



Scottish Information
Commissioner

**Decision 216/2007 Mr Duncan Shields and the
Scottish Ministers**

*Request for unredacted copies of the published responses to a
public consultation.*

**Applicant: Mr Duncan Shields
Authority: The Scottish Ministers
Case No: 200600450
Decision Date: 15 November 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 216/2007 Mr Duncan Shields and the Scottish Ministers

Request for unredacted copies of the published responses to the consultation “Reforming complaints handling, building consumer confidence” – information withheld in terms of sections 30(c), 36(2) and 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA) – Commissioner upheld decision to withhold.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs); 38(1)(b), (2)(a)(i) and (b) (Personal information) and 67 (Protection from actions for defamation)

Data Protection Act 1998 (DPA): sections 1 (Basic interpretive provisions) (definition of "personal data"); section 2 (Sensitive personal data) and Schedule 1, Part 1 paragraph 1 (the first data protection principle)

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

Facts

Mr Duncan Shields requested unredacted versions of published responses to the consultation “*Reforming complaints handling, building consumer confidence*” from the Scottish Ministers (the Ministers). The Ministers responded by withholding the information in terms of 36(2) and 38(1)(b) of FOISA. Mr Shields was not satisfied with this response and asked the Ministers to review their decision. The Ministers’ initial decision was upheld on review. Mr Shields subsequently applied to the Commissioner for a decision. During the course of the investigation, the Ministers also claimed that the information was exempt under section 30(c) of FOISA.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the information from Mr Shields.



Background

1. In May 2005, the Ministers launched a public consultation on the regulation of the legal profession in Scotland, entitled "*Reforming complaints handling, building consumer confidence*".
2. The consultation sought submissions from those who use or provide legal services in Scotland, with a view to reforming the arrangements for handling complaints against legal practitioners in Scotland.
3. The consultation closed in August 2005, and responses were subsequently published and made available via the Scottish Ministers' library. A number of the responses were published subject to the redaction of the respondents' names and/or addresses and, in some cases, parts of the responses were withheld.
4. On 22 December 2005, Mr Shields wrote to the Ministers requesting the following information:

Full, unredacted versions of the public responses to the consultation "*Reforming complaints handling, building consumer confidence*".

His email made clear that his request excluded those consultation responses that had already been published in full.
5. The Ministers responded to Mr Shields on 27 January 2006. They informed Mr Shields that consultation responses were only published if the respondent gave permission for them to appear in the public domain. The Ministers stated that to release unpublished responses to the consultation would breach the undertakings given to those responding to the consultation, and applied the exemptions in sections 38(1)(b) and 36(2) of FOISA to the unpublished information.
6. Mr Shields asked the Ministers to review this decision. Mr Shields drew the Minister's attention to the fact that he had not requested copies of unpublished consultation responses, but that he only sought unredacted versions of the published consultation responses which were already accessible via the Scottish Ministers' library.



7. The Ministers notified Mr Shields of the outcome of their review on 23 February 2006. They apologised for the misunderstanding that led to their initial consideration of the confidential responses to the consultation rather than the redacted parts of the published responses. However, they advised Mr Shields that they considered that the information he was looking for was exempt under section 38(1)(b) on the basis that it was third party personal data, the disclosure of which would breach the Data Protection Act 1998 (DPA).
8. On 24 February 2006, Mr Shields wrote to my Office, stating that he was dissatisfied with the Ministers' response to his request and applying to me for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the response from the Ministers because he considered that it was not only personal data which had been redacted. He maintained that the full responses should be disclosed.
9. Mr Shields' application was validated by establishing that he had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

The Investigation

10. On 7 March 2006, the Ministers were notified in writing that an application had been received from Mr Shields and were invited to provide comments on the matters raised by Mr Shields, and on the application as a whole, in terms of section 49(3)(a) of FOISA. The Ministers were also asked to provide my Office with a representative sample of the information that had been withheld.
11. The Ministers responded on 24 March 2006. They provided comments on the case along with a sample of redacted and unredacted copies of the withheld material. The Ministers explained their reasoning for applying the exemption in section 38(1)(b). At this stage, they also said that they wished to rely on the exemptions in sections 30(c) and 36(2) of FOISA.
12. In February 2007, the investigating officer contacted the Ministers with further questions about the case and requested copies of all of the published consultation responses that had been redacted. In response to this request, the Ministers provided my Office with copies of both the published and original versions of all of the redacted published consultation responses, along with a schedule listing each document.



13. Further information and comments were sought the Ministers in September 2007. Mr Shields was also invited to comment on the matters raised by the case in the light of the Ministers' submissions in November 2007.
14. I will consider the submissions made by both the Ministers and Mr Shields in my analysis and findings below.

The Commissioner's Analysis and Findings

15. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Shields and the Ministers and I am satisfied that no matter of relevance has been overlooked.
16. I must consider whether the Ministers acted in accordance with Part 1 of FOISA in refusing to provide unredacted versions of 144 published consultation responses to Mr Shields.
17. The type of information redacted from the published version of the responses varies. There are many instances where only the name, address and signatures of the respondents have been redacted. Other responses have been redacted to delete the location of solicitors' firms, the names of individual solicitors or solicitors firms and the names of companies. Personal data, relating both to the respondents to the consultation and to third parties named or identified in the responses by the respondents, has also been redacted. In addition, the comments and views of respondents on specific individuals and/or organisations have also been redacted in some cases.
18. Mr Shields has argued that it was unacceptable for the Ministers to, as he considers it, collate evidence demonstrating corruption in the law profession (via the consultation) only to redact the names of those accused, and fail to publish the responses in full.

Section 38(1)(b) – Personal information

19. The Ministers' submissions confirmed that redactions had been made to a number of the published responses on the basis that the information withheld was exempt from disclosure under section 38(1)(b). Section 38(1)(b), read in conjunction with sections 38(2)(a)(i) or (b), provides that information is exempt information if it is personal data as defined in section 1(1) of the DPA and the disclosure of the personal data would breach any of the data protection principles set out in the DPA.



20. In this case, the Ministers submitted that disclosure would breach the first data protection principle, which states that personal data shall be processed fairly and lawfully and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (of the DPA) is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 (again, of the DPA) is also met.
21. The Ministers explained that all respondents to their consultations are given a choice as to whether their response is made publicly available. The Ministers' policy is that a response will be published unless the respondent has indicated that they do not agree to its publication. Respondents are also asked to confirm whether they wish their name and address to be published.
22. The Ministers confirmed that the names and addresses of respondents were redacted from a number of the published responses, in line with the wishes of the respondents. Other redactions were made to the main body of the responses where information would identify a respondent who had asked for their name and/or address to be withheld. As these individuals had consented to the disclosure of their responses (subject to their names and addresses being withheld), the Ministers submitted that it would not make sense for this information to be published where they had asked for their name and address to be withheld.
23. The Ministers also confirmed that personal information relating to individuals other than the respondent had also been redacted from the published responses because they had no permission to disclose this.
24. In considering this exemption, I must first decide whether the information to which the exemption in section 38(1)(b) has been applied is personal data.
25. "Personal data" is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data. It includes any expression of opinion about the individual (see the full definition in the Appendix).
26. The majority of the information which has been redacted from the responses falls into the definition of personal data. Living individuals can be identified either from the responses which have been available publicly or from the responses and other information in the possession of the Ministers. The information is biographical in nature and has the individuals as its focus.
27. I would also note that, given the nature of the content of the documents under consideration in this case, some of the personal data falls within the definition of "sensitive personal data" as set out in section 2 of the DPA.
28. I will now go on to consider whether disclosure of the personal data would breach the first data protection principle.



29. Two main types of personal data have been redacted from the published responses: personal data relating to the respondents and personal data relating to third parties. I will consider these separately.

Personal data relating to respondents

30. The Ministers withheld the names and/or addresses of respondents where the respondents requested that they be withheld.
31. I accept the arguments from the Ministers that these respondents have provided personal information in the expectation that it would not be disclosed, and they have completed consent forms confirming these wishes. I am satisfied that it would amount to unfair processing for the names and/or addresses of these respondents to be disclosed, and that, as none of the conditions in Schedule 2 or Schedule 3 of the DPA could be met, release would also amount to unlawful processing.
32. I am therefore satisfied that the Ministers would be in breach of the first data protection principle if they did release this information, and that the Ministers were therefore correct to withhold this information under section 38(1)(b) of FOISA.
33. In some responses, the Ministers also redacted personal information relating to the respondent contained within the main body of the consultation response, even where the respondent did not ask for this to be done. The Ministers indicated that, although these individuals had agreed to their response being disclosed (i.e. with their name and/or address removed), these redactions were made in order to ensure that their identities were not revealed. They submitted that disclosing this information would undermine the respondents' request for confidentiality.
34. I agree with the Ministers that, having received confirmation that certain respondents wished their names and/or addresses to be withheld, it was reasonable to interpret this request as extending to information contained in their response which would allow their names and/or addresses to be deduced.
35. I note that the form completed by respondents did not provide an option of requesting that personal information relating to them also be removed from their response. In the circumstances, I consider that the Ministers' approach of removing identifying information about respondents who had requested that their names and/or addresses be removed allowed their wishes concerning the processing of their personal data to be respected.



36. In the circumstances, I conclude that the Ministers were entitled to exempt this information from release under section 38(1)(b) of FOISA; disclosure of the information would breach the first data protection principle on the basis that there are no conditions in Schedule 2 or Schedule 3 of the DPA which would permit the processing of the personal data.

Personal data relating to third parties

37. In some cases, the information redacted from the published responses is the personal data of third parties. This may include complaints or allegations with respect to individuals, or details of highly personal matters involving them. The Ministers did not gather this information from these individuals and would not be in a position to establish the accuracy or otherwise of the statements made by the respondents.
38. In determining whether release of the redacted third party information would breach the first data protection principle, I have again considered the conditions set out in Schedules 2 and 3 of the DPA. I have also taken into account the submissions made by the Ministers and Mr Shields.
39. I accept the arguments from the Ministers that it would be unfair to disclose the third party personal data, as they (the third parties) have not given consent for their personal information to be made public. While third party consent is not always required before personal data can be released under FOISA, I have considered the personal data which has been redacted here and find that, without consent, it would be unfair for the personal data to be released given that none of the other conditions in Schedule 2 or 3 of the DPA can apply to the personal data.
40. I am therefore satisfied that the Ministers would be in breach of the first principle of the DPA if they did release this third party personal data, and that the Ministers were therefore correct to withhold this data under section 38(1)(b) of FOISA.
41. I have therefore found that the personal data withheld by the Ministers is exempt from release under section 38(1)(b) of FOISA.

Section 30(c) – Prejudice to effective conduct of public affairs

42. 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 word “otherwise” is used to differentiate this particular exemption from the other types of substantial inhibition – such as to the free and frank provision of advice or exchange of views – envisaged by other parts of section 30.)



43. Section 30(c) is a qualified exemption, which means that where information falls within the scope of the exemption, the information must still be released unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in withholding the information.
44. In their submissions to my Office, the Ministers outlined their procedures for handling consultation responses. As noted above, all responses to consultations are published unless the respondent indicates that they do not want it to be published. Where a respondent does not wish their name/address to be published the Ministers' staff will ensure that it is redacted.
45. Staff are also instructed to remove any potentially defamatory statements before they are published. The Ministers explained that a number of the responses to this particular consultation exercise contained personal information relating to the experiences of the respondents. The Ministers contended that the views of some respondents were expressed in emotive language and that the team handling the consultation exercise had to strike a balance so that the views of the respondents were published, but in such a way that it did not open the possibility of third parties suing the Scottish Ministers.
46. The Ministers submitted that release of this "potentially defamatory" information could have an adverse impact on the effectiveness of the consultation process, and would therefore be likely to prejudice substantially the effective conduct of public affairs.
47. The Ministers stated that the effectiveness of the consultation process is dependent on the quality of the responses they receive and it is important that this process is not used by individuals to make unproven allegations against others which the Ministers may then have to publish under FOISA. The Ministers asserted that the publication of defamatory material would bring the consultation process into disrepute and may involve the Ministers in matters outwith the purposes of the consultation, subsequently reducing the effectiveness of the consultation process.
48. The Ministers acknowledged that section 67 of FOISA provides protection against legal challenge for a public authority which discloses defamatory material in compliance with its obligations under FOISA, where the defamatory material was provided by a third party and where the disclosure is made without malice.
49. However, the Ministers asserted that the publication through FOISA of defamatory statements or unproven allegations of wrongdoings of third parties made in responses to consultations would be fundamentally wrong and would prejudice substantially the effective conduct of public affairs, in this case the effectiveness of the consultation process.



50. Mr Shields has asserted that respondents to the public consultation were aware that any defamation claims would be made against them and not the Ministers who were merely gathering evidence for the inquiry. Mr Shields argued that it was the respondents, and not the Ministers, who should decide whether or not the content of their submission is redacted.
51. I have considered the Ministers' arguments in relation to the application of the exemption contained in section 30(c) and accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs. If respondents to public consultations knew that any unproven allegation they made would be published by the Ministers (and could be given credence by the mere fact of it being published by the Ministers), it is possible that the number of respondents using the process to publicly air their own personal grievances against specific individuals or organisations would increase.
52. Faced with this prospect Ministers might become more reluctant to conduct wide ranging consultations or at the very least become disinclined to proactively make available the responses.
53. Other individuals and organisations may also be dissuaded from engaging in a process which they may view as unsavoury and unproductive and this, in my view, would, or would be likely to, prejudice substantially the effectiveness of the consultation process.
54. It is my opinion that disclosure of the redacted comments in this case may inhibit the extent of consultation in the future and reduce the quality of responses the Ministers receive in any future consultations, which would undermine the consultation process and be detrimental to good governance.
55. I have carefully considered the nature of the information withheld in terms of section 30(c), and I am of the view that while some of the withheld information is potentially defamatory, some of it is clearly not. However, I do not consider that information needs to be defamatory for the exemption in section 30(c) to apply to the consultation process. I would also note that I consider that the redactions made by the Ministers have been made judiciously.
56. I therefore find that the Ministers were entitled to withhold information under the exemption in section 30(c) of FOISA.

The Public Interest



57. With regard to the public interest test, the Ministers argued that the redactions in no way restrict public access to the views and opinions put forward by the respondents and that there is little or no public interest in publishing defamatory statements by individual respondents. In summary, the Ministers have asserted that the public interest in disclosure is clearly outweighed by the public interest in protecting the reputation and effectiveness of the Scottish Ministers' consultation process.
58. I acknowledge that there are several arguments supporting the view that it would be in the public interest for the information to be released. For example, disclosure would ensure that public consultation exercises are as transparent as possible and that published responses accurately reflect the respondents' views and comments. However, I am of the opinion that these considerations are, in this case, outweighed by the public interest in ensuring that the effectiveness of the consultation process is maintained, and that the process is not weakened by a reduction in the quality of responses received. I am therefore satisfied that the public interest in the disclosure of this information is outweighed by that in maintaining the exemption in section 30(c).
59. I agree with the Ministers that the public consultation process is a fundamental part of government, and that if this process were to be utilised by individuals in order to publicise unsubstantiated allegations about specific individuals or bodies, it could undermine the efficacy of the consultation process. I agree that such an outcome would not be in the public interest. However, I would like to make it clear that this kind of information (consultation responses) will need to be addressed on a case by case basis and that my judgement in this case is specific to the documents laid before me and cannot be applied to all consultation responses.
60. I have therefore found that the majority of the information which has been withheld from Mr Shields is exempt under section 38(1)(b) of FOISA. Given that I have also found that the information which is not exempt under section 38(1)(b) is exempt under section 30(c) (and I should note here that much of the information is exempt under both exemptions), I do not intend to go on to consider whether the exemption in section 36(2) also applies to the information.

Decision

I find that the Scottish Ministers were entitled to withhold the unredacted versions of the responses to the consultation from Mr Shields in line with Part 1 of the Freedom of Information (Scotland) Act 2002.



I therefore do not require the Ministers to take any action in response to this decision.

Appeal

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

Kevin Dunion
Scottish Information Commissioner
15 November 2007



Appendix

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.

2 Effect of exemptions

- (1) To information which is exempt 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.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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.

67 Protection from actions for defamation

Where, in compliance with a request for information, information supplied to a Scottish public authority by a third party is communicated by the authority, under section 1, to the applicant, the publication to the applicant of any defamatory matter contained in the information so supplied is privileged unless that publication is shown to have been made with malice.

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



2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992,
- (e) his physical or mental health or condition
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1: The data protection principles

Part 1: 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.