

# Decision Notice



Decision 124/2009 Ms Jane Hartley Jacques and the Scottish Ministers

Caithness Blood Bank

Reference No: 200801368

Decision Date: 22 February 2010

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Ms Jacques requested information from the Scottish Ministers (the Ministers) relating to the closure of Caithness Blood Bank (CBB). The Ministers responded by releasing some information but relied on an exemption under section 30(b)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA) for withholding other information. Following a review, Ms Jacques remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Ministers released additional information but applied a further exemption in terms of section 38(1)(b) of FOISA.

The Commissioner found that the Ministers complied with Part 1 of FOISA by withholding some information which constituted personal data (including sensitive personal data). He also found that certain information was correctly withheld in terms of section 30(b)(i) in that release would (or would be likely to) substantially inhibit the free and frank provision of advice. He did not, however, accept the Ministers' application of section 30(b)(i) in respect of all the withheld information. He required the Ministers to release further information to Ms Jacques subject to the redaction of certain personal data (some of which was sensitive personal data).

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 30(b)(i) (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) sections 1(1) (Basic interpretative provisions) (definition of personal data) and 2 (Sensitive 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)

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



## Background

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1. Ms Jacques wrote to the Ministers (her letter was logged as received on 13 May 2008) requesting any information the Scottish Executive Health Department held regarding the MHRA Inspection failure and Blood Bank closure at Caithness General Hospital.
2. The Ministers responded on 7 August 2008 by releasing a number of documents, some subject to redaction, while advising that three other documents were withheld on the basis that section 30 of FOISA applied.
3. On 10 August 2008, Ms Jacques wrote to the Ministers requesting a review of their decision. In particular, Ms Jacques drew the Ministers' attention to the public interest in knowing what had happened at Caithness Blood Bank (CBB) and what preventative measures had been taken.
4. The Ministers reviewed the original decision and notified Ms Jacques on 9 September 2008 that some of the documents previously withheld could be released: it provided copies of these. However, they went on to advise that the remaining information, containing advice given to Ministers in relation to the media coverage at the time of the closure, remained exempt under section 30(b)(i) of FOISA.
5. On 14 September 2009 Ms Jacques wrote to the Commissioner, stating that she 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.
6. The application was validated by establishing that Ms Jacques 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

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7. On 30 October 2008, the Ministers were notified in writing that an application had been received from Ms Jacques and asked to provide the Commissioner with any information which had been withheld from Ms Jacques. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. In the schedule of documents provided to the Commissioner at this time, there were three documents identified from which information had been withheld (referred to subsequently as documents 1, 2 and 3). The schedule indicated that an Immediate Action Plan appended to document 2 had already been released.



9. 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.
10. During the course of the investigation, the Ministers provided Ms Jacques with information from documents 1 and 3. Given the extent to which the information in document 2 (which was not specifically released to Mr Jacques) duplicates that in document 3, the Commissioner does not consider it necessary to give its contents separate attention in this decision.
11. Document 1 is a Ministerial briefing (with date ascribed in the schedule as 19 October 2006), which was released in the course of the investigation subject to redaction of a number of paragraphs. With respect to document 3, which comprises a series of emails, three consecutive paragraphs were redacted. In regard to the withheld information in documents 1 and 3, the Ministers continued to rely on section 30(b)(i) of FOISA but also indicated during the investigation that they wished to apply an additional exemption under section 38(1)(b) of FOISA.

## **Commissioner's analysis and findings**

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12. It may be helpful to provide a brief description of the context of this request. In 2006, the Scottish National Blood Transfusion Service (SNBTS) carried out a pre-inspection of the CBB. As significant problems were identified, the pre-inspection was quickly followed by a formal inspection by the Medicines and Healthcare Products Regulatory Agency (MHRA), which found major failings. As a result, NHS Highland acknowledged deficiencies in arrangements at the laboratory and voluntarily suspended use of the facility. Contingency arrangements were put in place and remedial action taken. NHS Highland also published a number of press releases in connection with the closure, interim arrangements and subsequent re-opening of CBB. At the time, there were also reports in the media covering a range of issues. The CBB re-opened in May 2007, approximately a year before Ms Jacques' request in May 2008.
13. In coming to a decision on this matter, the Commissioner has considered all of the information withheld from Ms Jacques and the submissions made to him by both Ms Jacques and the Ministers and is satisfied that no matter of relevance has been overlooked.
14. The Commissioner must consider whether the exemptions cited in relation to the withheld information have been correctly applied. The Ministers did not indicate which of the two exemptions they were applying to each of the redactions and so the Commissioner will first consider whether section 38, which relates to personal data, applies to some or all of the withheld information.



15. The withheld information comprises nine blocks of redacted text in document 1 which can be referred to sequentially as block 1, block 2 and so on, up to and including block 9 together with the three paragraphs redacted from document 3. For the purposes of analysis in this decision, the withheld data can be grouped into four data sets as follows:
- Data Set 1: comprising redacted block 3, part of block 4 (first two sentences except for a reference to an individual postholder therein and also the last sentence except for words 9 to 24 inclusive), block 6 (except for a reference to an individual postholder therein) and block 8, all in document 1. Also, the second and third paragraphs in the redacted section of document 3, except for the first sentence of the second paragraph.
- Data Set 2: comprising part of redacted block 1 (first sentence and the last 13 words of the last sentence), words 9 to 24 inclusive in the last sentence of block 4, words 15 to 24 inclusive in block 5, and words 10 to 19 inclusive in block 9, all in document 1. Also, the fourth sentence of the first paragraph of the redacted section in document 3.
- Data Set 3: comprising those parts of blocks 1 and 5 not listed in data sets 2 and 4, blocks 2 and 7 in their entirety, together with the references to individual postholders in blocks 4 and 6, all in document 1. Also, as regards the redacted section of document 3, the first 3 sentences and the last sentence in the first paragraph together with the first sentence in the second paragraph.
- Data set 4: comprising part of block 1 the second and third sentences inclusive, and block 9 except for words 10 to 19 inclusive, all in document 1. Also, as regards document 3, sentences 5 to 7 inclusive within the first paragraph of the redacted section.

### **Consideration of section 38(1)(b)**

16. Section 38(1)(b) of FOISA, read with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data and its disclosure to a member of the public other than under FOISA would contravene any of the data protection principles. In order for a public authority to rely on this exemption it must first show that the information which has been withheld is personal data as defined by section 1(1) of the DPA, and then that its release would contravene one or more of the data protection principles laid down in Schedule 1 to the DPA. The relevant provisions are set out in full in the Appendix to this decision.

*Is the information under consideration personal data?*

17. The Commissioner must first establish whether the information withheld is personal data. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).



18. In his briefing on the section 38 exemptions at <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=3085&SID=133>, the Commissioner refers (under heading 3.2) to the Collie case (House of Lords in the case of *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550) and the Lords' conclusion that "the definition of 'personal data' in the DPA must, in terms of Recital 26 of EU Directive 95/46/EC, be taken to permit the disclosure of information which had been rendered fully anonymous in such a way that individuals were no longer identifiable from it, without having to apply data protection principles. Therefore, if individuals cannot be identified from the actual information requested, then the information is not personal data" and it cannot be exempt under section 38(1)(b) of FOISA.
19. With regard to data set 1 and the question of identifiability, it does not appear to the Commissioner that any living individuals could be identified from the data in this, either by itself or with other information which is in the possession of, or is likely to come into the possession of, the data controller. Consequently, the Commissioner does not consider the information in this set to constitute personal data and therefore must take the view that section 38 (1)(b) cannot apply to it. He will require to consider this information later in this decision, in respect of the section 30(b)(i) exemption cited by the Ministers.
20. Turning to data sets 2, 3 and 4, the Commissioner is satisfied that these sets of withheld data all relate to living individuals in that particular individual staff can be identified from the information in them. The information has these individuals as its focus and is biographical about them in a significant sense, and consequently the Commissioner is satisfied that it relates to those individuals, who are the subjects of it. Therefore, he is satisfied that the information constitutes those individuals' personal data. The Commissioner also notes that data set 2 consists of sensitive personal data as defined in section 2 of the DPA. He must now consider whether section 38 (1)(b) has been correctly applied to these data sets.

*First data protection principle – personal data shall be processed fairly and lawfully*

21. Having satisfied himself that data set 2 consists of sensitive personal data, and that data sets 3 and 4 comprise personal data relating to the managers and staff, the Commissioner must now consider the Ministers' assertion that their disclosure would breach the first data protection principle.
22. The first data protection principle requires that the processing of personal data (here, the disclosure of data in response to a request made under FOISA) shall be fair and lawful and, in particular, that data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA (and additionally, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA) is met. Given the additional restrictions surrounding the disclosure of sensitive personal data, it is appropriate to look firstly at whether there are any conditions in schedule 3 which would permit the sensitive personal data to be disclosed.



*Processing of sensitive personal data*

23. There are 10 conditions listed in Schedule 3 to the DPA. One of these, condition 10, also allows sensitive personal data to be processed in circumstances specified in an order made by the Secretary of State and the Commissioner has considered the additional conditions for processing sensitive personal data which have been specified in this way, as contained in secondary legislation such as the Data Protection (Processing of Sensitive Personal Data) Order 2000.
24. The Commissioner's guidance at <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp> suggests it is unlikely that a public authority dealing with a request for sensitive personal data will be able to satisfy any of the Schedule 3 conditions unless it has the data subject's explicit consent for the disclosure (condition 1) or the information has already been made public as a result of steps deliberately taken by that individual (condition 5). This is because the other conditions concern disclosure for a stated purpose and are very restrictive in nature, and therefore it is very unlikely that sensitive personal data could be released in response to a freedom of information request without consent or deliberate action by the data subject. The Ministers did not identify data set 2 as sensitive personal data and it is clear that consent has not been granted here (and the information has not been made public by the data subject(s)), so this condition cannot be met.
25. Having considered carefully each of the conditions which allow sensitive personal data to be processed, the Commissioner has come to the conclusion that there are no conditions which would permit the sensitive personal data under consideration in this case to be disclosed. He therefore finds that disclosure of the personal data in data set 2 would breach the first data protection principle and that the information is exempt from disclosure under section 38(1)(b) of FOISA.
26. 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 in data sets 3 and 4 to be disclosed and whether the disclosure of this personal data would be fair and lawful.

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

27. Of the conditions in Schedule 2, condition 6 would appear to be the only one which might permit disclosure in the circumstances of this case. Condition 6 is met where:  
"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."
28. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - i) Does the applicant have a legitimate interest in obtaining this personal data?
  - ii) 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 data subject(s)?

- iii) Even if the processing is necessary for the legitimate purposes of the applicant, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject(s)? This will involve a balancing exercise between the legitimate interests of the applicant and those of the data subjects. Only if (or to the extent that) the legitimate interests of the applicant outweigh those of the data subject(s) can the personal data be disclosed.

#### *Legitimate interests of the applicant*

29. In her application, Ms Jacques indicated that the information she sought related to the closure of an emergency service which should have been preventable and should not have happened. This, she submitted, should be investigated, results published and mechanisms put in place to ensure there could be no repeat. She indicated there was a need for transparency in relation to a service failure which was of serious public concern in a remote, rural hospital.
30. Ms Jacques appears to have genuinely held concerns about the proper investigation of the circumstances leading to the closure of a key service, which she believes to be a matter of legitimate public interest. In the circumstances, the Commissioner accepts that Ms Jacques has a legitimate personal interest in finding out what happened and that this is in line with the legitimate public interest in finding out both the causes of the closure and the measures taken to protect the public.

#### *Necessity*

31. Moving on to the second test set out above in paragraph 27, the Commissioner has considered whether disclosure of the withheld information is actually required to achieve the legitimate aims he has identified. The Ministers argued that the processing of the personal data was not necessary for the purposes of any legitimate interest.
32. The Ministers recognised that there was a significant public interest in seeing information about the circumstances surrounding the inspection and temporary closure of a facility such as the CBB. However, the Ministers also argued that a substantial amount of information had been released, not only by them but also by NHS Highland and this went a long way towards meeting that interest. The Ministers argued that release of the redacted information would add little to public knowledge or understanding of the issues.
33. Having acknowledged Ms Jacques' legitimate interest in access to information on the closure of CBB, the Commissioner cannot regard the existing disclosures by the Ministers and NHS Highland as meeting that interest in full. In the circumstances, he can identify no viable means of doing so which would interfere less with the privacy of the relevant data subject(s) than obtaining the information requested.





*Legitimate interests of the data subject*

34. The third test must consider the rights and freedoms or legitimate interests of the data subjects (the individuals to whom the data relate) and balance them against the identified legitimate interests of the applicant. The Ministers indicated that as the personal data remained controversial, the processing of this data in relation to Ms Jacques' request would be prejudicial to the rights and freedoms or legitimate interests of the individuals concerned.
35. In *Decision 012/2009 Mr John Young and North Lanarkshire Council*, the Commissioner examined the issue of revealing information about employees and in doing this made reference to the (UK) Information Commissioner's *Freedom of Information Act Awareness Guidance No 1 – Personal Data* [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance%201%20personal\\_information\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf), which considers the question of fairness. The guidance distinguishes between information relating to an individual's private and public lives, suggesting that information about an individual acting in an official or work capacity is less likely to deserve protection.
36. *Decision 012/2009* also refers to the Information Commissioner's *Data Protection Technical Guidance: Freedom of Information – Access to information about public authorities' employees* at [http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/public\\_authority\\_staff\\_info\\_v2.0\\_final.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/public_authority_staff_info_v2.0_final.pdf). When considering the expectations of the employees concerned regarding disclosure, this document states that more senior staff and those carrying out public functions should expect more information about them to be disclosed. Another key issue to be considered is whether the data subject would have a reasonable expectation of disclosure.
37. Therefore it is difficult to see how it would be unfair to the data subjects if data set 3 were released given this guidance. Data set 3 comprises general comments on operational matters in which staff are involved in their respective professional capacities only. The organisational structure of the CBB is clear from information already released (and it appears to the Commissioner that it would have been reasonably widely known within NHS Highland and among those having regular contact with it in any event), while references to staff outwith the CBB arise only by way of factual descriptions of reporting relationships. The Commissioner can identify nothing in this data set which the individuals concerned would not reasonably expect to be made available, and on balance is satisfied in the circumstances that the rights, freedoms or legitimate interests of those individuals do not outweigh the legitimate interests of the applicant in disclosure. Having taken account of the Ministers' submissions in this regard, he can identify no basis for considering disclosure to be otherwise unfair or unlawful. Consequently, the Commissioner does not accept that the first data protection principle would be contravened by disclosure of the personal data in data set 3 and therefore does not consider that information to be exempt in terms of section 38 (1)(b).
38. However, it also seems reasonable to conclude that the information in data set 4 would not be generally known, and in the circumstances (considering its content) the Commissioner is satisfied that its disclosure would clearly impact prejudicially on the rights and freedoms or



legitimate interests of the individuals concerned were it to become known. On balance, the Commissioner would conclude that this prejudicial impact outweighs the legitimate interests of the applicant identified above and therefore must determine that condition 6 is not met in relation to data set 4. Consequently, he would also consider disclosure to be unlawful and, given the prejudice he has identified, unfair. In all the circumstances, therefore, he must conclude that disclosure of the personal data in data set 4 would breach the first data protection principle.

#### *Conclusions on section 38(1)(b)*

39. The Commissioner concludes that none of the information in data set 1 constitutes personal data and therefore section 38(1)(b) cannot apply to this particular data set. With respect to the personal data in data set 2 (which constitutes sensitive personal data) the Commissioner agrees with the Ministers that it is exempt under section 38(1)(b) of FOISA, as none of the conditions in Schedule 3 to the DPA can be met and therefore disclosure would breach the first data protection principle. He has reached the same conclusion in respect of the personal data in data set 4, given that no condition in Schedule 2 can be met. With regard to the personal data in data set 3, however, he has concluded that disclosure would not contravene the first data protection principle and therefore that the information is not exempt from disclosure under section 38(1)(b) of FOISA.
40. The Commissioner will now go on to consider whether the exemption applied under section 30(b)(i) of FOISA to data sets 1 and 3 was applied correctly.

#### **Consideration of section 30(b)(i)**

41. As the Commissioner has said in previous decisions, the standard to be met in applying the tests contained in sections 30(b)(i) is high. Where a public authority finds that certain information falls within the scope of the exemption, it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
42. The matters to be considered in determining whether a section 30(b) exemption applies can be found set out in greater detail in, for example, *Decision 010/2009 Mr Paul Martin MSP and the Scottish Ministers*. Here, the Commissioner had regard to a number of his previous decisions on these exemptions, and also to the decision in the Court of Session appeal: *Scottish Ministers v Scottish Information Commissioner [2007] CSIH 8*. The Court's conclusions made clear that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of these exemptions. Key issues include:
  - a. Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case
  - b. The nature and content of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information.



- c. If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker.
43. The Ministers argued in this case that the redacted information comprised free and frank advice from NHS Highland and Scottish Government officials to the Minister of Health and Community Care. As the withheld material included candid assessments on a range of issues, the Ministers were concerned (noting that the issues covered were, and remained, controversial) that disclosure of the information would substantially inhibit officials in the future from providing this sort of advice, and in particular from committing their advice to paper. In this context, they submitted that it was vital for them to receive (as in this case) full and honest briefing from authorities such as NHS Highland: the briefing forming document 1 had been provided on a confidential basis and they contended that such organisations would be less likely to provide sensitive or confidential advice in future should the redacted information be made public, with the result that Ministers would be inadequately briefed and thus would be inhibited in their ability to carry out their functions.
44. The Ministerial Briefing was provided in October 2006 and provides a retrospective account of the events and circumstances surrounding the closure. Ms Jacques' request was made in May 2008, approximately one year after the CBB had re-opened and approximately 18 months after the withheld information was created. In considering the level of inhibition that would be caused or would be likely to be caused by disclosure, the Commissioner has given careful consideration to the issue of timing and to the cumulative effect disclosure of this particular information could have on any future provision of advice. He has considered this against the backdrop of a) the press releases made by the Ministers at the time of the closure and b) what was publicly known between 2006 and the time of Ms Jacques request being submitted and dealt with.
45. Analysis of the information in data sets 1 and 3 confirms that these passages are largely factual in content, descriptive of events which had occurred or decisions/conclusions which had been arrived at. For instance, where managerial arrangements are outlined it seems reasonable to conclude that these arrangements would be generally known to anyone with knowledge of either staffing structures or service provision in Caithness General Hospital at the time the arrangements were operational. Aspects of the closure and its aftermath were described by NHS Highland in a press release dated 11 May 2007.
46. Many of the comments are also brief and fairly innocuous, for instance simply outlining a remedial action taken and the staffing level required. Where views or opinions are recorded, this appears to be done in a measured way, not obviously contentious: even the passage providing an insight into the reaction to the pre-visit report, while potentially sensitive at the time it was written, could not reasonably be described as remaining so at the time the Ministers dealt with Ms Jacques' request. Also, with regard to the redacted section of document 3, the Commissioner takes a similar view in relation to the content of paragraph 2 and most of that of paragraph 3. On the other hand, the Commissioner accepts that the information in the redacted block 8, together with certain information in the redacted section of document 3 (the first three sentences and the last sentence in paragraph 1, together with the first sentence of paragraph 3) represents a frank appraisal of aspects of the situation leading



to the closure, which (given other matters still ongoing at that time) would have remained sensitive at the time the Ministers dealt with Ms Jacques' request and request for review.

47. Although the Commissioner accepts the seriousness of a situation where the safe operation of a blood bank is discussed, he must look at the actual information withheld and the circumstances pertaining to it at the time of the applicant's information request and request for review. Given his analysis above, it is very difficult to see how, in all the circumstances of this case, the information in data sets 1 and 3 (with the exceptions described in paragraph 46 above) could be seen to remain "controversial" at the time of Ms Jacques' request, a year after the Blood Bank re-opened. Many of the remedial actions were already in place by then (as the press release of 11 May 2007 announced) although he acknowledges that other aspects would necessarily remain an ongoing activity to meet the standards required. In all the circumstances, given the nature of the information and the passage of time (and the release of other information over that time), he cannot see how disclosure of the withheld information in data sets 1 and 3 (subject to the exceptions described above) would, or would be likely to, cause substantial inhibition as required by section 30(b)(i). He accepts, however, that such inhibition would or would be likely to follow from disclosure of the information in the redacted block 8, together with certain of the information redacted from document 3 (this being the first three sentences and the last sentence in paragraph 1 and the first sentence of paragraph 3), and therefore would consider that information (only) to be exempt under section 30(b)(i).
48. Given that the Commissioner has upheld the Ministers' reliance of the exemption in section 30(b)(i) in relation to certain withheld information (as described in paragraph 47 above), he will now go on to consider the public interest test contained in section 2(1)(b) of FOISA.

### ***Public interest***

49. The Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure. As noted above, exempt information is only required to be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding the information).

### ***The Ministers' submissions on the public interest***

50. In their submissions, the Ministers recognised a significant public interest in seeing information about the circumstances surrounding the closure of a facility such as the CBB, explaining that a substantial amount of material on the subject was already in the public domain. They believed the information released already went a substantial way towards meeting that public interest and took the view that release of the remaining small amount of information would add little to public knowledge or understanding of the issues.
51. The Ministers considered the public interest in seeing the remaining information to be outweighed by that in Ministers and officials having a "private space" within which to consider and discuss important and contentious issues such as the closure of a blood bank.



52. The Ministers also contended that on account of the issues concerned, disclosure of the withheld information could undermine the work done by NHS Highland to remedy previous failings. In the Ministers' view, any public interest in the withheld information was outweighed entirely by the public interest in maintaining the exemption.

*Ms Jacques' submissions on the public interest*

53. In her application to the Commissioner, Ms Jacques emphasised that she believed the public interest lay in understanding the reasons for the closure of an emergency service which, in her view, should have been preventable. This closure, she argued, should be investigated, findings published and mechanisms put in place to ensure there could be no repeat. Ms Jacques felt insufficient information had been made public and argued that the public interest would be strengthened by greater transparency of process in relation to the service failure, which was a matter of serious public concern.

*Conclusions on the public interest*

54. The Commissioner accepts that there may be a public interest in understanding the advice officials have provided to Ministers when formulating strategies to address failures in the provision of an emergency service. Whether this is appropriate in the circumstances will depend on the content of the advice and the context in which it is imparted: there may be a compelling public interest in making known the matters under consideration in the interests of transparency. Disclosure may contribute to a better understanding of the context in which decisions were taken and the advice on which these were based.
55. On the other hand, the context and timing of this request and its handling are relevant here. The Commissioner has considered carefully the information in respect of which he accepts the application of the exemption in section 30(b)(i) of FOISA (as described in paragraph 47 above), all of which comprises frank and candid advice on issues which he accepts would be likely to remain controversial and of some sensitivity at the time of Ms Jacques' request and that of the Ministers' review, and possibly for some time thereafter. In this case, the Commissioner accepts that disclosure of this particular information would have been likely to re-open some of the issues to the potential detriment of service provision.
56. Therefore, having considered all the public interest arguments put to him, the Commissioner has concluded in this case that the public interest in disclosure of the information in the redacted block 8, together with certain of the information redacted from document 3 (this being the first three sentences and the last sentence in paragraph 1 and the first sentence of paragraph 3), is outweighed by the public interest in maintaining the exemption in section 30(b)(i) of FOISA. He therefore concludes that the Ministers correctly withheld this information in terms of section 30(b)(i).
57. The Commissioner therefore requires the Ministers to provide Ms Jacques with the information in data sets 1 and 3 as described in paragraph 15 above, with the exception of the information in the redacted block 8 and certain of the information redacted from document 3 (i.e. the first three sentences and the last sentence in paragraph 1, together with the first sentence of paragraph 3).



## 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 Ms Jacques.

The Commissioner finds that the Ministers acted in accordance with Part 1 of FOISA by withholding the information in data sets 2 and 4, as specified in paragraph 15 of this Decision, in terms of the exemption in section 38(1)(b) of FOISA. He also finds that they acted in accordance with Part 1 by withholding the information in the redacted block 8, together with parts of the redacted section in document 3 (i.e. the first three sentences and the last sentence in paragraph 1 and the first sentence of paragraph 3), under the exemption in section 30(b)(i) of FOISA.

However, the Commissioner also finds that the Scottish Ministers incorrectly applied the exemption in section 30(b)(i) to the remaining information in data sets 1 and 3 (as specified in paragraph 15 of this Decision) and thereby failed to deal with Ms Jacques' request in accordance with Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner therefore requires the Scottish Ministers to release the information contained in data sets 1 and 3 as detailed in paragraph 15 of this Decision, with the exception of the information he has found to have been properly withheld under section 30(b)(i) of FOISA, by 9 April 2010.

## Appeal

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Should either Ms Jacques 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 after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**22 February 2010**



## Appendix

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### 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-

...

- (b) would, or would be likely to, inhibit substantially-



- (i) the free and frank provision of advice; or

...

### 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

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;

...

### 2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.



## **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.

...