



Scottish Information
Commissioner

**Decision 015/2008 Mr Mark Whittet and the
Scottish Ministers**

*Request for information concerning the Scottish
Safety Camera Programme*

**Applicant: Mr Mark Whittet
Authority: The Scottish Ministers
Case No: 200601461
Decision Date: 29 January 2008**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 015/2008 Mr Mark Whittet and the Scottish Ministers

Request for names and contact addresses of attendees at Advisory Board, meetings and copies of communications strategies – information withheld – sections 30(c), 38(1)(b) and 39(1) – information not held – section 17.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 16(1), (2) and (6) (Refusal of request); 17(1) (Notice that information is not held); 19 (Content of certain notices); 25(1) (Information otherwise accessible); 30(c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i) and (b) (Personal information) and 39(1) (Health, safety and the environment).

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretive provisions) (definition of personal data); Part 1 of schedule 1 (The data protection principles) (the first data protection principle) and schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6(1)).

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

Facts

Mr Mark Whittet requested the identities and contact addresses of individuals attending meetings of the Scottish Safety Camera Programme Advisory Board (the Advisory Board) and copies of the communications strategies of individual safety camera partnerships from the Scottish Ministers (the Ministers). The Ministers responded by advising Mr Whittet that they did not hold some of the information he was seeking and that the remainder was available elsewhere. Mr Whittet was not satisfied with this response and asked the Ministers to review their decision. The Ministers carried out a review and, as a result, notified Mr Whittet that the information about the individuals attending the Advisory Board was considered exempt from disclosure and that the communications strategies were not held. Mr Whittet 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 Whittet's request for information in accordance with Part 1 of



FOISA. He required the Ministers to release the names and contact addresses of the members of the Advisory Board listed on minutes of its meetings, up to the date of Mr Whittet's request. The Commissioner accepted that the communications strategies were not held and did not require the Ministers to take any action in relation to that part of the request. The Commissioner found that the Ministers had breached certain technical requirements of Part 1 of FOISA but he did not require the Ministers to take any action in relation to these breaches.

Background

1. The Scottish Safety Camera Programme ("the Programme") is part of the Scottish Ministers' Road Safety Strategy and is delivered by area-based partnerships. The Programme sits within the Justice Department of the Scottish Government. The partnerships consist of local authorities, the Police, the trunk roads network, district courts and other agencies with an interest in reducing road casualties (including the NHS, Fire and Rescue Service and the Ambulance Service). There are currently eight partnerships in Scotland.
2. At national level, there are two areas of governance – the Programme Office and the Advisory Board. The Programme Office delivers policy development and management of the Programme at national level by supporting the partnerships, monitoring finance and performance, and co-ordinates research and national communication. It reports to the Advisory Board, which meets quarterly. The Advisory Board advises the Ministers on operational issues for the Programme and advises on the activities of the Programme Office.
3. Membership of the Advisory Board is drawn from the Ministers (including the Crown Office), the Association of Chief Police Officers in Scotland, the Society of Chiefs of Transport Scotland, District Courts Association, Convention of Scottish Local Authorities, the Scottish Road Safety Campaign, the Royal Society for the Prevention of Accidents and a Scottish partnership. Another place is filled on a rotational basis by a representative from motoring organisations, i.e. the AA Motoring Trust, British Motorcyclists Federation and the RAC Foundation. Observers also attend from the Scottish Programme Office, HM Treasury, Department for Transport and the Driving Standards Agency.
4. On 14 April 2006, Mr Whittet emailed the Director of the Programme requesting the following information:



- “the names and contact addresses of all partners, members, officials, observers, participants – however appointed, seconded, elected – but not necessarily restricted to this who are members and/or who attend the Scottish Speed -Tax Camera Programme/aka Scottish Safety Camera Programme”; and
 - “the source of funding / income paid to officials of said body in detail, in absolutes and in percentages”.
5. On 19 April 2006, the Programme wrote to Mr Whittet in response to his request for information. The response referred to earlier correspondence which had asked Mr Whittet to clarify his request, and stated that because the request was unclear the Programme could not respond other than in general terms. The response also referred Mr Whittet to the Programme’s website.
 6. On 26 June 2006, Mr Whittet wrote to the Programme requesting a review of its decision and referred to his previous letter “requiring disclosure of the names of representatives from the AA, RAC and British Motorcycle Federation who are members of the Scottish Safety Camera Advisory Board / Scottish Speed -Tax Camera Advisory Board”.
 7. The email requesting a review also included a new request for information. Mr Whittet’s email quoted text from the Programme’s Handbook of Rules and Guidance, which referred to partnerships’ communication strategies, and requested that the Ministers “disclose the above-named strategy” (sic). I understand this request to have been for the (multiple) partnership communication strategies referred to in the text quoted.
 8. On 11 July 2006, the Programme wrote to Mr Whittet and said that it was treating his email of 26 June 2006 in its entirety as a new request for information since his email of 14 April 2006 made no specific reference to the Automobile Association (AA), Royal Automobile Club (RAC) or British Motorcycle Federation (BMF) (which his email of 26 June 2006 did). The Programme explained that the AA, RAC and BMF attend meetings of the Advisory Board on a rotational basis and that membership of the Advisory Board is by organisation and not individual. The Programme initially said that Mr Whittet should contact the respective organisations to ask if they were willing to provide the name of the person who represented them at the meeting. It also explained that it did not hold copies of the individual communications strategies for the various partnerships and suggested that Mr Whittet contact the individual partnerships directly for the information.



9. On 5 August 2006, Mr Whittet wrote again to the Programme asking for a review to be carried out and clarifying the scope of his request. In his letter of 5 August, Mr Whittet stated that he was requesting “details of the members of the Scottish Advisory Board of the National / Scottish (Speed Tax) Camera Partnership”. He also requested a review of the “refusal to supply a copy of your national speed tax camera partnership’s “communications strategy” and all other local speed tax camera quangoes’ “communications strategies””.
10. Given the formulation of the request of 26 June, I consider the request of 5 August for a communications strategy for a “national speed tax partnership” to be a new request for information. However, I do consider this email to contain a valid request for review with respect to the previous request for the communications strategies for the various partnerships.
11. On 7 September 2006, the Justice Department of the Scottish Ministers (“the Ministers”) notified Mr Whittet of the results of its review. The review found that the nature of Mr Whittet’s request was sufficiently ambiguous to justify referral to information in the public domain about membership of the Programme. The review also concluded that the Programme was justified in its response relating to the request for communications strategies as it did not hold copies of the local partnerships’ communication strategies.
12. On 10 September 2006, Mr Whittet wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to me for a decision in terms of section 47(1) of FOISA.
13. The application was validated by establishing that Mr Whittet 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

The scope of the request

14. Given the lengthy and overlapping correspondence between Mr Whittet and the Programme, and the various formulations of his requests, I will first make clear exactly what fell to be investigated in this case.
15. In reviewing the correspondence submitted by Mr Whittet, I have identified five separate requests for information:



- a) The names and contact addresses of all partners etc who attend the Safety Camera Programme
 - b) The sources of funding and income paid to officials of the above.
 - c) The names of the representatives from the AA, RAC and BMF who attend the Advisory Board
 - d) The individual partnerships' communications strategies
 - e) The national communications strategy.
16. Given the long history of correspondence between the parties in this case, and the confusion that has arisen regarding the exact nature of the requests, I shall treat Mr Whittet's email of 14 April 2006 as the first request (containing requests a) and b)) and his letter of 26 June 2006 as the second request (containing requests c) and d)).
17. Mr Whittet has at no stage requested a review of the Ministers' response in relation to request b). Therefore, I shall not consider this request within this decision notice.
18. Although request c) appears to narrow the scope of the original request, I am satisfied that the information that Mr Whittet has been seeking is for the name and contact addresses of all members of or participants at the Advisory Board rather than the smaller subset referred to in request c).
19. I am satisfied that Mr Whittet's letter of 26 June 2006 made reference only to the partnerships' communications strategies. Although his request for review dated 5 August 2006 alluded to a refusal to provide the national programme's communications strategy (request e)), I do not consider that this information had previously been requested and it was therefore outwith the scope of any review. I shall not therefore consider this request within this decision notice.
20. This decision notice shall therefore consider the requests made by Mr Whittet at points a) and d) in paragraph 15 above.

Submissions from the Ministers

21. On 22 September 2006, the Ministers' FOI Unit was notified in writing that an application had been received from Mr Whittet and invited to comment on the application in terms of section 49(3)(a) of FOISA. The Ministers were asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded with the information requested and the case was then allocated to an investigating officer.



22. The Ministers acknowledged that Mr Whittet's request was not dealt with in accordance with FOISA. He was not informed of his right to review, his right to apply to me for a decision, whether the information he had requested was held, and the exemption that applied to withheld material. The Ministers explained that steps had been taken to ensure that future requests would be dealt with in accordance with the technical requirements of FOISA.
23. The Ministers initially explained that there had been a lengthy history of correspondence between Mr Whittet and a range of individuals within the Scottish Government, the Department for Transport and the Home Office as well as with Ministers from the Scottish and UK governments concerning the operation of the Programme. The Ministers stated that this correspondence had commenced in late 2005.
24. The Ministers stated that Mr Whittet's requests for information to them were not clear and that he consistently used terms such as the "Speed-Tax Camera Partnership" when he knew no such organisation existed. The Ministers stated that they believed they would have had grounds for deeming Mr Whittet's correspondence as vexatious in terms of section 14 of FOISA in that it was not a genuine attempt to access information, but instead seemed to be intended to harass members of staff in the Programme Office. However, it was the Ministers' opinion that the Programme Office, in line with the spirit of FOISA, attempted to clarify what information Mr Whittet was seeking and to direct him to sources of that information.
25. The Ministers considered that section 25 of FOISA (Information otherwise accessible) applied to the information concerning membership of the Programme since details of bodies involved in the Programme are listed on its website (www.scottishsafetycameras.com). The Ministers also stated that, although Mr Whittet had requested the names of individual attendees at meetings of the Advisory Board, it was entirely a matter for the member organisations to decide who attended on their behalf and, accordingly, representation could change from meeting to meeting. Accordingly, the Ministers' position was that only the member organisations would be in a position to answer Mr Whittet's requests fully and accurately.
26. The Ministers explained that the minutes of meetings held by the Programme Office (which are not routinely published) would give some indication of the individual representatives, but this information was neither comprehensive nor up to date. In the opinion of the Ministers, this would not answer Mr Whittet's request.



27. The Ministers considered that the limited information held was exempt from disclosure in terms of section 30(c) of FOISA (Prejudice to effective conduct of public affairs). The Ministers stated that the Programme is a controversial area of work which, in their opinion, has made a significant contribution to road safety in Scotland. The Ministers believed that the work of the Programme could be undermined if attendees became concerned that their identities were to be made public. The Ministers stated that staff working on camera safety schemes had been subject to intimidating behaviour in the past, and there would be a danger to the efficient performance of their duties if there was a concern that their identities were made known.
28. The Ministers also submitted that the information was exempt from disclosure in terms of section 38(1)(b) of FOISA (Personal information) in that the information constituted personal data and disclosure would breach the first data protection principle (fair and lawful processing). The Ministers considered that representatives had no expectation that their names would be made public and disclosure would have no purpose beyond identifying the individuals who were acting on behalf of the member organisation. The Ministers stated that they were aware of previous instances where members of regional safety camera partnerships had been subject to intimidation.
29. The Ministers also argued that that the information was exempt under section 39(1) of FOISA (Health, safety and the environment) since disclosure would be likely to endanger the physical or mental health of individual representatives. The Ministers provided my Office with their reasoning for the application of this exemption which I have taken into account in reaching my decision.
30. The exemptions in sections 30(c) and 39(1) are subject to the public interest test required by section 2(1)(b) of FOISA. This means that even if the information is exempt, it must still be released unless the public interest in maintaining the exemption outweighs that in disclosure of the information. Here, the Ministers were of the view that any public interest in releasing the names of individual representatives was outweighed by the public interest in maintaining the exemptions. This was because the Ministers considered there was a greater public interest in ensuring that the Programme and related organisations should be able to perform their duties effectively, without intimidation or harassment and that the physical and mental health of representatives should not be put at risk.
31. On 19 December 2006, the investigating officer wrote to Mr Whittet advising him that submissions had been received by the Ministers and that the exemptions described at paragraphs 27 to 29 above were being cited as reasons for withholding the information that he had requested, insofar as it was held by the Ministers.



32. The Ministers contacted my Office again on 12 February 2007 with a further submission. This drew my attention to media reports that a number of explosive devices had recently been received by organisations with an involvement in the enforcement of roads legislation. The Ministers advised me that this had caused some concern in Safety Camera Offices throughout the country, with warnings being issued by both the Department of Transport and also by one of the companies that had received such a device. The Ministers went on to state that the devices in question had all been delivered to organisations rather than individuals within those organisations and they considered that the policy of UK Government departments in not releasing the names of individual members of staff into the public domain may have been part of the reason for this i.e. the fact that no individuals had been targeted.
33. The Ministers stated that this situation added greatly to their concerns about the possibility of the names and contact details of individuals involved in the Programme being made available to members of the public, particularly to individuals who have a serious issue with the enforcement of roads legislation.
34. The Ministers also submitted that, in relation to the request for the various partnerships' communications strategies, the letter to Mr Whittet dated 11 July 2007 was in effect a notice under section 17 of FOISA (Notice that information is not held).

The Commissioner's Analysis and Findings

35. In coming to a decision on this matter, I have considered all of the information and the submissions that have been made to me both by Mr Whittet and the Ministers and I am satisfied that no matter of relevance has been overlooked.
36. In their responses to Mr Whittet's requests for information, the Ministers have maintained that the membership of the Programme consists of organisations as opposed to individuals. In their submissions to me, the Ministers have reiterated this point and explained that this information is available on the Programme website.
37. I have noted, however, that Mr Whittet's original request specifically requested the names and contact addresses of "all partners, officials, observers, participants ... who are members and/or who attend the ... Scottish Safety Camera Programme". Mr Whittet's subsequent request for review specifically requested disclosure of "the names of representatives ... who are members of the Scottish Safety Camera Advisory Board ...".



38. The Ministers have submitted that copies of minutes of Advisory Board meetings are held, and that these do detail the names of those present. However, they did not believe that the information contained therein would properly answer Mr Whittet's request. This was because whilst some organisations were represented by the same member at each meeting, others designated different attendees at different meetings.
39. Having considered all of the correspondence submitted by Mr Whittet, I have concluded that the intention of his request was to ascertain the names and contact addresses of individual attendees at these meetings up to the date of his request as opposed to the organisations whose representatives attended on their (the organisations') behalf. The names of the individuals listed in the minutes of the Advisory Board meetings fall within the scope of this request. This decision shall therefore deal with his request on that basis.
40. The Ministers have submitted that the exemptions contained in sections 30(c), 38(1)(b) and 39(1) of FOISA apply to the information requested by Mr Whittet concerning the identities and contact addresses (which would be the contact addresses for the bodies represented) of individual attendees of the Advisory Board. I shall therefore go on to consider the application of these exemptions to that particular request.

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

41. Section 30(c) of FOISA states that information is exempt if its disclosure would (otherwise than provided for under section 30(a) and (b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
42. Section 30(c) is a qualified exemption and, if it is found to apply to information, is subject to the public interest test required by section 2(1)(b) of FOISA.
43. In their submissions, the Ministers have argued that the release of the information would be likely to prejudice substantially the effective conduct of public affairs. As indicated at paragraph 27 above, the Ministers have pointed out the controversial nature of the Programme. The Ministers have stated that a wide variety of organisations are represented at the Advisory Board. It is the Ministers' opinion that the work of the Board, and consequently that of the Programme, could be undermined if attendees became concerned that their identities were to be made public. The Ministers submitted that staff working on such schemes have, in the past, been subject to intimidating behaviour. The Ministers felt that there would be a danger to the efficient performance of their duties if representatives were to become concerned about their identities being made public.



44. In relation to the public interest test required by section 2(1)(b) of FOISA, the Ministers considered that the public interest in disclosing the names of the individual representatives was outweighed by that in ensuring that the Programme and related organisations were able to perform their duties effectively and without intimidation or harassment.
45. There is no definition of “substantial prejudice” in FOISA, but my view is that in order to claim this exemption, the damage caused by disclosing information would have to be very real or very likely, not hypothetical. The harm caused must be significant, not marginal and it would have to occur in the very near future, not in some distant time. If a public authority is applying this exemption, I would expect it to be able to show what kind of harm would result and why this would be the expected outcome if the information in question was released.
46. In order to uphold the exemption in section 30(c), I would expect a public authority to be able to demonstrate that the disclosure of the information would have a direct and harmful effect on the conduct of public affairs and be able to demonstrate that there is a clear relationship between the information in question and the harmful consequences anticipated from its disclosure. I would be less likely to uphold the exemption where the authority is relying on hypothetical factors to explain why harm would occur.
47. I have noted the Ministers’ comments regarding the controversial nature of the Programme’s work. Whilst I accept that the information relates to a subject matter that is clearly sensitive or controversial in nature, I would not conclude that the information itself is automatically sensitive as a consequence.
48. Additionally, I have not concluded that the Ministers have been able to demonstrate that there would be a direct and harmful effect on the conduct of public affairs if the information were to be disclosed. The submissions by the Ministers are essentially hypothetical in nature and whilst indicating that potential harm may occur at some point in the future, I am not persuaded that real or likely damage has been established.
49. Accordingly, I do not uphold the application of the exemption in section 30(c) to the withheld information. As I have not upheld the application of the exemption, there is no requirement for me to consider the public interest test in relation to this exemption.

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

50. Section 39(1) of FOISA states that information is exempt information if its disclosure under the Act would, or would be likely to endanger the physical or mental health or the safety of an individual. This is a qualified exemption and, if applied, is subject to the public interest test required by section 2(1) of FOISA.



51. In my briefing on this exemption (which can be found at: http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39_1_39.asp), I noted that section 39(1) does not contain the usual harm test; instead of the “substantial prejudice” test, the section talks about the endangerment of health or safety. The harm test in section 39(1) has therefore been set at a lower level, however there must still be an apprehension of danger before the exemption can be relied upon.
52. I would take the view that the phrase “would, or would be likely to” endanger means that there should be evidence of a significant risk to the physical or mental health or safety of an individual.
53. In their submissions, the Ministers have stated their concerns that some individuals involved with the Programme have already been subjected to unwanted communications that contain derogatory or provocative comments about the area in which they work. The Ministers went on to comment that some people can find this behaviour quite disturbing or distressing. The Ministers concluded that it seemed reasonable to suppose that if other names were to be made public, they too would become the focus of similar, or perhaps worse behaviour.
54. I note the Ministers’ comments that some people can find such behaviour disturbing or distressing. I do not however consider that a danger to physical or mental health or the safety of an individual equates to a perceived risk of distress. The Ministers’ submissions have not persuaded me that disclosure of the information would, or would be likely to endanger the physical or mental health or safety of an individual. In particular, I am unable to accept their supposition that the individuals whose names have been requested would become the focus of behaviour similar to or worse than that described by the Ministers.
55. The Ministers also raised more serious concerns following the receipt of explosive devices by organisations with an involvement in the enforcement of roads legislation. The Ministers advised me that this had caused some concern in Safety Camera Offices throughout the country, with warnings being issued by both the Department of Transport and also by one of the companies that had received such a device.



56. I have considered these comments seriously. The Ministers have highlighted a real threat to the health and safety of those who work in a controversial area. However this threat exists quite independently of the disclosure of the information under consideration in this case. It has not been suggested to me that the release of this information to Mr Whittet will directly result in or increase the prospect of similar incidents. I am not otherwise persuaded that because certain incidents have occurred elsewhere, that the Ministers have demonstrated that the disclosure of the particular information under consideration would be likely (at the time of Mr Whittet's request) to endanger the physical or mental health or safety of any person.
57. Accordingly, I do not uphold the application of section 39(1) in relation to the members of the Advisory Board.
58. Although my decision is made on the basis of the circumstances at the time of Mr Whittet's request and request for review, I note that a Scottish Government press release in August 2007 which provides the biographies of the Expert Group on Road Safety set up to help inform a new strategy for road safety in Scotland, clearly identifies one member of the Expert Group as being a member of the Advisory Board. This press release was issued after the date on which the Ministers made submissions to my Office that the release of such information would be likely to endanger the physical or mental health of individual representatives on the Advisory Board.
59. I am also aware that the names of staff of individual safety camera partnerships are routinely released into the public domain through newsletters, press releases and public documents.
60. As I have not upheld the exemption in section 39(1), there is no need for me to consider the application of the public interest test in relation to this exemption.

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

61. The Ministers have submitted that the information in question is personal data and that disclosure would contravene the first data protection principle on fair and lawful processing of personal data.
62. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or 38(2)(b)), information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in schedule 1 to the DPA.



63. In considering this exemption, I am required to consider two separate matters: firstly whether the information under consideration is personal data and, if so, whether the release of the information would indeed breach any of the data protection principles.

Is the information under consideration personal data?

64. "Personal data" is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (see the full definition in Appendix 1).
65. The information in question (i.e. the names and contact addresses of individuals) is clearly information from which these individuals can be identified, and which relates to them (by confirming their place of work, and that they were present at certain locations and meetings). I am therefore satisfied that the names and contact addresses of attendees at meetings of the Advisory Board constitute personal data under the terms of the DPA.

Would release of the information breach the first data protection principle?

66. I will now consider whether disclosure of this personal data would breach the first data protection principle.
67. This states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (of the DPA) is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
68. I have considered the definition of "sensitive personal data" in section 2 of the DPA and do not consider that the information sought by Mr Whittet falls into this category.
69. The Scottish Ministers have not made any submissions which suggest that disclosure of the information requested by Mr Whittet would be unlawful, other than by contravening the first data protection principle. In what follows below, I will focus in turn on the questions of whether disclosure of this information would be fair, and whether any of the conditions set out in Schedule 2 of the DPA can be met in this case.



Is it fair to release the names and contact addresses of attendees at meetings of the Advisory Board?

70. According to guidance from the Information Commissioner, who is responsible for enforcing and regulating the DPA throughout the UK (“Freedom of Information Act Awareness Guidance No 1”), which can be viewed at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detail_ed_specialist_guides/awareness_guidance%201_%20personal_information_v2.pdf), the assessment of fairness includes looking at whether the disclosure would cause unnecessary or unjustified distress or damage to the person whom the information is about, whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private. In addition, this guidance also states that:

“Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.”

71. The guidance goes on to indicate, however, “that these are not hard and fast rules”. It states that: “while names of officials in public facing roles would normally be provided on request, it may not be fair processing to provide the name of a member of staff in a junior role. There may also be good reason not to disclose the names of those in a public facing role if there is good reason to think that disclosure of the information could put someone at risk. It may be unfair processing to disclose the full names and work locations of those who carry out a role involving a risk of harassment or abuse. It may also be relevant to think about the seniority of staff generally: the more senior a person is, the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair”.
72. In their submissions to me, the Ministers have stated that representatives attending meetings of the Advisory Board would have no expectation that their names would be made public and that disclosure would achieve no obvious purpose beyond identifying individuals who are ultimately acting on behalf of member organisations. Their submissions, as noted above, also drew my attention to the perceived threat of harassment, intimidation or even physical harm as a result of their involvement with a controversial policy area, and an associated threat to the physical and mental health of the individuals concerned.



73. I have considered all of the Ministers' submissions, but I have concluded that disclosure in this case would be fair to the individuals concerned. In reaching this conclusion, I have noted that the information disclosed would relate only to their professional lives, revealing their involvement in the development and implementation of significant public policy.
74. The Ministers' submissions provided no evidence to suggest that these individuals had been given assurances that their names and contact addresses would not be disclosed. In these circumstances, and given that these people were working for and with the public sector, I find it difficult to accept that they would have no expectation that this information would be disclosed.
75. FOISA received Royal Assent in May 2002 and from that date onwards, public authorities and those who do work for or with those authorities were on notice that they might in future be identified in connection with the work they carry out in a professional capacity. In this case, the advice, specialist knowledge and experience of the attendees at the Advisory Board have been garnered by the Ministers in order to assist with the formulation and ongoing modification of road safety policy. In these circumstances, I do not accept that (and, indeed, no evidence has been put to me which suggests that) the individuals involved would never have expected that they might be identified in connection with their roles as attendees at the Advisory Board in circumstances where that information could be publicly accessible.
76. Individuals who are employed at a senior level and who play an active role in shaping government policy, whether or not they are employed directly by the government, are acting in a professional capacity. Disclosing information about those individuals would reveal information only about activities that they have carried out in their professional capacities.
77. I have also noted the Ministers' concerns for the health and safety of individuals but, in line with my findings on the exemption in section 39(2) of FOISA, I am not persuaded that this disclosure would be likely to lead to increase the level of risk the individuals concerned, through their association with the work of the Programme.

Can any of the conditions in Schedule 2 of the DPA be met?

78. Having concluded that disclosure in this case would be fair, I have also considered whether any of the conditions set out in Schedule 2 of the DPA might be met in this case.



79. It is my view that condition 6(1) of Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6(1) allows personal data to be processed (in this case, disclosed in line with an information request made under section 1(1) of FOISA) 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.
80. The application of condition 6 involves a balance between competing interests broadly comparable, but not identical, to the balance that applies when considering the public interest test in section 2 of FOISA. Condition 6 requires a consideration of the balance between (i) the legitimate interests of those to whom the data would be disclosed, which, in this context, are members of the public (see section 38(2)(a) of FOISA) and prejudice to the rights, freedoms and legitimate interests of the data subjects, which, in this case, are the attendees at meetings of the Advisory Board. However, because the processing must be “necessary” for the legitimate interests of members of the public to apply, only where (i) outweighs or is greater than (ii) should the personal data be disclosed.
81. In considering the legitimate interests of Mr Whittet and of the wider public, I accept that there is a legitimate and significant interest in being aware of matters surrounding the formulation of road safety policy and the sources of advice and specialist knowledge that are being sought in pursuance of the formulation of road safety policy. I am satisfied that this interest legitimately extends beyond simply knowing which bodies are represented, to include the identities of those attending. This additional information would allow understanding of the level of seniority and experience of those attending, for example.
82. I have considered whether these interests might be met equally effectively by a means other than by disclosure of the information requested by Mr Whittet. I have noted that a large amount of information about the membership (in terms of the organisations represented) and the operation of the Advisory Board is already in the public domain. This information goes a considerable way towards fulfilling the legitimate interest in understanding the Programme’s work and how it is developed. However, the request in this case quite clearly goes beyond the names of the organisations represented on the Advisory Board and requires the divulgence of individual attendees. In all the circumstances, I have concluded that the legitimate interests in question cannot be met without disclosure of the names and contact addresses of the attendees of the meetings of the Advisory Board.



83. Turning to consider any prejudice to the rights, freedoms and legitimate interests of the data subjects, I am aware that this disclosure will lead to their identification with their attendance at Advisory Group meetings. This could, I accept, lead to communications being directed to these individuals by others who have an interest in this policy area. However, I am satisfied that any such intrusion following from this disclosure would be likely to affect that person's professional life only, and would be of a nature and extent which would be expected by those working at a high level in formulating public policy. I am also satisfied (as detailed in my consideration of the exemption in section 39(2)), that disclosure would not be likely to endanger the physical or mental health of any individual.
84. Having balanced the two competing interests in this case, I am satisfied that any prejudice to the rights, freedoms and legitimate interests of the data subjects (i.e. the attendees at the Advisory Board) is outweighed (and so is not unwarranted) in this instance by the legitimate interests of the requestor and the wider public.
85. I therefore find that condition 6(1) of Schedule 2 of the DPA is met in this case.
86. As noted above, no separate arguments have been submitted to me as to why disclosure of this information would be unlawful. I am therefore entitled to proceed on the basis that the disclosure would be lawful.
87. Having found disclosure to be both fair and lawful in line with condition 6(1), I therefore do not accept that disclosure of the information under consideration would breach the first data protection principle, and so I do not accept that this information is exempt under section 38(1)(b).
88. I therefore require the Ministers to disclose the names and contact addresses of all attendees listed on the minutes of the Advisory Board, up to the date of Mr Whittet's request. By "contact addresses", I am referring to the organisational addresses held by the Programme for each of the individuals (or the member organisation that they represent) concerned.

Application of section 17(1)

89. I will now consider the Ministers' response to the request by Mr Whittet for copies of the individual partnerships' communications strategies.
90. The Ministers have submitted that the letter to Mr Whittet dated 11 July 2006 was in effect a notice under section 17(1) of FOISA that the information was not held. I note that the response to Mr Whittet's request for review restated the position that the information was not held within the Programme Office and suggested to him that he contact the individual partnerships directly to request copies.



91. Having considered the representations made by the Ministers and the position outlined within these representations and the previous responses to Mr Whittet, I am satisfied that these communications strategies are not held by the Programme Office. I am also satisfied with the Ministers explanation as to why these communications strategies would not be held by the Programme Office.
92. Accordingly, I am satisfied that the provisions of section 17(1) of FOISA have been complied with in dealing with this aspect of Mr Whittet's request.

Technical breaches of FOISA

93. The Ministers have acknowledged that the early correspondence with Mr Whittet was not dealt with in accordance with FOISA. In particular, he was given no explanation of the review or appeal processes, it was not made clear that some of the information was not held and he was not given an adequate explanation of the relevant exemptions.
94. The Ministers submitted that Mr Whittet had not been clear or consistent in his requests and this had created a degree of confusion about what information was actually being sought. It was also submitted that the Programme Office had attempted to be helpful by asking Mr Whittet to clarify his request and by directing him to the website of the Programme and individual partnerships.
95. Mr Whittet's original request dated 14 April 2006 was headed "Freedom of Information Disclosure". The request began: "Under the above Act, you are required to disclose....."
96. In terms of section 16 of FOISA (refusal of request), if a request for information is to be refused on the basis that it is considered exempt information under any provision in Part 2 of FOISA, a Scottish public authority must issue a refusal notice providing explanation of why that request is being refused. A refusal notice under section 16(1) of FOISA must confirm that the requested information is held by the authority, and specify the relevant exemption and the authority's reasons for relying on it.
97. In the responses to Mr Whittet dated 19 April 2006 and 11 July 2006, in relation to the request regarding membership of the Advisory Board, the position adopted by the Programme was that the information being sought was available elsewhere. Mr Whittet was referred to the Programme's website and advised to contact various organisations directly.



98. It is clear to me that the exemption contained in section 25(1) of FOISA (Information otherwise accessible) was being applied to this aspect of Mr Whittet's information request. Consequently, the responses of 19 April 2006 and 11 July 2006 should have set out, in accordance with section 16(1) of FOISA, the reasons why the request was being refused and why any exemptions were being applied. However, no exemptions were cited.
99. In failing to provide an adequate refusal notice, I find that the Ministers failed with regard to their obligations under section 16(1) of FOISA.
100. Section 19 of FOISA requires that when notifying an applicant in terms of section 16 or 17 of FOISA (and also, though not relevant to this case under section 9 or 18) that the information requested is considered exempt information, or that it is not held, the notice should provide details of:
 - (a) the authority's procedure for dealing with complaints about the handling of requests for information;
 - (b) the right to request a review in terms of section 20 of FOISA; and
 - (c) the right to make an application for a decision by the Scottish Information Commissioner under section 47(1) of FOISA.
101. The Ministers' responses dated 19 April 2006 and 11 July 2006 did not contain any of the particulars detailed in paragraph 100 above. I therefore find that the Ministers failed to comply with the requirements of section 19 of FOISA.
102. Having viewed the earlier correspondence, I find it understandable that some confusion has arisen in relation to the information being sought in this case. However, Mr Whittet's initial request clearly identified itself as a request for information under FOISA and subsequent responses should have been dealt with appropriately under FOISA.
103. The Ministers have assured me that steps have been taken to ensure that these errors do not occur in future. I do not therefore require the Ministers to take any further action in this regard.

Decision

I find 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 Whittet.



I find that the Ministers were justified in notifying Mr Whittet in terms of section 17(1) of FOISA that it did not hold the partnership communications strategies requested.

I find that the Ministers incorrectly applied the exemptions in sections 30(c), 38(1)(b) and 39(1) of FOISA to the information withheld concerning attendance at the Advisory Board and consequently failed to comply with section 1(1) of FOISA by withholding the names and contact addresses of participants at meetings of the Advisory Board.

I also find that in failing to respond appropriately to Mr Whittet's request for information, the Ministers breached the technical requirements of sections 16(1) and 19 of FOISA.

I now require the Ministers to provide the requested information in relation to the individual participants at the meetings of the Advisory Board up to the date of Mr Whittet's request within 45 days of the date of intimation of this Decision Notice.

Appeal

Should either Mr Whittet or the 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 of the date of intimation of this Decision Notice.

Kevin Dunion
Scottish Information Commissioner
29 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.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.



- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).



25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain otherwise than by requesting it under section 1(1) is exempt information

...

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.

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.



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 provision

- (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,

...

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.

