

# Decision Notice

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## Decision 263/2016: Mr James Duff and the Scottish Ministers

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### Reasons why correspondence not replied to

Reference No: 201601894

Decision Date: 12 December 2016



## Summary

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The Scottish Ministers (the Ministers) were asked why named Ministers were not responding to correspondence from the applicant. The Ministers refused to disclose the information as it was the applicant's own personal data and, therefore, exempt from disclosure.

The Commissioner found that the Ministers were entitled to do this.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(e)(i) (Effect of exemptions); 38(1)(a) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data")

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

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1. On 2 September 2016, Mr Duff made a request for information to the Ministers. Mr Duff referred to a number of letters he had written to named Ministers and asked that he be provided with information as to the reasons why these letters were not replied to.
2. The Ministers responded on 13 September 2016. They explained that any information held was subject to the exemption in section 38(1)(a) of FOISA, as it was considered to be Mr Duff's own personal data.
3. The Ministers advised Mr Duff of his rights to seek the information by way of a subject access request under the DPA.
4. On 14 September 2016, Mr Duff wrote to the Ministers, requesting a review of their decision on the basis that he did not accept the response to be correct.
5. The Ministers notified Mr Duff of the outcome of their review on 11 October 2016. The Ministers upheld the original response without modification.
6. On 12 October 2016, Mr Duff wrote to the Commissioner. Mr Duff applied to the Commissioner for a decision in terms of section 47(1) of FOISA.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Duff 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 17 November 2016, the Ministers were notified in writing that Mr Duff had made a valid application. 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 Ministers were invited to comment on this application and answer questions, with specific reference to the application of section 38(1)(a) of FOISA.
10. The Ministers confirmed they were relying upon section 38(1)(a) of FOISA, providing reasons for maintaining this position.

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

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

### **Section 38(1)(a) of FOISA**

12. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
13. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. The DPA will therefore usually determine whether a person has a right to their own personal data, and govern the exercise of that right. Crucially, it provides for access by the data subject (the person to whom the data relate) alone, rather than (as under FOISA) to the world at large. Section 38(1)(a) of FOISA does not deny individuals a right to access to information about themselves, but ensures that the right is exercised under the DPA and not under FOISA.
14. Personal data are 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 Appendix 1).
15. The Ministers explained that the only relevant information they held related to information Mr Duff had generated about his own situation. The only information they held about why they had not responded to him was to be found in previous correspondence explaining their position. They considered this information to be Mr Duff's own personal data.
16. Mr Duff also submitted that his contact with the Ministers related to his pursuit of access to justice (for himself).
17. The Commissioner has considered the submissions received from both the Ministers and Mr Duff. It is apparent that any information held on the correspondence in question would relate to Mr Duff and his own personal circumstances, and therefore would be his own personal data. In all the circumstances, therefore, the Commissioner is satisfied that the Ministers were entitled to withhold the information under section 38(1)(a) of FOISA.

## **Decision**

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

## **Appeal**

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

**Margaret Keyse**  
**Head of Enforcement**

**12 December 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

...

- (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 –

- (i) paragraphs (a), (c) and (d); and

...

#### 38 Personal information

- (1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;

...

## 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;

...

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