

Decision Notice



Decision 093/2011 Mr Paul Hutcheon of the Sunday Herald and the Scottish Ministers

Retrospective bonuses paid to the Chief Executive of VisitScotland

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Summary

Mr Paul Hutcheon, Scottish Political Editor of the Sunday Herald (Mr Hutcheon) requested from the Scottish Ministers (the Ministers) information about the consideration and approval of retrospective bonuses paid to the (then) Chief Executive of VisitScotland. The Ministers failed to respond and Mr Hutcheon requested a review of their handling of his request. Following a review, the Ministers responded, indicating that the requested information was personal data exempt from disclosure in terms of section 38(1)(b) of FOISA. Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers additionally applied the exemption in section 30(b)(ii) of FOISA to some of the withheld information, but disclosed much of the previously withheld information to Mr Hutcheon, the Commissioner found that they had partially failed to deal with Mr Hutcheon's request for information in accordance with Part 1 of FOISA.

He concluded that the Ministers had correctly applied the exemptions at sections 30(b)(ii) and 38(1)(b) to some parts of the withheld information. However he also concluded that the Ministers had incorrectly applied these exemptions to some other parts of the withheld information and required the disclosure of those parts of the information to Mr Hutcheon.

Relevant statutory provisions and other sources

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

1. On 16 January 2010, Mr Hutcheon wrote to the Ministers requesting the following:
all information held on a) the consideration of retrospective bonuses to the (then) Chief Executive of VisitScotland [Mr Philip Riddle] and b) the approval of retrospective bonuses to the Chief Executive of VisitScotland.

Mr Riddle will be referred to hereafter as the Chief Executive.
2. The Ministers emailed Mr Hutcheon on 15 February 2010 asking him to clarify what he meant by “retrospective bonuses”, and in particular whether the requested information should include just bonuses already paid, or also those which may be due but had not already been paid. Mr Hutcheon confirmed on 30 March that he intended his request to cover information only about bonuses already paid.
3. Following this exchange, Mr Hutcheon did not receive any substantive response to his request. On 4 May 2010 he emailed the Ministers again, requesting that they carry out a review of their failure to respond.
4. The Ministers notified Mr Hutcheon of the outcome of their review on 15 June 2010. They withheld the requested information on the grounds that it was exempt from disclosure under section 38(1)(b) of FOISA.
5. On 22 June 2010, Mr Hutcheon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Hutcheon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 7 July 2010 the Ministers were notified in writing that an application had been received from Mr Hutcheon and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested. This included a number of documents which the Ministers considered to contain some information relating to the consideration and approval of retrospective bonuses to the Chief Executive, along with other information which they considered to fall outside the scope of Mr Hutcheon’s information request. The Ministers had highlighted the parts of these documents that they considered to fall within the scope of Mr Hutcheon’s information request.

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8. The case was then allocated to an investigating officer, who 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 withheld from Mr Hutcheon.
9. Having reviewed the documents containing the withheld information, the investigating officer also asked the Ministers to reconsider the extent to which the information within these documents fell within the scope of Mr Hutcheon's information request, highlighting concerns that it appeared that certain relevant content had been considered by the Ministers to be outside the scope of the request. In addition the Ministers were asked to check that all the relevant information had been provided to the Commissioner.
10. In response to this letter, the Ministers stated that having considered the investigating officer's comments, they had broadened their view of which information fell within the scope of Mr Hutcheon's request. They provided the Commissioner with a further copy of the documents previously supplied, marked to show which information was considered to be exempt from disclosure. The Ministers also confirmed that they had undertaken comprehensive searches and concluded that they had identified all the information relevant to Mr Hutcheon's request.
11. The Ministers indicated that they wished to apply the exemptions in sections 30(b)(ii) and 38(1)(b) of FOISA to the information they considered exempt and supplied submissions explaining their application of these exemptions. They indicated that they now were willing to disclose the remaining information falling within the scope of Mr Hutcheon's request, and they subsequently did so.
12. After receiving this information, Mr Hutcheon confirmed that he wished to pursue his application to the Commissioner solely in relation to the remaining withheld information, which is contained within 11 numbered documents. The Commissioner has therefore considered only that remaining withheld information in what follows.
13. Mr Hutcheon was also invited to provide submissions on the matters raised by his application and he did so. The submissions from both the Ministers and Mr Hutcheon will be considered where relevant in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

14. 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 Hutcheon and the Ministers and is satisfied that no matter of relevance has been overlooked.



The withheld information

15. Although the information falling within the scope of Mr Hutcheon's request was contained within 42 documents, these documents also contained information which fell outwith the scope of his request. Only the information falling within the scope of Mr Hutcheon's request has been considered in this decision.
16. The Commissioner is satisfied that, following their reconsideration during the investigation of the extent to which the content of these 42 documents were relevant to Mr Hutcheon's request, the Ministers have identified and considered all relevant information. The Commissioner accepts that the comprehensive searches carried out by the Ministers have in this case identified all the information held by them relevant to Mr Hutcheon's request.
17. As noted earlier, much of the information falling within the scope of Mr Hutcheon's request was disclosed to him during the course of the investigation, and Mr Hutcheon has indicated that he only wishes to receive a decision on the remaining withheld information. As a result, only the remaining withheld information, which is contained within 11 of the numbered documents supplied by the Ministers, is considered in this decision.
18. The Ministers maintained that the exemption at section 30(b)(ii) of FOISA applied to certain information contained in documents numbered 16 and 27, and that the exemption in section 38(1)(b) of FOISA applied to some of the information contained in documents numbered 5, 14, 15, 17, 19, 23, 25, 27, 28 and 34.

Section 30(b)(ii) of FOISA

19. The Ministers applied this exemption to the text of an email sent by the Permanent Secretary in document 16, and to a single sentence within document 27, contained in a document providing advice to Ministers.
20. In order for the Ministers to rely on the exemption laid down in section 30(b)(ii) of FOISA, they must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
21. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the test contained in section 30(b)(ii) is high. In applying this exemption, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially, the exchange of views.



22. In applying this exemption, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing. Releasing views whilst a decision was being considered, and for which further views were still being sought, for example, is likely to be more substantially inhibiting than once a decision had been taken.
23. The Ministers submitted that they considered the identified sections within documents 16 and 27 to be free and frank exchanges of views on the lines to take and/or on the way to proceed in considering and determining the consequences of contractual obligations and the subsequent performance related pay and bonuses received by the Chief Executive. The Ministers maintained that the release of this information would be likely to substantially inhibit officials from providing written views on pay and performance issues in the future, for fear of it being released into the public domain.

Would disclosure cause substantial inhibition?

24. The Commissioner first considered the withheld content in document 16. He notes that the email in question forms part of a series of internal communications between senior officials, and includes comments that are both candid and frankly expressed. Given the content and expression of these comments, the Commissioner considers it most likely that they were made in the expectation that they would not be publicly disclosed.
25. The Commissioner accepts that disclosure of the information withheld within document 16 would be likely to make it less likely that Government officials would engage in discussions of this type in future with the same degree of openness and frankness. He therefore accepts that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation and concludes that the Ministers correctly applied the exemption in section 30(b)(ii) of FOISA to the information withheld in document 16.
26. Turning to document 27, the information under consideration is a single sentence within an advice note to Ministers. The Commissioner does not perceive the information in question as being particularly sensitive, nor as part of an exchange of views, frank or otherwise. The Commissioner notes that the withheld sentence consists of a statement of factual information relating to the mechanics of past pay policy implementation.
27. Having considered the relevant information within document 27 and the submissions from the Ministers, the Commissioner is not persuaded that the disclosure of this information would, or would be likely to, inhibit officials from compiling such future advice notes in a similar manner. He does not accept that disclosure would or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation.



28. The Commissioner has therefore concluded that the exemption in section 30(b)(ii) is not engaged in relation to the information to which it was applied within document 27. He requires the Ministers to disclose this information to Mr Hutcheon.

Public interest test

29. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is found to have been correctly applied, the Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).
30. Having concluded that the Ministers correctly applied the exemption in section 30(b)(ii) of FOISA to the information withheld in document 16, the Commissioner must next consider the public interest in relation to this information. (He is not required to consider this test in relation to the information in document 27 to which the exemption was found to have been incorrectly applied.)
31. The Ministers' submissions recognised that there is a public interest in releasing information regarding the bonuses of the Chief Executive in order to understand the justification for their payment. However, they went on to maintain that the public interest was served by the disclosure of the pay band and consolidated bonus information published on the VisitScotland web-pages.
32. The Ministers maintained that there is a strong public interest in ensuring that Ministers and officials have a private space within which free and frank debate of potentially sensitive issues such as performance related pay and bonuses can be undertaken without fear that these discussions will subsequently be made public. Disclosing this information could, the Ministers argued, prejudice similar discussions in future. They argued that this would not be in the public interest as it would remove a level of scrutiny (by the Ministers) which ensures that performance related bonuses are being applied within set guidelines and following best practice. On balance, the Ministers concluded that the public interest weighed in favour of withholding the information.
33. In his submissions Mr Hutcheon highlighted some of the particular circumstances around the award of bonuses to the Chief Executive, and in particular that a significant bonus had been awarded, but the Chief Executive had since left VisitScotland following a decision by its Board. Mr Hutcheon argued that it was in the public interest to know why the Chief Executive was paid such a bonus in the year before the board deemed that they wanted a new Chief Executive.
34. Having scrutinised the body of the email in question the Commissioner is of the view that its content does not contain any information which would shed any light on the reasoning behind the payment of the bonuses in question to the Chief Executive. He considers that it would contribute very little to the public interest in understanding the basis for any bonus award or the Ministers' consideration of the awards.



35. Against disclosure, the Commissioner has recognised that the nature of the content is such that its disclosure could possibly prejudice similar discussions in future. Since it is in the public interest that officials are able to engage in frank and open discussion, he considers that there is sufficient weight to the Ministers arguments in relation to the public interest against disclosure.
36. On balance, the Commissioner has concluded that in this instance the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in the disclosure of the information withheld within document 16. He therefore concludes that the Ministers were entitled to withhold this information and that they acted in line with Part 1 of FOISA by doing so.

Section 38(1)(b) of FOISA

37. The Ministers applied this exemption to information withheld within the documents numbered 5, 14, 15, 17, 19, 23, 25, 27, 28 and 34 (with the information in document 27 being other than that considered within the document in relation to section 30(b)(ii)).
38. The above documents can be grouped in the following way, based on the nature of the withheld information contained in each:
- *Group 1* – the salary earned by the Chief Executive in a previous job, which was withheld within documents 5, 15 and 17.
 - *Group 2* – information contained in the Chief Executive's performance reviews, which was withheld within documents 17, 19 and 23.
 - *Group 3* – information relating to the assessment of the Chief Executive's performance in his post, and the associated calculation of bonus, which was withheld in documents 14, 23, 25, 27, 28 and 34.
39. Section 38(1)(b), read in conjunction with section 38(2)(a)(i) (or, where appropriate, section 38(2)(b)) exempts information from disclosure if it is "personal data", as defined by section 1(1) of the DPA, and its disclosure would contravene one or more of the data protection principles set out in Schedule 1 to the DPA. This particular exemption is an absolute exemption (see section 2(2)(e)(ii) of FOISA), and so is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
40. In order for a public authority to rely on this exemption, it must show firstly that the information which has been requested is personal data for the purposes of the DPA and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
41. The Ministers have submitted that the information withheld from Mr Hutcheon is the personal data of the Chief Executive, and that disclosure of this personal data would contravene the first data protection principle.



Is the information personal data?

42. 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).
43. Given that the information under consideration focuses on the previous income, performance and bonuses paid to of the Chief Executive, the Commissioner accepts that the information clearly relates to the Chief Executive, who can be identified from that information either alone or in conjunction with other information in possession of the Ministers. The Commissioner is therefore satisfied that the information under consideration is personal data.
44. Therefore the Commissioner must go on to consider whether disclosure of this personal data would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

45. The Ministers argued that disclosure of the withheld information would breach the first data protection principle.
46. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The processing under consideration in this case is disclosure of the personal data into the public domain in response to Mr Hutcheon's information request.
47. The Commissioner has considered the definition of sensitive personal data in section 2 of the DPA and is satisfied in this case that none of the personal data which has been withheld constitutes sensitive personal data. As a consequence, no Schedule 3 conditions require to be met in this case.
48. 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.

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

49. 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 will then go on to consider whether the disclosure of this personal data would otherwise be fair and lawful.
50. In their submissions, the Ministers asserted that, of the conditions set out in Schedule 2 to the DPA, only the sixth might potentially apply, but that they considered it was not met in this case.

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51. The Ministers informed the Commissioner during the course of the investigation that they had consulted with the Chief Executive as to whether he agreed to disclosure of the withheld information and that he had declined.
52. The Commissioner is therefore satisfied that condition 1 (which applies where the data subject consents to the processing of their personal data) cannot be met, and so condition 6 is the only one that might apply in the circumstances of this case
53. Condition 6 allows personal data to be processed if 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 (i.e. the individual to whom the data relates).
54. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
 - a. Does Mr Hutcheon have a legitimate interest in obtaining the personal data?
 - b. If yes, is the disclosure necessary to achieve these legitimate interests? 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 Mr Hutcheon's legitimate interests, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the individual in question? There is no presumption in favour of the release of personal data under the general obligation laid down by FOISA. Accordingly, the legitimate interests of Mr Hutcheon must outweigh the rights and freedoms or legitimate interests of the Chief Executive before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that the Ministers were correct to refuse to disclose the personal data to Mr Hutcheon.

Does Mr Hutcheon have a legitimate interest in obtaining the information?

55. Mr Hutcheon has maintained that he has a legitimate interest in accessing the remaining withheld information as he considered publication would be the only way to inform taxpayers about the award of significant bonuses to the Chief Executive. He highlighted the particular circumstances surrounding these bonuses and noted that the recipient was no longer in post.
56. As the Commissioner recognised in Decision 033/2011 *Mr Paul Hutcheon of the Sunday Herald and the Scottish Ministers*, the remuneration of senior public servants is a matter of legitimate public concern, particularly in the current economic climate. The Commissioner accepts that Mr Hutcheon, in his capacity as a journalist and indeed as a taxpayer, has a legitimate interest in obtaining the withheld information.

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57. He recognises that disclosure of the withheld information would offer insights into how the performance of the Chief Executive was assessed, and the mechanisms by which the bonuses paid to him were determined. As such, this disclosure would contribute to understanding of the expenditure of public funds, and allow assessment of whether the remuneration of the most senior employee of a large public authority was justified.

Is disclosure necessary to achieve these legitimate interests?

58. The Commissioner must now consider whether disclosure is necessary for those legitimate interests. The Ministers have argued that disclosure of specific bonus payments or the performance appraisal used to justify them is not necessary since VisitScotland publishes details of salary and performance pay on its webpages.
59. Having considered the withheld information, the Commissioner has concluded that disclosure of the salary received by the Chief Executive in a previous post (Group 1) would not contribute to understanding of the bonuses awarded to him in his post at VisitScotland. However, its disclosure would intrude significantly into his financial affairs, by allowing understanding of his past income, and how this might have changed over time.
60. In the circumstances, the Commissioner considers that disclosure of this information would be disproportionate as a means to achieving Mr Hutcheon's legitimate interests, and so the necessity test can not be met in relation to this information. Consequently, the Commissioner concludes condition 6 can not be met in relation to the Group 1 information and (since no other condition in Schedule 2 of the DPA can be met) therefore that its disclosure would breach the first data protection principle. The Commissioner therefore concludes that the Ministers correctly applied the exemption in section 38(1)(b) in relation to this information.
61. In relation to Groups 2 and 3, the Commissioner concludes that Mr Hutcheon's legitimate interests could not be met in any way other than by the release of the information under consideration. He notes that although information about the remuneration and bonuses paid to the Chief Executive was already publicly available on the VisitScotland website when Mr Hutcheon made his information request, the publicly accessible information does not provide any details as to the basis upon which the bonus figures were reached. He recognises that Mr Hutcheon's legitimate interest in understanding the basis upon which bonus awards were reached cannot be met without the more detailed information within Group 2 and 3 being made available.
62. The Commissioner therefore accepts that disclosure of the withheld information within Groups 2 and 3 is necessary in order to achieve Mr Hutcheon's legitimate interests.

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

63. The Commissioner must now consider whether disclosure of the remaining personal data under consideration (that in Groups 2 and 3) would nevertheless cause unwarranted prejudice to the rights, freedoms and legitimate interests of the data subject, the Chief Executive. This involves a balancing exercise between the legitimate interests of Mr Hutcheon and those of the data subject. Only if the legitimate interests of Mr Hutcheon outweigh those of the data subject can the information be disclosed without breaching the first data protection principle.
64. The Commissioner's guidance on the exemptions in section 38¹ identifies a number of factors which should be taken into account in carrying out this balancing exercise. These include:
- whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances);
 - the potential harm or distress that may be caused by the disclosure;
 - whether the individual has objected to the disclosure;
 - the reasonable expectations of the individual as to whether the information would be disclosed.

The Ministers' submissions on the balance of legitimate interests

65. Although recognising that there is a lesser expectation of confidentiality for those at a senior level in public office than for less senior employees, the Ministers noted that the specific bonus/performance pay information is seen as personal because it would reveal the outcomes of performance review. They maintained that the disclosure of the withheld information was unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the Chief Executive
66. The Ministers maintained that the Chief Executive would have no expectation that information so specific as to his performance appraisal information/scores would be released into the public domain, and he would not have any expectation of disclosure beyond the publication of the salary/bonus figures in the accounts available on the VisitScotland website.
67. In addition, the Ministers argued, disclosure would cause unwarranted distress to him and that the obligations of the Ministers as a data controller, Article 8 of the European Convention on Human Rights (ECHR)² and the general law of confidentiality, should take precedence over any possible public interest in disclosure. They maintained that release posed a real and significant possibility of prejudice to the legitimate interests, rights and to respect for private and family life of the data subject, and any future Chief Executive or public servant.

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

² http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf



Mr Hutcheon's submissions on the balance of legitimate interests

68. Mr Hutcheon submitted that he was not convinced that there would be any level of distress caused to the Chief Executive by the disclosure of the withheld information and that his legitimate interest in accessing the information outweighed that in withholding the information.

The Commissioner's findings on the balance of legitimate interests

69. When conducting the balancing exercise required by condition 6, the Commissioner has considered all of the comments made by the Ministers and Mr Hutcheon.

Group 2 - performance reviews

70. The withheld information in this group consists of the information contained within the Chief Executive's performance reviews for the years 2005-06 and 2006-07.
71. The Commissioner accepts that this information concerns the public life of the data subject. It relates to his activities as a holder of a position of leadership within a large public authority, the objectives against which his performance was assessed, and comments on his performance in relation to these. The Chief Executive holds overall responsibility for the performance of his organisation, and his remuneration involved significant expenditure from the public purse. It is reasonable for Mr Hutcheon or any other member of the public to ask how public funds were used and whether the remuneration of the Chief Executive was proportionate and justified.
72. However, an individual's performance at work also relates to private matters, including their skills, strengths and weaknesses, and other factors which contributed to their performance over the relevant period. Performance appraisal is generally a private matter because it involves the assessment of an individual's personal contribution and successes, along with recognition of areas where performance could be improved. The Commissioner recognises that employees at all levels of seniority within both the public and private sectors would reasonably expect such information to remain private.
73. The Commissioner notes that the data subject has not consented to the release of this information and accepts that he would have no expectation that the minutia of his personal performance appraisal would be made available to the public.
74. The Commissioner considers that public disclosure of information revealing the detail of the assessment of the Chief Executive's performance would go against his reasonable expectations and would be intrusive and likely to cause distress for him and his family.



75. He has noted Mr Hutcheon's argument that, as the Chief Executive is no longer in post the issue is no longer a live one and the information can be disclosed. However, the Commissioner does not consider that the passage of time and changing circumstances has any appreciable affect on the balance of legitimate interest. He considers that any employee would continue to reasonably expect that information about their personal performance will be treated in confidence after they leave a post. He considers in this case that the intrusion prompted by disclosure would be much the same whether that disclosure took place during or after the Chief Executive's tenure in that post.
76. It is the Commissioner's view that the information within the performance reviews can be divided into (a) that comprising of the objectives set and (b) that outlining how the data subject performed against these objectives.

Group 2 - performance outcomes

77. In relation to the information pertaining to the Chief Executive's performance against the objectives set, on balance, the Commissioner concludes that the rights, freedoms and legitimate interests of the Chief Executive, in relation to his reasonable expectations of privacy, outweigh the legitimate interest Mr Hutcheon has in obtaining this information. The Commissioner concludes that disclosure of the withheld information in the Group 2 pertaining to the Chief Executive's actual performance against each objective, would be an unwarranted intrusion into his private life.
78. Given this conclusion, the Commissioner finds that condition 6 of Schedule 2 to the DPA could not be met in relation to disclosure of this particular information and, since no other Schedule 2 condition is applicable in the circumstances of this case, disclosure would breach of the first data protection principle. The Commissioner therefore accepts that the information was properly withheld under section 38(1)(b) of FOISA.

Group 2 – objectives set

79. The Commissioner considers that disclosure of information setting out the objectives against which the Chief Executive's performance was assessed would be considerably less intrusive than disclosure of the information detailing his performance against those objectives. He has therefore given less weight to the data subject's legitimate interests when considering the withheld information that simply reveals the objectives that were set, compared to consideration of performance outcome.
80. Disclosure of the objectives would shed light on which work areas the Chief Executive was expected to focus on in his post. As such, disclosure of this information would provide some insight into the basis for the bonus payments, without revealing the detail of his actual performance in each area.

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81. Having balanced the legitimate interests of Mr Hutcheon and those of Chief Executive, the Commissioner has concluded that the legitimate interests identified by Mr Hutcheon outweigh any prejudice to the rights and freedoms and legitimate interests of the data subject with respect to the information setting out the objectives against which the Chief Executive's performance was assessed. He is therefore satisfied that condition 6 can be met in relation to this information.
82. The Commissioner would note that in reaching this conclusion, he has given consideration to the Ministers' comments regarding the "general law of confidentiality" and Article 8 of the ECHR taking precedence over any public interest in disclosure.
83. Having received no submission from the Ministers which identifies any explicit obligation of confidentiality that arises in relation to the information under consideration, the Commissioner has considered "the general law of confidentiality", where an obligation of confidentiality would arise under the terms of the DPA or the ECHR.
84. The Commissioner is always mindful of the right to respect for individuals' private and family life provided by Article 8, but he is satisfied in this case (particularly given the absence of any further comments on this point from the Ministers) that disclosure of this particular information would not breach this right.
85. Having reached the above conclusions, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure of the information concerning the objectives against which the Chief Executive's performance was assessed would be fair and lawful.
86. The Commissioner considers that disclosure would be fair, for the reasons already outlined in relation to condition 6. The Ministers have not put forward any specific arguments as to why the disclosure of the information would be unlawful, although their references to the general law of confidence and the rights under Article 8 of the ECHR could be relevant to this test. For the reasons set out above, the Commissioner is satisfied that disclosure would not be unlawful on these grounds. The Commissioner can identify no other reason why disclosure should be considered unlawful.
87. Having found disclosure of this information to be both fair and lawful, and in accordance with condition 6, the Commissioner therefore concludes that disclosure of this information would not breach the first data protection principle.
88. The Commissioner therefore concludes that the exemption in section 38(1)(b) has been wrongly applied by the Ministers to the withheld Group 2 information relating to the objectives against which the data subject's performance was measured within documents 17, 19 and 23 and he requires the Ministers to disclose this information to Mr Hutcheon.

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Group 3

89. The withheld information in this group is contained in documents 14, 23, 25, 27, 28 and 34 and includes the total performance score/rating achieved by the Chief Executive in the relevant years, and the weighting, achievement and rating given in relation to each objective achieved and associated calculation of bonus.
90. In line with his conclusions in relation to the content of performance review documents concerning the Chief Executive's performance against objectives, the Commissioner has concluded that condition 6 cannot be met in relation to this information.
91. For the reasons set out in paragraphs 70-78 above, the Commissioner concludes that the rights, freedoms and legitimate interests of the data subject, in relation to his reasonable expectations of privacy, outweigh the legitimate interest Mr Hutcheon has in obtaining this information.
92. Given this conclusion, the Commissioner finds that condition 6 of Schedule 2 to the DPA could not be met in relation to disclosure of this particular information, and (since no other condition within Schedule 2 can be met) disclosure would breach the first data protection principle. The Commissioner therefore accepts that the information detailed in paragraph 89 above was properly withheld under section 38(1)(b) of FOISA.

DECISION

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

The Commissioner finds that the Ministers complied with Part 1 of FOISA by withholding some of the information considered in this decision in terms of section 38(1)(b) of FOISA, and by correctly applying section 30(b)(ii) of FOISA.

However, by incorrectly applying the exemptions in section 30(b)(ii) and section 38(1)(b) to other information under consideration in this decision, the Ministers failed to comply with Part 1, and in particular section 1(1), of FOISA.

The Commissioner therefore requires the Ministers to disclose to Mr Hutcheon the information found in this decision to have been incorrectly withheld (which will be specified in the covering letter accompanying this decision), by 4 July 1011.

Decision 093/2011
Mr Paul Hutcheon of the Sunday Herald
and the Scottish Ministers



Appeal

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

Kevin Dunion
Scottish Information Commissioner
19 May 2011



Appendix

Relevant statutory provisions

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-

...



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

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

...

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

- (a) from those data, or



- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

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

...

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

...

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

...