

# Decision Notice



Decision 083/2012 Mr X and the Crown Office and Procurator Fiscal Service

Total expenses claimed by two members of staff

Reference No: 201200027  
Decision Date: 10 May 2012

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**Rosemary Agnew**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
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## Summary

Mr X requested from the Crown Office and Procurator Fiscal Service (COPFS) the total expenses claimed by two members of staff. COPFS withheld this information under section 38(1)(b) of FOISA, arguing that it was the staff members' personal data and that its disclosure would breach the first data protection principle. Following a review, Mr X remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that COPFS had dealt with Mr X's request for information in accordance with Part 1 of FOISA. She found that the information had been correctly withheld under section 38(1)(b) of FOISA.

## 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)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions 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"); Schedules 1 (The data protection principles) (the first data protection principle) and 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

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

## Background

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1. On 29 September 2011, Mr X emailed COPFS requesting the total amount of expenses claimed by two named individuals (one of whom was employed by COPFS as a Depute Procurator Fiscal) since being appointed to their posts within COPFS. Mr X also requested other information that is not the subject of this investigation and decision.
2. COPFS responded on 25 October 2011, advising Mr X that it considered the requested information to comprise personal data exempt from disclosure in terms of section 38 of FOISA.



3. On 27 October 2011, Mr X emailed COPFS requesting a review of its decision. In particular, Mr X noted that, in response to another part of his request, COPFS had disclosed the amount of expenses claimed by the Crown Agent since her appointment to that post. Mr X argued that the same information should be disclosed in respect of the two named individuals.
4. COPFS notified Mr X of the outcome of its review on 21 November 2011, upholding its original decision without modification. COPFS explained that, whilst it had disclosed the information requested regarding the Crown Agent, it considered the individuals who were the subject of the requests under consideration to be more junior members of staff and it would not be appropriate to disclose that information.
5. On 28 December 2011, Mr X wrote to the Commissioner, stating that he was dissatisfied with the outcome of COPFS' 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 X had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 2 February 2012, COPFS was notified in writing that an application had been received from Mr X and was asked to provide the Commissioner with any information withheld from him. COPFS responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted COPFS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, COPFS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. COPFS responded on 17 April 2012, providing submissions on its application of the exemption in section 38(1)(b) of FOISA.
10. The investigating officer also contacted Mr X during the investigation, seeking his submissions on the matters to be considered in the case. Mr X's submissions, along with those of COPFS, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.



## Commissioner's analysis and findings

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11. 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 X and COPFS and is satisfied that no matter of relevance has been overlooked.

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

12. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and if its disclosure to a member of the public otherwise than under FOISA would breach any of the data protection principles set out in Schedule 1 to the DPA.
13. The exemption in section 38(1)(b) is an absolute exemption, not subject to the public interest test laid down by section 2(1)(b) of FOISA.

#### *Is the information personal data?*

14. 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).
15. The Commissioner accepts that the withheld information in this case is personal data as defined in section 1(1) of the DPA, as it relates to living individuals who can be identified from that information. The Commissioner will go on to consider whether this information is exempt from disclosure under section 38(1)(b) of FOISA.

#### *Would disclosure breach the first data protection principle?*

16. The first data protection principle requires 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 into the public domain in response to Mr X's information request.
17. The Commissioner has considered the definition of sensitive personal data set out in section 2 of the DPA and is satisfied that the personal data in this case does not fall into any of the relevant categories. It is therefore not necessary to consider the conditions in Schedule 3 in this case.
18. The Commissioner will now go on to consider whether there are any conditions in Schedule 2 to the DPA which would permit the personal data to be disclosed. If any of these conditions can be met, he must then consider whether the disclosure of this personal data would be fair and lawful.



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

19. When considering the conditions in Schedule 2, the Commissioner notes Lord Hope's comment in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47<sup>1</sup> that the conditions require careful treatment in the context of 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 and freedoms or legitimate interests of the data subject.
20. The Commissioner considers that condition 6 of Schedule 2 of the DPA would appear to be the only condition which might permit disclosure of the personal data requested by Mr X. 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.
21. There are a number of different tests which must therefore be satisfied before condition 6 can be met. These are:
  - Does Mr X have a legitimate interest in obtaining the personal data?
  - If he does, is the disclosure necessary to achieve these legitimate aims? In other words, is the disclosure proportionate as a means and fairly balanced as to ends, or could these legitimate aims be achieved by means which interfere less with the privacy of the data subjects? (In this case, the data subjects are the individuals named in Mr X's request.)
  - Even if the processing is necessary for Mr X's legitimate purposes, would the disclosure nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects?
22. 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 X must outweigh the rights and freedoms or legitimate interests of the data subjects before condition 6 will permit the personal data to be disclosed. If the two are evenly balanced, the Commissioner must find that COPFS was correct to refuse to disclose the personal data to Mr X.

*Does Mr X have a legitimate interest?*

23. In his submissions to the Commissioner, Mr X highlighted that in response to another request made alongside those under consideration in this decision, COPFS had provided information to him concerning the expenses claimed by the Crown Agent. In his view, as COPFS had no objection in principle to the disclosure of this personal data, it seemed suspicious to him that it was reluctant to disclose personal information relating to other staff exercising prosecutorial discretion.

<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>



24. In his application to the Commissioner, Mr X had stated that the expenses of a prosecutor should be open to public inspection in order to identify undisclosed conflicts of interest thereby ensuring that the role of a public prosecutor can be shown to be impartial.
25. Mr X also argued that his application was intended to refer to all Depute Fiscals generally and that the example of the individuals given had merely highlighted the more general issue of public interest. In further submissions, he stated that he wished the Commissioner to make a determination as to whether the expense details of all Depute Fiscals should be available for public inspection. Mr X stated that, as he was seeking a general ruling, there was no need for the Commissioner to dwell on individuals.
26. The Commissioner notes that, in his submissions, Mr X has indicated that he is seeking a general determination regarding the publication of the expense details of all Depute Fiscals and has referred to the scrutiny of the expenses of employees with responsibility for decision making in relation to prosecutions.
27. However, the Commissioner notes that Mr X has sought information concerning the expenses of two specified individuals. One of these individuals is not a Depute Fiscal and has no involvement in making decisions regarding prosecutions. As such, the Commissioner is unable to conclude that Mr X has established any legitimate interest in obtaining the requested information in relation to this individual.
28. The Commissioner also notes that, although Mr X has indicated that he is seeking a decision regarding the *expense details* of employees with responsibilities for making decisions on prosecutions, his original request was for the *total amount* of expenses claimed by a named Depute Fiscal since their appointment to that post. As such, the Commissioner is limited to considering whether the information that was sought in the original request (i.e. the total amount of expenses claimed) should be disclosed or not. She will not, therefore, make any comment on the wider issues that Mr X has sought to introduce in his submissions.
29. In relation to the individual who is a Depute Fiscal, the Commissioner notes that Mr X wishes to scrutinise the expense details of prosecutors in order to identify undisclosed conflicts of interest and to ensure impartiality.
30. The Commissioner is unclear as to the nature of the “undisclosed conflicts of interest” to which Mr X has referred. Moreover, she considers it would be difficult to envisage circumstances whereby any perceived conflict of interest could be identified simply by scrutinising the total sum of expenses claimed by one individual in the period of their employment in that post. Therefore, in the Commissioner’s view, Mr X has also failed to demonstrate any legitimate interest in obtaining the information sought in relation to this individual.
31. The Commissioner finds that Mr X has failed to demonstrate any legitimate interest which would require disclosure of this personal data, with the result that condition 6 of Schedule 2 to the DPA cannot be met in this case. In the absence of a condition permitting it, disclosure would be unlawful. Disclosure of the information would therefore contravene the first data protection principle, which means that the information is exempt from disclosure under section 38(1)(b) of FOISA.



32. The Commissioner therefore finds that COPFS was entitled to withhold the information in question under section 38(1)(b) of FOISA.

## **DECISION**

The Commissioner finds that the Crown Office and Procurator Fiscal Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr X.

## **Appeal**

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Should either Mr X or the Crown Office and Procurator Fiscal Service 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.

**Margaret Keyse**  
**Head of Enforcement**  
**10 May 2012**





## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (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.

##### 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.

...