

Decision Notice



Decision 072/2010 Mr David Rule and the Scottish Ministers

Meeting between Alex Salmond and Hillary Clinton

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Summary

Mr Rule requested from the Scottish Ministers (the Ministers) information regarding the meeting held in February 2009 between the First Minister, Alex Salmond MSP, and the US Secretary of State, Hillary Clinton. The Ministers did not respond to Mr Rule's request. Following a review the Ministers responded by providing some information to Mr Rule, some of which was subject to redaction under the exemption in section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Ministers also relied on the exemption in section 32(1)(a)(i) of FOISA for withholding other relevant information from Mr Rule. Following this review, Mr Rule 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 Rule's request for information in accordance with Part 1 of FOISA. He found that they had been correct to rely on the exemption in section 38(1)(b) of FOISA (which relates to personal data) for withholding an individual's name. However, he did not accept that disclosure of certain other withheld information would, or would be likely to, substantially prejudice either the effective conduct of public affairs (section 30(c)) or relations between the United Kingdom and the USA (section 32(1)(a)(i)), or that other information should be withheld because its disclosure would, or would be likely to, endanger the health or safety of an individual (section 39(1)). He required the disclosure of this information. The Commissioner also found that the Ministers failed to comply with section 10(1) of FOISA in not responding to Mr Rule's information request within 20 working days, but did not (in this case) require any action in respect of that breach.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 10(1) (Time for compliance); 30(c) (Prejudice to effective conduct of public affairs); 32(1)(a)(i) and (3) (International relations); 38(1)(b), 2(a)(i), (2)(b) and (5) (Personal information), and 39(1) (Health, safety and the environment).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of personal data); Schedules 1 (The data protection principles: the first principle) and 2 (Conditions relevant for the 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 March 2009, Mr Rule wrote to the Ministers requesting the following information:
... all correspondence and documents regarding the meeting this February of the First Minister, Alex Salmond, with the US Secretary of State, Hillary Clinton.
My request includes all documents regarding the arrangement of the meeting, all documents regarding the intended content and agenda for the meeting, any minutes or records of what took place at the meeting, and any letters or documents making reference to the meeting produced or received since the meeting.
In addition, I would like to know whether or not any gifts were exchanged between Mr Salmond and Mrs Clinton and a description of any such gifts.
2. The Ministers acknowledged the request but did not provide a substantive response and so Mr Rule submitted a request for a review on 7 April 2009.
3. A response was provided by the Ministers to Mr Rule's request for a review on 22 April 2009. They released information to Mr Rule, including confirmation of the gifts presented to the Secretary of State by Mr Salmond, subject to redaction of material they considered to be outwith the scope of his request. The Ministers withheld other information under sections 32(1)(a)(i) and 38(1)(b) of FOISA.
4. In a further communication of 24 April 2009, the Ministers apologised for the delay in providing a response to Mr Rule's request.
5. On 27 April 2009, Mr Rule wrote to the Commissioner, 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 Rule 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. Although there were subsequent communications with the Ministers regarding the validity of Mr Rule's request, eventually they accepted that the request (and therefore the application) was valid.

Investigation

7. The Ministers were notified in writing that an application had been received from Mr Rule and were asked to provide the Commissioner with any information withheld from him. They 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 in sections 32(1)(a)(i) and 38(1)(b) of FOISA for withholding certain information from Mr Rule. They were also asked to comment on the delay in responding to Mr Rule's request.
9. A full response was received from the Ministers, in which they maintained their reliance on the exemptions in sections 32(1)(a)(i) and 38(1)(b) of FOISA. In addition, they indicated that they wished to rely on the exemptions in sections 30(c) and 39(1) of FOISA in respect of certain of the withheld information. Clarification of certain of the Ministers' arguments was sought and obtained in the course of the investigation, while further comments (particularly in respect of the public interest) were also obtained from Mr Rule.
10. The comments received from both the Ministers and Mr Rule will be considered in the Commissioner's analysis and findings below.
11. In his application, Mr Rule explained that he did not object to the redaction of telephone numbers, under the exemption in section 38(1)(b), from the information disclosed to him. During the course of the investigation, Mr Rule also commented that he was not interested in receiving the email address that had been redacted from document 2, for which the Ministers also relied on section 38(1)(b). Finally, he confirmed during the investigation that he was not concerned with receiving the car registration details which had been withheld, for which the Ministers relied on the exemption in section 39(1) of FOISA. As a consequence the Commissioner will not consider any of this information further in his decision notice.
12. During the course of the investigation, it became apparent that certain information which had been redacted from document 1 (the name of a photographer) had in fact been released to him in response to another request for information. In further correspondence, the Ministers confirmed that they were no longer relying on section 38(1)(b) of FOISA (the only exemption claimed) in respect of this information. However, as this information has already been released to Mr Rule, the Commissioner does not deem it necessary to consider it again in this decision.

Commissioner's analysis and findings

13. 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 Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.



Section 32(1)(a)(i) – International relations

14. The Ministers have relied on the exemption in section 32(1)(a)(i) of FOISA for withholding the information contained in one document (document 2) from Mr Rule. Section 32(1)(a)(i) states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between the United Kingdom and any other State.
15. In this case, the Ministers submitted that disclosure of document 2 would substantially prejudice relations between the United Kingdom and the United States of America (USA). For the purposes of this exemption, the Commissioner accepts that the USA is a State other than the United Kingdom, in line with the definition in section 32(3) (reproduced in the Appendix below).
16. For the exemption in section 32(1)(a)(i) to apply, the harm caused or likely to be caused by disclosure requires to be at the level of substantial prejudice: it must be of real and demonstrable significance. For the substantial prejudice to be "likely", the Commissioner takes the view that there must be a significant probability that it will occur, in the near (certainly the foreseeable) future.
17. In his briefing on section 32 (<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.asp>), the Commissioner emphasises the need to justify the use of this exemption on a case by case basis. Authorities should be aware that the international relations of the whole of the United Kingdom must be engaged for the exemption to apply, and should consider the potential impact of disclosure on the United Kingdom's particular relationship with the State in question rather than looking solely at the nature, content and/or sensitivity of the information. The other State's attitude to freedom of information may be relevant.
18. Even if a negative reaction is anticipated from the release of information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice the relationship in question substantially. There may be circumstances where the release of information may cause diplomatic annoyance or irritation, but would not necessarily result in significant, long term harm to relations with the State in question. The timing of release may also be an issue, and the risk of substantial prejudice may well diminish as time passes.
19. The Ministers argued that this exemption applied to the information in document 2 as it was a summary of a private "government to government" meeting. They submitted that there would be no expectation of release of this information into the public domain, as it was prepared for purely internal circulation. The Ministers stated that it was the accepted diplomatic convention that communications between governments (and, by extension, records of meetings of this kind) should be held in confidence and not routinely be made available. They suggested that by ignoring this convention they would run the risk that foreign governments would be unwilling to exchange information with them in confidence, with consequent detriment to their ability to conduct business with those governments.



20. While recognising that the meeting in question took place between the First Minister of the Scottish Government and the US Secretary of State, the Ministers argued that (foreign relations being reserved to the UK Government), the United Kingdom's interests were as directly involved as any distinctly Scottish interests. The Ministers consider the two sets of interests to be inextricably linked. Given the established diplomatic convention referred to above, they were strongly of the view that the disclosure of information such as that in document 2 would substantially prejudice relations between the United Kingdom and the administration in the USA. They also submitted that if the likelihood of such information being released became known this could lead to wider substantial prejudice to the United Kingdom's relationships with other governments.
21. The Commissioner has considered the information in document 2 along with the Ministers' submissions, but is not satisfied that disclosure of this information would, or would be likely to, have an impact on relations between the United Kingdom and the USA amounting to substantial prejudice. The Commissioner recognises that foreign relations are a reserved matter for the United Kingdom Government, but it is apparent that the matters addressed in this information are specific to Scotland and the Scottish Government, and do not affect the UK Government or impinge on any reserved matters. The matters under discussion appear to be of no direct relevance to relations between the two States. In any event, bearing in mind the long-established good relations between the two States and the fact that a mature freedom of information regime exists in the USA, the Commissioner does not accept that any of the content of the withheld information is of such sensitivity that its disclosure could cause significant harm to the working of the relevant diplomatic conventions or the relationship between the United Kingdom and the USA.
22. Even if the US Government were to take extreme exception to the information being released (which the Commissioner does not expect would occur) then it would be obvious that the disclosure occurred as a result of the Freedom of Information (Scotland) Act, and not as a result of any action or legislation of the UK Government. Consequently disclosure in such circumstances would be highly unlikely to substantially prejudice relations between the United Kingdom and the administration in the USA.
23. For the reasons given above, therefore, the Commissioner cannot accept that that disclosure of the information in document 2 would, or would be likely to, prejudice substantially relations between the United Kingdom and the USA. As a consequence, the Commissioner does not uphold the Ministers' reliance on the exemption in section 32(1)(a)(i) of FOISA in respect of this information.
24. As the Commissioner is not satisfied that the exemption in section 32(1)(a)(i) is applicable to the information in document 2, he is not required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.



Section 30(c) – Prejudice to the effective conduct of public affairs

25. The Ministers also relied on the exemption in section 30(c) in respect of the information in document 2. Under this exemption, information is exempt if its disclosure under FOISA would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The requirements for substantial prejudice have been outlined above in relation to section 32(1)(a)(i): the use of the word “otherwise” in section 30(c) means that the harm in question must be of a nature other than that covered by the exemptions in section 30(a) and (b) (which relate respectively to the maintenance of the convention of the collective responsibility of the Scottish Ministers, and substantial inhibition to the free and frank provision of advice or exchange of views for the purposes of deliberation).
26. In the Ministers’ view, it is clearly important that records should be kept of high level meetings such as the meeting in question. Indeed, they believe this would be considered a key element of the effective conduct of public affairs. They contend that were such records to be released, against the established diplomatic convention, it would be highly unlikely that they would continue to be kept, ultimately to the detriment of the public record.
27. The Ministers argued that disclosure of this report, in breaching the established diplomatic convention referred to above, would undermine their ability to have open discussions and good relations with the USA. They considered it highly likely that the USA would be less willing to co-operate with the Scottish Government. As a consequence, and given the importance of good relations with the USA, the Ministers took the view that disclosure would be substantially prejudicial to their ability to effectively conduct public affairs by maintaining good relations with their international partners.
28. Having considered the withheld information and the Ministers submissions on it, the Commissioner accepts that the information records subjects of discussion between the First Minister and the US Secretary of State at the meeting in question. He is not, however, satisfied that the recorded content of the discussion is of such sensitivity that its disclosure would (or would be likely to) prejudice substantially the effective conduct of public affairs. In particular, he is not persuaded that its disclosure would be likely to deter discussion between the Scottish Government and the US Administration on these or other matters in future. The record is set out in a general manner, in measured terms, and much of the information on the policies and agreements which were discussed is (and was at the time the Ministers dealt with Mr Rule’s request) in any event available in the public domain. For these reasons, the Commissioner does not accept that the exemption in section 30(c) of FOISA would be engaged in this case.
29. The Commissioner has considered the timing of the request, as to whether disclosure would be premature (e.g without allowing time for the note to be circulated to relevant parties.) Although the information had been recorded only shortly prior to Mr Rule’s request, by the time of review it was several weeks old and there is no reason to believe that by that time release would be premature.



30. The arguments against disclosure made by the Ministers are somewhat generic, maintaining in effect that this type of information by convention should not be disclosed, and that disclosure in this case would have the future effect of at best causing such information not to be recorded. At worst it might inhibit foreign governments from agreeing to meet or to engage in certain discussions.
31. The Commissioner does not find those arguments to be persuasive especially with regard to the nature of the meeting and the manner in which it was recorded.
32. As the Commissioner is not satisfied that the Ministers were correct to rely on the exemption in section 30(c) of FOISA in respect of the information in document 2, he is not required to go on to consider the application of the public interest test.

Section 38 – Personal Information

33. The Ministers relied on the exemption in section 38(1)(b) of FOISA for redacting certain information from document 1. They also relied on this exemption for withholding an email address from document 2. As indicated previously, Mr Rule is not concerned with receiving the telephone number redacted in document 1 or the email address redacted from document 2. Therefore, these items of withheld information are not considered here. The only information being considered under this exemption is the name of one particular individual.
34. The exemption in section 38(1)(b) (read with section 38(2)(a)(i) or, as appropriate, section 38(2)(b)) of FOISA exempts information from disclosure, where it is personal data and its disclosure otherwise than under FOISA would contravene any of the data protection principles. 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.
35. 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 Data Protection Act 1998 (the DPA), and secondly that its disclosure would contravene one or more of the data protection principles to be found in Schedule 1 to the DPA. Here, they have argued that the individual's name is personal data and that its disclosure would contravene the first data protection principle on fair and lawful processing of personal data.

Is the information personal data?

36. 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 is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
37. Having considered the information in question, the Commissioner is satisfied that this is the personal data of the individual concerned. That individual can be identified from the information. The information is biographical in a significant sense and focuses on the individual, and therefore it relates to them.



Would disclosure breach the first data protection principle?

38. The first data protection principle requires that personal data shall be processed fairly and lawfully. It also provides 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 (again, to the DPA) is also met.
39. The conditions in Schedule 3 are very restrictive and therefore it makes sense to look at whether the information falls into the definition of sensitive personal data, before going on to consider whether any of the conditions in Schedule 2 would permit the information to be disclosed.
40. The Commissioner has considered the categories of sensitive personal data set out in section 2 of the DPA, but does not consider the withheld personal data to fall into any of them. He is therefore satisfied that it is not sensitive personal data and that he is only required to consider whether any of the conditions in Schedule 2 can be met.
41. As Lord Hope noted in *Common Services Agency v Scottish Information Commissioner [2006] CSIH 58*¹ (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 why the disclosure of information is unlawful, for example 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 disclosure of the withheld personal data would be unlawful, otherwise than as a result of breaching the first data protection principle.
42. 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.
43. The Ministers advised that of the six conditions for processing contained in Schedule 2 to the DPA, they only considered condition 6 to be of potential relevance in this case. They went on to argue, however, that in practice this condition was not met. In their view, the processing of the data in this case was not necessary for the purposes of any legitimate interest and, even if it were, the processing would be prejudicial to the rights and freedoms or legitimate interests of the individual concerned, who would have no expectation of their details being placed in the public domain.

¹ [2008] UKHL 47: <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



44. In the circumstances, the Commissioner agrees with the Ministers that the only potentially relevant condition in Schedule 2 would be condition 6. Condition 6 permits personal data to be processed (which in this case would be by disclosure in response to Mr Rule'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, freedoms or legitimate interests of the data subject (in this case, the individual whose name has been withheld). It is clear from the wording of this condition that each case will turn on its own facts and circumstances.
45. There are, therefore, a number of different tests which must be considered before condition 6 can be met. These are:
- a. Does Mr Rule have a legitimate interest in obtaining the withheld personal data?
 - b. 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 Rule's legitimate interests be achieved by means which interfere less with the privacy of the individual in question?
 - c. Even if the processing is necessary for Mr Rule's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the named individual? This will involve a balancing exercise between the legitimate interests of Mr Rule and the legitimate interests of the other person. 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.

Does Mr Rule have a legitimate interest?

46. Mr Rule has provided reasons why he considers he has a legitimate interest in receiving the withheld personal data. He has explained that he wishes to know the names of those involved in the meeting of Mr Salmond with Mrs Clinton, so that he can better understand the nature of the meeting and the working of government. Mr Rule considers that this information will allow him to identify any individual that also takes part in other government activities.
47. The Commissioner accepts that Mr Rule has a legitimate interest in knowing who was involved in the meeting between the First Minister and the Secretary of State, with a view to better understanding the nature of the meeting. The Commissioner considers that this legitimate interest of Mr Rule reflects the general public interest in governmental transparency.

Is disclosure necessary to achieve these legitimate aims?

48. The Commissioner must now go on to consider whether the disclosure of the withheld information is necessary to achieve Mr Rule's legitimate aims. He notes that the Ministers do not believe that is.



49. Having considered the submission made by Mr Rule as to why he has a legitimate interest in the disclosure of the driver's name, together with the content of the redacted information, and the information that has already been disclosed to him, the Commissioner is of the view that the information which has already been released to Mr Rule by the Ministers satisfies his legitimate interest.
50. It is clear from reading the information disclosed to Mr Rule in document 1 (an email dated 20 February 2009 at 2:43pm) that he has been provided with full details of the individuals who accompanied Mr Salmond to the meeting and who he would be meeting with. The individual whose name has been withheld played no more than a supporting role in Mr Salmond's attendance at the meeting and could not be described as having been involved in the meeting itself. Consequently, the Commissioner does not accept that the disclosure of this individual's name is (or was) necessary to fulfil Mr Rule's legitimate interest, or that of the wider public in ensuring governmental transparency.
51. Having concluded that disclosure of the withheld personal data is not necessary to fulfil Mr Rule's legitimate interests, the Commissioner is not required to go on to consider if disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject. Therefore, the Commissioner is satisfied that condition 6 of Schedule 2 to the DPA cannot be met in this case.
52. As condition 6 cannot be met, the Commissioner would also regard disclosure of the individual's name as unlawful. In all the circumstances, therefore, the Commissioner finds that disclosure would breach the first data protection principle and that this information was properly withheld under section 38(1)(b) of FOISA.

Section 39(1) – Health, safety and the environment

53. The Ministers have relied on the exemption in section 39(1) of FOISA for withholding the make and model (including the colour) of the car Mr Salmond travelled in on his way to his meeting with Mrs Clinton.
54. Section 39(1) of FOSIA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This exemption is also subject to the public interest test contained in section 2(1)(b) of FOISA.
55. This exemption does not contain the usual harm test of substantial prejudice and, in referring simply to endangerment, appears to set a lower threshold of harm. However, as the Commissioner has indicated in, for example, *Decision 071/2008 Mr S and the Chief Constable of Strathclyde Police*, the exemption still requires that the harm be at least likely and therefore he will expect a realistic prospect of danger to the health and safety of one or more identifiable individuals, based on evidence or convincing arguments to that effect.



56. The Ministers submitted that release of the make and model of the car would be likely to endanger the physical safety of an individual. In their view this information would, by definition, would go part of the way to identifying a particular vehicle. This would, they argued, endanger not only the driver but also, by association, any passengers in the car.
57. Having considered the withheld information, together with the Ministers' submissions on this point, the Commissioner cannot accept that release of the make, model and colour of the car would be likely to endanger the physical safety of an individual. It is clear that this model of car has been produced in considerable numbers. It appears to be in common use as a VIP transport, although clearly it has been sold to other users as well. In a city where there are numerous businesses offering VIP transport services, it appears unlikely (to say the least) that wider awareness of a car of this particular make and model (even in a particular colour) being used for such purposes would increase to any appreciable extent the risk to the physical safety of individuals travelling in such a car. The Commissioner must therefore conclude that any likelihood of danger is too remote to engage the exemption in section 39(1) of FOISA.
58. The Commissioner is not satisfied that the exemption in section 39(1) of FOISA applies to this information he is not required to go on to consider the application of the public interest test in section 2(1)(b).

Technical issues

59. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
60. The Ministers did not provide Mr Rule with a substantive response to his initial request for information.
61. The Commissioner therefore finds that the Ministers did not comply with the requirements of section 10(1) of FOISA in dealing with Mr Rule's request.
62. As the Ministers subsequently provided a response to Mr Rule's request for a review, within the timescale laid down for that purpose in section 21(1) of FOISA, the Commissioner does not require them to take any action in relation to this breach in response to this particular application.



Scope of request/information located

63. In his application, Mr Rule argued that the Ministers should not have redacted information from documents released to him on the basis that it fell outwith the scope of his request. He believed that if a document contained any information regarding the meeting in question, then the entire document should have been considered for release. The Commissioner cannot accept this, however. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73*, the Court of Session emphasised that FOISA gives a right to information, not documents. In requesting information regarding a particular meeting, Mr Rule is entitled under section 1(1) of FOISA to information regarding that meeting. He is not entitled to whatever other information may be contained in the same documents, where that other information has no relevance to the meeting in question.
64. Mr Rule has also commented that the Ministers' release of information appeared to be incomplete. In this connection, he noted references in the information released to him which he believed suggested that other relevant information might be held by the Ministers. The Ministers were asked to comment on this and to carry out additional searches to ascertain whether any further information was held.
65. In response, the Ministers explained that one of the references identified by Mr Rule concerned a briefing for the First Minister's entire visit to Washington DC and not specifically the meeting with Mrs Clinton, which the Ministers considered to be outwith the scope of Mr Rule's request. They also explained that certain other references related to issues other than the meeting and were therefore outwith the scope of the request. Having considered the Ministers' submissions on this point, the Commissioner is satisfied with their position on it.
66. Additional searches were carried out by the Ministers during the course of the investigation to determine whether any other relevant information was held, with particular reference to Mr Rule's concerns. The outcome of these searches was that no further information was identified.
67. Having taken into account the submissions received from both Mr Rule and the Ministers, the Commissioner is satisfied that no further information is held by the Ministers, or was held by them at the time they received Mr Rule's request, which fell within the scope of that request.



DECISION

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

The Commissioner finds that by relying on the exemption in section 38(1)(b) of FOISA for withholding the name of a particular individual in document 1, the Ministers complied with Part 1.

However, in withholding all of the information in document 2 under the exemptions in sections 32(1)(a)(i) and 30(c) of FOISA, the Ministers failed to comply with Part 1.

The Commissioner also finds that the Ministers were wrong to rely on the exemption in section 39(1) of FOISA for withholding the make, model and colour of the car in document 1.

The Ministers also breached section 10(1) of FOISA in not providing a response to Mr Rule's request within 20 working days.

The Commissioner therefore requires the Scottish Ministers to disclose the information in document 1, apart from redacted names of individuals, car registration and mobile phone number. The Scottish Ministers are also required to disclose all of the information in document 2 to Mr Rule, apart from the redacted email address. The Commissioner does not require the Scottish Ministers to take any action in relation to their breach of section 10(1) in response to this application.

The Scottish Ministers are required to provide this information by 19 July 2010.

Appeal

Should either Mr Rule 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
1 June 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

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

...

- (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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or



...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

32 International relations

(1) Information is exempt information if-

- (a) its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (i) relations between the United Kingdom and any other State;

...

(3) In subsection (1)-

...

"State" includes-

- (a) the government of any State; and
- (b) any organ of such a government,

and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

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;

...

39 Health, safety and the environment

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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.

...