

Decision Notice



Decision 033/2010 Mr Tom Gordon and the Scottish Ministers

Travel and accommodation costs for members of Council of Economic Advisors

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Summary

Mr Tom Gordon requested from the Scottish Ministers (the Ministers) details of travel and accommodation costs for members of Council of Economic Advisors (CEA).

The Ministers responded by withholding the information in terms of section 38(1)(b) of FOISA. Following a review, during which the Ministers released the majority of the information to Mr Gordon, but withheld details of the start and end points of journeys undertaken by CEA members in terms of 38(1)(b) of FOISA, Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers additionally applied the exemption at section 30(c) of FOISA to the withheld information, the Commissioner found that the Ministers had partially failed to deal with Mr Gordon's request for information in accordance with Part 1 of FOISA.

The Commissioner found that the Ministers had correctly withheld information constituting personal addresses of CEA members. He did not however accept that disclosure of the remaining information would breach any of the data protection principles nor that it would, or would be likely to, prejudice substantially the effective conduct of public affairs. He required the Ministers to release the relevant information to Mr Gordon.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs) and 38(1)(b) and (2)(a)(i) and (b) (Personal information)

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

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

1. On 18 March 2009, Mr Gordon wrote to the Ministers requesting the following information:

“...[A] breakdown of travel and accommodation costs met by the Scottish Government to allow members of the CEA to attend its meetings since its inception.

This should include, but not be limited to, the start and destination points of road, rail and air travel, ticket costs, and hotel costs in respect of each member.”
2. The Ministers responded to Mr Gordon’s information request on 29 April 2009, stating that they were withholding the information under section 38(2)(a)(i) of FOISA. The Ministers clarified later in the investigation process that it had been their intent to apply the exemption in section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i). This applies where the information requested is personal data, disclosure of which would breach any of the Data Protection Principles.
3. On 2 May 2009, Mr Gordon wrote to the Ministers requesting a review of their decision. He submitted that he did not agree with the application of section 38 of FOISA and that the information requested should be disclosed.
4. The Ministers notified Mr Gordon of the outcome of their review on 22 June. Having reconsidered the request, they released details of travel and accommodation costs broken down (so far as was possible) by each member of the CEA. However, they withheld information confirming the start and end points of the CEA members’ travel. They upheld their previous decision regarding the application of section 38(1)(b) of FOISA to this information.
5. Mr Gordon wrote to the Commissioner on 1 July 2009, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. He maintained that the start and end points of the journeys should be disclosed, at least by providing the countries, cities/towns, postcodes or airports to and from which the CEA members travelled.
6. The application was validated by establishing that Mr Gordon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 10 July 2009, the Ministers were notified in writing that an application had been received from Mr Gordon and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.



8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers were also asked by the investigating officer to comment on a proposal put forward by Mr Gordon that rather than providing specific locations that they consider identifying only the towns/cities or postal codes at either end of the travel or the airports or countries for overseas travel.
10. In their response the Ministers clarified that where they had previously cited the exemption in section 38(2) of FOISA, they had intended to cite 38(1)(b) in conjunction with 38(2)(a)(i). The Ministers also stated that they wished to additionally apply the exemption in section 30(c) of FOISA to the withheld information, and that while they had given consideration to Mr Gordon's proposal, they would maintain their application of both sections 38(1)(b) and 30(c) to the remaining withheld information.
11. Mr Gordon was also asked to provide his submissions on this case. In particular he was asked to comment on his legitimate interest in obtaining the information and to provide his views on the public interest in the disclosure of the information.
12. The submissions made by both the Ministers and Mr Gordon are summarised (where relevant) in the Commissioner's Analysis and Findings section below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.

Scope of the request

14. In his application to the Commissioner Mr Gordon acknowledged that the Ministers had provided most of the information that he had requested but pointed out that the start and end points of the travel were still being withheld. The Commissioner will therefore confine his deliberations to the issue of whether the Ministers were entitled to withhold details of the start and end points of the travel undertaken by the CEA members. He also notes that Mr Gordon only requested details of costs met by the Scottish Government. Therefore the Commissioner will not consider those travel arrangements made by the CEA members themselves at no cost to the Scottish Government.

Section 38(1)(b) of FOISA

15. The Ministers have applied the exemption in section 38(1)(b) of FOISA to the information requested by Mr Gordon.



16. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
17. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.

Is the information under consideration personal data?

18. "Personal data" is defined in section 1(1) of the DPA; the definition is reproduced in full in the Appendix to this decision.
19. The Ministers have submitted that start and end points of an individual CEA member's travel constitutes personal information. No further submissions were made by the Ministers as to why they considered this to be personal data.
20. Mr Gordon argued that the information was not personal data. He asked how it could conceivably be personal data to say that "Mr X was one of tens of thousands of people to fly from LAX or JFK [airports] on a certain day".
21. Despite Mr Gordon's comments, the Commissioner notes that the definition of what constitutes personal data is broad. If it is demonstrated that the information concerned relates to a living individual who can be identified from that information, or from that information along with other information in the possession of (or likely to come into the possession of) the data controller, then it is personal data.
22. The information under consideration in this case relates to the individual members of the CEA and travel they have undertaken. Although the journeys are undertaken in the course of government business, information about these journeys clearly relates to those individuals. Furthermore, the individuals concerned can be identified from this information, either alone or in conjunction with other information in the possession of the Ministers.
23. The Commissioner is therefore satisfied that the information in question is personal data.

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

24. The Ministers have argued that the release of the information would breach the first data protection principle.



25. The first data protection principle requires that the processing of personal data (here, the disclosure of the data in response to a request made under FOISA) 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. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met. (The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA, and he is satisfied that the personal data in this case does not fall into this category. It is therefore not necessary to consider the conditions in Schedule 3 of the DPA in this case.)
26. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. However, these three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
27. The Commissioner will first go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he will then go on to consider whether the disclosure of this personal data would otherwise be fair and lawful.

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

28. The Ministers have argued that of all the conditions in Schedule 2 of the DPA, only the sixth may be potentially applicable in this case. The Commissioner has therefore focused his attention on this condition.
29. Condition 6(1) 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.
30. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a. Does the applicant (Mr Gordon) have a legitimate interest in obtaining this personal data?
 - b. If yes, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the individual members of the CEA?
 - c. Even if the processing is necessary for the legitimate purposes of Mr Gordon, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individual members of the CEA? This will involve a balancing exercise between the legitimate interests of Mr Gordon and those of the members of the CEA. Only if (or to the extent that) the legitimate interests of Mr Gordon outweigh those of the members of the CEA can the personal data be disclosed.



Does the applicant have a legitimate interest

31. Mr. Gordon was asked for his views on what legitimate interest he had in the disclosure of this personal data, i.e. the start and end points of the journeys of each individual CEA member. In his response he argued that he has a legitimate interest in knowing this as some of the individual flights were likely to have cost thousands of pounds, and so significant public funds were involved.
32. He went on to argue that the Ministers had, in response to another information request, disclosed certain figures for the travel expenses claimed by the CEA members. (Details of the fifth Council of Economic Advisers meeting were published on the Scottish Government website on 5 May 2009.) Mr Gordon argued that this tacitly acknowledged the public interest in the release of such information.
33. The Ministers, while acknowledging a public interest in the cost to the public purse of journeys taken by CEA members, submitted that disclosing private journey details per se, serves no legitimate public purpose.
34. Having considered the submissions made by both Mr Gordon and the Ministers, the Commissioner accepts that Mr Gordon's interest in gaining insight into how public money is being spent with respect to the travel of members of the CEA is a legitimate interest. While the Ministers have already disclosed information about those costs, the Commissioner considers there to be a legitimate interest in knowing the nature of the journeys that prompted this expenditure.
35. The Commissioner takes the view further that the legitimate interest identified by Mr Gordon in this case is one that is shared by the general population. He considers that scrutiny of expenditure of this type to be a matter of general legitimate interest.

Is disclosure of the information necessary to achieve those legitimate interests?

36. The Commissioner must now consider whether disclosure is necessary for the legitimate interests and in doing so he must consider whether these interests might reasonably be met by any alternative means.
37. The Commissioner has concluded that disclosure is necessary, because Mr Gordon would not be able to satisfy his legitimate interest without access to the information concerning the start and end point of the journeys.
38. As noted above, the Ministers have supplied information to Mr Gordon as to the cost of the journeys undertaken, but this alone does not allow scrutiny of the nature of the journeys for which this expenditure was incurred. The Commissioner can envisage no alternative way of satisfying the legitimate interest identified by Mr Gordon.



Would disclosure cause unwarranted prejudice to the legitimate interests of the data subjects?

39. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the individual members concerned. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Gordon and those of the CEA members. Only if the legitimate interests of Mr Gordon outweigh those of the members can the information be disclosed without breaching the first data protection principle.
40. The Commissioner has issued guidance on the interpretation of the exemptions in section 38¹, and notes a number of factors which should be taken into account in carrying out this balancing exercise. These include:
 - whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
 - the potential harm or distress that may be caused by the disclosure
 - whether the individual has objected to the disclosure
 - the reasonable expectations of the individuals as to whether the information would be disclosed
41. Mr Gordon argued that his information request was not about seeking to delve into the private lives of the CEA members, but rather about value for money in public spending. He stated that he was not asking for members' personal addresses, but did point out that should he wish to access such information, that the home addresses of many of the members were already in the public domain and accessible on the Companies House website.
42. The Ministers argued that the CEA members were entitled to privacy in terms of their own personal travel arrangements and that they would have no expectation of such details being placed in the public domain.
43. They acknowledged that there was a legitimate interest in the public cost of journeys taken by members. However, they indicated that release of private journey details would be an unjustified intrusion into their private lives. They argued that the whereabouts of a CEA member before or after a Council meeting, or indeed their route of journey, has no bearing on the purpose of their travel to attend the CEA meeting.
44. The Ministers submitted that CEA members had been consulted regarding disclosure of the information, and had expressly objected to disclosure.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



45. The Ministers were asked further questions about the nature and outcome of this consultation in the light of this comment. In response, the Ministers provided a copy of an email sent to the 11 CEA members on 7 September 2009 (after Mr Gordon had made an application to the Commissioner). This repeated Mr Gordon's request in full, and explained that the only information still being withheld was that detailing the start and end points of the journeys in question.
46. The email asked each CEA member if they would object to disclosure of this information. The email indicated that the proposed disclosure would (in line with Mr Gordon's suggestion) be limited to station or airport names, or cities. The Ministers noted that they would not intend to disclose the home or work addresses of any member.
47. On sending a copy of the email of 7 September 2009, the Ministers advised the investigating officer that the email was followed up by further informal discussions with CEA members at the Council's meeting on 18 September 2009. In a telephone conversation the following day, the investigating officer was advised that the general feeling of the CEA members at this meeting had been one of objection to the disclosure.
48. When the investigating officer later received copies of the responses from the CEA members to the email of 7 September 2009, she was therefore surprised to note that out of the nine responses received, only two objected to the release of the data. The other seven respondents stated that they had no objection to disclosure of the start and end points of journeys, in line with the Ministers' suggestion.
49. Given the apparent discrepancy between the outcome of this meeting as described by the Ministers, and the small number of objections to the proposed disclosure suggested by the emails received from the CEA members (which were sent only days before the meeting on 18 September), the investigating officer wrote again to the Ministers seeking further clarification and any documentary evidence regarding the discussions at the CEA meeting on 18 September 2009.
50. In response, the Ministers indicated that the discussions had not been minuted and so no record could be provided. The Ministers stated that it was understood that while CEA members were not happy as such about release of further detail, they generally accepted (given the principle and expectations of FOI) that certain further detail could be released. They indicated that this 'acceptance' should be seen in the context of the consultation email which referred to a general level of disclosure, which would not include detail of work or home addresses.
51. Before going on, the Commissioner wishes to express concern at the findings set out above regarding the outcome of the consultation with the CEA members. At two separate points in the investigation of this case, the Ministers indicated in clear terms that the members of the CEA had (it was implied collectively) objected to the disclosure of the information under consideration with respect to the start and end points of their journeys.



52. Where such claims are made, the Commissioner's investigation will seek further information and any relevant documentation to understand the nature and outcome of discussions with the data subject(s) concerned, to ensure that appropriate consideration is given to the expectations of the data subjects, and the weight that should be given to these when balancing their legitimate interests against those of the applicant. In this case, these routine investigative steps revealed that the views expressed by the data subjects were quite different from the simple, collective objection that the Ministers' statements suggested.
53. The Commissioner has noted that no evidence is available in this case to indicate what views the CEA members held with respect to the disclosure of the start and end point of their journeys at the time of the Ministers' review of their handling of Mr Gordon's information request. This is the point in time at which the Commissioner must come to a view as to whether the Ministers acted in accordance with FOISA.
54. In the absence of evidence as to the views of the data subjects at the relevant time, the Commissioner has proceeded on the basis that the views expressed in writing in September 2009 reflect those held by the same individuals during June 2009 when the Ministers conducted their review.
55. Having considered all of the above, the Commissioner has concluded that the outcome of the consultation with the data subjects during the investigation gives weight to the argument that disclosure in this case would not lead to an unwarranted intrusion into the private lives of the individuals concerned. Seven CEA members indicated in writing that they had no objection to the disclosure of the start and end points of their journeys as proposed by the Ministers, and another two members did not respond to the email seeking their views, suggesting that they did not hold strong views on the matter.
56. For these nine individuals, the Commissioner takes the view that they clearly held only limited expectations that such data would be withheld. However, it is clear that the other two individuals held different expectations, that such information would not be disclosed.
57. The Commissioner would note that although a data subject's objection to disclosure is a relevant factor to be considered when deciding whether personal data should be disclosed, the fact that a data subject objects to disclosure does not necessarily mean that disclosure will be unwarranted or unfair.
58. While there is no documentary evidence to support this, the Commissioner notes also that it appears that, following discussion at the meeting of 18 September 2009, the CEA members generally accepted (though perhaps did not welcome) the level of further disclosure proposed by the Ministers in their email of 7 September 2009.
59. When considering the weight that should be given to the CEA members' objections or expectations as to whether their personal information might be disclosed, the Commissioner has taken account of his guidance on the exemption in section 38(1)(b) of FOISA. This makes clear that an additional relevant factor is whether information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances).



The guidance states:

“Information about an individual’s private life will deserve more protection than information about them acting in an official or work capacity. The seniority of their position and whether they have a public facing role will also be relevant. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official’s public life should also generally be disclosed unless it also reveals details of the private lives of other people, such as their family.”

60. The Commissioner notes that the information requested relates to the data subjects' travel undertaken in order to undertake activities in their advisory capacity. Although he accepts that CEA members are not government employees, and that their roles are non-remunerative, he considers that they are nonetheless engaged in high-profile public activities in which there is a significant public interest.
61. In reaching his conclusions on this case, the Commissioner has also taken account of the deliberations and conclusions reached in *Decision 198/2007 Mr Simon Johnson and the Scottish Ministers* which considered a request for information regarding Ministerial journey, which included consideration of whether the start and end point of journeys should be disclosed. However, each case is determined on its own merits.

Conclusions regarding personal addresses

62. There are two instances within the withheld information which list private addresses as either start or end points of journeys. The Commissioner notes that the agreement to disclosure provided by most CEA members was made in response to a request for comment on disclosure that would not include actual addresses. However, he does note that the Ministers' email suggested a level of disclosure that would include e.g. a city as a starting point.
63. The Commissioner is satisfied that the CEA members would *not* expect private addresses to be disclosed in response to Mr Gordon's information request, or other requests of this type. He notes that disclosing these addresses would provide information about the private lives of the individuals concerned, and not simply which cities, airports or railway stations were the start and end points of their journeys to attend CEA meetings. He considers that such disclosure would be an intrusion into the private lives of the individuals concerned.
64. Having balanced the legitimate interests of Mr Gordon in relation to those of the data subjects concerned, the Commissioner has concluded that disclosure of these addresses would be unwarranted, and accordingly condition 6 cannot be met in relation to this information.
65. For the same reasons, the Commissioner has concluded that disclosure would be unfair and, in breaching the first data protection principle, unlawful.
66. Therefore the Commissioner finds these addresses to be exempt from disclosure under the terms of section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (b).



67. However, in the instances where a personal address is present as a start or end point of a journey, the Commissioner is satisfied that disclosure of the city or postal area within which the address is found would not be an unwarranted intrusion. Indeed, this disclosure would be in line with the proposal made by the Ministers which was accepted by the majority of the CEA members.
68. The Commissioner therefore requires the Ministers to provide details of journeys where a private address is specified, with the words "personal address" substituted for the actual building address, but with the city or postal area still specified.

Conclusions regarding the remaining information

69. As noted above, the data subjects in this case are figures who hold positions advising the government as members of a high profile group. As such, and notwithstanding the objections to disclosure raised by two of the 11 CEA members, the Commissioner has concluded that CEA members would reasonably expect information such as that requested by Mr Gordon to be potentially disclosed in the course of the fulfilling a freedom of information request.
70. The Commissioner notes that for the most part the start and end points contained within the remainder of the information refer to towns/cities where train or air travel has taken place, the airports themselves, hotels where the CEA members were accommodated, venues where meetings were held and public buildings. He does not accept that disclosure of this information would entail an intrusion into the private lives of the individuals concerned.
71. He appreciates that the CEA members would not necessarily expect that information pertaining to personal addresses, be it their own or their family members or associates to be disclosed, but also notes that disclosure of the majority of the withheld information would not reveal any such personal details or addresses.
72. Having balanced the legitimate interests of Mr Gordon with those of the individual CEA members in this case, the Commissioner is satisfied that any prejudice to the rights, freedoms and legitimate interests of the data subjects is outweighed in this instance by the legitimate interests of the requestor and the wider public. As such, he has concluded that disclosure of the remaining information would be in line with condition 6(1) within schedule 2 of the DPA.

Is the processing otherwise fair and lawful?

73. In the absence of any submissions by the Ministers which suggest that disclosure of the information requested by Mr Gordon would be unlawful, other than by contravening the first data protection principle, and having considered the question carefully, the Commissioner can find no reason to find that the disclosure would be unlawful. He will therefore go on to consider the issue of the fairness of such disclosure.



74. The Commissioner is satisfied that the processing of the information in question (i.e. by disclosure) would not be unfair, for similar reasons to those outlined above in relation to his consideration of condition 6. In reaching this view he considers that the specific roles and responsibilities which are undertaken by the CEA members are such that they might reasonably expect such information as to their activities in their advisory roles to be released into the public domain.
75. Having found disclosure to be both fair and lawful, and in line with condition 6(1), the Commissioner therefore does not accept that disclosure of the information under consideration would breach the first data protection principle, and so does not accept that this information is exempt under section 38(1)(b).

Section 30(c) of FOISA

76. The Ministers have also applied the exemption in section 30(c) of FOISA to the information requested by Mr Gordon. Having found that personal addresses within this information are exempt in terms of section 38(1)(b) of FOISA, the Commissioner has only considered this exemption in relation to the remaining information withheld from Mr Gordon.
77. Section 30(c) applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" signifies that this exemption is to be used other than in the situations envisaged by the exemptions in section 30(a) and (b). However, section 30(c) remains a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information.
78. The exemption in section 30(c) is subject to the public interest test.
79. The Ministers submitted that release of the information in question would prejudice CEA members' future engagement with the Scottish Government. They argued that potential members of the CEA or similar groups would be reluctant to volunteer their services and thereby open up their lives to public scrutiny. They went on to argue that the CEA is a key body in advising the First Minister in the best way to improve Scotland's sustainable economic growth rate. The Ministers stated that they believed that anything prejudicial to the workings of what they considered to be a key group would be substantially prejudicial to the effective conduct of public affairs.
80. Mr Gordon submitted that he believed the Ministers' application of section 30(c) at a late stage in the proceedings to be an indication that they believed their earlier application of section 38(1)(b) to be untenable.
81. He argued that if the conduct of public affairs had been such a crucial issue then it would have surely been manifest from the outset. He argued that it was unjustifiable to claim substantial prejudice if the same "risk" had gone un-noticed for several months beforehand.



82. The Commissioner has carefully considered the information which has been withheld under section 30(c) of FOISA, along with the submissions made by both the Ministers and Mr Gordon.
83. As noted above, the Commissioner does not consider that disclosure of the start and end points of journeys (where these would not reveal personal addresses) would entail a significant intrusion into the private lives of CEA members.
84. Having noted in particular that the majority of members expressly stated that they were content with disclosure of the information as proposed by the Ministers, the Commissioner is unable to accept that disclosure of start and end points of the CEA members' journeys would, or would be likely to, discourage CEA members from participating in future meetings with the Scottish Government, or would discourage potential members from joining the CEA or similar groups.
85. Since the Commissioner has concluded that he cannot accept that disclosure in this case would, or would be likely to, have the effects described by the Ministers, he does not accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs.
86. As the Commissioner is satisfied that the section 30(c) exemption does not apply in this case, he is not required to go on to consider the public interest.
87. The Commissioner therefore requires the Ministers to disclose to Mr Gordon the information withheld, subject to the substitution of the two personal addresses therein with the words "personal address" substituted for the actual building address, but with the city or postal area still specified.



DECISION

The Commissioner finds that 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 Gordon.

He finds that the Ministers misapplied the exemption in section 38(1)(b) of FOISA to some of the information requested by Mr Gordon and in so doing they failed to comply with section 1(1) of FOISA. He also finds that the Ministers misapplied the exemption in section 30(c) to the same information.

The Commissioner finds that the exemption within section 38(1)(b) was correctly applied to those personal addresses which were the start and end points of CEA members' journeys.

The Commissioner therefore requires the Ministers to disclose to Mr Gordon the information withheld, subject to the substitution of the two personal addresses therein with the words "personal address", but with the city or postal area within which these addresses are located still specified by 19 April 2010.

Appeal

Should either Mr Gordon or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
02 March 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

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

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

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

(e) in subsection (1) of section 38 –

...



- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

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.

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.

...