

Decision Notice



Decision 200/2011 Mr Peter Cherbi and the Scottish Ministers

Payment to former Chief Executive of the Scottish Legal Complaints Commission

Reference No: 201101209
Decision Date: 3 October 2011

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr Cherbi requested from the Scottish Ministers (the Ministers) information relating to their approval of an ex-gratia payment to the former Chief Executive Officer (CEO) of the Scottish Legal Complaints Commission (the SLCC). The Ministers responded by withholding the information under sections 30(b)(i), 36(1), 36(2) and section 38(1)(b) of FOISA. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Cherbi's request for information in accordance with Part 1 of FOISA, by withholding the information in terms of the above exemptions. He did not require the Ministers to take any action.

Relevant statutory provisions and other sources

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

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedules 1 (The data protection principles - Part I: the principles) (the first data protection 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 18 May 2011, Mr Cherbi wrote to the Ministers requesting the information contained in documents and discussions relating to the Scottish Government's approval of an ex-gratia payment to Eileen Masterman, former CEO of the SLCC.
2. The Ministers responded on 16 June 2011. They withheld the information under a combination of the exemptions in sections 30(b)(i), 36(1), 36(2) and 38(1)(b) of FOISA.



3. On 16 June 2011, Mr Cherbi wrote to the Ministers requesting a review of their decision. He believed the information should be in the public domain, given what he described as “the many problems reported by the media on the SLCC and its poor performance as a regulator to date”.
4. The Ministers notified Mr Cherbi of the outcome of their review on 1 July 2011, upholding their original decision in respect of the request without amendment.
5. On 5 July 2011 Mr Cherbi wrote to the Commissioner’s office, 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 Cherbi 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 8 July 2011, the Ministers were notified in writing that an application had been received from Mr Cherbi and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer 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. They were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested, with particular reference to the requirements of the exemptions cited in their responses to the applicant.
9. In their submissions to the Commissioner (which will be considered further below), the Ministers advised that they had reconsidered the exemptions which applied to the information Mr Cherbi had requested and had concluded that document 2 and parts of document 5 could be released. That information was subsequently provided to Mr Cherbi and the Commissioner does not consider it necessary in the circumstances to consider it further in this decision.

Commissioner’s analysis and findings

10. 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 Cherbi and the Ministers and is satisfied that no matter of relevance has been overlooked.



11. The Ministers applied more than one exemption to elements of the withheld information. In the circumstances, the Commissioner has found it appropriate to consider the application of each of the exemptions claimed to all of the information in respect of which it has been claimed, even where there is a degree of overlap.

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

12. The Ministers withheld the information in documents 1, 5 (in part) and 14 under section 30(b)(i) of FOISA. This exempts information where its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice.
13. As the Commissioner has commented in previous decisions, the standard to be met in applying the tests contained in section 30(b)(i) is high. The Commissioner's views on the application of this exemption have been set out at length in a number of decisions, most notably *Decision 089/2007 Mr James Cannell and Historic Scotland*¹ and *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*².
14. While he will not repeat these views in full here, the Commissioner would reiterate that in coming to a decision on the application of this exemption, he will consider the actual information withheld, not simply the category of information to which it belongs or the situation in which the request has arisen. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that similar information will require to be disclosed routinely in the future.
15. The Commissioner looks for public authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
16. The Ministers explained that they were required by virtue of the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act) to be involved in the appointment of the Board of the SLCC and to have an overview on any compensation packages or issues regarding the removal of such members. In order to undertake this task to the best of their ability, Ministers required to be fully apprised of any issues. The Ministers submitted that they would feel constrained from seeking this information, and officials would be reluctant to offer full and frank background and advice on any similar issues, if the information were likely to be released into the public domain. This would be to the substantial detriment of policy and decision-making processes and would severely constrain Ministers' ability to undertake their statutory obligations.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600959.asp>

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200700579.asp>



17. In this case, it was necessary, the Ministers argued, for them to be informed of the reasons behind the former CEO's departure from their post at the SLCC. In order for them to understand the situation, the Ministers stated that they had required personal information relating to the departing CEO, and to obtain advice to ensure appropriate actions were taken and legal issues were resolved appropriately.
18. The Commissioner has considered the submissions presented by the Ministers on the application of this exemption, together with the content of the withheld information to which the exemption was applied. The Commissioner has taken into consideration that those involved in the discussions concerned were either Ministers or senior officials who would have been well aware that any recorded information held by the Ministers might be requested under FOISA. While their submissions refer to their role in relation to the Board of the SLCC, the Commissioner notes from the 2007 Act that the appointment and remuneration (including compensation for loss of employment) of that body's CEO is also subject to the approval of the Ministers.
19. Having had regard to the particular information the Ministers still wish to withhold under these exemptions, the Commissioner has concluded that disclosure of that information would, or would be likely to, have the effect of substantially inhibiting officials and/or Ministers from seeking or providing advice freely and frankly in future.
20. The Commissioner has concluded that this information contains advice with respect to which the participants would have justifiably have expected would not be made publicly available. He accepts that disclosure of this information would be likely to have the effect of making participants in such processes in future less likely to make known their views so fully or frankly.
21. As a result, the Commissioner has found that the Ministers were correct in their application of section 30(b)(i) of FOISA. Having reached this conclusion, he is required to go on to consider the public interest test contained in section 2(1)(b) of FOISA.

Public Interest Test

22. While acknowledging a public interest in transparency and accountability with regard to their involvement in the matter, the Ministers considered that this was outweighed by the need for them to have access to private space in which to consider and debate issues and agree solutions. There was, the Ministers submitted, a definite need for them to be informed of the full circumstances prior to the approval of any payment and this required the provision of free and frank advice, particularly when it concerned an individual and the termination of their employment.



23. Mr Cherbi's application to the Commissioner provided arguments which could constitute public interest arguments in favour of disclosure of the information. Mr Cherbi argued that it was in the public interest that information relating to the Ministers' involvement in this matter be reported on by the media and published, particularly to establish the role the Ministers had played and whether any public funds had been involved. He also considered it to be the right of taxpayers and the legal profession to know how much had been paid to the departing CEO, given that the levy to fund the SLCC was gathered from individual solicitors, who were in turn funded by their clients, the public at large.
24. The Commissioner acknowledges that there is a public interest in this information. However, having considered the competing public interests in disclosure and in maintaining the exemption, the Commissioner finds that, on balance, there was at the relevant time a stronger public interest in the Ministers being able to consider a range of options, some of which would be discarded or developed further, and to put these to Ministers to allow a fully informed decision.
25. The Commissioner has therefore found that the information was correctly withheld under section 30(b)(i) of FOISA.

Section 36(1) – confidentiality

26. The Ministers withheld items 3, 4, 6, 7, 8, 9, 11, 12, 13 and 15 under section 36(1) of FOISA.
27. Section 36(1) exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication in this category are those subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*). Another aspect of legal professional privilege is legal advice privilege.
28. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For legal advice privilege to apply to information, certain conditions must be fulfilled. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of that adviser's professional relationship with his/her client.
29. The Ministers submitted that the information was covered by legal advice privilege, comprising either requests for legal advice or the provision of legal advice by their legal advisers acting in their professional capacity. They argued that, given the nature of their responsibilities in relation to the SLCC, and the requirement to approve/oversee certain payments, it was necessary for them to seek advice from lawyers regarding the legal ramifications of the procedure, the situation leading to the CEO's departure and their position with regard to their responsibilities under the 2007 Act.



30. Having read the exchanges to which the Ministers have applied this exemption, together with their submissions, the Commissioner is satisfied that they are communications between legal advisers and clients, in circumstances where legal advice privilege could apply.
31. There is a further matter to be considered before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption is applicable in the circumstances of this case. Information cannot be privileged unless it is also confidential. For the exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal advice privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed.
32. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or the outcome of a review in respect of that request) been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.
33. The Ministers stated that they were not aware of any waiver of any privilege by disclosure of the advice, in full or in summary. The Commissioner accepts this, and is not aware of any evidence to show otherwise.
34. Consequently, the Commissioner is satisfied that the withheld information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that this information is exempt in terms of section 36(1) of FOISA.
35. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

36. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*³, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.

³ (2004) UKHL 48



37. The Ministers argued that it was vital to the successful working of any solicitor/client relationship that both parties could be confident that all information passing between them would be treated confidentially. They stated it was crucial to the quality and efficacy of the advice and representation given by the solicitors that they were in possession of a full and frank account of the facts and the position of their client in order that they could advise fully and freely. As a consequence, any impediment to this full and frank exchange would gravely undermine the solicitor/client relationship and the usefulness of the advice provided.
38. The Ministers argued that, although there might be a public interest in transparency and accountability with regard to the use of public funds, that did not apply in this case. Funding for the SLCC was provided not from public funds, but directly from the legal profession. The SLCC are independent of both the Crown and the Government and funding was raised through a levy collected by the Law Society of Scotland, the Faculty of Advocates and the Association of Commercial Attorneys.
39. The Ministers also argued that there was a greater public interest in enabling Government decisions to be taken in a fully informed legal context (which required a degree of protected confidentiality) and ensuring that the Government's ability to defend its legal interest was not prejudiced by inappropriate disclosure of information and legal analysis. Consequently, they considered any public interest in disclosure of this information to be outweighed by the public interest in ensuring that legal advisers and their clients could discuss relevant issues and give and receive legal advice in confidence. It was also in the public interest, they contended, that the Government could receive the most comprehensive legal advice about its proposed actions.
40. The Ministers emphasised the importance the courts placed on the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds (and commented that this has been recognised by the Commissioner in several decisions). They argued that such communications should only be released in highly compelling cases.
41. The Commissioner has considered the public interest arguments submitted by Mr Cherbi (see paragraph 23 above) and by the Ministers. He accepts that there is a general public interest in public authorities being open to scrutiny and accountable for their actions. He also considers that this extends to knowing whether the Ministers have been correctly discharging their duties on behalf of its taxpayers, and have behaved appropriately in terms of their statutory obligations (in this case, under the 2007 Act). He acknowledges that disclosure of the legal advice in this case would contribute to transparency and accountability in this context.
42. As stated above, however, there is a long-recognised and strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, and in his instance the Commissioner accepts the Ministers' argument that there is a greater public interest in allowing the Ministers to obtain and consider legal advice in confidence. On balance, therefore, the Commissioner is satisfied, in all the circumstances of this case, that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 36(1).



43. Consequently, the Commissioner accepts that the Ministers were entitled to withhold the information under the exemption in section 36(1) of FOISA.

Section 36(2) – confidentiality

44. The Ministers withheld items 6, 8, 9 (part), 10, 11 (part), 12, 13 and 15 under section 36(2) of FOISA.
45. The Ministers explained that disclosure of the information could lead to an actionable breach of confidence against them, either by the SLCC or by the departing CEO.
46. Section 36(2) of FOISA provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in 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 necessary in the public interest (this is commonly known as "the public interest defence").
47. The exemption contains a two-stage test, both parts of which must be fulfilled before it can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
48. The Ministers explained the circumstances in which the information had been obtained from another person (the SLCC). Having considered these submissions, the Commissioner is satisfied that the information was obtained by the Ministers from another person and that the first part of the section 36(2) test has therefore been fulfilled.
49. The second part of the test is that the disclosure of the information by the public authority must 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.
50. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- the information must have the necessary quality of confidence;
 - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - unauthorised disclosure must be to the detriment of the person who communicated the information.



Necessary quality of confidence

51. Having considered the information to which the Ministers seek to apply section 36(2), the Commissioner is satisfied in the circumstances that (as the Ministers have submitted) it is not common knowledge and could not readily be obtained by Mr Cherbi through any other means. Consequently, he is satisfied that it has the necessary quality of confidence.

Obligation to maintain confidentiality

52. The Ministers' submitted that their confidentiality obligations in relation to the information had been intimated to them by the SLCC when it shared the relevant documentation, noting that it had been sent under confidential cover. Having considered the circumstances of SLCC's provision of the information to the Ministers, the Commissioner is satisfied that it was received in circumstances which imposed upon the Ministers an obligation to maintain confidentiality. In any event, he would acknowledge that its content is such it would carry with it a reasonable expectation that confidentiality would be maintained. In all the circumstances, therefore, the Commissioner is satisfied that the withheld information was received by the Ministers in circumstances which imposed upon them an obligation to maintain confidentiality.

Unauthorised disclosure which would cause detriment

53. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence. Having considered the content of the information to which this exemption has been applied, the Commissioner is satisfied that there would be sufficient potential for detriment by disclosure for this requirement to be met.
54. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case. As noted above, however, there may still be circumstances in which the disclosure of confidential information is required in the public interest. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. In such cases, the courts are required to balance the competing interests in disclosure and in maintaining confidentiality, but the public interest in confidentiality remains strong and there is no presumption in favour of disclosure.
55. These arguments have been taken into account by the Commissioner in considering the public interest. While acknowledging, as he has in previous cases on the same general subject matter, that there is a clear public interest in transparency and effective scrutiny in relation to how an authority complies with a statutory obligation, he is not persuaded that any of the arguments advanced in this case in support of disclosure are sufficiently compelling to outweigh the strong public interest in the maintenance of confidentiality in relation to the withheld information.



56. Having considered all the arguments, therefore, the Commissioner does not consider there to be any basis for the disclosure of confidential information on public interest grounds, and consequently he is satisfied that the Ministers were entitled to withhold the information in question under section 36(2) of FOISA.

Section 38(1)(b) - Personal information

57. The Ministers withheld the information in parts of items 1, 3, 5, 7, 8, 9, 10, 12, 14 and 15 in terms of section 38(1)(b) of FOISA, on the basis that disclosure would breach the first data protection principle.
58. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) or (b) (as appropriate), exempts personal data if disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles.
59. In considering the application of this exemption, therefore, the Commissioner will first 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.

Is the information under consideration personal data?

60. "Personal data" is defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller..." (the full definition is set out in the Appendix).
61. The Commissioner has considered the information to which section 38(1)(b) has been applied and is satisfied that it all falls within the above definition of personal data. The information either includes direct reference to the former CEO or clearly forms part of an exchange of correspondence about their position in the SLCC. The Commissioner is satisfied that this information relates to a living individual who can be identified from that information, and that it is therefore personal data as defined in section 1(1) of the DPA.
62. The Commissioner will now go on to consider whether disclosure of the information would breach the first data protection principle.

The first data protection principle

63. The first data protection principle states that personal data shall 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 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.



64. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner*⁴ 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, freedoms or legitimate interests of the data subject.
65. In line with the submissions provided by the Ministers, the Commissioner considers that only condition 6 in Schedule 2 to the DPA might be considered to apply in this case. Condition 6 allows personal data to be processed (in this case, disclosed in response to Mr Cherbi's information request) if that 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.
66. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- Does Mr Cherbi have a legitimate interest in obtaining this personal data?
 - If so, is the disclosure necessary to achieve those legitimate aims? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subject (i.e. the individual to whom the data relate)?
 - Even if disclosure is necessary for the legitimate purposes of the applicant, would disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects? As noted by Lord Hope in the above judgement, there is no presumption in favour of the release of personal data under the general obligation laid down in FOISA. Accordingly, the legitimate interests of Mr Cherbi must outweigh the rights, freedoms or legitimate interests of the data subject before condition 6(1) will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the personal data to Mr Cherbi.

Does Mr Cherbi have a legitimate interest?

67. The Ministers acknowledged that Mr Cherbi might have an interest in the information, given that he reported on certain issues (within which the subject matter of his request could be considered to fall), but they questioned whether such an interest would outweigh the interests of the data subject in this case.
68. Mr Cherbi's application contained general arguments as to what he believed to be the public interest in disclosure (see paragraph 23 above), which have been taken into account in considering whether he has a legitimate interest for the purposes of condition 6.

⁴ <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



69. Having considered all submissions he has received on this matter, together with the withheld information, the Commissioner is satisfied that Mr Cherbi has some legitimate interest in the withheld personal data for the purposes of carrying out the scrutiny he describes and, where appropriate, reporting on matters of public concern.

Is disclosure of the information necessary to achieve these legitimate interests?

70. The Commissioner must now consider whether disclosure of the withheld personal data is necessary for the legitimate interests identified above, and in doing so he must consider whether these interests might reasonably be met by any alternative means.
71. In this case, the Commissioner can identify no viable means of meeting Mr Cherbi's legitimate interests which would interfere less with the privacy of the data subject than the provision of the withheld personal data. In the circumstances, he is satisfied that disclosure of those personal data is necessary to meet the legitimate interests in question.

Would disclosure cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?

72. In considering the rights, freedoms and legitimate interests of the data subjects, the Ministers advanced arguments as to that individual's expectations of privacy. They considered the information to be sensitive and private. Given its nature and sensitivity, they believed disclosure would be contrary to the data subject's legitimate expectations and would cause them unwarranted distress.
73. The Ministers explained that they had received the personal data only to enable them to fulfil their statutory responsibilities and that the data was processed by them only for that purpose. The information had not been shared with any parties who were not legally obliged to be involved in the process under the 2007 Act, and had been processed only in so far as was required to adhere to the designated responsibilities.
74. The Commissioner has considered these arguments carefully. He has also taken into account the guidance on this point in his own briefing on the section 38 exemption⁵, which identifies relevant factors as including:
- a. whether the information relates to the individual's public or private life
 - b. the potential harm or distress that may be caused by disclosure
 - c. whether the individual has objected to disclosure
 - d. the reasonable expectations of the individual as to whether their information would be disclosed.
75. The Commissioner accepts that there is often an overlap between working life and private life. As he found in *Decision 093/2011 Mr Paul Hutcheon of the Sunday Herald and the Scottish Ministers*:

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



"... an individual's performance at work also relates to private matters, including their skills, strengths and weaknesses, and other factors which contributed to their performance over the relevant period... The Commissioner recognises that employees at all levels of seniority within both the public and private sectors would reasonably expect such information to remain private."⁶

76. The Commissioner takes the view that the some of the personal information withheld in this case relates to both the private life and the working life of the former CEO. However, while taking into account the former CEO's seniority when in post, he accepts as reasonable in the circumstances their expectations that the withheld personal data would not be disclosed into the public domain. Given the nature of the data, the Commissioner accepts that disclosure of the withheld personal data would be a significant intrusion into matters which the former CEO would reasonably expect to be kept private, even taking into account the position of seniority occupied.
77. The Commissioner has weighed Mr Cherbi's legitimate interests in the withheld information against the rights, freedoms and legitimate interests of the former CEO. As noted previously, there can be no presumption that the disclosure of personal data is in the public interest. The Commissioner must be satisfied that Mr Cherbi's legitimate interests outweigh those of the former CEO before requiring disclosure.
78. Having considered the nature and content of the withheld personal data, the Commissioner has concluded on balance that disclosure would be disproportionately intrusive in terms of the limited public benefit likely to result, and consequently finds that disclosure would cause unwarranted prejudice to the rights, freedoms and legitimate interests of the former CEO. That being so, the Commissioner finds that condition 6 in Schedule 2 to the DPA is not met.
79. For the reasons given above, the Commissioner also finds that disclosure would be unfair. In addition, since the Commissioner has found that no condition in Schedule 2 can be met, he would consider disclosure to be unlawful. It therefore follows that disclosure of the personal data under consideration would breach the first data protection principle. Accordingly, the Commissioner accepts that the information is exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.

⁶ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201001272.asp>



DECISION

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

Appeal

Should either Mr Cherbi 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.

Margaret Keyse
Head of Enforcement
3 October 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

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

...

- (c) section 36(2);

...

- (e) in subsection (1) of section 38 –

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



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

...

36 Confidentiality

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

...

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

...

"personal data" means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.



...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...