

Decision Notice

Decision 094/2016: Mr Rab Wilson and the Scottish Ministers

Emails relating to specified Scottish Government correspondence

Reference No: 201502293
Decision Date: 3 May 2016



Scottish Information
Commissioner

Summary

On 7 October 2015, Mr Wilson asked the Scottish Ministers (the Ministers) for emails sent from the Permanent Secretary's office to the Director General Health and Social Care, relating to Mr Wilson's correspondence.

The Ministers disclosed some information and withheld the remainder under a number of exemptions in FOISA.

The Commissioner found that the Ministers partially failed to respond to Mr Wilson's request for information in accordance with FOISA. The Commissioner accepted that some of the information should be withheld. However, the Ministers wrongly withheld other information.

The Commissioner requires the Ministers to disclose the information which was wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) and (e)(ii) (Effect of exemptions); 25(1) (Information otherwise accessible); 30(c) (Prejudice to effective conduct of public affairs); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provision) (definition of personal data); Schedule 1 (The data protection principles, Part 1 - the principles) (the first data protection principle); Schedule 2 (Conditions relevant for the purposes of the first principle: processing of any personal data) (condition 6)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 7 October 2015, Mr Wilson made a request for information to the Ministers. He asked for all emails sent from the Permanent Secretary's office to the Director General Health and Social Care, since 14 August 2015, pertaining to his correspondence with the Permanent Secretary's office.
2. The Ministers did not respond. On 5 November 2015, Mr Wilson emailed the Ministers, requesting a review, as they had not responded to his request.
3. The Ministers notified Mr Wilson of the outcome of their review on 3 December 2015. The Ministers disclosed some information, stated that other information fell outwith the scope of the request and withheld the remainder under several exemptions in FOISA.
4. On 4 December 2015, Mr Wilson applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Wilson considered that the Ministers' response to his review was completely unsatisfactory and the information disclosed was virtually unreadable due to the amount of redactions.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Wilson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
6. On 15 February 2016, the Ministers were notified in writing that Mr Wilson had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Wilson. The Ministers provided the information and the case was allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions. These questions focused on the searches to identify information covered by the request, the information falling outwith the scope of the request and the exemptions relied upon to withhold the requested information. The Ministers responded on 25 February 2016.
8. Mr Wilson was invited to provide his views as to why the withheld information should be disclosed, and did so.
9. On 22 March 2016, the investigating officer contacted the Ministers, and requested further submissions on one of the documents they considered was already accessible to Mr Wilson. The Ministers responded on 29 March 2016.
10. On 12 April 2016, the investigating officer asked Mr Wilson if he was content to exclude his own emails, which the Ministers were withholding under section 25(1) of FOISA. Mr Wilson confirmed that this information could be excluded from consideration in the Commissioner's decision.

Commissioner's analysis and findings

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

Section 1(1) – information falling within scope of the request

12. Section 1(1) of FOISA creates a general entitlement to be given information held by a Scottish public authority when it receives the applicant's request, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1.
13. The Ministers submitted that only a limited and focused search was required to find the emails covered by Mr Wilson's request. His request was very specific and covered a short, recent time period. The mailboxes for the Permanent Secretary and the Director General Health and Social Care were each searched, along with those of relevant staff in their offices. The Ministers confirmed that all of these individuals still work for the Scottish Government.
14. The Ministers explained that as any relevant e-mails would be held in the mailboxes of staff in the two offices specified and the time period was limited, a physical search rather than an electronic search was undertaken.

15. Having considered all the relevant submissions, the Commissioner is satisfied that the Ministers have taken adequate and proportionate steps to establish the information they held which fell within the scope of Mr Wilson's request, and that they do not hold any other information covered by that request.
16. The Ministers submitted that some of the information within the withheld documents did not fall within the scope of Mr Wilson's request. They explained that this information was of two types: correspondence with another individual and correspondence about a different subject.
17. The Commissioner is satisfied that the Ministers complied with section 1(1) of FOISA in identifying all information falling in scope of the request. This information is contained in two email chains and a draft letter. She accepts that some information in these documents falls outside the scope of the request.

Section 25(1) - Information otherwise accessible

18. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute: in other words, it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
19. Where information is not made available in line with an approved publication scheme, the onus is on the authority to demonstrate that the information is reasonably obtainable by the applicant otherwise than by making a request under FOISA.
20. The Ministers withheld an email chain (document 2) and a draft letter under section 25(1) of FOISA. They considered this information was otherwise accessible to Mr Wilson.
21. The email chain included emails from Mr Wilson. As noted above, Mr Wilson does not require the Commissioner to consider this information in reaching her decision. The Ministers also withheld a draft letter under section 25(1) as they considered it contained substantially the same information as in the final version sent to Mr Wilson.
22. The Ministers provided a copy of the final version of the letter that had been sent to Mr Wilson. The Ministers acknowledged that there were some differences between the draft and the final versions of the letter, but they did not consider these to be material. While there were minor differences in, for example, wording and presentation, the actual information was the same in both versions of the letter: if anything, the final version sent to Mr Wilson contains a little more information than the withheld draft.
23. The Commissioner has considered the draft and final version of the letter together with the Ministers' submissions. She accepts that the draft version contains little, if anything, of substance beyond the information provided in the final version. However, as there are some differences, the Commissioner has concluded that not all the information in the draft version was "otherwise accessible" to Mr Wilson, and that the exemption in section 25(1) of FOISA was wrongly applied to information which did not appear in the final version.
24. The Commissioner therefore finds that the exemption in section 25(1) of FOISA was wrongly applied to the draft letter and she requires the Ministers to disclose it to Mr Wilson.

Section 38(1)(b) – Personal information

25. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate) exempts personal data if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.

26. Within the information falling within scope of the request, the Ministers withheld the names of individuals and a reference to a non-work event under section 38(1)(b) of FOISA.
27. In considering the application of this exemption, the Commissioner will first consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she will go on to consider whether disclosure of the information would breach the first and (if necessary) the second data protection principle, as claimed.
28. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

29. "Personal data" are 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, 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."
30. The Ministers submitted that the withheld names identified living individuals who work for the Scottish Government, and the reference to a non-work event is personal data because it is about the individual personally, and is more about their personal than their professional life.
31. The Commissioner accepts that living individuals would be identified from this information and the information relates to the individuals in a biographical sense and is their personal data.

The first data protection principle

32. The first data protection principle states that the processing of personal data (in this case, making those data publicly available in response to a request made under 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. In the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA must also be met. The Commissioner agrees with the Ministers that none of the withheld information is sensitive personal data as set out in section 2 of the DPA.
33. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition which permits the personal data to be made available, it is likely that disclosure will also be fair and lawful.
34. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be made available. If any of these conditions can be met, she must then consider whether the disclosure of the personal data would also be fair and lawful.

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

35. The Commissioner has considered all the conditions in Schedule 2 and considers that condition 6 is the only one which might be relevant in this case. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. the individuals to whom the data

relate). The processing in this case would be making the data available in response to Mr Wilson's request.

36. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
- (i) Is Mr Wilson pursuing a legitimate interest or interests?
 - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subjects?
 - (iii) Even if the processing is necessary for Mr Wilson's legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects?

Is Mr Wilson pursuing a legitimate interest or interests?

37. There is no definition within the DPA of what constitutes a "legitimate interest", but the Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. In the Commissioner's published guidance¹ on section 38(1)(b) of FOISA, it states:

"In some cases, the legitimate interest might be personal to the applicant - e.g. he or she might want the information in order to bring legal proceedings. With most requests, however, there are likely to be wider legitimate interests, such as the scrutiny of the actions of public bodies or public safety."

38. The Ministers submitted that they found it difficult to see how Mr Wilson has any legitimate interest in the withheld personal data, as the individuals in question were simply copied in to the correspondence for information, and were not directly involved in dealing with Mr Wilson's correspondence with the Permanent Secretary.
39. Mr Wilson referred the Commissioner to the underlying matters that led him to correspond with the Permanent Secretary and Director General Health and Social Care. Mr Wilson considered that the information he seeks is of the highest public interest.
40. Having considered the submissions from both Mr Wilson and the Ministers, the Commissioner has not identified any legitimate interest in information about an event relating to the private life of one of the individuals named in the withheld information, and therefore finds that condition 6 of Schedule 2 of the DPA cannot be met in relation to this information. She accepts that the information was correctly withheld under section 38(1)(b) of FOISA.
41. However, the Commissioner accepts that Mr Wilson has a legitimate interest in information which would show who has seen his correspondence and is therefore aware of the issues it raises.

Is the processing necessary for the purposes of those legitimate interests?

42. In all the circumstances of this case, the Commissioner can identify no viable means of meeting Mr Wilson's legitimate interest which would interfere less with the privacy of the data

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

subjects than the provision of the withheld personal data. In the circumstances, she is satisfied that making those personal data available is necessary to meet the legitimate interests in question.

Is the processing unwarranted in this case by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?

43. The Commissioner must now consider whether the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the individuals concerned. This test involves a balancing exercise between the legitimate interests of Mr Wilson and the rights, freedoms and legitimate interests of the individuals. Only if the legitimate interests of Mr Wilson outweigh those of the individuals concerned can the information be made available without breaching the first data protection principle.
44. In the Commissioner's guidance on section 38(1)(b), she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:
 - (i) 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)
 - (ii) the potential harm or distress that may be caused by the disclosure
 - (iii) whether the individual objected to the disclosure
 - (iv) the reasonable expectations of the individuals as to whether the information should be disclosed.
45. The Ministers submitted that if the individuals' names were disclosed, it is likely that Mr Wilson would add their names to his extensive copy list for his emails. The Ministers submitted that it would be unfair to disclose the individuals' names as they were not directly involved in dealing with Mr Wilson's correspondence to the Permanent Secretary.
46. The Commissioner has considered and weighed the submissions made by both the Ministers and Mr Wilson. While the Commissioner accepts that Mr Wilson has a legitimate interest in knowing who received the correspondence, it is significant that the individuals in question were not involved in the handling of his correspondence. Taken together with the likelihood of Mr Wilson copying these individuals into future correspondence, the Commissioner has concluded that the legitimate interests of the data subjects outweigh those of Mr Wilson. As a result, she has determined that condition 6 in Schedule 2 (to the DPA) is not met and disclosure of the withheld personal data would be unwarranted in this case.
47. As no schedule 2 conditions can be met, the personal data cannot be disclosed without contravening the first data protection principle. The Commissioner therefore concludes that disclosure of the personal data would breach the first data protection principle, and that the information was properly withheld under section 38(1)(b) of FOISA. As the only information being withheld in document 2 is personal data, this document will not be considered further in this decision.

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

48. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b) FOISA. This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to

the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from such disclosure.

49. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
50. It is important for public authorities to treat each request for information individually. Disclosure of information in one case should not be taken to imply that information of a particular type will routinely be released in future. The circumstances of each case, including the content of the information under consideration and the time of the request, must be taken into consideration.
51. The Ministers submitted that Mr Wilson has been a regular correspondent over the past year or so, with over 80 pieces of correspondence being received by the Health and Social Care Directorates in 2015. The Ministers described his correspondence as making a variety of complaints and allegations against the Scottish Government, other public authorities and individuals, expressed in immoderate and sometimes insulting terms. They argued that officials need to be able to exchange emails discussing how to respond to such correspondence, without fear that every detail will be disclosed to the correspondent.
52. The Ministers described Mr Wilson's correspondence as "often lengthy". They stated that officials must read it all carefully to identify any FOI requests, subject access requests, legitimate complaints or questions which it may contain. They stated that managing his correspondence was already time-consuming.
53. The Ministers concluded that disclosing the withheld information is likely to discourage officials from recording this type of discussion in the future, which will result in their records being less complete than they are now. Without a full written record of why particular decisions were taken in relation to correspondence, it will be necessary to rely on the recollection of individuals. This will make it more difficult to manage subsequent correspondence consistently.
54. The Ministers considered that these arguments substantiate their position that disclosing the withheld information would cause substantial prejudice to the effective conduct of public affairs in terms of the exemption in section 30(c) of FOISA.

The Commissioner's findings

55. In reaching a decision on whether the information has been correctly withheld under the exemption in section 30(c) of FOISA, the Commissioner must be satisfied that disclosure would, or would be likely to, cause harm which is of real and demonstrable significance.
56. The Ministers did not consider the comments expressed to be particularly free or frank. The Commissioner agrees.
57. In relation to the argument that the Ministers need private space to have such conversations, the Commissioner can see no basis for concluding that disclosure in this case would result in future comments not being recorded or individuals hesitating to record their thoughts, given that the comments were not particularly free or frank.

58. The Ministers submit that Mr Wilson's correspondence is often lengthy and must always be read carefully, but this is not an unusual or unique situation. In general, the Commissioner does not consider that the difficulties caused by such correspondence are likely to amount to substantial prejudice to the effective conduct of public affairs, and the Ministers have not presented her with any evidence to persuade her to take a different view in this case.
59. The Commissioner considers that the Ministers have not provided any justifiable explanation as to how disclosure of the withheld information would, or would be likely to, prejudice substantially the effective conduct of public affairs. The withheld information appears to be a general discussion of Mr Wilson's correspondence, offering general comments and guidance on the content of the response. The Commissioner is unable to accept that disclosure of the information under consideration in the circumstances of this case would, or would be likely to, have the prejudicial effect which the Ministers have asserted. The arguments from the Ministers do not describe harm at the level of substantial prejudice, and she is not convinced that disclosure would result in such an outcome.
60. In the absence of any persuasive evidence or explanation, the Commissioner cannot accept that disclosure of the withheld information would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all the relevant submissions, therefore, the Commissioner does not accept that the Ministers were correct to withhold the information under the exemption in section 30(c) of FOISA.
61. As the Commissioner has concluded that the exemption in section 30(c) of FOISA is not engaged, she is not required to consider the public interest test in section 2(1)(b).

Decision

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

The Commissioner is satisfied that the Ministers conducted proportionate searches and identified all information falling within scope of the request. The Commissioner finds that the Ministers correctly withheld personal data under section 38(1)(b) of FOISA, but were incorrect to withhold information under section 25(1) of FOISA and section 30(c) of FOISA.

The Commissioner therefore requires the Ministers to disclose the information which was wrongly withheld, by **Friday, 17 June 2016**.

Appeal

Should either Mr Wilson or the Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Rosemary Agnew
Scottish Information Commissioner

3 May 2016

Appendix 1: 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 –

(a) section 25;

...

(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.

...

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other 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.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
- ...

Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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