

Decision Notice



Decision 080/2009 Mr Eddie Barnes and the Scottish Ministers

Funding from Scottish Ministers to the Scottish Islamic Foundation

Reference No: 200801540
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Summary

Mr Barnes requested from the Scottish Ministers (the Ministers) information related to funding provided to the Scottish Islamic Foundation (the SIF). The Ministers responded by providing certain information to Mr Barnes, but withholding other information and relying on various exemptions in FOISA for doing so. The Ministers also explained that they did not hold other information requested by Mr Barnes. Following a review, Mr Barnes remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had partially failed to deal with Mr Barnes' request for information in accordance with Part 1 of FOISA. While they had been entitled to withhold certain information under sections 30(b)(i), 30(b)(ii), 30(c), 36(2) and 38(1)(b) of FOISA, certain other information had been incorrectly withheld under section 30(b)(i) and (ii). The Commissioner required the release of the incorrectly withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality); 38(1)(b), 2(a)(i) and (b) (Personal information).

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions - definition of personal data); Schedules 1 (The data protection principles - the first principle) and 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 9 August 2008, 14 August 2008 and 19 August 2008, Mr Barnes wrote to the Ministers requesting the following information:



Request of 9 August 2008

- (1) A copy of the grant application form issued by the SIF for funding from the Race, Religion and Refugee Integration programme 2008-11.
- (2) All communications between the independent assessors from the Voluntary Action Fund, and officials and/or ministers regarding the application for RRR1 funding from the Scottish Islamic Foundation.
- (3) All communications from 10th July 2008 to the present date between the Scottish Government and the Glasgow Islamic Centre/Glasgow Central Mosque regarding the application for funding from the Scottish Government.
- (4) All communications between the Scottish Government's Equality Unit and the Scottish Islamic Foundation regarding the award to the SIF of £215,752.
- (5) All communications between the Scottish Government's Equality Unit and other government departments regarding the award to the SIF of £215,752.

Request of 14 August 2008

- (1) Regarding the £210,000 awarded to the Scottish Islamic Foundation by the Scottish Government in March, the name of the bank account into which the sum was paid.

Request of 19 August 2008

- (1) Further to the 9 August request, all the supporting documentation (memorandum/articles of association) supplied by the SIF for this application.
 - (2) Details of all payments made by the Scottish Government to Mango Public Relations Limited.
2. Mr Barnes received a response to all three of his requests on 2 September 2008. In this response the Ministers provided Mr Barnes with information which would address (in part) points 1, 2, 4 and 5 of his request of 9 August 2008, his request of 14 August 2008 and point 1 of his request of 19 August 2008. Other information which would address these points was withheld from Mr Barnes, the Ministers citing the exemptions in sections 30(b)(i), 30(b)(ii), 30(c), 36(2) and 38(1)(b) of FOISA for doing so. In responding to point 3 of Mr Barnes' request of 9 August 2008 and point 2 in his request of 19 August 2008, the Ministers indicated that they did not hold any information which would address these points, and were therefore unable to provide this information to him.



3. On 10 September 2008, Mr Barnes wrote to the Ministers requesting a review of their decision to withhold information. In particular, Mr Barnes argued that the public interest in disclosing this information outweighed that in maintaining the exemptions claimed, referring to specific concerns about the funding in question. He also commented on supporting documents given by the Voluntary Action Fund to applicants for funding, which stated that the Scottish Government might be required to make applications for grants available for public scrutiny to comply with FOISA.
4. A response to his requirement for review was provided to Mr Barnes on 20 October 2008. In this response, the Ministers upheld their original decision to withhold the information, explaining that they were relying on the exemptions in sections 30(c), 36(2) and 38(1)(b) of FOISA for doing so.
5. Mr Barnes wrote to the Commissioner's Office on 21 October 2008, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Barnes had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 10 November 2008, the Ministers were notified in writing that an application had been received from Mr Barnes and asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on the exemptions they considered applicable to the withheld information. The Ministers responded to this and to subsequent requests for clarification.
9. After further consideration of the withheld information, the Ministers decided to release to Mr Barnes a copy of the SIF's grant application, subject to redaction of certain personal details, together with part of its assessment of that application and some related correspondence. This information was subsequently released to Mr Barnes. In the circumstances, the Commissioner does not regard it as necessary to consider this released information further in this decision notice.
10. The submissions of both parties will be considered further in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Barnes and the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 30 – Prejudice to the effective conduct of public affairs

12. Information is exempt under section 30(b) of FOISA if disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)) respectively.
13. As the Commissioner has noted in previous decisions, e.g. *Decision 089/2007 Mr James Cannell and Historic Scotland*, the standard to be met in applying these tests is high. The chief consideration is not whether the information constitutes advice or opinion, but whether release of the information would, or would be likely to, have the effect of inhibiting substantially the free and frank provision of advice or exchange of views. The Ministers' own guidance to their staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive. The word "substantial" is also important: for the exemption to apply, the inhibition would require to be of real and demonstrable significance. In this connection, the Commissioner looks for authorities demonstrating a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote possibility.
14. When considering the application of these exemptions, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. For example, this would involve considering:
- the nature of the information
 - the subject matter of any advice or exchange of views
 - the manner in which any advice or exchange of views are expressed, and
 - whether the timing of disclosure would have any bearing; releasing advice or views whilst a decision was being considered, and for which further views were still being sought, would be likely to be more substantially inhibiting than once advice has been taken.
15. Section 30(c) of FOISA exempts information which would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" in section 30(c) makes it clear that the exemption in section 30(c) is designed to protect situations other than those already offered protection by section 30(a) and (b).



16. As the Commissioner stated in *Decision 017/2006 Mrs X and Angus Council*, he expects any public authority citing the exemption in section 30(c) to show the specific harm which would be caused to the conduct of public affairs by release of this information. Any damage caused by release of this information would have to be real or very likely, not hypothetical. The harm caused must be significant and not marginal.

Section 30(b)(i)

17. The Ministers have relied on the exemption in section 30(b)(i) of FOISA for withholding the entire contents of 2 documents and redacting information from another 3 documents. In their view, the information withheld from documents 7, 9, 10 (Annex A only), 12 (Annex A only) and 13 comprises free and frank advice, the release of which would have the effect of substantially inhibiting officials from providing free and frank written advice on similar, sensitive issues in future, for fear of that advice being made public.
18. In their submissions to the Commissioner, the Ministers have provided background information on the SIF and its funding from the Scottish Government, with related arguments as to why they believe the withheld information to be particularly sensitive.
19. Having considered the withheld information and the Ministers' submissions, the Commissioner acknowledges that the withheld information does contain advice, expressed freely and frankly. However, as noted above, the primary consideration is not whether the information contains advice, but whether its disclosure would have, or would be likely to have, the substantially inhibiting effect specified in section 30(b)(i) of FOISA.
20. The Commissioner has considered carefully the Ministers' comments with regard to the likelihood of inhibition to the particular type of advice under consideration in this case. The Commissioner accepts that awareness of the possibility of disclosure might lead officials to take care in recording their advice, and pay more attention to the manner of expression. The issue, however, is whether the effect of disclosure would be adverse by way of causing, or being likely to cause, officials to be substantially inhibited in the provision of advice. If, on the other hand, the effect of disclosure was to increase the care given when offering advice and views to ensure they were justifiable and measured, and in recording that advice to provide an accurate representation of the issues being addressed, then the effect would be unlikely to represent substantial inhibition.
21. Having considered its content, the Commissioner is not satisfied that release of the information in document 7 would, or would be likely to, inhibit substantially the free and frank provision of advice. The Commissioner takes this view as it is apparent that the withheld information in document 7 is factual information, and information which is public knowledge as a result of the Ministers' disclosure in response to Mr Barnes' information request.



22. The Commissioner also does not accept, that the information in document 9 is exempt under section 30(b)(i). He is not satisfied that this information comprises the provision of free and frank advice. The document appears to be seeking information from the recipient, rather than providing advice, and relates to the process of payment of grant funding to the SIF. While the Commissioner accepts that the process would have remained ongoing at the time of Mr Barnes' request for review, it is apparent from certain of the information that was released to Mr Barnes (letter dated 25 March 2008 from the Ministers to the SIF) that the request for information contained in this letter was an integral part of the funding process. Its content is of a relatively routine nature, of a kind that would be expected between the Ministers and the SIF in the circumstances, and while the issue of the grant award to the SIF might be considered sensitive the Commissioner can identify nothing of sensitivity in the terms of this particular letter. In the circumstances, therefore, the Commissioner cannot accept that the disclosure of this information, at the time of Mr Barnes' request or his request for a review, would have had (or would have been likely to have) the effect of substantially prejudicing the level and detail of advice officials might give to outside organisations in future.
23. The Commissioner is not satisfied that the information in Annex A to document 10 would be exempt under section 30(b)(i). The information contained in Annex A is largely factual or already available in the public domain, either through the publication of social attitudes surveys or as a result of the information the Ministers have already released to Mr Barnes in response to his request.
24. Similarly, the Commissioner does not agree that release of all of the information in the enclosures to documents 12 and 13 would, or would be likely to, inhibit substantially the free and frank provision of advice. It is clear from reading the information in the enclosures that some of it (points 1, 2 and 3) concerns the provision of an update to the Ministers on responses made to press enquiries from various journalists concerning the SIF and IslamFest. Given that most of the information in these enclosures simply recounts responses made to journalists, it is the Commissioner's view that officials would have within their expectation the likelihood of this information being put into the public domain. As a consequence, the Commissioner cannot uphold the assertion of the Ministers that release of this information would have (or would be likely to have) a substantially inhibiting effect, either when the Ministers dealt with Mr Barnes' request or subsequently. For the same reasons the Commissioner is also not satisfied that the information recorded at points 9 and 10 in these enclosures would be exempt under section 30(b)(i), given that it concerns the content of parliamentary questions (S3W -15005, S3W-15006, S3W-15007, S3W-15008 and S3W-15009) submitted on this matter, or that the exemption could be applied to the information at point 5 in the enclosures (which provides a factual background to the Race, Religion and Refugee Integration Fund).



25. The Commissioner also does not accept that the information recorded at points 4, 5, 6, 7, 11 and 12 would, or would be likely to inhibit substantially the free and frank provision of advice. Much of the information recorded at these points provides updates, largely of a factual nature, on the progress of the funding application, the relationship between the SIF, other Muslim organisations and the Ministers, and related community relations issues. Although the Commissioner accepts that certain of the information does relate to matters which were ongoing at the time of Mr Barnes' request for review, he does not consider that any of it is of such sensitivity that its release would, or would be likely to, inhibit substantially the free and frank provision of advice if disclosed in response to Mr Barnes' request. Certain of the information which was withheld here (at point 6) is clearly personal data, however, in respect of which the Commissioner would regard it as appropriate to consider the application of section 38(1)(b) of FOISA (see below).
26. The Commissioner does, however, accept that the remaining information (point 8) in these enclosures would have substantially inhibited the free and frank provision of advice, or would have been likely to do so, if disclosed in response to Mr Barnes' request. The Commissioner accepts that the advice recorded here is of a sensitive nature and concerns a matter which was still very much "live" and subject to further discussion at the time of Mr Barnes' request and request for a review.
27. The Ministers have redacted certain information from the emails released to Mr Barnes from document 13. In their submissions to the Commissioner, the Ministers asserted that this redacted information concerned the provision of free and frank advice. Mr Barnes has explained to the Commissioner that he is not concerned about receiving certain of the information which has been redacted here, namely, the contact fax and telephone numbers for a named journalist. As a consequence the Commissioner will not consider this information further.
28. Having looked at the content of the redacted information, the Commissioner cannot agree that this concerns the provision of advice. It is quite clear that the redacted information relates to a mobile telephone number for an official. As there is no provision of advice here the Commissioner cannot uphold the Ministers' reliance on section 30(b)(i) for withholding this information from Mr Barnes. The Commissioner will, however, go on to consider whether this information should be withheld under section 30(c) of FOISA, which the Ministers have also argued applies to it.
29. As the Commissioner is not satisfied that disclosure of the information in documents 7, 9 and Annex A to document 10, or certain of the information in the enclosures in documents 12 and 13 (as more particularly detailed above) would, or would be likely to, inhibit substantially the free and frank provision of advice, he is not required to go on to consider the application to this information of the public interest test in section 2(1)(b) of FOISA. As the Ministers have not applied any other exemptions to this information, the Commissioner requires them to release it to Mr Barnes.



30. The Commissioner is satisfied that release of certain of the information in the enclosures to documents 12 and 13 (as more particularly detailed above) would, or would be likely to, inhibit substantially the free and frank provision of advice, and is therefore required to consider the application of the public interest test in section 2(1)(b) of FOISA. In making their submissions regarding the public interest, the Ministers provided combined arguments for both of the exemptions under section 30(b). The Commissioner will therefore consider the application of the public interest test to this information after he has considered the Ministers' reliance on section 30(b)(ii) for other withheld information.

Section 30(b)(ii)

31. The Ministers have relied on the exemption in section 30(b)(ii) for withholding information redacted from 3 documents which were released to Mr Barnes.
32. In their submissions, the Ministers have provided an explanation for each of the withheld documents as to why they consider that release of the withheld information from them would, or would be likely to have the effect of substantially inhibiting the free and frank exchange of views for the purposes of deliberation.
33. Having considered the submissions from the Ministers, together with the withheld information, the Commissioner is satisfied that the information withheld from document 2 (most of the first page of this document was released to Mr Barnes) contains an exchange of views for the purposes of deliberation between the authors of the document (external advisers commissioned to assess the funding application) and the Ministers. The Commissioner is also satisfied in the circumstances that release of this information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, given the frank way in which the views are expressed, the working practices and expectations of the external advisers, and the fact that the author of the document has an ongoing role to play with regard to the funding granted to the SIF. The Commissioner accepts that disclosure of the information in this document would, or would be likely to, inhibit substantially the author's ability to express their views frankly in respect of their future role, if this information had been or were to be released in response to Mr Barnes' request.
34. The Commissioner is also satisfied that the information which has been redacted from documents 11 and 14 contains an exchange of views on the line officials should take in responding to enquiries from the media. It is clear from reading document 14 that a final settled position had not been reached by the officials in determining how best they should respond to a particular enquiry. Therefore, the Commissioner accepts that in this case, to release this information in response to Mr Barnes' request would, or would be likely to, have inhibited substantially the free and frank exchange of views for the purposes of deliberation.
35. With regard to the information withheld from document 11, the Commissioner accepts that this also concerns officials reaching a view on the best response to provide to the journalist, and that while in this case an email reflecting the settled view on the matter was released, disclosure would be likely to have a substantially inhibiting effect on officials discussing views on this issue in the future.. For that reason, the Commissioner is satisfied that this information would be exempt under section 30(b)(ii) of FOISA.



36. As the Commissioner is satisfied that the withheld information in documents 2, 11 and 14 is exempt under section 30(b)(ii) of FOISA, he is now required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

The public interest – section 30(b)(i) and (ii)

37. As mentioned above, the Ministers have provided one submission setting out their consideration of the public interest test for the documents withheld under sections 30(b)(i) and (ii) of FOISA.
38. In their submissions, the Ministers have explained that they recognise a public interest in releasing information to account for the use of public money, and in being open and transparent about the reasons for supporting the SIF. On the other hand, they go on to point out that a lot of information is already in the public domain and that this should go a long way towards satisfying that public interest. It is the Ministers' view that there is also a strong public interest in ensuring that Ministers and officials have a private space within which they can freely and frankly debate sensitive issues about funding organisations such as the SIF, without fear that those discussions will subsequently be made public. The Ministers have explained that the funding of the SIF is a sensitive issue which attracts a great deal of media attention. They have also explained that this is an ongoing issue as the projects for which the grants have been given are still under way. They point out that similar grant applications are received on a regular basis and are considered in the same way. Disclosing these discussions could, in the Ministers' view, prejudice future similar discussions and this would not be in the public interest.
39. The Ministers state that on balance they have taken the view that the public interest lies in favour of maintaining the exemptions in sections 30(b)(i) and 30(b)(ii).
40. In his submissions to the Commissioner, Mr Barnes has indicated that he believes the public interest lies in disclosure of the documents. He submits that the funding of the SIF by the Scottish Government has raised significant concerns from leaders of the Muslim community, from political parties, and from leaders in the Voluntary Sector. It is Mr Barnes' view that it is in the public interest for all documents to be released to prove beyond reasonable doubt that due process was followed. Mr Barnes also outlined his concern as to why the grant application forms were not being released. Mr Barnes commented on the content of supporting documents, which are provided to authorities applying for grant funding, and which state that the content of these completed grant application forms may be released in response to an information request under FOISA.



41. The Commissioner recognises that there is a public interest in ensuring that when public money is being spent, or awarded as a grant, it is fully accounted for and due process is followed in terms of awarding the grant and ensuring that it is spent appropriately. The Commissioner also accepts that there is a public interest in allowing the applicant organisation to fully understand the views of those assessing their application for funding. This public interest would also include, in the Commissioner's view, the ability for that organisation to understand why decisions are made and redress any unfounded criticism. Release of the information in document 2 would also allow the public to gauge whether the funding body had given due consideration to the advice of the assessors when providing what is a substantial grant.
42. However, the Commissioner also accepts that where information under consideration relates to matters of sensitivity, particularly where these issues are ongoing, there is a public interest in ensuring that officials and Ministers are well-informed. The Commissioner also recognises that it is the intention of the Ministers to make publicly available any evaluation reports that are prepared by the assessors during the course of monitoring SIF's performance in respect of the grant funding, which will go some way to fulfilling the public interest in this information. In this case, the Commissioner finds on balance that the public interest in disclosing the information in document 2 is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA.
43. The Commissioner also accepts that where officials are providing an update to Ministers on matters of sensitivity which are ongoing, there is generally a public interest in allowing these updates to be presented in a frank manner to provide a comprehensive update to Ministers and officials. On balance, the Commissioner finds that the public interest in disclosing the information at point 8 of the enclosures to documents 12 and 13 (as outlined above) is outweighed by that in maintaining the exemption in section 30(b)(i) of FOISA.
44. As mentioned already, the information withheld in documents 11 and 14 contain exchanges of views about the response to be made to enquiries from particular journalist. In the circumstances, the Commissioner considers that the public interest in allowing officials to have time and space to discuss their response and fully research this to reach a settled position on the appropriate line to take outweighs any public interest in release of this information (which he does not believe would add significantly to public debate on the matters covered in any event). On balance therefore, the Commissioner is satisfied that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA.

Section 30(c)

45. The Ministers have relied on the exemption in section 30(c) of FOISA for withholding information in 2 documents from Mr Barnes. As the Commissioner has found that the information the Ministers have not disclosed from document 2 was properly withheld under section 30(b)(ii) he will not consider it any further in this decision notice.



46. As the Commissioner was not satisfied that the information in document 9 and a mobile phone number in document 13 was properly withheld under section 30(b)(i) of FOISA, he is required to consider the Ministers' reliance on the exemption in section 30(c) in relation to this information,
47. In their submissions to the Commissioner regarding document 9, the Ministers contend that this letter imparts free and frank advice regarding a sensitive matter. They argue that revealing the detail of this advice might discourage organisations from submitting grant applications, because they would not want information they are required to provide to be put into the public domain. The Ministers have also explained that if certain organisations did not submit applications for grant funding, this would limit their capacity to carry out important community work, reducing participation and thereby causing substantial prejudice of public affairs.
48. Having considered the information in document 9, together with the submissions from the Ministers, the Commissioner does not accept (as mentioned previously) that the content of this document concerns the free and frank provision of advice. Nor does he accept that the information contained in this letter discloses anything more of substance about what is contained in the grant funding application form than has already been made available to Mr Barnes as a result of the information disclosed by the Ministers. As indicated above, it is a relatively routine request for information which the SIF was clearly required to provide as part of the funding process. The Commissioner does not accept the contention of the Ministers that release of the content of this letter would have the effect of discouraging organisations from submitting funding applications to them in future, particularly given the clause contained in the documents which accompany the application forms and which advises applicants that information in the application may be released in response to an FOI request. For these reasons, the Commissioner is not satisfied that release of the information in document 9 would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
49. As the Commissioner does not accept that document 9 would be exempt under section 30(c) of FOISA, he is not required to go on to consider the application of the public interest test.
50. Having considered the mobile phone number which has been redacted from document 13, the Commissioner accepts that this would be exempt under section 30(c). He is satisfied that this number is held for operational reasons, to ensure that the employee concerned can be contacted directly for urgent matters related to their job. The Commissioner accepts that release of this number in response to Mr Barnes information request would, or would be likely to, impede the operational effectiveness of this facility and therefore would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
51. As the Commissioner accepts that the mobile phone number in document 13 was correctly withheld under section 30(c), he is required to go on to consider the application of the public interest test.



Public interest test

52. Having considered the application of the public interest test, the Commissioner recognises that there is a public interest in individuals being able to contact personnel working within public authorities in order that they can ask questions about issues which concern them. In this case, the Commissioner considers that this public interest is fulfilled by release of the landline telephone number for the member of staff concerned. On balance, considering the potential for impeding the effectiveness of the mobile facility inherent in disclosure, the Commissioner finds that the public interest in disclosing the mobile telephone number is outweighed by that in maintaining the exemption in section 30(c).

Section 36(2)

53. The Ministers have relied on the exemption in section 36(2) of FOISA for withholding information in 2 entire documents and parts of 2 other documents from Mr Barnes. As the Commissioner has found that the information that the Ministers have not disclosed from document 2 was properly withheld under section 30(b)(ii), he will not consider this information any further under this exemption. That leaves the information withheld from documents 8, 15 and 16.
54. Section 36(2) of FOISA states that information is exempt information if it was obtained by a Scottish public authority from a third party and its disclosure by that authority would constitute a breach of confidence actionable by that person or any other person. The exemption is absolute in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is in the public interest.
55. In their submissions, the Ministers contend that release of the information in documents 8, 15 and 16 comprising bank account details would obviously constitute an actionable breach of confidence. They submit that these details were provided by the relevant organisation in confidence and that their release would be inappropriate in the circumstances. It is the Ministers' contention that this information was only provided to enable the payment of certain grants.
56. In order to rely on section 36(2), an authority needs to demonstrate certain elements. Firstly, the information must have been obtained by the Ministers from another person. In this case, the Commissioner is satisfied that the information which has been withheld in documents 8, 15 and 16 was provided to the Ministers by a third party, i.e., the SIF.
57. The second part of the test associated with 36(2) is that the disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
58. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:



- the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already;
 - the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
 - there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.
59. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here, as the only people, other than the organisation itself, who will have seen this information are Scottish Government staff involved in the allocation and regulation of the grant payments.
60. In order for information to be confidential, it must at least be clear that the information was imparted in circumstances which gave rise to a reasonable expectation of confidentiality.
61. The information contained in documents 8, 15 and 16 concerns bank account details which were provided by the SIF. The Commissioner accepts that this information was provided to the Ministers under an implied obligation of confidentiality. The Commissioner is therefore satisfied that the information which has been withheld from documents 8, 15 and 16 was imparted in circumstances which gave rise to a reasonable expectation of confidentiality.
62. The third part of the test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it.
63. The Commissioner is satisfied that when the SIF provided this information to the Scottish Government its expectation would have been that the information would be used and processed by the relevant government department in connection with the provision of grant funding. The Commissioner recognises that it would not have been within the SIF's expectation that this information would subsequently be made available to the public as a result of responding to an information request under FOISA. As such, having considered the Ministers' submissions, the Commissioner considers that the disclosure of the information under FOISA would be unauthorised and that detriment to the SIF would follow if it were disclosed.
64. The Commissioner is satisfied, therefore, that were the Ministers to release the bank account information relating to the SIF, the SIF would be able to raise an action for breach of confidence. The Commissioner is therefore satisfied that disclosure of the withheld information from documents 8, 15 and 16 would constitute an actionable breach of confidence and therefore that the information is exempt under section 36(2) of FOISA.



65. As stated above, if the conditions of section 36(2) are fulfilled an absolute exemption is created. However, it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest. The law of confidence recognises that there is a strong public interest in ensuring that people respect confidences, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information.
66. In this instance, the Commissioner can see no overwhelming public interest which would justify the release of this information into the public domain.
67. The Commissioner is therefore satisfied that the Ministers have acted in accordance with Part 1 of FOISA in relying on section 36(2) for withholding information from documents 8, 15 and 16.

Section 38(1)(b)

68. The Ministers relied on the exemption in section 38(1)(b) for withholding certain information in documents 1 and 5 from Mr Barnes. In the case of the information in document 5, Mr Barnes has indicated that he is not interested in receiving the address of the individual which was the only information redacted. The Commissioner will therefore not consider this withheld information any further.
69. As mentioned above, the Ministers also withheld the name of a specific individual from point 6 in the enclosures to documents 12 and 13 and relied on the exemption in section 30(b)(i) for doing so. The Commissioner did not uphold the application of this exemption but considers it appropriate in the circumstances to determine whether the exemption in section 38(1)(b) should apply to this information.
70. The exemption in section 38(1)(b) (read with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)) of FOISA exempts personal data from disclosure, if the disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 (the DPA). This particular exemption is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA. As a result, the Commissioner has been unable to consider the public interest in coming to his decision.
71. In order to rely on this exemption, the Ministers must show firstly that the information being withheld is personal data for the purposes of the DPA, and secondly that disclosure of the information into the public domain (which is the effect of a disclosure under FOISA) would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA.



72. In their submissions to the Commissioner, the Ministers have argued that the information withheld under this exemption is personal data for the purposes of the DPA and so is covered by the exemption. The Ministers also believe that disclosure of this information would contravene the first data protection principle on fair processing of personal data. Having considered the six conditions for processing, as set out in Schedule 2 of the DPA, the Ministers argue that only the sixth condition is relevant but in this case the terms of it would not be met by disclosure of the information.

Is the information personal data?

73. Section 1(1) of the DPA defines personal data as data which relate to a living individual who can be identified (a) from those data or (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
74. Having considered the information withheld from Mr Barnes in documents 1, 12 and 13, comprising the telephone numbers of certain individuals, and the name of a particular individual recorded at point 6 in the enclosure to documents 12 and 13, the Commissioner is satisfied that they comprise the personal data of the individuals concerned. These individuals can be identified from this information, either by itself or in conjunction with other information in the possession of the data controller. The information is biographical in a significant sense and focuses on the individuals, and therefore it relates to them.

Would disclosure breach the first data protection principle?

75. The first data protection principle requires personal data to be processed fairly and lawfully. It also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 (of the DPA) is met, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
76. The conditions in Schedule 3 are very restrictive and it therefore makes sense to look at whether the information falls into the definition of sensitive personal data, before going on to consider whether the conditions in Schedule 2 would permit the information to be disclosed.
77. The Commissioner has considered the categories of sensitive personal data set out in section 2 of the DPA, but does not consider any of the personal data withheld from documents 1 or 13 to fall into any of them. He is therefore satisfied that it is not sensitive personal data and need only consider whether any of the conditions in Schedule 2 can be met.
78. Part II of Schedule 1 to the DPA provides assistance in defining “fairness” for the purposes of the first data protection principle. As Lord Hope notes in the case of *Common Services Agency v Scottish Information Commissioner [2006] CSIH 58* (the Collie judgement) “fairness” is concerned essentially with the method by which data is obtained, and in particular with whether the person from whom the data was obtained was deceived or misled as to the purpose or purposes for which the data are to be processed.



79. As Lord Hope also noted in the Collie judgement, the concept of lawfulness cannot sensibly be addressed without considering the conditions set out in Schedule 2 (and Schedule 3 also, where it is applicable), because any disclosure which fails to meet at least one of the necessary conditions would be contrary to section 4(4) of the DPA (which provides that it shall be the duty of the data controller to comply with the data protection principles). There may also be other reasons as to why the disclosure of information is unlawful, e.g. because disclosure of the information would be a breach of confidence, or because there is a specific law forbidding disclosure. In this case, however, the Ministers have not put forward any arguments as to why the disclosure of the personal data is unlawful otherwise than as a result of breaching the first data protection principle.
80. When considering the conditions in Schedule 2, the Commissioner has also noted Lord Hope's comment in the Collie judgement that the conditions require careful treatment in the context of a request for information under FOISA, given that they were not designed to facilitate the release of information but rather to protect personal data from being processed in a way that might prejudice the rights and freedoms or legitimate interests of the data subject.
81. The Ministers have considered the six conditions for processing that are contained in Schedule 2 to the DPA and only consider condition 6 to be relevant in this case. They go on to argue that it is their belief that release of this information would not fulfil the terms of condition 6. The Ministers contend that the processing of the data in this case is not necessary for the purposes of any legitimate interest and, if it were, the processing would be prejudicial to the rights and freedoms or legitimate interests of the individual(s) concerned.
82. The Commissioner agrees with the Ministers that the only condition in Schedule 2 to the DPA which could be fulfilled by release of this information would be condition 6. Condition 6 permits personal data to be processed (in this case, disclosed in response to Mr Barnes' information request) if the disclosure of the data 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, freedoms or legitimate interests of the data subjects (in this case, the named individual and the persons to whom the numbers relate). It is clear from the wording of this condition that each case will turn on its own facts and circumstances.
83. There are, therefore, a number of different tests which must be considered before condition 6 can be met. These are:
- Does Mr Barnes have a legitimate interest in obtaining the numbers?
 - 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 can Mr Barnes' legitimate interests be achieved by means which interfere less with the privacy of the individuals in question?



- Even if the processing is necessary for Mr Barnes' legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the named individual and the persons to whom the numbers relate? This will involve a balancing exercise between the legitimate interests of Mr Barnes and the legitimate interests of these other persons. As noted by Lord Hope in the Collie judgement, there is no presumption in favour of release of personal data under the general obligation laid down by FOISA. This highlights that only if the legitimate interests of Mr Barnes outweigh those of the data subjects will condition 6(1) permit the personal data to be disclosed. If the two are equally balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the personal data to Mr Barnes.

Does Mr Barnes have a legitimate interest?

84. In his submissions to the Commissioner, Mr Barnes has set out what he considers to be his legitimate interests in receiving this information. Mr Barnes states that as a journalist who has been following the story for some time he is seeking to access as much information as possible about the funding arrangement between the Ministers and the SIF, so that he is able to answer questions arising about it. He has highlighted specific concerns about the SIF and suggested that the withheld personal data might address these. Given the debate which has arisen in relation to the funding of the SIF, and in particular concerns as to whether due process was followed in the allocation of funding, he also believes there to be a wider legitimate interest in all relevant information being available for public scrutiny.
85. The Commissioner accepts that Mr Barnes, as a tax payer and as a journalist, has a legitimate interest in ensuring that the allocation and expenditure of public funds is open to public scrutiny. He acknowledges in this case that there are genuinely held concerns about the funding of the SIF, giving rise to a general legitimate interest in transparency and accountability as to the relevant decisions.

Is the disclosure necessary to achieve these legitimate aims?

86. The Commissioner must now go on to consider whether the disclosure of the name and telephone numbers is necessary to achieve these legitimate aims. As mentioned above, it is apparent from Mr Barnes' submissions that he is concerned about the allocation of grant funding from the Scottish Government to the SIF and whether the appropriate rules and processes were followed. The Commissioner notes Mr Barnes belief that he needs the withheld personal data to fulfil this legitimate interest, but in the circumstances he cannot accept that they would add anything of substance to the information disclosed already on this matter. Consequently, he does not believe that they would further Mr Barnes' legitimate interests in any way and cannot accept that their disclosure would be a proportionate or fairly balanced response to Mr Barnes' request. Therefore, he must conclude that disclosure of the name and numbers is not necessary to achieve Mr Barnes' legitimate interests and that condition 6 cannot be met in the circumstances.



87. As condition 6 of Schedule 2 to the DPA could not be met in this case, the Commissioner must also conclude that disclosure of the withheld name and telephone numbers would be unlawful. As a result, the Commissioner finds that disclosure of this personal data would breach the first data protection principle and the information was therefore properly withheld under section 38(1)(b) of FOISA

DECISION

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

The Commissioner finds that by relying on the exemptions in sections 30(b)(i), 30(b)(ii), 30(c), 36(2) and 38(1)(b) of FOISA in withholding certain information from Mr Barnes, the Ministers complied with Part 1.

The Commissioner also finds that the Ministers should have relied on section 38(1)(b) of FOISA for certain information which was redacted from documents 12 and 13.

However, the Commissioner finds that the Ministers failed to comply with Part 1 (and in particular section 1(1)) of FOISA in relying on the exemptions in section 30(b)(i) and 30(b)(ii) for certain information withheld from Mr Barnes.

The Commissioner therefore requires the Ministers to release all of the information in documents 7 and 9, the information in Annex A of document 10, and all of the information (other than that at point 8) in the enclosures to documents 12 and 13 (subject to the redaction of certain personal data, as considered at paragraphs 65-85 above). The Commissioner requires the Ministers to do this by 29 August 2009.



Appeal

Should either Mr Barnes 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
15 July 2009



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

- (2) Information is exempt information if-



- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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.

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.

...