

# Decision Notice



Decision 149/2010 Peter Stewart-Blacker and the Scottish Public Services  
Ombudsman

External review of handling of complaint and subsequent internal business  
review

Reference No: 200902154  
Decision Date: 24 August 2010

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## Summary

Mr Stewart-Blacker requested from the Scottish Public Services Ombudsman (SPSO) information relating to an external review of the SPSO handling of an investigation and information relating to a subsequent internal business review. The SPSO responded by providing some of the information to Mr Stewart-Blacker and withholding the remaining information held by it under exemptions contained in sections 26(a), 36(2) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Stewart-Blacker remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPSO had partially failed to deal with Mr Stewart-Blacker's request for information in accordance with Part 1 of FOISA. He concluded that the SPSO had incorrectly applied the exemptions in sections 26(a), 30(b)(ii) and 38(1)(b) to some of the information withheld, and required disclosure of that information to Mr Stewart-Blacker.

## 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)(a),(b) and (e)(ii) (Effect of exemptions); 15 (Duty to provide advice and assistance); 25(1) (Information otherwise available); 26(a) (Prohibitions on disclosure); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality) and 38(1)(b), (2)(a)(i) and (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 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 – conditions 1 and 6)

Scottish Public Services Ombudsman Act 2002 sections 2 (Power of investigation); 3 (Persons liable to investigation); 12 (Investigation procedure); 15(1) and (3) (Reports on investigations); 19 (Confidentiality of information) and 23 (Interpretation) (definition of "complaint")

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. On 29 October 2009, Mr Stewart-Blacker wrote to SPSO requesting information pertaining to case number 20050254 and the report and external review by Jerry White (then one of the Local Government Ombudsmen in England (LGO)).
2. The following day, Mr Stewart-Blacker again wrote to SPSO extending the scope of his request to include all notes, emails etc and any correspondence between the LGO and the SPSO.
3. The SPSO responded on 26 November 2009, indicating that it was relying on the exemptions in sections 26(a), 36 and 38 of FOISA to withhold most of the information requested by Mr Stewart-Blacker. However, the SPSO provided links to publicly available versions of its investigation report regarding case reference 200502514<sup>1</sup> and the associated report by Jerry White into the handling of complaint reference 200502514.<sup>2</sup> The SPSO also provided Mr Stewart-Blacker with redacted copies of some correspondence with the LGO and documents relating to the subsequent internal review of procedures.
4. On 27 November 2009, Mr Stewart-Blacker wrote to the SPSO requesting a review of its decision. Mr Stewart-Blacker indicated that he would like to “appeal the redacted information” in the response. (During the investigation, Mr Stewart-Blacker confirmed that he had not intended this to mean that he only wanted the SPSO to consider the refusal to provide information which had been redacted from specific documents, as opposed to information in documents which had been withheld in full.)
5. The SPSO notified Mr Stewart-Blacker of the outcome of its review on 15 December 2009, indicating that it was upholding in full the previous decision to withhold the redacted information.
6. On 15 December 2009, Mr Stewart-Blacker wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPSO’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Stewart-Blacker 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.

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<sup>1</sup> [http://www.spsso.org.uk/webfm\\_send/2260](http://www.spsso.org.uk/webfm_send/2260)

<sup>2</sup> [http://www.spsso.org.uk/webfm\\_send/2351](http://www.spsso.org.uk/webfm_send/2351)



## Investigation

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8. In his application to the Commissioner, Mr Stewart-Blacker clarified that he wished the Commissioner to investigate:
  - a. The decision by the SPSO to withhold, under the exemptions contained in sections 26(a) and 38 of FOISA, procedural information regarding the SPSO's handling of case reference number 200502154 (the case file); in particular, he wished to see the evidence upon which Jerry White based the assertion in his case handling review that this was "the worst case of complaint handling by an Ombudsman's office that I have seen";
  - b. The decision by the SPSO to redact, under the exemption contained in section 38(1)(b) of FOISA, information from the copy documents provided to him and in particular the six pages of information under the heading "Staff Feedback" redacted from a document entitled SPSO Business Review Intranet Update 3;
  - c. The decision by the SPSO to withhold the information contained in legal advice under the exemption in section 36(1) of FOISA;
  - d. The decision by the SPSO to withhold, under the exemption in section 38(1)(b) of FOISA, information relating to the review undertaken by Jerry White including all notes, emails and correspondence between the SPSO and the LGO;
  - e. The decision by the SPSO to withhold, under the exemption in section 38(1)(b) of FOISA, information relating to confidential communications between, and meetings of, the SPSO senior management team relating to case reference 200502154, the review undertaken by Jerry White and the Business Review
9. On 12 January 2010, the SPSO was notified in writing that an application had been received from Mr Stewart-Blacker and was asked to provide the Commissioner with any information withheld from him. The SPSO responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the SPSO, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the SPSO was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.



11. In response, the SPSO clarified that, in addition to the exemptions previously identified in its responses to Mr Stewart-Blacker, it wished to rely on the exemption in section 25(1) of FOISA to withhold copies of the Investigation Report reference 200502154 and the associated report by Jerry White. It also indicated that, in addition to section 3(1)(b), it wished to rely on the exemption in section 30(b)(ii) to withhold the information redacted from the six pages of the SPSO Business Review Intranet Update 3 under the heading of “Staff Feedback” and to withhold information contained in confidential communications between, and records of, meetings of the SPSO senior management team. Additionally, the SPSO also indicated that it wished to rely on the exemptions in sections 30(b)(ii) and 30(c) of FOISA to withhold the information contained in three identified emails between the SPSO and the LGO.

### Commissioner’s analysis and findings

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12. 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 Stewart-Blacker and the SPSO and is satisfied that no matter of relevance has been overlooked.
13. The investigating officer analysed the withheld information in the case file provided by SPSO, with particular reference to the exemption contained in section 26(a) of FOISA, which indicates that information is exempt if its disclosure by a Scottish public authority, otherwise than under FOISA, is prohibited by or under an enactment. Section 19(1) of the Scottish Public Services Ombudsman Act 2002 (the SPSO Act) states:

*“Information obtained by the Ombudsman or any of the Ombudsman’s advisers in connection with any matter in respect of which a complaint or request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).”*

The Commissioner has previously held, in *Decision 080/2008: Mr Mark French and the Scottish Public Services Ombudsman*<sup>3</sup> that the provisions in section 19 of the SPSO Act do amount to a prohibition on disclosure for the purposes of section 26(a) FOISA.

14. The investigating officer also analysed the withheld information in the case file with particular reference to personal data and the application of section 38 of FOISA. The case file contained large quantities of personal data relating to the underlying case that had been referred to the SPSO for investigation, and which Mr Stewart-Blacker had already indicated he had no interest in receiving. Finally, the investigating officer also analysed the case file to identify information that was already available in the public domain which had been withheld by the SPSO under the exemption contained in section 25(1) of FOISA.

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<sup>3</sup> <http://www.itspublicknowledge.info/UploadedFiles/Decision080-2008.pdf>



15. The result of this analysis identified that the Commissioner was likely to find that the vast majority of the information contained in the case file was wholly or partly subject to the exemptions in section 26(a) and 38 of FOISA or already available in the public domain. The investigating officer notified Mr Stewart-Blacker accordingly, and he accepted that it was unlikely that he would be provided with wholesale access to information contained in the case file. He did, however, re-affirm his desire to obtain information that resulted in the assertion by Jerry White referred to in paragraph 8 above.
16. Following a discussion with the investigating officer, Mr Stewart-Blacker identified that an unpublished appendix to Jerry White's report, entitled "Detailed Chronology" may contain the evidence he wished to obtain, and agreed that the investigation of this aspect of his dissatisfaction should focus on the unpublished appendix rather than the entire contents of the case file.

#### **Section 25(1) – Information otherwise accessible**

17. The exemption contained in section 25(1) of FOISA indicates that information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The Commissioner's guidance<sup>4</sup> on this exemption explains that, when it applies, an authority does not have to supply the information requested, but they must tell the applicant why they believe the information is available through other means. Additionally, the guidance indicates that, given the duty to provide advice and assistance to applicants under section 15(1) of FOISA, the authority should normally tell the applicant where the information can be obtained.
18. In its refusal notice, the SPSO informed Mr Stewart-Blacker that a copy of the Investigation Report and a copy of the report prepared by Jerry White could be found on its website, and provided direct links to both documents. Although the SPSO did not cite the section 25(1) exemption at this time, the information it did supply to Mr Stewart-Blacker enabled him to access the reports. The failure to identify the exemption did not materially affect Mr Stewart-Blacker's access to the information and in the circumstances the Commissioner is satisfied that the SPSO would have been entitled to rely on this exemption.

#### **Section 26(a) – Prohibitions on disclosure**

19. The exemption contained in section 26(a) of FOISA indicates that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. It is an absolute exemption and therefore is not subject to the public interest test. In this case, the SPSO identified that such a prohibition is created by section 19 of the SPSO Act.

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<sup>4</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2663&SID=107>



20. As noted above, section 19(1) of the SPSO Act indicates that information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for a limited range of purposes specified elsewhere in that section of the SPSO Act. These purposes do not include disclosure of information under FOISA.
21. As mentioned in paragraph 13 above, the Commissioner accepts that section 19(1) of the SPSO Act does create a prohibition on disclosure of information that engages section 26(a) of FOISA. However, this prohibition only extends to a specific range of information held by the SPSO. This issue is discussed at some length in *Decision 080/2008 Mr Mark French and the Scottish Public Services Ombudsman* but it is complex and therefore important to rehearse the relevant considerations in this decision notice.
22. Section 2 of the SPSO Act sets out the types of matters which the SPSO has the power to investigate. An investigation may come about as a result of a complaint to the SPSO (a "complaint") or where a person who is liable to be investigated has requested the SPSO to investigate a matter (a "request"). However, in both of these cases, it is clear from section 2 that the power of the SPSO to carry out an investigation is limited to matters consisting of action taken by or on behalf of a person liable to investigation under the SPSO Act and matters which the SPSO is entitled to investigate. Schedule 2 to the SPSO Act lists the authorities which are liable to investigation by the SPSO, but, significantly, the SPSO does not appear in this list.
23. Section 23 of the SPSO Act clarifies that "complaint" for the purposes of that Act means a complaint to the Ombudsman. The Commissioner is satisfied that the interpretation provided in the SPSO Act clearly creates a distinction between complaints made to the Ombudsman and complaints about the Ombudsman. This is an issue of some significance when considering the review undertaken by Jerry White. As the review undertaken by Mr White does not fall within the definition of a "complaint" or a "request" in section 2 of the SPSO Act, it does not therefore fall under the provisions created by sections 12 and 19 of that Act.
24. Section 19(1) of the SPSO Act clearly identifies that the prohibition on disclosure relates to information "obtained" by the Ombudsman or any of his advisers in connection with any matter in respect of which a complaint or a request has been made. The prohibition therefore turns on the obtaining of information and the Commissioner accepts, as suggested by the SPSO in its submissions, that information can be obtained proactively, i.e. in response to a specific request for the information made by the SPSO, or by default, i.e. provided without a specific request for the information having been made by the SPSO. The extent of the information "obtained" during an investigation is therefore extensive, but the Commissioner is content that it does not extend to all information contained in an investigation or case file. The Commissioner takes the view that the definition of "obtained" does not extend to include information generated by the SPSO during an investigation, except where the generated information includes information provided to the SPSO (obtained) in connection with that investigation.



25. The Commissioner accepts that Mr White's review was based on an examination of the case file and, accordingly, that his report may contain information obtained by the Ombudsman during the conduct of that investigation. As the Commissioner takes the view that Mr White's review does not amount to the investigation of a "complaint" or "request" under section 2 of the SPSO Act, it therefore does not fall under the confidentiality provisions contained in section 19 of that Act. He does, however, accept that there is an enduring obligation of confidentiality in relation to any information obtained by the Ombudsman during the conduct of the original investigation if that is included in the review report prepared by Mr White.
26. The SPSO argue that, in addition to the prohibition on disclosure contained in section 19(1) of the SPSO Act, there is a further significant imposition of privacy contained in section 12(1) of that Act, namely that an investigation under section 2 must be conducted in private. The SPSO considers that this requirement to privacy covers much of the information contained in an investigation or case file that does not amount to information "obtained" by the SPSO and caught by the prohibition in section 19(1). As an example, the SPSO indicated that many documents in a case file will comprise exchanges between the Ombudsman and his staff and form part of the "conduct of the investigation". The SPSO argues that as part of the process of carrying out the investigation such exchanges must be made "in private".
27. The Commissioner is familiar with exchanges between managers and staff during the course of an investigation and accepts that such exchanges are an integral part of the investigative process and, therefore, in relation to investigations conducted by the SPSO, fall within the scope of section 12(1). However, unlike the prohibition created by section 19(1), the Commissioner does not accept that the restrictions created by section 12(1) last in perpetuity. It is without question that any investigation has a finite timescale during which it is "conducted". Indeed, this is recognised in section 15(1) of the SPSO Act which states, "After conducting an investigation, the Ombudsman must ... send a report of the investigation to the persons specified ... and to the Scottish Ministers, and must lay a copy of the report before the Parliament". The Commissioner is satisfied that the process of conducting an investigation, and therefore the requirement to privacy imposed by section 12(1), must have concluded on or before the date upon which the report of such an investigation was issued by the Ombudsman in accordance with section 15(1) of the SPSO Act. In this case the Ombudsman's report was laid before Parliament on 19 August 2009, more than two months before Mr Stewart-Blacker made his information request.
28. Accordingly, the Commissioner finds that the SPSO incorrectly applied the exemption contained in section 26(a) of FOISA to information contained in Appendix 1 to Mr White's review report where the information was not obtained by the Ombudsman in connection with the investigation of case reference 200502154.





### Section 30 – Prejudice to effective conduct of public affairs

29. Section 30 of FOISA contains a number of exemptions relating to the disclosure of information which would, or would be likely to, prejudice the effective conduct of public affairs. All of the exemptions are prejudice based and, as non-absolute exemptions, are also subject to the public interest test contained in section 2(1)(b) of FOISA. In this case, the SPSO relied upon the exemptions contained in section 30(b)(ii) (disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation) and section 30(c) (disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs). The drafting of this section of FOISA results in these two exemptions being mutually exclusive – relevant information may be exempt by virtue of one or other, but not both, of these exemptions.
30. The SPSO applied the exemption in section 30(b)(ii) to three different batches of information withheld from Mr Stewart-Blacker that require individual considerations, namely;
- a. Information redacted from the document entitled SPSO Business Review Intranet Update 3 under the heading “Staff Feedback”;
  - b. Information contained in confidential communications between, and meetings of, the SPSO senior management team relating to the original case investigation, the review undertaken by Jerry White and the Business Review; and
  - c. Information contained in three emails exchanged between the Ombudsman and Jerry White during the period of Mr White’s review.
31. In the case of the information identified as staff feedback, the views of staff were sought to identify shortcomings in processes and procedures operated by the SPSO and to suggest methods of improvement. The deliberations were therefore focussed on process and procedure rather than case specific issues. The Commissioner does not accept that disclosure of this information, already anonymised and to an extent edited during the process of preparing the Intranet Update, would, or would be likely to, inhibit members of staff from contributing their views to any future similar exercise. Indeed, the Commissioner considers that identifying shortcomings and suggesting improvements in the processes and procedures operated by public authorities forms part of the professional and public responsibilities of those employed in the public sector. Accordingly the Commissioner finds that the exemption in section 30(b)(ii) of FOISA was incorrectly applied to Information redacted from the document entitled SPSO Business Review Intranet Update 3 under the heading “Staff Feedback”.
32. In the case of information contained in confidential communications between, and records of meetings of, the SPSO senior management team there are three areas of information originally requested by Mr Stewart-Blacker, namely:
- a. Information relating to the original investigation;
  - b. Information relating to the review undertaken by Jerry White; and



c. Information relating to the Business Review.

33. The Commissioner takes the view that information regarding communications involving the senior management team in relation to the original investigation form part of the contents of the original case file. As Mr Stewart-Blacker narrowed the scope of his request in relation to the original case file to consider only the contents of Appendix 1 to Mr White's report, any such information in the case file now lies outside the scope of Mr Stewart-Blacker's narrowed request.
34. The Commissioner has examined the information that lies within the second and third areas described in paragraph 32 above. The SPSO submitted that the Business Review was ongoing at the time it dealt with Mr Stewart-Blacker's request and subsequent request for review and that, as no final decisions had been made, the organisation was entitled to some private space to discuss options and arrive at a solution that would achieve the best possible use of public money. The SPSO also argued that the information was extremely sensitive, because it contained a range of potential options for restructuring that might impact on staff and therefore should not be disclosed while the review was ongoing.
35. The Commissioner accepts that reviews of processes, procedures and structure, such as that undertaken by the SPSO, involve the consideration of a number of options to rectify shortcomings or failings that have been identified. He also accepts that such a range of options may include proposals ranging from radical change to minor alterations to a limited number of procedures and that disclosure of options that are subsequently rejected during the process of deliberations can cause unnecessary concerns for employees and others connected with the organisations, including users of its services. The Commissioner therefore considers that the SPSO is correct in its assertions that an organisation does, from time to time, require some space to undertake deliberations and discussions of options. In this case, he finds that the SPSO correctly applied the exemption contained in section 30(b)(ii) to the information described in paragraph 32 (b) and (c) above. However, as section 30(b)(ii) is not an absolute exemption, he must go on to consider the public interest test contained in section 2(1)(b) of FOISA.
36. The Commissioner is clear that there is a public interest in identifying that a public sector organisation operates effectively and efficiently. He also considers that there is a public interest in explaining why and how failures occurred and what steps have been taken to remedy them. The release of the information discussed immediately above would contribute to that understanding.
37. However, the Commissioner also considers that, during a comprehensive review, a number of options that are discussed will be rejected before an agreed solution is identified. The process of identifying potential solutions may result in some radical options being identified that would prove to be extremely unpopular with staff or service users and could result in anxiety or distress if disclosed. If these options are subsequently rejected, the anxiety or distress would have been unnecessary and the Commissioner does not consider that there is a public interest in unnecessarily causing such anxiety or distress before any internal discussion of options has concluded.



38. On balance, therefore, the Commissioner considers that in this case the public interest favours maintaining the exemption, especially as the Business Review is not yet complete.
39. In the case of information contained in the emails exchanged between the Ombudsman and Jerry White, the views exchanged were focused on Mr White's, then ongoing, review and concerned presentational, management and factual accuracy aspects of his report. The Commissioner accepts the SPSO's position that from time to time Ombudsmen discuss and exchange views, usually in relation to particularly difficult matters, and the publication of such exchanges is likely to substantially inhibit such mutual assistance in the future. The Commissioner further accepts that any inhibition on the free and frank exchange of views between Ombudsmen may have a detrimental effect on either the investigation of a particular complaint or in the public confidence in the Ombudsman to fulfil his duties, with the proviso that each case must be judged on its merits, including consideration of the public interest.
40. In this instance, the three emails in question take the form of a covering message accompanied by a number of attachments relating to information intended for inclusion in Mr White's report. The information contained in the attachments amounts to the views of Mr White exchanged with the Ombudsman for the purpose of deliberation on the nature and extent of Mr White's report, including, where appropriate, allowing the Ombudsman to seek legal advice regarding specific elements of the information concerned. However, the information contained in the accompanying email messages is information of a routine nature that might preface or otherwise accompany information amounting to views. Accordingly the Commissioner does not uphold the application of section 30(b)(ii) to the three email covering messages but does accept that the exemption was correctly applied to the documents attached to the messages. The Commissioner must therefore go on to consider the public interest test in section 2(1)(b) of FOISA in relation to the documentary attachments.
41. The Commissioner is mindful that the compilation of a report, such as that produced by Mr White, is complex and involves necessary discussion regarding factual accuracy, the extent of the coverage and legal issues concerning the content. This process is essential to ensure that the final report fully addresses the remit given to its author, accurately reflects the facts of the case and does not contain information that is inaccurate, contravenes any statutory obligations such as those imposed by the Data Protection Act 1998 or otherwise might expose the author or publisher of the report to legal action. The Commissioner cannot identify any public interest in releasing information amounting to the exchange of views that resulted in the publication of a comprehensive and hard-hitting report such as produced on this occasion where the release of such views is likely to result in the production of a less comprehensive or less accurate report in the future. The Commissioner is of the opinion that the public interest supports the free and frank exchange of views necessary to achieve the production of a report such as that produced by Mr White. Accordingly, the Commissioner considers that on this occasion the public interest favours maintaining the exemption in relation to the documentary attachments that accompanied the three emails.



42. The SPSO also applied the exemption in section 30(c) to the information contained in the three emails discussed directly above. As the Commissioner is satisfied that the exemption in section 30(b)(ii) was correctly applied to the information contained in the documentary attachments he is only required to consider the exemption in section 30(c) in relation to the covering email messages.
43. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The word "otherwise" is used here to differentiate this particular exemption from the other types of substantial prejudice – such as substantial inhibition to the free and frank provision of advice or exchange of views – envisaged by other parts of section 30. Section 30(c) is a qualified exemption and, if it is found to apply to information, is subject to the public interest test required by section 2(1)(b) of FOISA.
44. As indicated in paragraph 29 above, the exemptions contained in section 30(b)(ii) and section 30(c) are mutually exclusive. The Commissioner, having decided that the information contained in the three covering emails is not exempt from disclosure under section 30(b)(ii) of FOISA, is therefore entitled to consider whether the exemption in section 30(c) has been appropriately applied to the information by the SPSO. As indicated in paragraph 40 above, the Commissioner considers the information in the three covering emails to be information of a routine nature that might preface or otherwise accompany information amounting to views. In his briefing<sup>5</sup> on the section 30 exemption, the Commissioner has indicated that in order to claim this exemption the damage caused by disclosing the information must be real and significant, as opposed to hypothetical or marginal and that damage would have to occur in the near future and not at some distant time. The SPSO argued that it was likely that disclosure of the information would undermine public confidence in the SPSO as an organisation and that such confidence is crucial to the SPSO's successful operation.
45. The Commissioner accepts that public confidence in an organisation such as the SPSO is essential to ensure continued uptake of the services offered by the public in the belief that the organisation will deal with their problems in a fair and effective manner. However, in the context of this case, and given the nature of the information contained in the three covering emails, the Commissioner does not consider that disclosure of this information will have the effect of undermining public confidence in the SPSO to any greater extent that might already have occurred from publication of Mr White's report. Accordingly the Commissioner finds that the exemption contained in 30(c) of FOISA was incorrectly applied to the three email covering messages.

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<sup>5</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&sID=117>



### Section 36(1) - Confidentiality

46. The exemption contained in section 36(1) indicates that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
47. For the exemption in section 36(1) to apply to this particular type of communication, certain conditions must be fulfilled. The information being withheld must relate to communications with a legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
48. The Commissioner notes that the information under consideration in this case is legal advice sought by and provided to the SPSO by an external firm of solicitors in the context of a professional relationship and circumstances in which legal advice privilege could apply.
49. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption is applicable in the circumstances of this case. Information cannot be privileged unless it is also confidential. For the exemption to apply the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal professional privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed. A claim of confidentiality will not be capable of being maintained where information has (prior to a public authority's consideration of an information request or conducting a review) been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.
50. The Commissioner notes that the "other report" prepared by the SPSO and available on its website, containing as an appendix the report by Jerry White, carries the following footnote:

*"Mr White's report is attached as Annex 1. It is published in full with minor amendments resulting from legal advice on data protection issues. Appendix I of Mr White's report has been withheld because it presents issues under the Data Protection Act relating to the possible identification of SPSO employees".*



Although this footnote identifies a matter upon which the SPSO has sought and received legal advice, the Commissioner does not believe that it is sufficiently detailed to reveal in any meaningful way the advice provided to the SPSO. The Commissioner is not aware of any instances of the legal advice having been made public by the SPSO and therefore considers that its confidentiality has been maintained. Accordingly, the Commissioner considers that, having examined the information, the exemption contained in section 36(1) has been applied appropriately. However this is not an absolute exemption and the Commissioner must therefore go on to consider the public interest test in terms of section 2(1)(b) of FOISA.

51. In *Decision 023/2005 Mr David Emslie and Communities Scotland*<sup>6</sup> the Commissioner stated that there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client and that, while each case will be considered on an individual basis, he is only likely to order the release of such communications in highly compelling cases. The Commissioner's view reflects the arguments and decision in the House of Lords case, *The Three Rivers District Council and Others -v- Governor and Company of the Bank of England [2004] UK HL 48*.<sup>7</sup> Accordingly, and as no arguments have been made to the contrary, the Commissioner considers that the public interest on this occasion favours maintaining the exemption.

### Section 38 – Personal information

52. Section 38 of FOISA contains a number of exemptions relating to personal information. In this case, none of the personal information involved relates to the applicant so there are no issues concerning first party personal information. In relation to the personal information involved, the SPSO has applied the exemption contained in section 38(1)(b), read in conjunction with section 38(2)(a)(i). The effect of this combination of provisions contained in section 38 (or the combination of section 38(1)(b) read in conjunction with section 38(2)(b)) is to render exempt personal data, the disclosure of which to a member of the public other than under FOISA would contravene any of the data protection principles. In this case, the SPSO has asserted that disclosure would breach the first data protection principle.
53. The SPSO had applied this exemption to five categories of information, namely:
- a. The entire contents of the original investigation case file;
  - b. The personal details of junior members of SPSO staff;
  - c. The comments of staff contained under the heading of "Staff Feedback" in SPSO Business Review Intranet Update 3;
  - d. Information relating to the review undertaken by Jerry White;

<sup>6</sup> <http://www.itspubliknowledge.info/UploadedFiles/Decision023-2005.pdf>

<sup>7</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>



- e. Information contained in confidential communications between, and meetings of, the SPSO senior management team relating to the original case investigation, the review undertaken by Jerry White and the Business Review.

*The entire contents of the original investigation case file*

54. As outlined earlier in paragraph 15, Mr Stewart-Blacker accepted that most of the contents of the case file were exempt by virtue of exemptions contained in sections 25, 26 and 38 of FOISA. The Commissioner has therefore agreed with Mr Stewart-Blacker that there is no need to consider the entire contents of the case file in relation to this exemption. Where there is reference to personal data derived from the case file, this will be considered accordingly.

*The personal details of junior members of SPSO staff*

55. The Commissioner considered the issues surrounding the release of the names and other personal details of junior members of SPSO staff in *Decision 080/2008*, and, more recently, reinforced his decision in that case in *Decision 031/2010 Mr Arthur McFarlane and the Scottish Public Services Ombudsman*<sup>8</sup>, that the exemption had correctly been applied when withholding the names and other personal details of junior members of SPSO staff. The Commissioner has not been provided with any information that causes him to re-consider that position and accordingly accepts that the exemption has been applied appropriately to withhold the names and other personal details of junior members of SPSO staff.
56. The Commissioner dealt with this issue in full within *Decision 080/2008* and does not intend to repeat the arguments here. There, having concluded that staff member details did constitute personal data, the Commissioner stated in relation to the disclosure of those data (at paragraph 47): “... it will normally be the case that the higher the position and the greater the authority of an individual, the greater is the argument for openness, transparency and accountability and the more likely it is that disclosure of their names, etc. would be fair. In this case, the correspondence makes reference to more junior SPSO staff (such as investigative officers and personal assistants), senior SPSO staff (such as the Service Quality Manager) and officeholders including the Ombudsman herself and the (then) Deputy Ombudsmen.” He went on to conclude that disclosure of the personal data of the more junior staff would be unfair and therefore in breach of the first data protection principle.
57. In this case, the Commissioner notes that the names of the Ombudsman and the Director of Complaints and Investigations have been released within the redacted documents and that only the names and contact details of the more junior staff have been redacted, in line with the Commissioner’s decision in the above cases.
58. As indicated above, the Commissioner is required to consider each case on its own merits. Here, however, he is satisfied in the circumstances that there is no reason for him taking a different approach to the withheld personal data of the more junior SPSO staff (such as investigative officers, personal assistants or complaints managers) from that taken in *Decisions 080/2008 and 031/2010*.

<sup>8</sup> <http://www.itspubliknowledge.info/UploadedFiles/Decision031-2010.pdf>



59. Consequently, he has concluded that it would be unfair in this case to disclose the withheld details of those junior members of SPSO staff, as they would have no expectation that they would be identified in relation to the type of correspondence in question. Therefore, he considers that disclosure of the personal data pertaining to those junior staff members would breach the first data protection principle.
60. Accordingly, the Commissioner finds that the personal data of junior members of SPSO staff, comprising their names and contact details, redacted from the information published is exempt in terms of section 38(1)(b) of FOISA. This is an absolute exemption and therefore is not subject to the public interest test set down in section 2(1)(b) of FOISA.

*Staff comments in SPSO Business Review Intranet Update 3*

61. The SPSO withheld all of the information contained under the heading of “Staff Feedback” in a document provided to Mr Stewart-Blacker entitled SPSO Business Review Intranet Update 3. This amounted to the redaction of approximately 6 pages of information from a 7 page document.
62. 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). The definition extends to cover opinion as a form of personal data.
63. The Commissioner accepts that, although the comments in the document are anonymous, and, as highlighted in the document as supplied to Mr Stewart-Blacker, “*To avoid duplication, not every comment has been included and some have been edited to make them appropriate for office-wide reading*”, that the SPSO does hold other information from which it is possible to identify the author of each comment. Accordingly the Commissioner accepts that the redacted information does amount to personal data.

Would disclosure breach the first data protection principle?

64. 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.
65. 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.





66. 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 disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.

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

67. As outlined in the Commissioner's guidance<sup>9</sup> there are in reality only two conditions in Schedule 2 that are likely to be relevant when considering a request for personal information under FOISA. The SPSO has indicated that, while it did not specifically seek the consent of staff when considering Mr Stewart-Blacker's request, there was a degree of implied confidentiality and that staff did not expect their (not anonymised) comments to be made public. This effectively negates the use of Condition 1 in the schedule thus rendering condition 6(1) as the only grounds upon which a decision to disclose the information could be based.

Condition 6(1)

68. Condition 6(1) allows personal data to be processed (in this case, disclosed in response to an information request made under section 1(1) of FOISA) if the processing is necessary for the purposes of legitimate interests pursued by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

69. There are, therefore, three specific tests which must be satisfied before condition 6(1) can be met, namely:

- a. Does the applicant (Mr Stewart-Blacker) 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 data subject?
- c. 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 subjects? 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 subjects can the personal data be disclosed.

<sup>9</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.asp>



*Does the applicant have a legitimate interest in obtaining the information?*

70. Mr Stewart-Blacker has indicated that the principal reasons for submitting his request for information to the SPSO was to gain an understanding of the evidence upon which Jerry White based his assertion mentioned in paragraph 8 and also to learn how the SPSO intended to improve its processes and procedures as a result of the outcome of the review and the parallel business review. He considers that the staff comments redacted from the document supplied to him are likely to contain significant information relating to ineffective processes and procedures and suggested methods of improvement. He further considers that he, in common with many other users of the services provided by the SPSO, has a legitimate interest in obtaining the information to enhance his understanding of the organisation's shortcomings and to use the information as a basis for identifying future improvements in the service provided.
71. The Commissioner is mindful that the SPSO deals with matters concerning the perceived failings of a wide range of public sector organisations falling within its remit to deliver services to the satisfaction of consumers. The Commissioner is also aware that the acceptance of a case by the SPSO comes after the full extent of an organisation's complaints procedure has been exhausted by the applicant and to many is regarded as their last hope of gaining resolution. Indeed, the Commissioner is reinforced in this belief by the following message contained in the "About Us" page<sup>10</sup> on the SPSO website:

*"We look into complaints where a member of the public claims to have suffered injustice or hardship as a result of maladministration or service failure. We are the 'last resort', and look at complaints when you have been through the formal complaints procedure of the organisation concerned.*

*We aim to provide justice for the member of the public that is making a complaint and also to share the learning from our work in order to improve the delivery of public services in Scotland".*

72. Accordingly, the Commissioner considers that Mr Stewart-Blacker does have a legitimate interest in obtaining the information requested.

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

73. 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.

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<sup>10</sup> <http://www.spsso.org.uk/about-us>



74. The information is contained in a document that is held on the SPSO intranet and has been distributed to SPSO staff but has not otherwise been circulated or published by the SPSO. Research conducted on behalf of the Commissioner has not identified any of the redacted information contained in the document to be available in the public domain. This second element of the test is designed to consider whether it is necessary for the personal data to be disclosed in order to pursue the applicant's legitimate interests, or whether there is any other information available to the applicant which would meet those aims and which would interfere less with the privacy of the data subjects.
75. The Commissioner is satisfied, given the nature of the information requested, that there is no other viable method of meeting Mr Stewart-Blacker's legitimate interests other than by disclosure of the information in response to his request.

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

76. The Commissioner must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the SPSO staff who contributed comments to the Business Review. As noted above, this will involve a balancing exercise between the legitimate interests of Mr Stewart-Blacker and those of SPSO staff. Only if the legitimate interests of Mr Stewart-Blacker outweigh those of the SPSO staff can the information be disclosed without breaching the first data protection principle.
77. The Commissioner has issued guidance on the interpretation of the exemptions in section 38, mentioned in paragraph 67 above, and identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- a. 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);
  - b. the potential harm or distress that may be caused by the disclosure;
  - c. whether the individual has objected to the disclosure;
  - d. the reasonable expectations of the individuals as to whether the information would be disclosed.
78. The comments were provided by members of SPSO staff as part of an internal business review. In a document entitled "SPSO Business Review" provided to Mr Stewart-Blacker the internal review is described as:

*" ... a review of all aspects of complaint handling. It will include guidance and processes, timescales, challenges and appeals. It will look at what we deliver and the gap between our procedures and our practice. It will look at team structure and areas of responsibility. It will look at consistency across teams in processes and approach. It will look at how we build and improve knowledge management."*

The Commissioner is satisfied that the comments contributed by staff clearly relate to their role as employees of the SPSO and are directly related to working practices and procedures.



79. The comments redacted from the document provided to Mr Stewart-Blacker are not attributed to any specific individuals and, as mentioned in paragraph 63, the actual comments made by staff were to an extent consolidated or edited prior to their inclusion on the SPSO intranet. The Commissioner considers that there is little, if any, potential for harm or distress being caused by the disclosure of the redacted information. He considers that it is highly unlikely that any of the comments could be attributed to a specific individual by anybody not directly connected with the SPSO due to their anonymity and the fact that the comments have been consolidated and edited. In arriving at this conclusion, the Commissioner notes that all of the redacted comments have previously been made available to SPSO staff. He is of the opinion that any risk of identifying the author of a specific comment, and thereby potentially causing harm or distress, has already occurred given that the only real risk of identification lies with individuals directly connected with the SPSO.
80. As noted above, in its submissions to the Commissioner the SPSO indicated while it did not specifically seek the consent of staff when considering Mr Stewart-Blacker's request, there was a degree of implied confidentiality involved. The Commissioner however notes that while the SPSO does not hold explicit consent to the disclosure, it has also not provided any evidence of explicit refusal. The Commissioner also considers that the submission made by SPSO relates to the original comments contributed by staff and does not address any issues concerning the anonymised, consolidated and edited comments that were redacted from the document provided to Mr Stewart-Blacker. The Commissioner considers the question of consent or refusal is therefore moot and in any case, although objection to disclosure is a factor that can be taken into account, it is not in itself enough to automatically render disclosure unwarranted or unfair.
81. The SPSO argue that staff did not expect their (not anonymised) comments to be made public. The Commissioner considers the caveat of "not anonymised" to be significant and would agree that SPSO staff would have a legitimate expectation that their original contributions including the name of the author would not be made public. However, the Commissioner considers that the information included on the SPSO intranet and redacted from the document supplied to Mr Stewart-Blacker is at the margins of the definition of personal data in the DPA. He also considers that it would have been reasonable for the staff to expect that a synopsis of their views from which all personal identifiers had been removed might enter the public domain.
82. On balance the Commissioner is satisfied that disclosure of the information under the heading "Staff Feedback" redacted from the document entitled SPSO Business Review Intranet Update 3 would not cause any unwarranted prejudice to the legitimate interests of the SPSO staff who contributed comments to the review.
83. The Commissioner, having ascertained that a condition in schedule 6 of the DPA can be met, will now go on to consider whether disclosure would otherwise be fair and lawful.



#### Fair and lawful

84. The Commissioner considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. The SPSO has not put forward any arguments as to why the disclosure of the information would be unlawful (other than in terms of a breach of the data protection principles) and, in any event, the Commissioner can identify no reason why disclosure should be considered unlawful.
85. The Commissioner therefore finds that the SPSO was wrong to withhold the information under the exemption in section 38(1)(b) of FOISA.

#### Information relating to the review undertaken by Jerry White

86. The Commissioner accepts that the review undertaken by Mr White was based on his examination of the original investigation case file. Accordingly, he accepts that much of this file comprises the personal data of individuals involved with that investigation, both those who were the subject of and those undertaking the investigation. However, as noted above, the Commissioner notes that Mr Stewart-Blacker has accepted that most of the case file is exempt and that he has identified the unpublished Appendix 1 to Mr White's report as the information about which he wishes to receive a decision from the Commissioner. The Commissioner will therefore focus this aspect of his investigation of the personal information contained in the Appendix.
87. The Commissioner has already accepted, in paragraphs 55 to 60 above, that the personal details of junior members of SPSO staff were correctly redacted from information supplied to Mr Stewart-Blacker. The Commissioner considers that it is also appropriate to redact such information where it appears in Appendix 1 for the reasons discussed above.
88. In his discussions with the Commissioner, Mr Stewart-Blacker made it clear that he has no interest whatsoever in obtaining any personal information relating to the complainants or the members of North Lanarkshire Council involved in the original complaint investigated by the SPSO. Accordingly the Commissioner considers it is appropriate to redact any information from which these individuals could be identified where it appears in Appendix 1.
89. It is appropriate also to consider the extent of any personal information included in Mr White's report, therefore in the public domain, in order to establish the relationship between that personal information and any remaining personal information in Appendix 1 following the redaction of the information identified in paragraphs 87 and 88. The report makes reference to the current Ombudsman, his predecessor who held the office for most of the period during which the investigation was conducted and the complainant's MSP. It is relatively easy to ascertain the names of these individuals from information freely available in the public domain. The Commissioner has also identified that at least one further senior member of SPSO staff is identified in Appendix 1, but is not referred to directly in the report. The Commissioner therefore has to decide whether the SPSO correctly applied the exemption contained in section 38(1)(b) of FOISA when withholding this information from Mr Stewart-Blacker.



90. The Commissioner takes the view that there are different considerations that apply when considering the disclosure of personal information concerning the public role of senior public officials than apply to junior members of staff. In this regard the Commissioner supports the advice issued by the Information Commissioner, who has statutory oversight of the operation of the DPA, contained in his guidance<sup>11</sup> entitled “When should names be disclosed?” The key points in that guidance relate to fairness in naming an individual. In order to make this judgement it is necessary to consider the following:
- a. Is the information about the person’s public role?
  - b. Would the person expect their role to be subject to public scrutiny? In considering this particular question, the following factors are important:
    - i. How senior is the individual’s role in the organisation?
    - ii. Does the individual have a public profile?
    - iii. Does the role require a significant level of personal judgement and individual responsibility?
  - c. Is there a likelihood of unwarranted damage or distress to the individual?
91. The Commissioner is satisfied that the remaining individuals identified in Appendix 1 are senior public officials who should expect their actions to be the subject of public scrutiny, both proactively in relation to information published by a public authority and reactively in response to requests for information submitted under FOISA. The Commissioner considers that there is no need to differentiate between the senior officials of the SPSO and the MSP in arriving at that decision. The Commissioner must, however, go on to consider whether there is a likelihood of unwarranted damage or distress being caused to these individuals.
92. In assessing whether there is a likelihood of unwarranted damage or distress being caused, the Commissioner is mindful of the considerations outlined in the Information Commissioner’s guidance mentioned paragraph 90:
- a. Would disclosure involve a risk to the individual’s safety and security?
  - b. Would disclosure result in unfair damage to their career or reputation?
  - c. Considerations should not include embarrassment, legitimate criticism, or the risk of misunderstanding or misrepresentation.
93. In the circumstances, the Commissioner cannot identify any reasons to suspect that the individual’s safety or security might be compromised by disclosure. Accordingly the Commissioner is satisfied that disclosure of information identifying the officials will not create such a risk.

<sup>11</sup> [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/practical\\_application/whenshouldnamesbedisclosed.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/whenshouldnamesbedisclosed.pdf)



94. The report submitted by Mr White contains, in part, criticism of the management of the investigation and the interaction between the SPSO and the MSP. The report is relatively brief and summarises the main issues identified. Mr White also included a second appendix that was published along with his report, entitled “Key Milestones” but this appendix is very brief and lacking in detail. The effect of Appendix 1 is to add a significantly more detailed chronology of the progress of the investigation than is contained in the report or the other appendix. While Appendix 1 “adds flesh to the bones” of the report, the Commissioner does not consider that the release of the identities of the senior public officials identified in Appendix 1 would cause any unfair damage to their careers or reputation. Indeed, given the unique circumstances of this case, the Commissioner considers that if any such damage was likely to have occurred it would have done so when the report was published. In arriving at this decision the Commissioner takes note of the comments made by the Ombudsman in the report he laid before Parliament containing Mr White’s report:

*“This week I received the report of the independent review that I commissioned. I am very grateful to Jerry White for his thorough examination. His report makes for sobering reading for us, and, while noting that it is about the handling of one specific case at a particular point in time, the report confirms my view that despite a great deal of change that has taken place over recent years, there are some aspects of the organisation’s complaint handling process that need attention*

*Mr White groups his findings into five areas – First Contact, Investigative Focus, Management, Communications with Stakeholders and Communications. Failings in each area are identified. I accept the findings without reservation.”*

95. The Commissioner considers that as the Ombudsman has accepted the findings in Mr White’s report without reservation that the report, including its appendices, amounts to legitimate criticism. As the individuals whose identities have not been redacted from Appendix 1 in accordance with the Commissioner’s finding expressed in paragraphs 87 and 88 above are senior public officials, the Commissioner finds that the SPSO was wrong to withhold the personal information relating to those officials from Mr Stewart-Blacker.

Information contained in confidential communications between, and meetings of, the SPSO senior management team

96. The Commissioner has already decided that the SPSO correctly applied the exemption contained in section 30(b)(ii) of FOISA to the information contained in confidential communications between the SPSO senior management team. Having decided that all of the information is covered by that exemption he is not required, nor does he intend, to go on to consider the application of the exemption in section 38(1)(b).



## DECISION

The Commissioner finds that the Scottish Public Services Ombudsman (the SPSO) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Stewart-Blacker.

The Commissioner finds that the SPSO complied with Part 1 of FOISA by applying the exemption in:

- i) section 25(1) of FOISA to copies of SPSO Investigation report 200502514 and the Review Report prepared by Jerry White and providing links to these reports on its website; and
- ii) section 30(b)(ii) of FOISA to information contained in confidential communications between, and records of meetings of, the SPSO senior management team in relation to the review undertaken by Jerry White and the Business review and also to information contained in the attachments to three email messages exchanged between the SPSO and the LGO ; and
- iii) section 36(1) of FOISA to information amounting to the obtaining of legal advice in emails exchanged between the SPSO and its lawyers; and
- iv) section 38(1)(b) of FOISA to withhold the names and personal contact details of junior members of SPSO staff.

However, he also finds that the SPSO failed to comply with Part 1 of FOISA by incorrectly applying

- i) the exemption in section 26(a) of FOISA to information, other than information obtained by the Ombudsman in accordance with section 19 of the Scottish Public Services Ombudsman Act 2002, contained in Appendix 1 to the review report prepared by Jerry White; and
- ii) the exemptions in section 30(b)(ii) and section 38(1)(b) to the information under the heading of "Staff Feedback" redacted from the document entitled SPSO Business Review Intranet Update 3;
- iii) the exemption in section 30(b)(ii) to information contained in three email covering messages exchanged between the SPSO and Jerry White; and
- iv) the exemption in section 38(1)(b) to withhold information relating to senior public officials contained in Appendix 1 to the review report prepared by Jerry White.

The Commissioner therefore requires the SPSO to

- a) prepare and provide to Mr Stewart-Blacker a redacted version of Appendix 1 to the review report prepared by Jerry White in accordance with instructions to be provided separately to the SPSO by the Commissioner;
- b) provide Mr Stewart-Blacker with the information redacted from the document entitled SPSO Business Review Intranet Update 3 under the heading "Staff Feedback"; and





- c) provide copies of the three covering email messages exchanged between the SPSO and Jerry White, subject to the redaction of the names and personal contact details of junior members of SPSO staff,
- and to do so by 8 October 2010.

## Appeal

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Should either Mr Stewart-Blacker or the SPSO 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**  
**24 August 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 –

- (a) section 25;
- (b) section 26;

...

- (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.



**15 Duty to provide advice and assistance**

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

**25 Information otherwise accessible**

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

...

**26 Prohibitions on disclosure**

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

**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-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

**36 Confidentiality**

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...



### 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 the 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

1. The data subject has given his consent to the processing.

...

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.

...



## Scottish Public Services Ombudsman Act 2002

### 2 Power of investigation

- (1) The Ombudsman may investigate any matter, whenever arising, if—
  - (a) the matter consists of action taken by or on behalf of a person liable to investigation under this Act,
  - (b) the matter is one which the Ombudsman is entitled to investigate, and
  - (c) a complaint in respect of the matter has been duly made to the Ombudsman.
- (2) The Ombudsman may investigate any matter, whenever arising, if—
  - (a) paragraphs (a) and (b) of subsection (1) are satisfied, and
  - (b) the person liable to investigation has requested the Ombudsman to investigate the matter.
- (3) Without prejudice to paragraph 2(2) of schedule 1, it is for the Ombudsman to decide whether to initiate, continue or discontinue an investigation under subsection (1) or (2).
- (4) The Ombudsman may take such action in connection with the complaint or request as the Ombudsman thinks may be of assistance in reaching any such decision.
- (5) Such action may, in particular, include action with a view to resolving the complaint or request.

### 3 Persons liable to investigation

- (1) The persons liable to investigation under this Act are the persons specified, or of a class specified, in Parts 1, 2 and 3 of schedule 2; and references in this Act to a listed authority are references to any such person.
- (2) Her Majesty may by Order in Council amend Part 2 of that schedule so as to—
  - (a) modify any entry in it,
  - (b) remove any entry from it, or
  - (c) subject to subsections (3) to (6) and section 4, add any entry to it.
- (3) An entry may be added to that Part of that schedule only if the entry relates to a person who, or a class of persons each of whom, is—



- (a) a Scottish public authority with mixed functions or no reserved functions,
  - (b) a publicly-owned company, or
  - (c) a person who is neither a Scottish public authority nor a publicly-owned company but who appears to Her Majesty to exercise functions of a public nature.
- (4) An Order in Council under subsection (2) adding an entry to that Part of that schedule in pursuance of subsection (3)(c)—
- (a) may provide for this Act to apply to any person to whom, or falling within any class of persons to which, the entry relates subject to such modifications or exceptions as may be specified in the Order in Council, and
  - (b) must, in relation to each such person or class of person, specify the functions of a public nature which appear to be exercised by that person or, as the case may be, persons of that class.
- (5) No recommendation to make an Order in Council referred to in subsection (4) is to be made to Her Majesty in Council unless every person to whom the Order relates has been consulted.
- (6) No entry is to be added to Part 2 of schedule 2 in relation to—
- (a) a person whose sole activity is, or whose main activities are—
    - (i) the provision of education, or the provision of training otherwise than under the Industrial Training Act 1982 (c.10),
    - (ii) the development of curricula, the conduct of examinations or the validation of educational courses,
    - (iii) the control of entry to any profession or the regulation of the conduct of members of any profession, or
    - (iv) the investigation of complaints by members of the public regarding the actions of any person or the supervision or review of such investigations or of steps taken following them, or
  - (b) a person operating in an exclusively or predominantly commercial manner or a person carrying on under national ownership an industry or undertaking or part of an industry or undertaking.
- (7) Her Majesty may by Order in Council amend Part 3 of schedule 2 so as to –
- (a) modify any entry in it,



- (b) remove any entry from it, or
  - (c) add to it any entry relating to a person, or class of persons, providing fundable further education or fundable higher education (within the meaning of the Further and Higher Education (Scotland) Act 2005 (asp 6)).
- (8) An Order in Council under subsection (7) adding an entry to that Part of that schedule relating to a person, or class of persons, whose business (whether commercial, charitable or otherwise) includes matters other than the activities which fundable bodies (within the meaning of that Act) generally carry on –
- (a) must, as regards that person or class, provide for this Act to apply only in relation to those activities; and
  - (b) may do so subject to such modifications or exceptions as may be specified in the Order in Council.
- (9) No recommendation to make an Order in Council under subsection (7)(c) is to be made to Her Majesty unless every person to whom the Order relates has been consulted.

## 12 Investigation procedure

- (1) An investigation under section 2 must be conducted in private.
- (2) Where the investigation is pursuant to a complaint, the Ombudsman must give—
  - (a) the listed authority in question, and
  - (b) any other person who is alleged in the complaint to have taken the action complained of,an opportunity to comment on any allegations contained in the complaint.
- (3) In other respects the procedure for conducting the investigation is to be such as the Ombudsman thinks fit.
- (4) The Ombudsman may, in particular—
  - (a) obtain information from such persons and in such manner, and make such inquiries, as the Ombudsman thinks fit,
  - (b) determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation.
- (5) The Ombudsman may pay to—





- (a) the person by whom the complaint was made (where an investigation is pursuant to a complaint), and
- (b) any other person who attends or supplies information for the purposes of an investigation (whether or not pursuant to a complaint),

such allowances in respect of expenses properly incurred by the person and by way of compensation for loss of time as the Parliamentary corporation may determine.

- (6) The conduct of an investigation does not affect—
  - (a) any action taken by the listed authority in question,
  - (b) any power or duty of the listed authority to take further action with respect to any matter being investigated.

## 15 Reports on investigations

- (1) After conducting an investigation, the Ombudsman must -
  - (a) if the investigation is pursuant to a complaint, send a report of the investigation to the persons specified in section 11(2) and to the Scottish Ministers,
  - (b) if the investigation is pursuant to a request, send a report of the investigation to the persons specified in section 11(4) and to the Scottish Ministers,

and must lay a copy of the report before the Parliament.

...

- (3) Apart from identifying the listed authority in question, the report must not –
  - (a) mention the name of any person, or
  - (b) contain any particulars which, in the Ombudsman's opinion, are likely to identify any person and can be omitted without impairing the effectiveness of the report,

unless the Ombudsman determines that it is necessary to do so.

## 19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as



- permitted by subsection (3).
- (2) Those purposes are—
    - (a) the purposes of—
      - (i) any consideration of the complaint or request (including any statement under section 11),
      - (ii) any investigation of the matter (including any report of such an investigation),
    - (b) the purposes of any proceedings for—
      - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
      - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
    - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
    - (d) the purposes of any proceedings under section 14.
  - (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of patients, the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health and safety of patients.
  - (4) In relation to information disclosed under subsection (3), the Ombudsman must—
    - (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
    - (b) inform the person from whom the information was obtained of the disclosure.
  - (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.
  - (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to—



- (a) any document or information specified in the notice, or
- (b) any class of document or information so specified,

that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.

- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from -
  - (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
  - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),

is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.

- (9) In relation to such information, subsection (2)(a) has effect as if—
  - (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
  - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.
- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.

## 23 Interpretation

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

...

“complaint” means a complaint to the Ombudsman

...