

# Decision Notice

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## **Decision 122/2017: James McEnaney and the Scottish Ministers**

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### **Communications between the Scottish Government and the Hometown Foundation**

Reference No: 201700036

Decision Date: 1 August 2017



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for information concerning communications with the Hometown Foundation, a Scottish charity.

The Commissioner found that the Ministers were entitled to withhold some personal information under the relevant exemption in FOISA, but that other information had been incorrectly withheld under this exemption. The Commissioner found that the Ministers had incorrectly withheld other information without applying any exemptions. She found that some information had been incorrectly withheld under the exemption relating to commercial interests and required this information to be disclosed. Additionally, the Commissioner found that the Ministers failed to meet the required timescale for responding and failed to provide adequate advice and assistance to Mr McEnaney.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 10(1) (Time for compliance); 15 (Duty to provide advice and assistance); 33(1)(b) (Commercial interests and the economy); 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) sections 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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

## Background

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1. On 14 October 2016, Mr McEnaney made a request for information to the Scottish Ministers (the Ministers). The information requested was as follows:

*“Please release full details of any communication (such as meetings, emails and telephone calls) between the Scottish Government and representatives of the Hometown Foundation. Please also provide the minutes between the Scottish Government and representatives of the Hometown Foundation.”*

2. The Ministers responded on 25 October 2016. They informed Mr McEnaney that, in order that they could proceed with his request, he was required to include a relevant date period for the information requested. The Ministers informed Mr McEnaney that his request would be put on hold until he had responded.

3. On 25 October 2016, Mr McEnaney emailed the Ministers. He informed them that he required the relevant information from 1 January 2010 “until the present”.
4. The Ministers did not respond. On 23 November 2016, Mr McEnaney wrote to them requesting a review of their failure to respond.
5. The Ministers notified Mr McEnaney of the outcome of their review on 22 December 2016. The Ministers disclosed information to Mr McEnaney, but withheld:
  - (i) some financial information under the exemption in section 33(1)(b) of FOISA (Commercial interests and the economy)
  - (ii) the names and contact details of individuals under the exemption in section 38(1)(b) (Personal information)
  - (iii) the job titles and work areas (within the Scottish Government) of Scottish Government staff, although no exemption was applied to this specific information.
6. The Ministers stated also that they had interpreted Mr McEnaney’s request as covering the period from 1 January 2010 until 14 October 2016 – the date of his original request.
7. On 5 January 2017, Mr McEnaney wrote to the Commissioner’s office. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr McEnaney stated he was dissatisfied with the outcome of the Ministers’ review as they had
  - (i) not explained why they had failed to respond initially to his request;
  - (ii) misinterpreted the date parameters of the request;
  - (iii) incorrectly withheld personal data under the exemption in section 38(1)(b), and
  - (iv) misapplied the exemption in section 33(1)(b) of FOISA.

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr McEnaney 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.
9. On 6 February 2017, the Ministers were notified in writing that Mr McEnaney had made a valid application. They were asked to send the Commissioner the information withheld from McEnaney. The Ministers provided the information and the case was allocated to an investigating officer.
10. 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 specific questions. They were asked to comment on their application of exemptions and also on other aspects of their handling of the request.
11. The Ministers responded on 30 March 2017. At this stage, the Ministers stated that they had reconsidered their decision to withhold the personal data of the staff and representatives of the Hometown Foundation, as this information was already in the public domain. The Ministers confirmed that they now intended disclosing this information to Mr McEnaney.
12. On 4 April 2017, the Ministers disclosed additional information to Mr McEnaney, i.e. the personal data of staff and representatives of the Hometown Foundation which were already

in the public domain. The Ministers continued to withhold the personal data of Scottish Government staff under the exemption in section 38(1)(b) of FOISA.

13. The Ministers also explained that, following a subsequent information request from Mr McEnaney, additional information had been disclosed to him covering the period from 15 October 2016 to 5 January 2017. The Ministers supplied a copy of this information to the Commissioner.
14. The investigating officer subsequently contacted Mr McEnaney to ascertain whether he still required a decision from the Commissioner on the information that had now been disclosed, i.e. the personal data of Hometown Foundation staff and representatives. Mr McEnaney indicated that he would still like the general issue to be considered as part of the Commissioner's decision.
15. During the investigation, the investigating officer sought – and received – additional submissions from the Ministers, concerning their application of the exemption in section 38(1)(b) of FOISA to the remaining withheld personal data (of Scottish Government staff).
16. Also during the investigation, the Ministers disclosed additional information to Mr McEnaney which had been withheld previously. This comprised the job titles and work areas of relevant Scottish Government staff.

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

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17. 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 McEnaney and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Information withheld where no exemptions applied**

18. As noted above, the Ministers initially withheld the job titles and work areas (within the Scottish Government) of Scottish Government staff. This information was disclosed to Mr McEnaney during the investigation.
19. As no exemption was applied to this information and, given that the Ministers agreed to disclose it during the investigation, the Commissioner must conclude that it was incorrectly withheld. By withholding it, the Commissioner finds that the Ministers failed to comply with section 1(1) of FOISA.

### **Section 33(1)(b) of FOISA – Commercial interests and the economy**

20. The exemption in section 33(1)(b) of FOISA applies to information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. "Person" must be interpreted widely, to include a legal person (such as a company) as well as an individual: specifically, in this context, it includes a Scottish public authority. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
21. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial: in other words, of real and demonstrable significance.

22. The information withheld under this exemption comprises financial information contained within the business plans of two individual schools.
23. The Ministers submitted that the parties whose commercial interests would be affected would be the Hometown Foundation and the two schools.
24. The Ministers explained that the Hometown Foundation is a Scottish charity which supports communities to gain control over institutions that are vital to their communities' benefit and growth. The Ministers stated that part of this involves the provision of advice and assistance to community groups to take over education establishments, and to existing schools, to run them as community schools.
25. The Ministers submitted that it is necessary, in doing this work, that substantial financial information is provided to establish the appropriateness of the shift to state-funded autonomous schools. The Ministers explained that the Hometown Foundation provides its help, advice and assistance within a commercial environment. It has to compete with other organisations, and subsequently the schools have to provide information to ensure their ability to fund and run the schools independently (as detailed in the business plans).
26. The Ministers submitted also that the schools in question are currently independent schools, which operate privately and charge fees aligned to the needs of their school. While recognising that the fees charged by these schools were minimal in comparison with other independent schools, they believed disclosure might allow other schools to use the information to compete against them.
27. Having considered the Ministers' submissions, the Commissioner is satisfied that the interests identified in relation to the schools are commercial interests for the purposes of this exemption. The information concerns estimated expenditure involved in the running of the schools. It forms part of a business proposal to present a case for direct funding from the Scottish Government for the establishment of a state-funded, autonomous school. As such, in the Commissioner's view, it relates directly to the commercial interests of the schools.
28. The Commissioner is not satisfied that the information engages commercial interests for the purposes of the exemption in relation to the Hometown Foundation. The Commissioner is not satisfied that the information *in itself* relates directly to the Hometown Foundation's activities and aims, and to its role in providing support to communities seeking to gain control over educational establishments such as this. Nor does it relate directly to any commercial activity undertaken by the Hometown Foundation.
29. Having accepted that the information concerns the commercial interests of the schools in question, the Commissioner must now go on to consider whether those commercial interests would, or would be likely to, be prejudiced substantially by disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
30. In the Ministers' view, disclosure of the specific costs (in the withheld information) would be likely to substantially prejudice the ability of the Hometown Foundation and the individual schools to conduct negotiations and seek support for their aim of establishing themselves as state funded autonomous community schools. The Ministers noted that these cases were still under consideration by the Scottish Government.
31. The Ministers submitted that disclosure of this information would allow competitors (other independent schools currently operating in the same market) to gain an insight into the specifics of the current processes, funding streams and costs of each of these schools. The

Ministers argued that this could be used to undercut/outmanoeuvre the schools in future applications, which would substantially prejudice their ability to operate in a competitive environment.

32. The Commissioner has considered the Ministers' submissions carefully. As in any case, she must consider the position as it stood at the point when the Ministers notified Mr McEnaney of the outcome of their review, on 22 December 2016.
33. On the question of harm, the Commissioner must be persuaded by the submissions she receives from the Ministers. In her view, the Ministers' submissions in this case do not explain how any real and demonstrable prejudice might ensue as a result of disclosing the information.
34. The information comprises projected costs under relatively broad headings. These costs are not particularly detailed and the Commissioner is unable to accept that they provide any insight into (for example) margins or feeing structures.
35. Additionally, the Commissioner notes that the proposals appear to be designed to fill a fairly specific niche. The Ministers have provided no evidence to suggest that there is existing competition in each specific market, or that existing schools would be likely to refocus their existing provision to fill the relevant niche.
36. Based on the submissions received from the Ministers, the Commissioner is not satisfied that disclosure of the information would have the substantially prejudicial impact required for section 33(1)(b) to be engaged. Consequently, in this case, the Commissioner is not satisfied that the information under consideration was properly withheld under this exemption.
37. In conclusion therefore, the Commissioner has not been persuaded by the Ministers that section 33(1)(b) of FOISA is engaged in relation to the information withheld under this exemption. Having reached that conclusion, she is not required to consider the public interest test in section 2(1)(b) of FOISA and now requires that information to be disclosed.

### **Section 38(1)(b) - Personal information**

38. As noted above, the information withheld originally under this exemption comprised the personal data of Scottish Government staff and staff and representatives of the Hometown Foundation.
39. In his application to the Commissioner, Mr McEnaney stated that he had no objection to the redaction of third party personal data not directly connected to his request. As such, the Commissioner has discounted such information from consideration in her investigation and decision.
40. As Mr McEnaney has indicated that he is dissatisfied by the Ministers' decision, in their review response, to withhold all of the remaining personal data, she will consider the application of this exemption both in relation to the information disclosed during the investigation and that which continues to be withheld.
41. Also as noted above, the Ministers reconsidered their position during the investigation and disclosed the personal data of Hometown Foundation staff and representatives. This was on the basis that the information was already in the public domain. However, in withholding this information under section 38(1)(b) of FOISA, the Commissioner finds that the Ministers failed to comply with Part 1 (and in particular section 1(1)) of FOISA in responding to Mr

McEnaney's request. She would have expected the Ministers to check whether the information was in the public domain before withholding it under this exemption. Given that the information has now been disclosed, the Commissioner does not require any further action to be taken by the Ministers in relation to this breach.

42. The Commissioner will now go on to consider the position in relation to the personal data of Scottish Government staff (specifically names and contact details) withheld under this exemption.
43. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or, as appropriate, section 38(2)(b), exempts information from disclosure if it comprises "personal data" (as defined in 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.
44. The exemption in section 38(1)(b) of FOISA is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.
45. In order to rely on this exemption, the Ministers must show that the information being withheld is personal data for the purposes of the DPA and that its disclosure into the public domain (which is the effect of disclosure under FOISA) would contravene one or more of the data protection principles in Schedule 1.

*Is the information under consideration personal data?*

46. The Commissioner will firstly consider whether the information withheld is personal data. "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 Appendix 1.)
47. The Commissioner is satisfied that the information withheld under this exemption comprises personal data, in line with the definition in the first part of section 1(1) of the DPA. Living individuals, i.e. those named within the correspondence, can be identified from the information. Given its nature, the Commissioner is satisfied that this information relates to them as individuals.

*Would disclosure breach the first data protection principle?*

48. In their submissions to the Commissioner, the Ministers stated that they were now seeking to withhold only the names and contact details of more junior officials of the Scottish Government. The Ministers submitted that disclosure of the withheld information would contravene the first data protection principle. This 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. The processing in this case would be making the information publicly available in response to Mr McEnaney's request.

*Can any of the conditions in schedule 2 be met?*

49. When considering the conditions in Schedule 2, the Commissioner has noted Lord Hope's comment in the case of *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. 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,

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

freedoms or legitimate interests of the data subject (i.e. the person or persons to whom the data relate).

50. It appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr McEnaney. In any event, neither Mr McEnaney nor the Ministers have suggested that any other condition would be relevant.
51. Condition 6 allows personal data to be processed where 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 subjects.
52. There are, therefore, a number of tests which must be met before condition 6(1) can apply. These are:
  - Does Mr McEnaney have a legitimate interest in obtaining the personal data?
  - If so, is disclosure necessary to achieve those legitimate interests? In other words, is disclosure proportionate as a means and fairly balance as to ends, or could these legitimate interests be achieved by means which interfere less with the privacy of the data subjects?
  - Even if disclosure is necessary for these purposes, would it nevertheless be unwarranted by reason of prejudice to the rights, freedoms or legitimate interests of the data subjects?
53. As noted by Lord Hope in the above judgment, there is no presumption in favour of disclosure of personal data under the general obligation laid down in FOISA. The legitimate interests of Mr McEnaney must outweigh the rights and freedoms or legitimate interest of the data subjects before condition 6 will permit the personal data to be disclosed.

*Does Mr McEnaney have a legitimate interest in obtaining the personal data?*

54. There is no definition in the DPA of what constitutes a "legitimate interest." The Commissioner takes the view 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 38 of FOISA<sup>2</sup> 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.*
55. The Ministers accepted that, as a journalist, Mr McEnaney had a legitimate interest in obtaining information regarding his request. The Ministers also argued that Mr McEnaney had not contested the withholding of Scottish Government officials' names.
56. The Commissioner disagrees with the Ministers' view that Mr McEnaney did not contest their decision to withhold the names of Scottish Government staff. In his application, he clearly stated that he considered it inappropriate to withhold the personal data of individuals working for the Scottish Government.

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>

57. In the Commissioner's view, Mr McEnaney (and the wider public) has a legitimate interest in obtaining the personal data under consideration. The Commissioner is satisfied that disclosure of the information would allow some insight into the range of Scottish Government staff involved in correspondence and discussions with the Hometown Foundation and in arranging meetings with representatives of the Hometown Foundation.

*Is disclosure necessary to achieve those legitimate aims?*

58. Having concluded that Mr McEnaney has a legitimate interest in obtaining the personal data under consideration, the Commissioner must now consider whether disclosure of the personal data is necessary to achieve those legitimate aims, or whether these legitimate aims can be achieved by means which interfere less with the privacy of the data subjects.

59. In the Ministers' view, disclosure of the personal data was not necessary for the purposes of Mr McEnaney's request which, in their view, was to understand the Scottish Government's position on state-funded autonomous schools.

60. In his application to the Commissioner, Mr McEnaney stated that he did not believe it was appropriate to withhold the names of individuals working for (or with) the Scottish Government who had been involved in correspondence with the Hometown Foundation.

61. In a subsequent submission, Mr McEnaney argued that the withholding of this information made it effectively impossible to clearly establish lines of communications and chains of events. In his view, this could be achieved by making clear the positions of the individuals involved if it remained the case that the names could not be disclosed.

62. In this case, the Commissioner has considered all of the relevant submissions that she has received on this point along with the withheld personal data (i.e. the names and contact details of Scottish Government staff).

63. In the Commissioner's view, the disclosure of the job titles and work areas of the Scottish Government staff involved in correspondence and discussions with the Hometown Foundation would be sufficient to allow Mr McEnaney to establish the relevant lines of communication to which he has referred. It would identify the relevant Directorates and (in most instances) Units within the Scottish Government, along with the relative level of seniority of staff involved. In her view, disclosure of the actual identities of individual employees would add little or nothing to understanding of the nature of communications which took place.

64. In all the circumstances of this case, the Commissioner does not accept that disclosure of the names and contact details of the Scottish Government staff is necessary to meet Mr McEnaney's legitimate interests.

65. Having decided that disclosure of this information is not necessary to achieve Mr McEnaney's legitimate interests, the Commissioner does not consider it necessary to decide whether disclosure would cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects. As disclosure is not necessary in the circumstances, she must conclude that condition 6 in Schedule 2 to the DPA cannot be met and, for the same reasons, that disclosure would not be fair. In the absence of a condition permitting disclosure, it would also be unlawful.

66. In all the circumstances, therefore, the Commissioner has concluded that disclosure of the names and contact details of Scottish Government staff would contravene the first data

protection principle. Consequently, she is satisfied that this specific information was properly withheld by the Ministers under section 38(1)(b) of FOISA.

### **Section 10(1) – Time for compliance**

67. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
68. It is a matter of fact that the Ministers did not provide a response to Mr McEnaney's request for information within 20 working days, so the Commissioner finds that they failed to comply with section 10(1) of FOISA. She also acknowledges that the Ministers apologised to Mr McEnaney for this delay in their review outcome.
69. The Ministers explained that their response was delayed as the person identified as the most appropriate to respond was on leave when the request was received. The Ministers explained also that this was compounded by the volume of information and the redactions required, and the limited availability of the designated official.
70. The Ministers acknowledged that the request should have been allocated to someone else who was available and could have progressed it until such time as the person with specialised knowledge of this issue became available. They confirmed that, in future, allocation of requests would take into account the availability and capacity to ensure that deadlines could be met.
71. The Commissioner appreciates the Ministers' candid explanation of the reasons for the delay in responding to this request. She would urge the Ministers to maintain their efforts to ensure that adequate and appropriate resources are allocated to dealing with information requests of this nature in future.

### **The Ministers' request for clarification**

72. As noted above, the Ministers contacted Mr McEnaney after receiving his request. They informed him that, in order to proceed with the request, he was required to include a relevant date period for the information requested.
73. The Ministers submitted that their request to Mr McEnaney for a timescale should have made it clear that this was being requested in order to provide the information within the cost limit (in section 12 of FOISA). They submitted that there was potential for the request to exceed the cost limit without a defined timescale.
74. The Ministers acknowledged that there is no requirement in FOISA to provide a timescale within requests, that this had been an oversight on their part and that they should have made it clear to Mr McEnaney why they were seeking such information from him.
75. The Commissioner acknowledges the Ministers' explanation of why they sought clarification of the date parameters from Mr McEnaney. However (and as the Ministers are aware), there is no provision in FOISA which requires a requester to include any date parameters within a request for information. In this respect, the Ministers' communication of 25 October 2016 to Mr McEnaney was clearly misleading. Consequently, the Commissioner finds that the Ministers failed to comply with section 1(1) of FOISA by responding to Mr McEnaney's request in this way.
76. Also as noted above, Mr McEnaney wrote to the Ministers on 25 October 2016, explaining that he required the information from 1 January 2010 "until the present". However, the

Ministers subsequent response to his requirement for review covered the period to 14 October 2016 – the date of his original request.

77. The Ministers acknowledged that this was incorrect. They explained that this had not been a conscious oversight on their part and had arisen due to pressure of work at the time.
78. The Commissioner welcomes the Ministers' acknowledgement that they used the incorrect end date when responding to Mr McEnaney' request. However, in her view, it ought to have been clear from the terms of Mr McEnaney's clarification email that he was seeking information up to the actual date of that email, i.e. 25 October 2016. Given that the Ministers sought clarification of the date parameters of the request, the Commissioner is surprised that they subsequently decided to limit the parameters to the date of the initial request, rather than the date specified by Mr McEnaney in his email of 25 October 2016.
79. The Commissioner notes that, following a subsequent information request from Mr McEnaney, additional information was disclosed covering the correct period of the request. However, by failing to respond to Mr McEnaney's clarified request (i.e. using the correct date parameters specified by him), the Commissioner finds that the Ministers failed to comply with section 1(1) of FOISA.

### **Section 15 – Duty to provide advice and assistance**

80. Section 15(1) of FOISA requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it. Section 15(2) states that a Scottish public authority shall be taken to have complied with this duty if it conforms with the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004<sup>3</sup> (the Section 60 Code of Practice).
81. In his application to the Commissioner, Mr McEnaney expressed dissatisfaction that the Ministers had provided only a limited explanation as to why they had failed to respond to his request timeously.
82. As noted (in the consideration of section 10(1)) above, the Ministers explained the reasons for the delay in responding to the request.
83. The matter is not addressed expressly in the Section 60 Code of Practice, but the Commissioner considers it would have been reasonable to expect the Ministers to address this under the duty to provide advice and assistance. In the Commissioner's view, it would have been good practice to have provided Mr McEnaney with an explanation of the reason for the delay in responding (particularly as there does, from the submissions set out above, appear to have been one, even if it did not excuse the failure). By failing to provide this explanation, the Commissioner finds that the Ministers failed to comply with section 15(1) of FOISA. The Commissioner would suggest that the Ministers reflect on this point, with a view to avoiding its recurrence.

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<sup>3</sup> <http://www.gov.scot/Resource/0051/00510851.pdf>

## Decision

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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 McEnaney.

The Commissioner finds that the Ministers:

- i. correctly withheld the names and contact details of Scottish Government staff under section 38(1)(b) of FOISA, but were wrong to apply this exemption to other information. This was a breach of section 1(1) of FOISA.
- ii. failed to respond to Mr McEnaney's request for information within the timescale laid down in section 10(1) of FOISA.
- iii. failed to provide reasonable advice and assistance to Mr McEnaney in relation to their failure to respond timeously, and so failed to comply with section 15(1) of FOISA.
- iv. breached section 1(1) of FOISA by withholding some information without applying any exemptions.
- v. unnecessarily required Mr McEnaney to include date parameters in his request and wrongly interpreted the date parameters of the request. This was a breach of section 1(1) of FOISA.

Given disclosures and other action during the investigation, the Commissioner does not require the Ministers to take any action in respect of the above failures, in response to Mr McEnaney's application.

The Commissioner also finds that the Ministers were not entitled to withhold information under the exemption in section 33(1)(b) of FOISA, and in doing so breached section 1(1) of FOISA. She requires the Ministers to disclose this information to Mr McEnaney, by **15 September 2017**.

## Appeal

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Should either Mr McEnaney 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.

## **Enforcement**

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If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

**Margaret Keyse**  
**Acting Scottish Information Commissioner**

**1 August 2017**

## Appendix 1: Relevant statutory provisions

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### 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 –

...

- (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.

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

#### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

### **33 Commercial interests and the economy**

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

### **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.

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