOISA.

Section 30(b)(i) – free and frank provision of advice

57. Section 30(b) of FOISA allows information to be withheld if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation (section 30(b)(i) and (ii) respectively).
58. The Ministers relied on the exemptions in section 30(b) to withhold items 6, 8, 9, 11 to 13 inclusive, 15, 17 and 18. Although, in a heading in a letter containing submissions from the Ministers dated 28 March 2006, both sections 30(b)(i) and (ii) are referred to, the arguments put forward by the Ministers relate solely to the free and frank exchange of advice. I will therefore concentrate on this particular exemption in the decision.
59. The Ministers considered that the disclosure of the information contained in these documents would, or would be likely to, inhibit substantially the provision of advice in the future and that it would not be in the public interest for officials to feel obliged to moderate their language in such a way to ensure that their advice contains nothing that might prove upsetting to victims. Whilst they accept that much of the advice in this case is not of itself particularly emotive, they consider that the release would impact on officials providing similar advice in the future.
60. In relation to section 30(b)(i), I have also taken account of the further arguments on the application of section 30(b) (of relevance to this case and others) which were provided by the Ministers with a letter of 2 May 2007, emphasising the points made for non-disclosure.



61. I have addressed these additional, general submissions already in paragraphs 23 to 31 of another decision (089/2007, Mr James Cannell and Historic Scotland). As these new arguments which have been submitted by the Executive are not specific to the information under consideration, I do not intend to discuss these further here, other than to say that I have considered these fully, together with the original submissions that the Executive have provided, in reaching my decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration here.
62. It should be clear by now from previous decisions that I do not, as a rule, accept the application of either of the exemptions in section 30(b) to the information in an entire class of documents simply because they belong to that particular class. I believe that view to have been upheld by the Court of Session in the conjoined cases of *The Scottish Ministers v The Scottish Information Commissioner (William Alexander's Application)* and *The Scottish Ministers v The Scottish Information Commissioner (David Elstone and Martin William's Applications)* 2007 SLT 274. A full assessment of the nature and content of the information will be necessary to determine whether either exemption applies, along with due consideration of all other relevant circumstances, and it cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in future.
63. Having taken account of all the arguments put forward by the Ministers, and having analysed the content of all documents, I find that the exemption in section 30(b)(i) applies only to some of the information which has been withheld (see Appendix 2 for details) on the basis that, in line with the arguments put forward by the Ministers, if this information were to be released it would, or would be likely to, significantly reduce the likelihood of this type of work being carried out or recorded in the future and therefore would, or would be likely to, inhibit substantially the free and frank provision of advice.
64. As noted above, the Ministers accept that much of the advice in this case is not particularly emotive, but they are concerned that, "the release would impact on officials providing similar advice in the future". As I have stated in previous judgements, each case will be considered in context and on its own merit. The fact that I have upheld the decision in relation to documents at item 6 and to part of item 18 as mentioned above, should allay the blanket fear in this respect.



65. In relation to all the other information, to which the Ministers applied a section 30(b)(i) exemption, I am not convinced that there is anything of a contentious or controversial nature within any advice given or that the release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. Taking account of the content and context of the remaining information, I find that the exemption contained in section 30(b)(i) has been applied incorrectly.

The public interest test

66. Having decided that that section 30(b)(i) applies to some of the information which has been withheld from Mr Alba, I shall now consider the public interest in respect of that information. The exemption in section 30(b)(i) is a qualified exemption, which means that its application is subject to the public interest test required by section 2(1)(b) of FOISA. I am therefore required to go on to consider whether, in all the circumstances of the case, the public interest in the disclosure of the information is outweighed by the public interest in maintaining the exemption.
67. The Ministers considered there was a strong public interest in maintaining the integrity of giving free and frank advice in this sort of case. They did not consider that the exemption contained in section 30(b)(i) should only apply in cases where officials have used strong or trenchant language (i.e. rigorous, outlandish or unusual statements), but rather that was what important to take into account were any underlying effects likely to suppress effective future communication. They suggested that there was not a powerful public interest argument in disclosing the views provided in this case and were doubtful that release would add little to the information already in the public domain, whilst having a damaging and inhibiting impact on the provision of advice in the future. They argued that consideration of the public interest must rest on what lies in the public interest, not what is of interest to the public and that just because a subject has received a particularly high profile does not necessarily lead to an overriding public interest in release of information about it. The Ministers suggested therefore that in this case the public interest in disclosure is outweighed by the interest in protecting the future frankness of advice and avoiding distress.



68. The Ministers continued that there is also a strong public interest in ensuring that, where necessary, advice in sensitive areas such as this can take place in a non-public arena which will enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that that such considerations will be picked over out of context. Whilst they considered the public interest test must be considered on a case by case basis, in such instances as these where information requested relates to an important process (such as provision of advice in order to reach policy decision), there can be a public interest in protection of a process itself.
69. I acknowledge that there is a strong public interest in scrutiny of our Scottish legal system, including what action is considered when a complaint is made, to which the correspondence in question refers, and the fairness to both accused and victim of crime. I also acknowledge the wide media coverage and public interest in relation to this particular set of circumstances. That a subject has received a particularly high profile, however, does not necessarily lead to an overriding public interest in release of all information about it.
70. There is also a strong public interest in authorities being able to give free and frank advice and I have to ensure that the release of such advice does not inhibit substantially the free and frank provision of such advice in the future.
71. I have considered the content and context of the information which I agree is exempt under section 30(b)(i) and I am not satisfied that disclosure will add anything to the scrutiny of our Scottish legal system or provide insight to the decision-making process in relation to complaints raised. I am, however, satisfied that release would likely inhibit such future advice.
72. The Ministers considered there was a strong public interest in maintaining the integrity of giving free and frank advice in this sort of case. With this in mind, I am satisfied that the public interest in disclosure is outweighed by the Ministers' ability to receive comprehensive advice and conclude their deliberations accordingly. In all the circumstances, therefore, where I have found that information is exempt under section 30(b)(i), I have also found that the public interest lies in the maintenance of the exemption.

Section 30(c) - effective conduct of public affairs



73. As noted above, the Ministers have applied the exemption in section 30(c) to the majority of the documents withheld from Mr Alba. Information is exempt in terms of section 30(c) if its disclosure would, otherwise than for the reasons specified in sections 30(a) and (b), prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. As with the other exemptions contained in section 30, the exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA.
74. I will now go on to consider whether the information which I have not yet considered (or which I have not considered to be exempt under any of the other exemptions put forward by the Ministers) is exempt under section 30(c).
75. The remaining documents relate, in the main, to discussions about a possible meeting. The Ministers did not see it as appropriate or in the public interest for these discussions to be made public. They argued that the issues involved with criminal cases of this sort are of the utmost sensitivity and that it might be pointlessly distressing to the victims to see frank assessments of various positions reproduced. They further argued that the information relates to an extremely sensitive and private matter and that to place discussions of this sort into the public domain would substantially prejudice the ability of the Ministers as a public authority to deal appropriately and respectfully with this sort of case. The Ministers added that there would be little or nothing in the withheld material that could add to the public understanding of the matter.
76. The Ministers considered that it was in the public interest that bereaved victims of crime be able to make representation to the Ministers and for the Ministers to consider these representations, without either party being concerned about public disclosure of their comments.
77. Whilst taking account of the points raised above, it is clear that the family have campaigned publicly on the matters which are the subject of the information in this case. In recognition of this, the Ministers have already released some information to Mr Alba in response to his information request.



78. These arguments necessarily relate to all of the information withheld under section 30(c), much of which I have already found to be exempt from disclosure under other exemptions. In taking into account the remaining information, and in taking account of what information has already been put into the public domain both by the family and by the Ministers themselves, I do not consider that the disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs as envisaged by section 30(c).
79. Given that I have not upheld the use of the exemption in section 30(c), I am not required to go on to consider whether the public interest in the disclosure of the information is outweighed by the public interest in maintaining the exemption.

Decision

I find that the Scottish Ministers (the Ministers) partially complied with Part 1 of the FOISA in withholding information under the exemptions in section 30(b)(i) and section 38(1)(b). By withholding other information under these exemptions, I find that the Ministers failed to comply with section 1(1) of FOISA.

I also find that by withholding certain information under section 30(c) of FOISA, the Ministers also failed to comply with section 1(1).

In order to comply with Part 1 of FOISA, I require the Ministers to provide Mr Alba with information as indicated in Appendix 2 of this Decision Notice.

I am obliged to give the Ministers at least 42 days in which to supply Mr Alba with the information as set out above. In this case, I require the Ministers to take these steps within 45 days after the date of intimation of this decision notice.

Appeal

Should either Mr Alba or the 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 this notice.



Kevin Dunion
Scottish Information Commissioner
17 January 2008



Appendix 1

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (...)
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (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.



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.

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.



67 Protection from actions for defamation

Where, in compliance with a request for information, information supplied to a Scottish public authority by a third party is communicated by the authority, under section 1, to the applicant, the publication to the applicant of any defamatory matter contained in the information so supplied is privileged unless that publication is shown to have been made with malice.

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;

(...)

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to –

(...)

(h) any proceedings for any offence committed or alleged to have been committed by [the data subject], the disposal of such proceedings or the sentence of any court in such proceedings.

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**

1. The data subject has given his consent to the processing.
2. The processing is necessary –
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary –
 - (a) for the administration of justice,
 - (aa) for the exercise of any functions of either House of Parliament,
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 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...



Schedule 3 Conditions relevant for purposes of the first principle: processing of sensitive personal data

- 1 The data subject has given his explicit consent to the processing of the personal data.
- 2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.

(2) The Secretary of State may by order—
 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 3 The processing is necessary—
 - (a) in order to protect the vital interests of the data subject or another person, in a case where—
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- 4 The processing—
 - (a) is carried out in the course of its legitimate activities by any body or association which—
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical, religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and



- (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.
- 5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
- 6 The processing—
(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
(b) is necessary for the purpose of obtaining legal advice, or
(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
- 7 (1) The processing is necessary—
(a) for the administration of justice,
(b) for the exercise of any functions conferred on any person by or under an enactment, or
(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.
- (2) The Secretary of State may by order—
(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 8 (1) The processing is necessary for medical purposes and is undertaken by—
(a) a health professional, or
(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.
- (2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.
- 9 (1) The processing—
(a) is of sensitive personal data consisting of information as to racial or ethnic origin,



(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.
- 10 The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.



APPENDIX 2

Schedule of documents

No.	Item	Date of Item	Exemptions applied	Exemptions upheld?	Decision
1	File Note	Unknown	S30(c)	No	Release
2	List	Unknown	S38(1)(b) S30(c)	Partly. No	Release the following; Page 3 from 'Perception of the Advocate' to the end of page 4; Page 10 from point 'G)' to the end of the paragraph after point 80 on page 12; Page 12 from point '81' to point 96 on page 15 with the exception of point 86 and preceding line, and the first and last bullet points under L) on page 14; Page 16 from 'O)' to first paragraph under point 'S)' on page 17; and Page 19 from 'You have made no ...' to the end of page 20 with the exception of second paragraph under point 4 on page 20. Withhold the remainder of the document.
3	Letter from Mr Wallace	27/03/01	n/c		Previously Released
3a	Letter from Mr McAveety	02/03/01	n/c		Previously Released
4	MCS Notes	18/02/02	S38(1)(b) S30(c)	Partly No	Release with redaction of addresses
	Letter to Mr McConnell	14/02/02	S38(1)(b) S30(c)	Partly No	Release with redaction of the first two sentences of the second paragraph of the letter only.
	2 Pages with photograph	No date	S38(1)(b) S30(c)	Partly No	Release with redaction of paragraph 5 of page 1; paragraphs 2 and 3 on page 2 and bullet points 3 (except for first sentence), 4, 5 and 6 also on page 2.
	Letter to all MSPs	7/03/01	S38(1)(b)	Partly	Page 1: redact words "which as you know .. minutes" in 1 st paragraph; "and the ... was returned" in 2 nd paragraph; bullet points 2 and 3. Redact whole of section entitled "Prosecution." Redacted whole of section entitled "The acquittal of ...". Redact whole of section entitled "The Charges" except for last 2



					<p>paragraphs. Release section entitled "Lack of support" except for paragraphs 1 and 2. Redact section entitled "Christopher Cawley" to the end of page 6 of the letter. On final page of letter, redact "we now assume ... of Justice" and release remainder of page.</p>
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	Corresp. Unit compliments slip	Unknown	S38(1)(b) S30(c)	No No	Release
5	Letter from D McGurk	18/03/02	n/c		Previously Released
6	Briefing Note from G Dickson	1/11/02	S38(1)(b) S30(b)(i) S30(c)	No Yes n/c	Withhold
7	Letter from G Lindsay	29/11/02	n/c		Previously Released
8	Email from G Dickson	6/11/05	S38(1)(b) S30(b)(i) S30(c)	Partly Partly No	Withhold "he went" to end of paragraph in paragraph 3 and all of paragraphs 5 and 7.
	Copy email from K Davidson	5/11/05	S38(1)(b) S30(b)(i) S30(c)	No No No	Release
	Press Release.		S25	Yes	Withhold
9	Email from G Dickson	7/11/02	S38(1)(b) S30(b) S30(c)	No Partly No	Release with last paragraph of email of 7/11/02 redacted
10	Letter to Mr Wallace	11/11/02	n/c		Previously Released
11	Minute from G Dickson	14/11/02	S38(1)(b) S30(b)(i) and (c)	Partly No	Release with paragraph 5 and manuscript note redacted
12	Email from G Dickson	18/11/02	S38(1)(b) S30(b)(i) S30(c)	No No No	Release
13	Letter from B Gilchrist	19/11/02	S38(1)(b) S30(b)(i) S30(c)	No No No	Release
14	Email from G Dickson	19/11/02	S38(1)(b) S30(c)	No No	Release
15	Email from A Shields	22/11/02	S38(1)(b) S30(b)(i) S30(c)	No Partly No	Withhold text of email of 22/11/02 (14.12). Redact "We will also..." to end of email from G Dickson.
16	Email from DFM	22/11/02	S38(1)(b) S30(c)	No No	Release
17	Email from G Dickson with draft letter attached	22/11/02	S38(1)(b) S30(b)(i) S30(c)	No Partly No	Email already considered as part of document 15. Redact draft letter.
18	Note from G Dickson	22/11/02	S38(1)(b) S30(b)(i) S30(c)	No Partly No	Release with the redaction of point 2 only.
19	Email from G Dickson	3/12/02	S38(1)(b) S30(c)	Partly No	Release subject to redaction of line beginning "Early" in the 5 th paragraph.
20	Email from G Dickson	3/12/02	S38(1)(b) S30(c)	Yes n/c	Withhold emails timed at 15.18 and 15.27 (email timed 14:57 which in



					addition appears in part dealt with above).
21	Letter from DCA	23/12/02	S38(1)(b) S30(c)	No No	Release
22	Email from G Dickson	23/12/02	S38(1)(b) S30(c)	No No	Release
23	Email from S Knox	7/01/03 & 19.12.02	S38(1)(b) S30(c)	No No	Release
24	Email from S Sadler	9/01/03	S38(1)(b) S30 (c)	No No	Release
25	Letter	11/01/03	n/c		Previously Released
26	Letter	11/01/03	n/c		Previously Released
27	MCS Case	4/09/01	n/c		Previously Released
27a	MCS Case	2/08/01	n/c		Previously Released
28	MCS Case	13/08/01	n/c		Previously Released
28a	MCS Case	19/07/01	n/c		Previously Released

In this table, “n/c” means “not considered.”