

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2020

Public Authority: Office of the Secretary of State for Scotland

Address: Dover House
Whitehall
London
SW1A 2AU

Decision (including any steps ordered)

1. The complainant has requested information on specific files held by the public authority relating to the UK constitution, including the arrangements for referendums about devolution in 1997 in Scotland and Wales.
2. The Commissioner's decision is that the Office of the Secretary of State for Scotland ("OSSS") has appropriately applied the exemptions at FOIA section 35(1)(a) & (b) and 35(3) – Formulation of government policy etc., section 28(1) – Relations within the United Kingdom and section 40(2) – Personal information. However, in regard to documentation engaging the section 35(1)(a) & (b) exemptions she finds that the public interest favours disclosure. In respect of the exclusion at section 35(3) in relation to section 35(1)(c) - the provision of advice by any of the Law Officers, the Commissioner is not satisfied by the OSSS's consideration of the public interest test. She finds that the balance of the public interest requires the OSSS to either confirm or deny holding information relating to law officers' advice. In respect of the section 28 exemption she finds that the public interest favours withholding the material engaging section 28.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the material withheld under section 35(1)(a) & (b) in files SOE22/3, SOE22/35/3, SOE22/38/3 and the five documents from file SOE22/34/00413-00417.
 - Issue a further response to confirm or deny holding information relating to law officers' advice and either disclose or issue a valid refusal notice in respect of any information identified.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 November 2018, the complainant wrote to the OSSS and requested information in the following terms:

"Under freedom of information legislation, I request the following files are opened.

SOE22/3

SOE22/27/3

SOE22/34

SOE22/35/3

SOE22/38/3

SOE22/39/2"
6. The OSSS responded on 7 February 2019 with a refusal notice in reliance of FOIA sections 28 & 35(1)(a) & (b) with respect to three of the files and section 40(2) in respect of the remaining three files.
7. Following an internal review the OSSS wrote to the complainant on 15 April 2019. The review upheld the initial response and in addition relied on FOIA section 42.

Background

8. The National Records of Scotland website catalogue describes the series of files SOE22 as follows:

"This series covers the arrangements for the referendums in Scotland and Wales, the implementation of the Scotland Act 1998 and the creation of the Scottish Parliament on 1st July 1999. Earlier files on devolution are to be found at SOE9. The Referendums (Scotland and Wales) Bill passed through the UK Parliament in 1997. Its purpose was to make provision for referendums in Wales and Scotland concerning the establishment of an assembly in Wales and a parliament in Scotland with tax varying powers."

Scope of the case

9. The complainant contacted the Commissioner 23 April 2019 to complain about the way her request for information had been handled.
10. During the Commissioner's investigation the OSSS determined not to rely on section 42(1) – Legal professional privilege to withhold any information. Following advice the OSSS decided that it would rely on section 35(3) to neither confirm nor deny ('NCND') holding information in relation to section 35(1)(c) – "the provision of advice by any Law Officers or any request for the provision of such advice."
11. The Commissioner considers the scope of her investigation is to consider the OSSS's handling of this request and whether its application of sections 35(1)(a) & (b) & (c), 35(3), 28 and 40(2) are appropriate.

Reasons for decision

Section 35: Formulation of government policy

12. Section 35 FOIA states:

"(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-

 - (a) the formulation or development of government policy,
 - (b) Ministerial communications.
 - (c) The provision of advice by any of the Law Officers or any request for the provision of such advice."
13. The Commissioner's view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
14. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a

safe space to consider policy options in private. Her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

15. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
16. The OSSS explained that files SOE22/3, SOE22/35/3 and SOE22/38/3:
“...contain high volumes of information relating to the formulation of government policy, notably devolution policy and the Scottish referendum of 1997. In agreeing the policy of said referendum, the files also contain Cabinet papers and a number of letters between Ministers of the Crown and also Ministerial private offices.”
17. The OSSS advised the Commissioner that whilst the referendums and creation of Parliaments have concluded, it considers that some of the issues under discussion are not purely historic. It explained that whilst the 1997 referendums are no longer ongoing, devolution policy is still being developed and issues are still live. It considers that disclosure would be likely to:
“...disrupt the formulation of policy on live issues pertaining to the working relationship between the UK Government and the Devolved Administrations in the context of EU Exit.”
18. The Commissioner is satisfied that the class based exemption at section 35(1)(a) is engaged in respect of all pages contained in SOE22/3; all save two of the limited number of pages in SOE22/35/3 and two pages in SOE22/38/3. The four pages identified have been withheld under section 35(1)(b). She has considered the assessment of prejudice provided by the OSSS as part of its submission as part of the public interest analysis set out below.
19. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to Ministerial communications. Section 35(5) defines ‘Ministerial communications’ as any communication between a Minister of the Crown and;
“includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales.”
20. As with section 35(1)(a), section 35(1)(b) provides a class-based exemption. The OSSS relied on this exemption with respect to information including ministerial correspondence regarding the 1997

devolution referendums in Scotland and Wales. The exemption is applied in addition to section 35(1)(a) to a limited number of documents and in isolation only with respect to two pages in SOE22/35/3 and two pages in SOE22/38/3.

21. Having inspected the requested information the Commissioner is satisfied that this material falls within the description set out at section 35(1)(b), therefore the exemption is engaged.
22. As the various exemptions contained within section 35 are qualified the Commissioner has continued to consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions contained at section 35 outweighs the public interest in disclosing the information.

The public interest

23. The OSSS combined its public interest consideration of both subsections 35(1)(a) and (1)(b).

24. It acknowledged the public interest in government accountability and transparency and also:

"...increasing public awareness and understanding of why certain decisions were taken in this instance."

25. It continued:

"Alternatively, due consideration should be given to Cabinet Collective Responsibility, and within that Cabinet confidentiality. This convention exists because Cabinet minutes are very sensitive pieces of information, not only because of the exact content of the documents, but also because the confidentiality they carry allows Cabinet members to privately debate and raise concerns in a 'safe space'."

26. The OSSS advised that the public interest in this case is larger than simply the content of the files and explained its view that releasing the files would undermine Cabinet confidentiality and:

"...so could damage the public interest because doing so would likely affect the behaviour of ministers or other members of the government in the future."

27. The OSSS supported its view on collective responsibility by reference to previous First- Tier and Upper Tribunals¹:

"By reason of the convention of collective responsibility, cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years. The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within 30 years will be very rarely ordered and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future..."

Balance of the public interest

28. The Commissioner is satisfied that the exemptions at sections 35(1)(a) and section 35(1)(b) are engaged, however, as she has previously advised, she does not consider that there is an inherent or automatic public interest in maintaining them. The exemptions are not absolute but are subject to the public interest test. This means that Parliament was of the opinion that in some cases the public interest would lie in the disclosure of information into the public domain, despite the exemptions being engaged.
29. The Commissioner notes that the weight to be attached to the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
30. In respect of the exemption at section 35(1)(a) the Commissioner notes that the policy in question was not under formulation or development at the time of the request. Clearly the relevant legislation was enacted many years ago and devolution in Scotland and Wales has long since been implemented. She acknowledges that the information on devolved government and the EU withheld under this exemption may be said to have some relevance to the UK's current circumstances following Brexit. However, she is not persuaded by the OSSS' argument that disclosure of this information would influence or disrupt the content of future discussions.
31. The Commissioner accepts that disclosure would allow scrutiny of matters relating to devolution that took place in 1997. The Commissioner's view is that such scrutiny would assist the public's

¹ EA/2010/0031 Cabinet Office v IC, cited in Cabinet Office v IC and Aitchison [2013] UKUT 526(AAC)

understanding as to how government considers issues of significance such as devolution. The Commissioner is mindful of the age of the requested information which was already over 20 years old at the time of the request. She notes that under the amendments to the Public Records Act 1958, many Cabinet papers over 20 years old are now routinely published.²

32. The Commissioner has also carefully considered the OSSS's public interest arguments relating to the convention of Cabinet collective responsibility. She has had regard to the Tribunal's comments in *Scotland Office v Information Commissioner*³:

"Where Ministerial communication does engage the convention of collective responsibility, it is necessary in particular, to assess whether and to what extent the collective responsibility of Ministers would be undermined by disclosure. Factors such as the content of the information, whether it deals with issues that are still "live", the extent of the public interest and debate in those issues, the specific view of different Ministers it reveals, the extent to which Ministers are identified, whether those Ministers are still in office or in politics as well as the wider political context, are all matters that are likely to have a bearing on the assessment of the public interest balance."

33. As set out above, the Commissioner considers that the issues are no longer live, in that the specific policy under development was implemented some time ago. Although a very small number of the individuals involved at the time remain involved in politics, none of them remain in office.
34. A large number of people across the UK (not just in Wales and Scotland) were affected by this consideration and it involved large sums of public money in terms of the referendums, establishing institutions and devolving budgetary management.
35. Having inspected the withheld information the Commissioner is satisfied that the policies and discussions relate to historic decisions. Returning to the OSSS case cited above, the Commissioner considers that the political context at the time of the request differed significantly from that at the time the information was created. The impact of the UK

² <http://www.legislation.gov.uk/ukpga/2010/25/part/6>

³ Appeal no EA/2007/0070

leaving the European Union has created a significant public interest in both implemented and developing policy and government communications.

36. The Commissioner recognises that there are public interest arguments both in favour of maintaining the exemption and in favour of disclosure. She acknowledges the significance of the convention of collective responsibility and the emphasis placed on it by the OSSS. Notwithstanding this she is mindful that it is not an overriding factor in the circumstances of this case. The Commissioner is satisfied that there is a considerable weight attached to public interest in the content of the withheld information. In the circumstances of this case she considers that the public interest in maintaining the exemptions at section 35(1)(a) and section 35(1)(b) does not outweigh the public interest in disclosure of the information.
37. Section 35(3) states:

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”
38. To engage section 35(3), the department should be able to explain why the requested information would engage one (or more) of the main exemptions. When doing so it is immaterial whether the department actually holds the information, since section 35(3) refers to information which is exempt, or would be exempt if it were held.
39. In this case the OSSS related its reliance on section 35(3) to section 35(1)(c) and explained why, if held, the information would relate to Law Officers’ advice.
40. Section 35(1)(c) provides that information held by a government department is exempt if it relates to the provision of advice by any of the Law Officers.
41. The Law Officers are the government’s most senior legal advisers. ‘Law Officers’ are defined in section 35(5) as the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General of the Welsh Government and the Attorney General for Northern Ireland.
42. Section 35(1)(c) reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought.

43. The Commissioner is able to accept the relevance of law officers' advice to the general subject matter of the request. On the basis of the explanation given by the OSSS on how the information, if held, would relate to the provision of advice by Law officers, the Commissioner is satisfied that section 35(1)(c) of the FOIA would be engaged by the information, if held. Consequently, she is satisfied that section 35(3) is engaged.

The public interest

44. The section 35(3) exemption is also qualified by the public interest test. Departments can only NCND if the public interest in not confirming whether or not information is held, outweighs the public interest in knowing whether information is or is not held.

45. Therefore, a department cannot automatically NCND whether it holds information that falls within section 35. If it wishes to NCND, it must be able to explain in the public interest test exactly what a hypothetical confirmation or a hypothetical denial would reveal in the context of the particular request, and why at least one of these responses would be harmful to good government.

46. The OSSS explained that it agrees that there is a general public interest in the disclosure of information. It recognises that:

"...openness in government may increase public trust in and engagement with the government."

47. Notwithstanding this, the OSSS went on to explain that there is also a strong public interest in protecting confidentiality between legal professionals and their clients. It argued that if the OSSS confirmed or denied holding information this would reveal whether legal advice was sought in regard to elements of the devolution process which in turn may deter government from seeking legal advice in sensitive or difficult areas.

48. In forming a conclusion on the balance of the public interest the Commissioner notes that inherent to section 35(1)(c) is the public interest in avoiding harm to government decision making processes and in preserving the convention of confidentiality in relation to Law Officers' advice.

49. The Commissioner is aware that the purpose of this convention, as recognised in section 35(1)(c), is to provide the fullest guarantee that government business will be conducted in a way that facilitates fully informed legal advice, where Ministers and the Law Officers are fully open with each other. This protection of the confidentiality of the conditions in which legal advice is sought allows the Law Officers to

discharge their responsibility to advise the government on complex legal matters, and support the government in acting within the rule of law.

50. However, in this case the Commissioner is not persuaded that compliance with section 1(1)(a) would, in the particular circumstances of this case, be harmful to good government. The wording of the request, listing different files, means that disclosure of the confirmation or denial would not indicate, if held, any detail or location of information.
51. In the Commissioner's opinion the age of the requested information strengthens the public interest in not maintaining the exclusion to confirm or deny.
52. She is not satisfied by the OSSS's reasoning for using the NCND provision in the circumstances of the case. She is not convinced that confirmation or denial of whether legal advice was sought in regard to elements of the devolution process would be likely to deter government from seeking, or not seeking, legal advice in other circumstances. Arguably it could be expected that the public would expect such advice to be sought on such matters.
53. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exclusion at section 35(3) is outweighed by the public interest in confirming or denying whether the government holds information within the scope which would be exempt by virtue of section 35(1)(c).

Section 28 – Relations within the United Kingdom

54. Section 28 FOIA states:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) “administration in the United Kingdom” means –

(a) the government of the United Kingdom

(b) the Scottish Administration

(c) the Executive Committee of the Northern Ireland Assembly, or

(d) the National Assembly of Wales.”

55. The OSSS explained that at the time of its responses to the complainant it considered files SOE22/3, SOE22/35/3 and SOE22/38/3 were exempt under the exemption at section 28(1), in addition to section 35(1)(a) & (b). Following a reconsideration of the material at the time of the

Commissioner's investigation, the OSSS decided that only file SOE22/3 contained very limited information which engaged section 28(1).

56. The OSSS considers that disclosure of the identified information would be likely to prejudice relations between the UK Government and the Devolved Administrations and would be likely to result in an adverse effect on public debates on these issues related to the EU.

The Commissioner's position

57. In order for a prejudice based exemption, such as section 28(1), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
58. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the OSSS clearly relates to the interests which the exemption contained at section 28(1) is designed to protect. With regard to the second criterion, the Commissioner accepts that there is a causal link between disclosure of the information and prejudice occurring. When considering the third criterion, she finds that the lower level of would be likely to cause prejudice, to be met. In reaching this conclusion the Commissioner has taken into account issues covered in the Confidential Annex.
59. The Commissioner has therefore determined that section 28(1) of FOIA is engaged. Section 28 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 28(1) outweighs the public interest in disclosing the information.

The public interest test

60. The OSSS referred the Commissioner to its reasoning in regard to the public interest considerations for section 35, as set out above in paragraphs 23 – 27.

61. The OSSS concluded:

“The public interest in transparency and accountability of Government is outweighed by the possible negative impact on the working relationship between the governments of the UK, especially considering that work relating to EU Exit is live and pertinent.”

Balance of the public interest

62. The Commissioner considers that there is a strong public interest in disclosure of the withheld information in order to inform the public about the government’s considerations of the matters concerning devolution and to promote accountability and transparency.

63. However, the Commissioner considers that there is a significant public interest in ensuring that effective relations exists between the UK and the other administrations. The Commissioner considers that disclosure of the withheld information would be likely to harm to those relations particularly in the current circumstances as in those at the time of the request.

64. Therefore, despite the public interest in disclosure of the limited information covered by this exemption, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 28(1) of FOIA.

Section 40 - Personal information

65. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

66. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation ('GDPR') ('the DP principles').

67. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
68. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

69. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
 70. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
 71. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
 72. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
 73. The information requested in files SOE22/27/3, SOE22/34 and SOE22/39/2 comprises information on third parties to be invited to events associated with devolution including names and addresses, replies, personal affairs and procedural arrangements.
 74. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to third parties. She is satisfied that this information both relates to and identifies the third parties concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
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75. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
76. The OSSS referenced both Article 5(1)(b) and Article 5(1)(a) of the GDPR.
77. The Commissioner considers the most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)

78. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

79. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
80. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

81. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
82. The Commissioner considers that the lawful basis most applicable is basis (f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”⁵

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

83. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

Legitimate interests

84. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
85. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
86. In this case the Commissioner accepts that there is a general legitimate interest in disclosure of information which would promote accountability and transparency. In the circumstances of this case, the Commissioner acknowledges that there may be considered to be a legitimate interest in disclosure of those people invited to events regarding the referendum. However, she does not consider this to be a compelling interest.

Is disclosure necessary?

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

87. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
88. The complainant has not provided the Commissioner with any reasons why disclosure of this personal data is necessary. In fact, the complainant explained that her request was based on a generic title of 'devolution information'. She had assumed that all the requested files would comprise policy documents. Consequently, she was not seeking disclosure of personal information of the type withheld.
89. In reaching her conclusion the Commissioner has taken into account the complainant's view as well as her own consideration that disclosure of the personal information in this case would add little if anything to the accountability of Government.
90. As the Commissioner has decided in this case that disclosure is not necessary to meet a legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
91. The Commissioner has therefore decided that the OSSS was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

92. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

93. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

94. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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