

Decision Notice

Decision 025/2016: Mr Tom Gordon and the Scottish Parliamentary Corporate Body

Register of Interests

Reference No: 201501108

Decision Date: 4 February 2016



Scottish Information
Commissioner

Summary

On 7 April 2015, Mr Tom Gordon asked the Scottish Parliamentary Corporate Body (the SPCB) for information relating to Alex Salmond MSP's Register of Interests.

The SPCB responded and withheld the information under various exemptions in FOISA. Following a review, Mr Gordon remained dissatisfied and applied to the Commissioner for a decision. During the investigation, the SPCB located one further document, which it also withheld.

The Commissioner investigated and found that the SPCB had partially failed to respond to Mr Gordon's request for information in accordance with Part 1 of FOISA.

The SPCB was entitled to apply sections 36(1) (Confidentiality) and 38(1)(b) (Personal information) of FOISA to some of the information.

The SPCB failed to comply with section 1(1) of FOISA:

- (i) by failing to identify all of the information it held and which fell within the scope of Mr Gordon's request, and
- (ii) by incorrectly withholding information under sections 30 (Prejudice to effective conduct of public affairs) and 36(2) (Confidentiality).

The Commissioner required the SPCB to disclose the information it had incorrectly withheld from Mr Gordon.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1), (2)(c) and (2)(e)(ii) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36 (Confidentiality); 38(1)(b), (2)(a)(i), 2(b) and (5) (definition of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA): section 1(1) (Basic interpretative provisions) (definition of personal data); Schedule 1 (The data protection principles, Part 1 - the principles) (the first data protection principle); Schedule 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. The Scottish Parliament has established a public Register of Interests of its Members as required by section 39(1) of the Scotland Act 1998.
2. On 7 April 2015, Mr Gordon (of the Sunday Herald) made a request for information to the SPCB. The information requested was:

... all items of information held by the Parliament in relation to Alex Salmond MSP and his Register of Interests generated after 1 January 2015. This should include, but not be limited to, all information on proposed updates to the Register, whether completed or not, and all correspondence between Mr Salmond, or his officer, and the Parliamentary authorities in

relation to the Register, and all correspondence between the Parliamentary authorities and third parties on the issue.

3. The SPCB responded on 5 May 2015, withholding the information under the exemptions in sections 30(b) and (c) and 36(1) and (2) of FOISA.
4. On 13 May 2015, Mr Gordon wrote to the SPCB, asking for a review of its decision. He provided reasons why he disagreed with the SPCB's application of exemptions.
5. The SPCB notified Mr Gordon of the outcome of its review on 10 June 2015. The SPCB upheld its application of the exemptions claimed earlier, and additionally applied the exemptions in sections at 25(1) and 38(1)(b) of FOISA.
6. On 11 June 2015, Mr Gordon wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Gordon stated he was dissatisfied with the outcome of the SPCB's review because he disagreed with the application of all the exemptions applied by the SPCB, apart from section 25(1) (which applied to documents 1 and 4).

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Gordon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 30 June 2015, the SPCB was notified in writing that Mr Gordon had made a valid application. It was asked to send the Commissioner the information withheld from him. The SPCB provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SPCB was invited to comment on this application and to answer specific questions. These focused on the exemptions applied by the SPCB.
10. The investigating officer also asked the SPCB to explain the searches and other enquiries carried out to ascertain whether they held any further information falling within the scope of Mr Gordon's request. The SPCB did so and also carried out further searches, locating one further document.
11. Mr Gordon was asked for any comments he wished to make and he provided his comments to the investigating officer.

Commissioner's analysis and findings

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

The withheld information

13. The withheld information under consideration here is contained in an exchange of emails between: Mr Salmond and his office and the Standards, Procedures and Public Appointments Committee clerks' office (SPPA); the SPPA and a Scottish Parliamentary legal advisor; and internal to SPPA.

14. Mr Gordon stated that he did not require the names of SPPA staff, so that information falls outwith the scope of this investigation.
15. An attachment to some of the emails, a copy of Mr Salmond's published Register of Interests as at 26 February 2015, is already publicly available. As Mr Gordon has stated that he does not require information already in the public domain, that information is also outwith the scope of the Commissioner's investigation.

Adequacy of searches

16. The SPCB was asked to explain the extent of any searches carried out and why this would have been likely to locate and retrieve any information covered by the request.
17. The SPCB explained that it kept an electronic folder for each MSP.
 - (i) This folder holds the documents relating to the Member's Register entry. Within each Member's Register folder there are folders for each year of the Parliamentary session. Documents relating to advice and correspondence with the Member or his/her staff about their Register entries are filed in the relevant electronic folder.
 - (ii) Legal advice from the Solicitor's Office regarding a Member's Register entry is also filed in this folder.
 - (iii) Each document has a file name beginning with the date, so they are listed in date order.
18. The SPPA Clerks searched Mr Salmond's Register folder to find any relevant documents which had been filed for the time period specified in the information request.
19. Additionally, each member of the team of five SPPA clerks searched their email accounts to establish whether any further emails were held which were not filed in the relevant Register folder. The search of all of their email folders was carried out using a number of search terms: "Salmond", "interest" and "register". Additional emails were identified and filed in Mr Salmond's Register folder.
20. The SPCB's view was that no other teams would hold relevant information, except the Media Relations Office and the Solicitor's Office.
21. In connection with the Media Relations Office, the SPCB submitted that the Lead Media Officer and main contact for the SPPA searched all of her email folders, using the search terms listed in paragraph 19 above. The acting Head of Media Relations also carried out the same search of his email folders and of the office database, the latter including a search for relevant media lines. Neither search identified any information about Mr Salmond's Register of Interests.
22. The SPCB submitted that all of the above searches were carried out without any limit on the time frame.
23. The SPCB believed any legal advice from the Solicitor's Office would be in the Member's Register folder. For completeness, it carried out an additional search of the records held by the Office of the Solicitor to the Scottish Parliament (the OSSP) during the investigation. This search found one additional document.
24. The SPCB stated that this search would have retrieved all information held by the OSSP within the scope of the request, because all information held by OSSP in relation to Register

of Interests matters was held in the folder searched. The folder contained only a small number of e-mails within the relevant time frame.

25. Although it originally failed to identify all of the information held and falling within the scope of the request, the Commissioner is satisfied (having considered the above submissions) that by the end of her investigation SPCB had carried out adequate and proportionate searches to identify and locate all of the relevant information it held.

Section 1(1) of FOISA

26. The Commissioner has considered the one additional document located by the SPCB during her investigation and agrees that it falls within the scope of Mr Gordon's request.
27. As the SPCB did not identify this information until after her investigation started the Commissioner must find that the SPCB breached the requirements of section 1(1) of FOISA in responding to Mr Gordon's request, by failing to identify and locate all the information it held and which fell within the scope of the request.
28. The Commissioner is critical of the authority for its failure to carry out adequate searches when it received the request and again at review. This failure resulted in additional, potentially avoidable, work for both the SPCB and her office, and extended the time the applicant will have to wait to receive the information to which he is entitled.

Section 36(1) of FOISA - Confidentiality

29. The SPCB applied this exemption to the information in documents 7, 19a, 19b and 23.
30. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This includes communications which are subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the SPCB argued applied in this case.
31. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
 - (ii) The legal adviser must be acting in his/her professional capacity, and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
32. The SPCB submitted that this exemption applied to the withheld information because it all related to advice given by or sought from one of its solicitors, in their capacity as a professional legal adviser. The advice was provided in the context of the solicitor's professional relationship with a client.
33. Having considered the content of all of the withheld information, the Commissioner is satisfied that all of the information withheld under this exemption relates directly to seeking, obtaining and considering legal advice from a professional legal adviser acting in their professional capacity. Therefore, the Commissioner is satisfied that this information meets the conditions set out above and so is subject to legal advice privilege.

34. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed. The information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole.
35. The Commissioner is satisfied that the withheld information remained confidential at the time the SPCB responded to Mr Gordon's information request and requirement for review.
36. The exemption in section 36(1) is a qualified exemption. This means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 36(1), the Commissioner must go on to 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.

The public interest test - section 36(1)

37. Mr Gordon submitted that the public interest was best served by maximum transparency around the financial arrangements of the former First Minister.
38. The SPCB submitted that the public interest in disclosing the information was outweighed by that in maintaining the exemption. They stated that there was a great public interest in the confidentiality of lawyer-client communications being maintained, and no compelling public interest in disclosing these communications.
39. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities, and that disclosure of the information would go some way to providing that transparency and accountability.
40. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
41. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information.
42. The Commissioner has considered the public interest arguments advanced on both sides. She is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client. Consequently, she accepts that the SPCB correctly withheld the information to which it applied section 36(1) of FOISA.

Section 38(1)(b) of FOISA – personal information

43. The Commissioner has already found some of the information to have been properly withheld under section 36(1) of FOISA and so will not consider it again here. As the names of SPCB staff are outwith the scope of the investigation, they also are not considered here.

44. The SPCB applied this exemption to information in documents 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21 and 22.
45. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (2)(b) (as appropriate) exempts personal data if its disclosure to a member of the public, otherwise than under FOISA, would contravene any of the data protection principles.
46. The SPCB submitted that the withheld information was personal data for the purposes of the Data Protection Act 1998 (the DPA) and that its disclosure would contravene the first data protection principle. Therefore, they argued that the information was exempt under section 38(1)(b).
47. In considering the application of this exemption, the Commissioner will first consider whether the information in question is personal data as defined in section 1(1) of the DPA. If it is, she will go on to consider whether disclosure of the information would breach the first data protection principle as claimed.
48. This is an absolute exemption, which means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

49. "Personal data" are defined in section 1(1) of the DPA as "data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller" (the full definition is set out in Appendix 1).
50. The Commissioner has considered the submissions received from the SPCB on this point, along with the withheld information. She is satisfied that the information withheld under this exemption is Mr Salmond's personal data because it is possible to identify him from the information, in line with the definition of personal data. The information is significantly biographical in relation to Mr Salmond, and therefore can be said to relate to him.

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

51. The SPCB argued that disclosure of the information would breach the first data protection principle. The first data protection principle requires that personal data 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 (as defined by section 2 of the DPA), at least one of the conditions in Schedule 3 to the DPA is also met. In this case, "processing" is disclosing the information into the public domain in response to Mr Gordon's request.
52. The Commissioner is of the view that the requested information is not sensitive personal data as defined by section 2 of the DPA, and it is therefore not necessary to consider whether any of the conditions in Schedule 3 could be met.
53. When considering the conditions in Schedule 2 to the DPA, the Commissioner has noted Lord Hope's comment in the case of *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47¹ that the conditions require careful treatment in the context of

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<http://www.itspublicknowledge.info/nmsruntime/logLink.aspx?linkURL=http%3a%2f%2fwww.publications.parliament.uk%2fpa%2fd200708%2fdjudgmt%2fjd080709%2fcomm-1.htm>

a request for information under FOISA, given that they were not designed to facilitate the release of information, but rather to protect personal data from being processed in a way that might prejudice the rights, freedoms or legitimate interests of the data subject(s) (i.e. the named individuals to which the data relates).

54. The Commissioner considers that the only condition in Schedule 2 to the DPA which might apply in this case is condition 6. Condition 6 allows personal data to be processed if that 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.
55. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
- (i) Does Mr Gordon have a legitimate interest in obtaining the personal data?
 - (ii) If so, is the disclosure necessary to achieve those legitimate interests? In other words, is disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subject (i.e. Mr Salmond)?
 - (iii) Even if making the information available is necessary for the legitimate purposes of Mr Gordon would it nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of Mr Salmond? This will involve a balancing exercise between the legitimate interests of Mr Gordon and those of Mr Salmond. Only if (or to the extent that) the legitimate interests of Mr Gordon outweigh those of Mr Salmond can the personal data be made available. There is no presumption in favour of disclosing personal data under FOISA.

Does Mr Gordon have a legitimate interest?

56. There is no definition in the DPA of what constitutes a "legitimate interest." The Commissioner takes the view that the term indicates that matters in which an individual properly has an interest should be distinguished from matters about which he or she is simply inquisitive. The Commissioner's guidance on section 38² states:

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

57. Mr Gordon was of the view that the public interest was best served by maximum transparency around the financial arrangements of the former First Minister.
58. The SPCB was unclear as to whether Mr Gordon had a legitimate interest, although it acknowledged that his purpose in seeking the information was journalistic.

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<http://www.itspublicknowledge.info/nmsruntime/logLink.aspx?linkURL=http%3a%2f%2fwww.itspublicknowledge.info%2fLaw%2fFOISA-EIRsGuidance%2fsection38%2fSection38.aspx>

59. The Commissioner has carefully considered the submissions from both parties and concludes that Mr Gordon, as a journalist and taxpayer, was pursuing a legitimate interest in seeking the withheld information. The Commissioner accepts that Mr Gordon (and the general public) has a legitimate interest in information surrounding the process of managing the Register of Interests of a public figure such as Mr Salmond.

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

60. Given the publication of Mr Salmond's Register entry, the SPCB did not consider disclosure of the withheld information was necessary to meet Mr Gordon's legitimate interests.

61. The Commissioner has considered all relevant submissions she has received carefully. She acknowledges that the information published in Mr Salmond's Register entry is available to Mr Gordon, and that it meets the general legitimate interest in transparency, if not Mr Gordon's concerns directly.

62. However, the Commissioner accepts that the legitimate interest in understanding the process, background and timescales involved in managing an MSP's Register entry cannot be met in full without disclosure of the type of personal data withheld. To that extent, disclosure of the withheld information is necessary, so the Commissioner must go on to consider whether it would nevertheless be unwarranted, in this case, by reason of prejudice to the rights and freedoms or legitimate interests of Mr Salmond.

Is disclosure unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of Mr Salmond?

63. This involves a balancing exercise between the legitimate interests of Mr Gordon and those of Mr Salmond. Only if the legitimate interests of Mr Gordon outweigh those of Mr Salmond can the information be disclosed without breaching the first data protection principle.

64. In the Commissioner's briefing on personal information, she notes that a number of factors should be taken into account in carrying out the 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 disclosure
- whether the individual objected to the disclosure
- the reasonable expectations of the individuals as to whether the information should be disclosed.

65. It was the SPCB's view that Mr Gordon's interest in obtaining the information did not outweigh Mr Salmond's right to keep private that information about his personal interests which he was not required to disclose on the Register.

66. The SPCB stated that Mr Salmond reasonably expected that the information would not be disclosed. The SPCB confirmed that Mr Salmond had been asked for, but had refused to give, his consent to disclosure of the personal data. Mr Salmond provided his reasons for his refusal but asked they be kept confidential.

67. The Commissioner has carefully considered the submissions put forward by the SPCB and Mr Gordon. She has also taken into account the fact that Mr Salmond has refused to give his consent to disclosure, and his comments in this connection.

68. In her deliberations the Commissioner must take into account that the information relates to Mr Salmond's public life as an MSP, and therefore someone very much in the public eye and accountable to the public. She is of the view that Mr Salmond, as such a widely known and recognised public figure, should have some expectation that information relating to his Register of Interests would be of legitimate interest to the public, with a view to transparency and accountability.
69. The documents withheld under this exception fall into two batches:
- (i) Batch 1: documents 5, 6, 14, 16, 20, 21 and 22 contain information specific to Mr Salmond's personal interests
 - (ii) Batch 2: documents 2, 3, 8, 9, 10, 11, 12, 13, 15, 17 and 18 are for the most part administrative exchanges

Batch 1 – legitimate interests and unwarranted disclosure

70. Having weighed up all of the above considerations the Commissioner concludes, on balance, that disclosure of the information in batch 1 would be disproportionately intrusive, and would be likely to cause a degree of harm to Mr Salmond's legitimate interests.
71. She finds that disclosure would cause unwarranted prejudice to the rights, freedoms and legitimate interests of Mr Salmond. Therefore, she finds that condition 6 in Schedule 2 to the DPA is not met in relation to this information.
72. Having concluded that disclosure of the withheld information in batch 1 would lead to unwarranted prejudice to the rights, freedoms and legitimate interests of Mr Salmond, the Commissioner must also conclude that disclosure would be unfair. As condition 6 cannot be met, she would also regard disclosure as unlawful.
73. In all the circumstances, therefore, the Commissioner finds that disclosure of the information in Batch 1 of the documents would breach the first data protection principle and that this information was properly withheld under section 38(1)(b) of FOISA.

Batch 2 – legitimate interests and unwarranted disclosure

74. The information in documents in Batch 2 is simple administrative exchanges and would be less likely to cause the same degree of harm to Mr Salmond's legitimate interests as that in Batch 1.
75. The Commissioner has balanced the legitimate interests of Mr Salmond against the legitimate interests identified by Mr Gordon in relation to the information in Batch 2. Given the routine administrative nature of this information, the Commissioner finds that the legitimate interests served by disclosure to Mr Gordon (and the wider public) outweigh any unwarranted prejudice that might be caused to the rights, freedoms or legitimate interests of Mr Salmond. The Commissioner is therefore satisfied that condition 6 of schedule 2 of the DPA can be met.
76. Having reached this conclusion, the Commissioner has gone on to consider whether (as required by the first data protection principle) disclosure of the information in Batch 2 would also be fair and lawful. She has already considered the question of fairness in the context of the legitimate interests of the Mr Salmond and, for the reasons already outlined in relation to condition 6, finds that disclosure would be fair.
77. The SPCB did 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. In the

circumstances, the Commissioner can identify no reason why disclosure should be considered unlawful.

78. In all the circumstances, therefore, the Commissioner finds that disclosure of the information in Batch 2 of the documents would not breach the first data protection principle and that this information was incorrectly withheld under section 38(1)(b) of FOISA.
79. The Commissioner will go on to consider the application of the exemption in section 36(2) of FOISA in relation to the information in document 9.

Section 36(2) of FOISA - Confidentiality

80. Document 9 contains an email exchange between the SPPA and Mr Salmond or his office.
81. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption. This means it is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA (although there may still be circumstances in which disclosure of confidential information is justified in the public interest).
82. Section 36(2) therefore contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
83. The second stage is that the disclosure of the information by the public authority must constitute a breach of confidence, actionable either by the person or persons from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means the basic requirements for a successful action must appear to be fulfilled.

Was the information obtained by a Scottish public authority from another person?

84. Having considered the information in question the Commissioner is of the view that only the communications received from Mr Salmond or his office can be considered to have been obtained from another person. The remaining information, generated by the SPCB, cannot be said to fall into this category: consequently, section 36(2) of FOISA cannot apply to that information.
85. In respect of the communications from Mr Salmond or his office, the Commissioner will now go on to consider whether disclosure would cause an actionable breach of confidence.

Actionable breach of confidence

86. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence,
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and

- (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

- 87. The information contained in these emails is factual information about entries in a public register. The Commissioner must question how this type of information could be considered to possess the necessary quality of confidence.
- 88. The only submissions provided by the SPCB in relation to these emails was that the information was sensitive and not in the public domain. No explanation was given as to how and in what way the information was sensitive. In the absence of any such an explanation, and given that the information is of a routine administrative nature in relation to entries in a public register (and, in one case at least, a public appointment) the Commissioner cannot accept that this information possesses the necessary quality of confidence.
- 89. In all the circumstances, therefore, the Commissioner is not satisfied that the requirements of the second part of the two-part test in section 36(2) of FOISA can be met in relation to this information. Consequently, she can only conclude that the SPCB incorrectly withheld information under section 36(2) of FOISA.
- 90. The Commissioner now will go on to consider the application of section 30 of FOISA.

Section 30(b) (i) and (ii) - Prejudice to effective conduct of public affairs

- 91. The SPCB applied these exemptions to documents 2, 3, 8 and 15.
- 92. In order for the SPCB to rely on these exemptions, it must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
- 93. It is the Commissioner's view that there is a high standard to be met in applying the tests in the section 30(b) exemptions. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
- 94. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would need to be at least a significant probability of it occurring. Each request must, of course, be considered individually.

Factors to consider

- 95. The Commissioner's guidance states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are

communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.

- (ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
- (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken.

96. The Commissioner has scrutinised the documents in question and notes that they consist of advice to an MSP about the process of amending the Register and correspondence with that MSP as to whether the Register accurately reflects his interests. Where advice or views are communicated and received as part of an individual's day-to-day professional functions then the risk of substantial inhibition may well be diminished. The email exchange in this case is clearly correspondence carried out by the SPPA clerks in the course of their professional functions.
97. The Commissioner has considered the SPCB's view that there is an inherent sensitivity to advice given by SPPA clerks to MSPs, and that disclosure of the emails would undermine confidentiality. Section 30 of FOISA cannot simply be applied in a blanket fashion so the Commissioner must look at the withheld information in the emails and consider whether it is particularly sensitive information. Having done this, she is of the view that the information in these emails is relatively innocuous. The information simply clarifies the process for updating and amending the Register of Interests, and contains factual communications. The information does not include any discussion of whether particular matters should be recorded in the Register, has no connection with policy formulation and is not in relation to any process that was being considered or drafted at the time.
98. The Commissioner notes the SPCB's argument that MSPs have to comply with the Register of Interests regime or they may, eventually, face criminal sanctions. However, the SPCB has provided nothing to explain how this fact relates to the content of the emails. Without such explanation, the Commissioner cannot, on the face of it, see how this is relevant to the information in question.
99. Having taken into account the content of the emails under consideration, and the submissions provided by the SPCB, the Commissioner is of the view that the SPCB has failed to demonstrate that disclosure of this information would, or would be likely, to cause substantial inhibition in relation to the provision of advice or the exchange of views for deliberation. Consequently, the Commissioner does not accept that the information should be withheld under either of the exemptions in section 30(b) of FOISA.
100. Because the Commissioner has found that the exemptions cited by the Council cannot be upheld, she is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
101. The Commissioner will now go on to consider the SPCB's application of section 30(c) of FOISA.

Section 30(c)

102. The SPCB applied this exemption to information in documents 2, 3, 8, 9, 10, 11, 12 13, 15, 17 and 18.
103. 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 use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
104. The prejudice in question must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).
105. The SPCB submitted that if the e-mails were disclosed it would demonstrate to MSPs that administrative steps in finalising their Register entries, rather than just the published entries themselves, were disclosable under FOISA, thereby undermining the essential confidentiality of the Register of Interests regime and the long-established system for interacting with MSPs in order to register interests.
106. The SPCB stated that disclosure would undermine the process of registration of Members' interests if emails which were draft submissions, and not the finished form of words for publication, were disclosed.
107. Having considered the content of all of the emails in question, the Commissioner notes that none of them are in draft format. The exchanges relate to questions of fact and process. They do not relate, in any substantive sense, to draft entries in the Register nor to whether particular matters should be registered there. Comments on drafts go no further than to confirm entries or instruct the removal of those which no longer apply (and so were already in the public domain).
108. The Commissioner accepts that MSPs should be able to discuss with the SPPA clerks, in confidence, whether interests require to be recorded in cases of uncertainty. However, she does not accept that this extends to protect the entire process of MSPs' engagement with the clerks in relation to the Register of Interests, particularly where it is purely administrative in nature.
109. MSPs are required to register their interests; failure to do so risks criminal proceedings. The Commissioner does not accept the argument that knowing that correspondence about the process or similarly administrative information would lead MSPs to cease registering their interests and so risk criminal proceedings. She is of the view that this argument is an extremely remote and hypothetical possibility.
110. Having taken into account the information in question, and the submissions provided by the SPCB, the Commissioner concludes that the SPCB has failed to demonstrate that disclosure of the withheld information would, or would be likely, to cause substantial prejudice to the interest registration process.

111. Therefore, she has concluded that the exemption in section 30(c) of FOISA is not engaged in relation to the information under consideration. This means she is not required to consider the public interest test in section 2(1)(b).
112. As none of the exemptions applied to the information in documents 2, 3, 8, 9, 10, 11, 12, 13, 15, 17 and 18 are engaged, the Commissioner requires the SPCB to disclose these documents to Mr Gordon. As Mr Gordon has said that he does not require the names of the SPPA staff, the names in the emails can be redacted.

Decision

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

The Commissioner finds that the SPCB was entitled to withhold information under the exemptions in sections 36(1) and 38(1)(b) of FOISA.

The SPCB failed to comply with Part 1 (and in particular section 1(1)) of FOISA by failing to identify all of the information falling within the scope of this request, and by incorrectly withholding information under sections 30 and 36(2).

The Commissioner requires the SPCB to provide Mr Gordon with the incorrectly withheld information, as detailed in paragraph 112 of this Decision, by **22 March 2016**.

Appeal

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

Enforcement

If the Scottish Parliamentary Corporate Body (SPCB) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the SPCB has failed to comply. The Court has the right to inquire into the matter and may deal with the SPCB as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

4 February 2016

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 -

...

(c) section 36(2); and

...

(e) in subsection (1) of section 38 -

...

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

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

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

(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.
- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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

...

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

...

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

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