



Scottish Information
Commissioner

**Decision 007/2008 Mr Mike Lloyd and the Scottish
Court Service**

Action taken in relation to two websites

**Applicant: Mr Mike Lloyd
Authority: Scottish Court Service
Case No: 200700061
Decision Date: 16 January 2008**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 007/2008 Mr Mike Lloyd and the Scottish Court Service

Request for information regarding action taken in respect of two websites – withheld on the basis of sections 30(b), 38(1)(b) and 39(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) – Commissioner found the SCS was entitled to refuse to disclose some of the information

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1) (Effect of exemptions); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 38(1)(b) and (2) (Personal information) and section 39(1) (Health, safety and the environment)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of “personal data”) and paragraph 1 of Part 1 of Schedule 1 (The data protection principles)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Information Commissioner’s Office: Data Protection Technical Guidance: Freedom of Information: access to information about public authorities’ employees (October 2005)

Facts

Mr Lloyd requested information regarding action taken in respect of two websites from the Scottish Court Service (the SCS). The SCS relied upon sections 30(b)(i) and (ii), 38(1)(b) and 39(1) of FOISA to withhold the information. The SCS upheld this decision on review. Mr Lloyd remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the details of the individuals who had sent and received the emails were exempt from disclosure. He also found that the contents of one of the emails was exempt, but ordered the SCS to disclose the contents of the remaining emails insofar as they did not identify the individuals involved.



Background

1. On 10 April 2006, Mr Lloyd wrote to the SCS requesting the following information:
 - a. The name of the individual, or individuals, who contacted the domain registrar for [named website]
 - b. The name of the individual, or individuals, who contacted the domain registrar for [named website]
 - c. The name of the individual, or individuals, who contacted Internet Service Providers for [named website]
 - d. The name of the individual, or individuals, who contacted Internet Service Providers for [named website]
 - e. Copies of all emails, correspondence, internal email and internal correspondence relating to 1,2, 3 & 4 above
2. The SCS responded on 25 May 2006 withholding the information under sections 30(b), 38 and 39(1) of FOISA.
3. Mr Lloyd wrote to the SCS on 4 June 2006 requesting a review of its decision to withhold the information. The SCS upheld its decision upon review and wrote to Mr Lloyd to notify him of this on 5 July 2006.
4. On 4 January 2007, Mr Lloyd wrote to my Office, stating that he was dissatisfied with the outcome of the SCS review and applying to me for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr Lloyd had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

6. The SCS is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were contacted on 16 February 2006 in terms of section 49(3)(a) of FOISA asking for their comments on the application and for a copy of the information which had been withheld from Mr Lloyd.



7. The Ministers responded on 12 March 2007 with the information requested (which comprised two emails) and the case was then allocated to an investigating officer.
8. On 2 May 2007, the Ministers wrote to my Office providing further general submissions on the application of the exemptions contained in section 30(b) of FOISA. They indicated that these should be taken into consideration in relation to any ongoing cases where either of the exemptions in section 30(b)(i) or (ii) had been raised, and so I have had regard to these submissions in reaching my decision below.

The Commissioner's Analysis and Findings

9. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by Mr Lloyd and the Ministers and I am satisfied that no matter of relevance has been overlooked.

Section 38(1)(b) (Personal information)

10. I will first of all consider the use of the exemption in section 38(1)(b) of FOISA, given that the first four of Mr Lloyd's information requests are for names.
11. The SCS refused to disclose information which could identify the particular officials to Mr Lloyd under the exemption in section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or (b)), i.e. on the basis that the information comprised personal data as defined in the Data Protection Act 1998 (the DPA), the disclosure of which would breach the first data protection principle.
12. In order to decide whether the exemption applies here, I must therefore consider whether the information which identifies particular officials constitutes their personal data and, if the answer is yes, whether the disclosure of this information would breach the first data protection principle. In summary, the first data protection principle states that personal data shall be processed fairly and lawfully (the full definition is contained in the Appendix).
13. The identifying information here includes the names, job titles and contact details of the officials in question. I am satisfied that this information is personal data as it clearly relates to individuals who can be identified from that information or from that information and other information held by the SCS.
14. I must now consider whether the disclosure of the personal data would breach the first data protection principle.



15. The (UK) Information Commissioner, who is responsible for the enforcement of the DPA throughout the UK has issued guidance on this issue (Freedom of Information: access to information about public authorities' employees). The guidance suggests a number of factors which should be considered by public authorities when deciding whether to release information identifying an employee, such as what information employees expect to be disclosed and whether disclosure would be damaging to the employee.
16. In this case, the Ministers have argued that the officials in question would have no expectation that information about their identity would be made public. The Ministers have also argued (particularly in relation to their arguments on the section 39(1) exemption, but the arguments are also relevant in relation to the exemption in section 38(1)(b)), that disclosure of the information would lead to the harassment of the staff (the Ministers have commented that there is no suggestion that Mr Lloyd would be likely to intimidate etc. an individual, but that the nature of the material published in connection with his request gives the SCS a reasonable expectation that disclosure of the information would lead to his/her defamation).
17. I have had the advantage of viewing a number of pages from the websites in question and, having taken the contents of these into account (including the allegations against certain named SCS staff), I am satisfied that the disclosure of the information which would identify the officials is likely to lead to their name(s) appearing on such website in future and that, as a result, the disclosure of the information would be unfair.
18. Given that I have found that disclosure of the name(s) would be unfair, I am satisfied that the disclosure of the information which identifies individual officials would breach the first data protection principle. (As I have found the disclosure of the information to be unfair, I am not required to go on to consider whether disclosure would be lawful or whether there are any conditions in schedule 2 and/or 3 of the DPA which would permit the disclosure of the information).
19. Accordingly, I find that the following information is exempt under section 38(1)(b) of FOISA:
 - The names of the senders and the recipients of all four emails
 - The contact details and job titles appearing at the end of the emails dated 13 April 2005 (timed at 16:38) and 8 June 2005 (timed at 16:41)
 - The final six words of the third sentence of the email dated 8 June 2005 (timed at 18:08).



Section 30(b)(i) and (ii) (free and frank provision of advice or exchange of views for the purposes of deliberation)

20. The SCS also relied on the exemptions in section 30(b) of FOISA to withhold the information from Mr Lloyd. Section 30(b) of FOISA states that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)).
21. The public interest test applies to the exemptions in section 30. This means that even if I find that the information is exempt in terms of section 30(b)(i) and/or 30(b)(ii), I must order release of the information unless, in all the circumstances of the case, I find that the public interest in maintaining one or both of the exemptions outweighs the public interest in disclosing the information withheld.
22. Firstly, however, I must consider whether either of the exemptions claimed is capable of applying to the information in question. Given that I have already found some of the information contained within the emails to be exempt under section 38(1)(b) (see paragraph 19), I do not intend to consider the application of the section 30(b) exemptions to that information.
23. As will be clear from previous decisions, authorities should be able to demonstrate a real likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question has to take the form of inhibiting substantially the provision of advice and/or exchange of views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word “substantial” is important here: it suggests that the degree to which the person is likely to be inhibited in expressing themselves is of demonstrable significance.
24. In considering the application of any exemption, I must always look at the actual information withheld, not only the category of information to which it belongs or the type of situation in which the request has arisen. In other words, I must consider whether the disclosure of that information would, or would be likely to, in all the surrounding circumstances, have the inhibiting effects described in section 30(b)(i) and/or 30(b)(ii) of FOISA. It cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future.
25. The documents withheld by the SCS are emails exchanges between staff regarding the two websites that Mr Lloyd identified in his request for information.



26. The Ministers argued in their letter of 12 March 2007 that it is important that in the course of fulfilling their duties officials do not feel constrained from the free and frank provision of advice and the open discussion of all relevant issues. The Ministers also commented that any potential constraint on such exchanges such as would be felt to exist if advice was likely to be made public, would in their opinion substantially inhibit the willingness or ability of officials to freely and frankly provide advice.
27. With regards to the process of deliberation, the Ministers stated that staff require a secure environment where it is possible to engage in seeking and providing views as part of the deliberative process in circumstances such as these.
28. The terms “inhibit” and “substantially” are not defined in FOISA. However, I take the view that in this context “inhibit” means to restrain, decrease or suppress the freedom with which opinions or options are expressed. The Ministers’ own guidance to its staff on the application of the exemptions in section 30(b) of FOISA points out that the word “inhibit” suggests a suppressive effect, so that communication would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive. Whilst the term “substantial” is defined here as the degree to which the person is likely to be inhibited in expressing themselves is of demonstrable significance.
29. Where information is withheld under section 30(b)(i) of FOISA and that information itself contains the free and frank provision of advice, this is likely to constitute stronger grounds in support of the view that the disclosure of such information would, or would likely to, inhibit the free and frank provision of advice in future. Conversely, if the information does not constitute free and frank advice, then the case for withholding is likely to be weaker. The same reasoning applies for section 30(b)(ii) of FOISA.
30. In my view, the standard to be met in applying the tests in each part of section 30(b) is high. When considering the application of these exemptions, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. For example, this would involve considering:
 - a) the subject matter of the advice or opinion;
 - b) the content of the advice and opinion itself;
 - c) the manner in which the advice or opinion is expressed, and



- d) whether the timing of the release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision had been taken).
31. Having reviewed the emails withheld by the Ministers and having taking into account the sensitivity of the emails and the candid manner in which advice was sought and given, I am satisfied that disclosure of the email dated 13 April 2005 (timed at 16:38) would, or would be likely to, inhibit substantially both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
32. However, I have come to a separate view in relation to the three remaining emails. I cannot accept that the factual contents of the remaining emails is so sensitive that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, either in the future or at the time Mr Lloyd made his information request (which was almost a year after the latest of the emails). The information in two of the emails also appears to have been used to reply to a request made by an MSP on behalf of a constituent.
33. I am therefore not satisfied that the disclosure of the contents of the emails dated 13 April 2005 (timed at 17:26), 8 June 2005 (timed at 16:41) and 8 June 2005 (timed at 18:08) (excluding the last six words of the third sentence which I have already found to be exempt under section 38(1)(b)) is exempt in terms of section 30(b)(i) and (ii) of FOISA.
34. As noted above, the exemptions in section 30(b) are subject to the public interest test contained in section 2(1)(b) of FOISA. As I have determined that the email dated 13 April 2005 (timed at 16:38) is exempt from disclosure under both of the section 30(b) exemptions, I am now required to go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Application of the public interest test in respect of section 30(b) of FOISA

35. The Ministers commented in their letter of 12 March 2007 that there is an overriding public interest in high quality decision-making developed from the provision of high quality advice, this being especially important where contentious issues are concerned. The Ministers also stated that the integrity of the process whereby advice can be freely and frankly given would be lost if there was the possibility that individuals providing the advice, in a non-public arena, would become known to the public and the possibility could therefore clearly have a detrimental effect on decision making.



36. In respect of public interest factors in favour of disclosure, Mr Lloyd has argued that the action taken by the SCS has contravened his human rights and that taxes have been used to strangle his democratic right to freedom of expression. I clearly agree that it is in the public interest for individuals to have access to information held by Scottish public authorities. However, I also need to balance this against the public interest arguments in favour of maintaining the exemptions.
37. In all the circumstances, I am satisfied that the public interest in allowing the SCS to receive advice and clarify such matters in a process of free and frank exchanges, without fear of subsequent disclosure, outweighs the public interest in disclosure in this case.
38. I am satisfied, therefore, that the Ministers acted in accordance with FOISA in withholding the email dated 13 April 2005 (timed at 16:38) from Mr Lloyd.

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

39. As noted above, the SCS also argued that the disclosure of the emails would, or would be likely to, endanger the physical or mental health or the safety of the individual staff. Given that I have already found some of the information to be exempt under sections 38(1)(b) or 30(b) of FOISA, I intend to consider this exemption only in relation to the remaining information, i.e. the contents of the emails dated 13 April 2005 (timed at 17:26), 8 June 2005 (timed at 16:41) and 8 June 2005 (timed at 18:08) (with the exception of the last six words in the third sentence of that email).
40. The arguments put forward by the SCS (some of which are set out above in paragraph 16) are, naturally, concerned with the effect which the disclosure of the emails would have on the individuals in question. They argue, for example, that the SCS is by definition involved in work of an extremely sensitive nature and that employees should not be placed in a position of increased stress which potential release of information containing individuals' names and contact details could create.
41. The SCS also comment that the SCS is corporately responsible for handling complaints, and is corporately responsible for the decision of which Mr Lloyd complains. They therefore consider that it is inappropriate to disclose information which attributes actions to specific officers in the SCS when it is the SCS which remains corporately responsible for those actions.



42. I am sympathetic to these arguments insofar as they relate to the identification of individual officials (and, indeed, have accepted a number of the arguments put to me when considering the applicability of the exemption in section 38(1)(b)). However, given the limited information which I am considering under this exemption (which does not contain information which identified officials), I do not accept that the disclosure of this information would, or would be likely to have, the effect set out in section 39(1).
43. The exemption contained in section 39(1) is also subject to the public interest test contained in section 2(1)(b) of FOISA. However, given that I have not upheld the use of the exemption, I am not required to go on to consider the public interest.

Decision

I find that the Scottish Court Service (the SCS) partially acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the information from Mr Lloyd.

I find that in applying the exemptions in section 30(b)(i), (b)(ii) and 39(1) to the entirety of the emails, the SCS failed to comply with Part 1 of FOISA, in particular section 1(1).

I have, however, upheld the use of the exemption in section 38(1)(b) to the information which would identify particular individual officials.

I require the SCS to disclose the information which I do not consider to be exempt within 45 days of the date of intimation of this decision notice.



Appeal

Should either Mr Lloyd or the SCS 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 of the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
16 January 2008



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.

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.

(...)

30 Prejudice to effective conduct of public affairs

- Information is exempt information if its disclosure under this Act-
- (...)
- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation (...)

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



- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
- (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.

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

- (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 1 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.