

# Decision Notice

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## **Decision 130/2015: Animal Concern and the Scottish Ministers**

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### **Effect of sea lice infestations at marine salmon farms on wild salmonids**

Reference No: 201402481

Decision Date: 19 August 2015



Scottish Information  
Commissioner

## Summary

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On 9 April 2014, Animal Concern asked the Scottish Ministers (the Ministers) for copies of all communications between Marine Scotland and Scottish Government Ministers regarding sea lice infestations at marine salmon farms and the effect of such infestations on wild salmonids.

The Ministers responded by withholding all of the requested information under the exception contained in regulation 10(4)(e) of the EIRs. Following a review, the Ministers disclosed some information but withheld other information under the exceptions contained in regulations 10(4)(e) and 11(2) of the EIRs. Animal Concern remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had wrongly withheld some information under regulation 10(4)(e) of the EIRs. She required the Ministers to provide Animal Concern with this information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and 2(2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available) and 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data"), Schedules 1 (The data protection principles, Part 1: 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 Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 9 April 2014, Animal Concern made a request for information to the Ministers. The information requested was:

*"...copies of all communications (including letters, e-mails, memos, meeting minutes and notes plus (should they exist) any transcripts or recordings of telephone calls) from 2010 to the present day between Marine Scotland and the First Minister and Scottish Government Ministers with responsibility for Aquaculture and the Marine Environment on the subject of sea lice infestations at marine salmon farms in Scotland and the effect of such sea lice infestations on wild salmonids."*

2. The Ministers responded on 2 May 2014. The Ministers informed Animal Concern that they had identified seventeen documents falling within the scope of the request but they were

withholding the content of all of the documents as they considered the information to be excepted from disclosure under regulation 10(4)(e) of the EIRs.

3. On 4 May 2015, Animal Concern wrote to the Ministers requesting a review of their decision because they were dissatisfied that the information was being withheld. Animal Concern argued that disclosure of the information would reveal whether any Scottish Government Ministers had disregarded advice from senior officials on the harm caused to wild salmonid populations by sea lice infestations at marine salmon farms.
4. The Ministers notified Animal Concern of the outcome of their review on 31 July 2014. The Ministers indicated that of the seventeen documents initially identified as falling within the scope of the request, they now considered that three of those documents (4, 10 and 17) were not within scope. The Ministers identified one further document (8(a)) that did fall within the scope of the request, therefore in total the Ministers were considering the content of fifteen documents.
5. Of those fifteen documents, the Ministers disclosed redacted versions of thirteen documents to Animal Concern and withheld the remaining two documents in their entirety. All of the withheld information was considered to be excepted from disclosure in terms of either regulation 10(4)(e) or regulation 11(2) of the EIRs (respectively, the exceptions for internal communications and personal data).
6. On 23 October 2014, Animal Concern applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Animal Concern stated it was dissatisfied with the outcome of the Ministers' review because it considered that the withheld information should be made public.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Animal Concern made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
8. On 29 October 2014, the Ministers were notified in writing that Animal Concern had made a valid application. The Ministers were asked to send the Commissioner the information withheld from them. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of the EIRs they considered applicable to the information requested.

## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Animal Concern and the Scottish Ministers. She is satisfied that no matter of relevance has been overlooked.

## **Handling in terms of the EIRs**

11. The Ministers handled the request under the EIRs, having concluded that the information requested by Animal Concern was environmental information, as defined in regulation 2(1) of the EIRs.
12. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
13. The information requested by Animal Concern concerns the impact of sea lice infestations at marine salmon farms on populations of wild salmonids.
14. The Commissioner is satisfied that the information requested by Animal Concern falls within the definition of either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of elements of the environment or on measures and activities affecting or likely to affect those elements (the full paragraphs are to be found in the Appendix).
15. The Commissioner therefore concludes that the Ministers were correct to consider Animal Concern's information request under the EIRs.

## **Section 39(2) of FOISA - environmental information**

16. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
17. As there is a statutory right of access to environmental information available to Animal Concern in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.

## **Withheld Information**

18. The Ministers initially withheld two entire documents and selected extracts from thirteen other documents under regulations 10(4)(e) and 11(2) of the EIRs.
19. During the investigation, the Commissioner determined that one of the three documents that the Ministers had discounted in their review outcome as being outwith the scope of Animal Concern's information request was actually within scope. The Commissioner advised the Ministers of her view and the Ministers disclosed a copy of this document (document 10) to Animal Concern, withholding some information under regulations 10(4)(e) and 11(2) of the EIRs. At this time, the Ministers also disclosed further information to Animal Concern from two other documents (documents 11 and 12); they had previously withheld this information under the exception in regulation 10(4)(e) of the EIRs.
20. In total, the Ministers continued to withhold two entire documents and parts of fourteen other documents under regulations 10(4)(e) and 11(2) of the EIRs.

## **Regulation 10(4)(e) of the EIRs (internal communications)**

21. The Ministers applied the exception in regulation 10(4)(e) of the EIRs to information in ten of the sixteen documents falling under the scope of Animal Concern's request (documents numbered 2, 3, 6, 7, 8, 8(a), 9, 10, 14 and 15)
22. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication.
23. The Commissioner notes that the ten documents originated from and were received by staff working for the Scottish Government. She is satisfied that all the information to which the Ministers have applied this exception can be described as internal communications, and therefore that the exception in regulation 10(4)(e) of the EIRs was correctly applied to this information.
24. The application of the exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, which the Commissioner will now consider.

### *Public interest test*

25. The public interest test in regulation 10(1)(b) states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

### *Animal Concern's submissions*

26. Animal Concern noted that a senior government fisheries scientist, the former head of the Freshwater Fisheries Laboratory at Pitlochry, had stated in a letter that he and his colleagues had known since 1989 that salmon and trout populations on the West Coast of Scotland are being adversely affected by sea lice from salmon farms. Animal Concern had always considered this to be the case but, until very recently, the Scottish Government had dismissed its claim, saying there was no evidence to support its view.
27. Animal Concern argued that it was very important to discover whether the Scottish Government had received advice confirming there was a major problem with sea lice from salmon farms causing damage to wild fish stocks, but had refused to act upon the advice. Animal Concern submitted that if senior civil servants brought these concerns to the attention of Government Ministers and those Ministers failed to act on or even acknowledge their concerns, then a very serious breach of Ministerial responsibility has occurred, resulting in continued serious damage to the marine environment, wild salmonid populations and the angling and tourism industries.
28. Animal Concern stated that if the Scottish Government has been making statements and taking action against the advice of senior scientific advisors, then that information should be made public.

### *The Ministers' submissions*

29. The Ministers acknowledged that there will be some public interest in releasing information which would help inform public debate, with regard to sea lice and the impact on the Scottish wild salmon population. However, the Ministers argued that this public interest was partly met by the considerable amount of information they had disclosed in this case, by providing the

requester with significant factual and background information and officials' advice about the topic.

30. The Ministers submitted that the public interest in informing public debate is significantly outweighed by the public interest in allowing officials to advise Ministers and to discuss and debate all of the issues, risks and options in order to fully understand the possible implications. The Ministers argued that there is a strong public interest in allowing private space for officials to provide free and frank advice to Ministers in relation to the development of Government policy on sea lice and marine salmon farms in Scotland, particularly in areas such as this where the issue remains a live one.
31. The Ministers indicated that the documents in question consist of internal communications which would not have been prepared in the expectation of publication. To Ministers and officials, private thinking space is essential to enable all options and issues to be properly considered, based on the best possible advice, so that good policy decisions can be taken. The Ministers argued that disclosure of the withheld information is likely to undermine the full and frank provision of advice from officials to Ministers on issues which they consider sensitive, or where they are still formulating their views, as they will be concerned that the information will be released.
32. The Ministers submitted that this would make officials provide much less detailed advice in writing, which in turn would undermine the quality of the decision making process as Ministers would not be aware of all the relevant information when making decisions. The Ministers asserted that this would not be in the public interest. The Ministers argued that there is a clear public interest in withholding documents prepared solely for internal communication where they provide detailed advice on sensitive, ongoing issues around sea lice and that this outweighs the arguments in favour of the release of information.

#### *Commissioner's considerations of the public interest*

33. The Commissioner has considered the public interest arguments put forward by the Ministers and she accepts that there is a public interest in ensuring that Ministers and officials have a private space within which they can discuss options and issues in detail without fear that such discussions will be disclosed. The Commissioner accepts that good decision making relies on the free and frank provision of advice and views, in order that all options (however politically unpalatable) are discussed and that the policy making that ensues from such discussions is fully informed. The Commissioner considers that disclosure of some of the withheld information could cause the harm claimed by the Ministers.
34. However, the Commissioner does not accept that disclosure of *all* of the withheld information in this case would result in the harm claimed by the Ministers. Nor has the Commissioner been provided with any evidence to substantiate the submission that disclosure of all the withheld information would have a detrimental impact on policy development or decision-making.
35. The Commissioner believes officials are capable of understanding that some information of a particular type may be disclosed, while other information of the same type may be withheld, depending on the circumstances. Decisions are always taken on a case-by-case basis: disclosing advice or views in one case does not imply that information in another case will also have to be disclosed.
36. The Ministers have argued that the withheld information comprises candid views and advice, but having reviewed all of the information being withheld under the exception contained in

regulation 10(4)(e) of the EIRS, the Commissioner notes that some of the withheld information appears to consist of statistical, factual and background information regarding the subject of sea lice and its impact on wild salmonids. The Commissioner also notes that in several instances (e.g. parts of document 3; Annex C of document 6; parts of document 9, etc.) this information is available publicly (in some form). Given that officials were providing Ministers with information already in the public domain, she does not accept that the information has the sensitivity claimed by the Ministers.

37. Accordingly, the Commissioner has upheld the application of the exception contained in regulation 10(4)(e) of the EIRs to some of the information being withheld from Animal Concern, where she accepts that its disclosure could adversely affect the policy-making process, but she has not upheld it in relation to other information being withheld, including information which is of a factual nature or already public knowledge.

### **Regulation 11(2) of the EIRs (Personal data)**

38. The Ministers withheld information contained in documents 1, 2, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and 16 under regulation 11(2) of the EIRs, and submitted that third party personal data was excepted from disclosure under this exception.
39. Regulation 11(2) excepts personal data of which the applicant is not the data subject, where either "the first condition" (set out in regulation 11(3)) or "the second condition" (set out in regulation 11(4)) applies.
40. The Ministers' arguments relate to those parts of the first condition which apply where making the information available would contravene any of the data protection principles. In order for a Scottish public authority to rely on this exception, it must show that:
- (i) the information is personal data for the purposes of the DPA and
  - (ii) making it available would contravene at least one of the data protection principles laid down in the DPA. In this case, the Ministers argued that the first data protection principle would be contravened.

#### *Is the withheld information personal data?*

41. Personal data are defined in section 1(1) of the DPA 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 possessions 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".
42. The withheld information comprises the names and/or contact details of junior Scottish Government officials, as well as the names and/or contact details of some third parties who are not employed by the Scottish Government. The Ministers noted that they had disclosed the names of senior civil servants as well as generic email addresses. The Ministers submitted that all of the information redacted under regulation 11(2) of the EIRs relates to living individuals who can be identified by disclosure of the requested information.
43. The Commissioner has considered the Ministers' submissions and the withheld information and she is satisfied that it is personal data as defined in section 1(1) of the DPA, being information which relates to living individuals who can be identified from that information.

#### *The first data protection principle*

44. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under the EIRs) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met.
45. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA. She does not consider any of the withheld information to be sensitive personal data.
46. There are three separate aspects to the first data protection principle:
  - (i) fairness
  - (ii) lawfulness and
  - (iii) the conditions in the schedules.
47. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
48. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of these personal data would also be fair and lawful.

*Can any of the conditions in schedule 2 to the DPA be met?*

49. The Ministers considered that only condition 6 in Schedule 2 could potentially apply in this instance. The Commissioner has considered all of the conditions in Schedule 2 and agrees that condition 6 is the only one which might be considered relevant in this case.
50. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued 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 (i.e. the individuals to whom the data relate). The processing in this case would be making the data available in response to Animal Concern's request.
51. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - (i) Is Animal Concern pursuing a legitimate interest or interests?
  - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
  - (iii) Even if the processing is necessary for Animal Concern's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?



*Is Animal Concern pursuing a legitimate interest or interests?*

52. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance on regulation 11(2) of the EIRs, it states:
- In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety.*
53. Animal Concern did not provide any specific arguments to the Commissioner as to why there was a legitimate interest in disclosure of the withheld personal data, but in its application it stated that it required access to all of the withheld information, arguing that if the Scottish Government has been making statements and taking action against the advice of senior scientific advisors, then that information should be made public.
54. The Ministers accept that there is a legitimate interest in understanding the processes and methods of consideration which officials and Ministers undergo when considering issues such as sea lice and other marine issues. The Ministers conceded that there might also be some legitimate interest in Animal Concern knowing that Ministers are receiving advice from staff who have sufficient expertise. However, the Ministers did not accept that disclosure of the withheld personal data would be necessary in furthering that interest and it argued that disclosure of the names or contact details in this case would not enable Animal Concern to judge the individuals' expertise or qualifications.
55. The Ministers argued that the legitimate interests of Animal Concern can be met by means of the content of released and published documents and policies of the Scottish Government without breaching the data protection rights of the data subjects.
56. The Commissioner notes that the Ministers have disclosed the names of senior officials involved in correspondence with Ministers on the subject of sea lice infestations at marine salmon farms and the impact on wild salmonid populations. The Commissioner accepts that Animal Concern may be interested in knowing the names of all junior officials who were copied into or were otherwise involved in correspondence to Ministers on this subject. However, Animal Concern has not explained why it requires this information, other than stating that it should be made public. In the circumstances, and after considering all submissions made on this point, the Commissioner finds that Animal Concern does not have a legitimate interest in the names and contact details which were withheld by the Ministers.
57. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the personal data under consideration. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently, the Commissioner finds that disclosure would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under regulation 11(2) of the EIRs.

## **Decision**

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The Commissioner finds that the Scottish Ministers partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Animal Concern.

The Commissioner finds that the Ministers were entitled to withhold the personal data of junior employees and third parties under regulation 11(2) of the EIRs. The Ministers were also entitled to withhold some information under regulation 10(4)(e) of the EIRs. However, the Commissioner found that the exception in regulation 10(4)(e) had been wrongly applied to some information, and that in failing to disclose this information, the Ministers breached regulation 5(1) of the EIRs.

The Commissioner therefore requires the Ministers to disclose the information which she has found not to be excepted from disclosure, by 3 October 2015.

## **Appeal**

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Should either Animal Concern or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

## **Enforcement**

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If the Scottish Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Ministers as if they had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**19 August 2015**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

..

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

#### 2 Effect of exemptions

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

...

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

#### 39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...

# The Environmental Information (Scotland) Regulations 2004

## 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

“the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

## 10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

## **11 Personal data**

..

- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.

- (3) The first condition is-

- (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998[6] that making the information available otherwise than under these Regulations would contravene-
  - (i) any of the data protection principles; or

...

- (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

# 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.

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