

# Decision Notice

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**Decision 046/2016: Ms Fiona Stalker and Grampian Health Board**

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**Report on general surgery service**

Reference No: 201500439

Decision Date: 2 March 2016



Scottish Information  
Commissioner

## Summary

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On 12 November 2014, Ms Stalker asked Grampian Health Board (NHS Grampian) for the report carried out by the Royal College of Surgeons on the general surgery service at Aberdeen Royal Infirmary.

NHS Grampian responded by disclosing a redacted version of the report on its website. Following a review, Ms Stalker remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that NHS Grampian had incorrectly withheld some information under sections 30(c) (Prejudice to effective conduct of public affairs) and 36(2) (Confidentiality) of FOISA. She also found that NHS Grampian had failed to respond to Ms Stalker's request for review within the timescales allowed by FOISA. The Commissioner required NHS Grampian to provide Ms Stalker with the information it had wrongly withheld.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a), (b) and (2)(c) (Effect of exemptions); 21(1) (Review by Scottish public authority); 30(c) (Prejudice to effective conduct of public affairs); 36(2) (Confidentiality); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "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")

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 12 November 2014, Ms Stalker made a request for information to NHS Grampian. The information requested was the full report of the review carried out by the Royal College of Surgeons (RCS) of the general surgery service at Aberdeen Royal Infirmary (ARI).
2. NHS Grampian responded on 2 December 2014, citing section 25 of FOISA (Information otherwise accessible) as it considered the information Ms Stalker sought was available on its website. It provided a weblink.
3. On 3 December 2014, Ms Stalker wrote to NHS Grampian, requesting a review of its decision. She stated that the weblink did not work and that, if it was simply to the recommendations and terms of reference, that was not all she had asked for.
4. NHS Grampian notified Ms Stalker of the outcome of its review on 27 February 2015. It released a redacted version of the full report. It withheld information under section 38(1)(b) of FOISA.
5. On 3 March 2015, Ms Stalker wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Stalker stated she was dissatisfied with the outcome of NHS Grampian's review, as well as with the time taken to carry out the

review. She highlighted what she considered to be the public interest in disclosing the full report.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Ms Stalker 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.
7. On 12 March 2015, NHS Grampian was notified in writing that Ms Stalker had made a valid application. NHS Grampian was asked to send the Commissioner the information withheld from Ms Stalker. NHS Grampian provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Grampian was invited to comment on this application and answer specific questions, with particular reference to the exemptions applied to withhold information.
9. Submissions were received from NHS Grampian in relation to section 38(1)(b). After the investigating officer sought clarification of these, NHS Grampian provided additional submissions applying the exemptions in sections 30(c), 34(1) and (4) (Investigations by Scottish public authorities, etc.), and 36(2) of FOISA to elements of the redacted information. NHS Grampian also disclosed a limited amount of information to Ms Stalker during the investigation.

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

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10. 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 Ms Stalker and NHS Grampian. She is satisfied that no matter of relevance has been overlooked.
11. NHS Grampian disclosed a small amount of additional information during the investigation and continued to withhold the remainder under a number of exemptions in FOISA.

### **Information disclosed during investigation**

12. It may be helpful to explain that the entire report extends to 69 pages, small parts of which were provided to Ms Stalker following NHS Grampian's review, including recommendations and the biographies of those conducting the review. The remainder was withheld at review stage.
13. During the investigation, the investigating officer queried, amongst other things, inconsistencies in NHS Grampian's approach to redacting senior job titles, with names. NHS Grampian disclosed to Ms Stalker a limited amount of additional information in the report (names and job titles).
14. In light of this, the Commissioner concludes that NHS Grampian failed to comply fully with section 1(1) of FOISA, by incorrectly withholding these job titles and names from Ms Stalker in responding to her request and her requirement for review.

## Section 36(2) of FOISA – Confidentiality

15. NHS Grampian appears to be arguing that it has disclosed all the information it can without breaching confidentiality. It considers the exemption in section 36(2) of FOISA to apply to the remaining information.
16. Section 36(2) provides that information is exempt if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person, or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA (although there may still be circumstances in which disclosure of confidential information is justified in the public interest).
17. Section 36(2) therefore contains a two-part test, both parts of which must be fulfilled before the exemption can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
18. NHS Grampian argued that the withheld information was obtained from another person, i.e. the RCS. The Commissioner accepts this.
19. The second part of the test is that disclosure of the information by the public authority must constitute a breach of confidence, actionable either by the person from whom the authority obtained the information or by any other person. The Commissioner takes the view that "actionable" means the basic requirements for a successful action must appear to be fulfilled.
20. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - the information must have the necessary quality of confidence;
  - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - unauthorised disclosure must be to the detriment of the person who communicated the information.

### *Necessary quality of confidence*

21. The Commissioner accepts that the withheld information has the necessary quality of confidence. As NHS Grampian has submitted, the information is not common knowledge and could not be ascertained with ease from information in the public domain.

### *Obligation to maintain confidentiality*

22. An obligation to maintain confidentiality can be either "express" or "implied". An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which information was obtained.
23. NHS Grampian presented arguments regarding both express and implied confidentiality. In relation to the former, it referred to the RCS's website specifically describing its Invited Review Mechanism (IRM – under which this review was carried out) as confidential. It is not clear where on the website such a statement is made, but NHS Grampian also made

reference to a statement relating to confidentiality in the IRM Handbook<sup>1</sup>. This (paragraph 28) reminds healthcare organisations to take account of their legal responsibilities towards the confidentiality of their patients and staff in considering what information they can make available about a review. It goes on to state that organisations “should not use patient confidentiality or data protection as blanket reasons to withhold information about a review which has identified issues of patient safety or quality of care.” Nowhere does it suggest that the IRM itself is confidential, as distinct from information relating to individuals.

24. Regarding implied duties of confidentiality, NHS Grampian simply highlighted the duties of confidentiality owed under the common law to its staff and patients. Basically, these are the same duties as are highlighted by RCS: they would appear to be the only obligations of confidentiality which arise in this case.
25. NHS Grampian explained that all the individual consultants involved in the RCS report had been assured that the report would be confidential and that only the recommendations of the report and information which would not identify them would be disclosed. Curiously, there is no suggestion that any other staff identified in the report were given a similar assurance, although a general reference is made to the duty of confidentiality owed to them. Similarly, only a general reference is made to any duty of confidentiality owed to patients. There is not always a clear distinction made in NHS Grampian’s submissions between confidentiality and data protection.
26. Undoubtedly, NHS Grampian owes duties of confidentiality to its patients and staff. There is information relating to patients in section 7 and appendix 2 of the report. NHS Grampian has submitted that this information is also subject to section 38(1)(b) of FOISA, as the sensitive personal data of the patients concerned. As not all of the patients concerned were alive at the time of the report, this is not a viable argument: for information to qualify as personal data (which it must if section 38(1)(b) is to apply) it must be information relating to a living individual.
27. It makes sense, therefore, to consider all of the withheld information relating to patients under section 36(2). Indeed, given the general lack of clarity in NHS Grampian’s submissions, including clarity as to the status of the individuals concerned, this will be the Commissioner’s initial approach to all information relating to individuals within the report: it is not necessarily an approach she would endorse in all circumstances.
28. The Commissioner has no difficulty accepting that all of the information within the report relating to patients was the subject of an implied duty to maintain confidentiality. All of this information relates to individual patients, living or dead, and is sufficiently specific to each of them that there must be a substantial risk of them being identified from it. Given its nature, in relating to the health and treatment of those individuals, it would all have been received by NHS Grampian (and, by extension, by the RCS) in circumstances which imported an obligation to maintain confidentiality.
29. Section 7 of the report is a summary of the evidence gathered in the course of the review. For the most part, it relates directly to the professional practice of individual surgeons and small teams of surgeons. It is clearly derived from information provided freely and frankly. Given the level of detail present, the Commissioner is satisfied that there is a significant risk of individual members of staff being identified from it. The Commissioner accepts that this information, too, was obtained in circumstances which imported an obligation to maintain

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<sup>1</sup> <http://www.rcseng.ac.uk/healthcare-bodies/docs/invited-review-handbook/view>

confidentiality: that would have been the reasonable expectation of those providing the information.

30. By extension, the Commissioner is prepared to reach the same conclusion in relation to the factual information listed in sections 3, 5 and 6 of the report, insofar as it relates to identifiable members of staff. She does not consider this to be the case, however, in relation to the information in the first paragraph of section 3, the final paragraph of section 6 or the first paragraph of section 7, all of which is purely factual or process-related and could in no sense be said to relate to particular individuals or their views. None of this, on any reasonable interpretation, could be said to have been obtained in confidence.
31. Section 6 lists documents considered as part of the review. As indicated above, the Commissioner accepts some of it, in relating to specific individuals, as having been obtained subject to an obligation to maintain confidentiality. Some of the remainder has been disclosed, but that still leaves a quantity of information which relates to processes, events or surgical procedures, with no personal connotations. The information simply identifies the documents: it does not comment on them, or say anything about their content. The fact that a particular procedure may be the specialism of a particular surgeon does not make it personal to that individual, or (by itself) say anything about that individual. The Commissioner fails to see how this information could impinge on any duty of confidentiality owed by an employer to its staff, and NHS Grampian has failed to explain satisfactorily how this might be the case. In the circumstances, she must conclude that no such obligation exists in relation to this information.
32. Section 8 of the report is headed "Conclusions". To some extent, as NHS Grampian has argued, it is of the same character as section 7, in relating directly to specific identifiable individuals and to evidence obtained from or about them. Within these elements, however, there are conclusions reached by the reviewers, which do not contain (and can be separated from) such confidential information. These cannot be described as having been received in circumstances importing an obligation of confidentiality (it will be recalled that the Commissioner has identified no such obligation owed to the RCS) and must be considered under the further exemptions discussed below.

*Unauthorised disclosure which would cause detriment*

33. The third part of the test is that unauthorised disclosure of the information must be to the detriment of the person(s) who communicated it, or any other person. The damage need not be substantial, and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
34. NHS Grampian submitted that the RCS had not given its consent to disclosure and considered action for breach of confidence likely if any of the withheld information were disclosed. However, as indicated above, the Commissioner has identified nothing to support NHS Grampian's claim that a duty of confidence was owed to the RCS. This is not, therefore, an argument she can consider further.
35. NHS Grampian also identified a risk of proceedings for breach of confidence from the affected consultants in the event of information being disclosed which would identify them or lead to their identification. It provided supporting submissions. For that information in respect of which she has accepted an obligation to maintain confidentiality, the Commissioner accepts this as sufficient risk of harm for section 36(2) to apply.

36. While NHS Grampian has made no specific reference to harm in relation to patient information, and while this information might (at least in part) be covered by the arguments set out in the preceding paragraph, the Commissioner would find there to be sufficient harm in the distress disclosure would cause to the individual patients and/or their relatives.

*Public interest – section 36(2)*

37. The conditions in section 36(2) appear to be met, therefore, for elements of the withheld information. While section 36(2) is not subject to the public interest test in section 2(1)(b) of FOISA, it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest. The law of confidentiality recognises that there is strong public interest in ensuring that people respect confidences and the burden of demonstrating that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances, the public interest in maintaining confidences may be outweighed by the public interest in the disclosure of information. Examples include situations where enforcing the obligation of confidence would cover up wrongdoing, allow the public to be misled or unjustifiably inhibit scrutiny of matters of genuine public concern.
38. Ms Stalker identified a public interest in knowing how and why the recommendations in the report were reached. Clearly, there is some force to this, in relation to matters with the potential to impact on public safety. However, in the circumstances (and having considered the information in question), the Commissioner is not satisfied that this interest is sufficiently overwhelming to justify the disclosure of confidential information into the public domain.
39. Accordingly, the Commissioner is partially upholding the exemption contained in section 36(2) of FOISA. She finds that this exemption is engaged in respect of the information relating to identifiable patients and members of staff, as discussed above.
40. The Commissioner will now go on to look at the application of other exemptions claimed by NHS Grampian to the remaining withheld information.

**Section 38(1)(b) – Personal information**

41. NHS Grampian applied the exemption in section 38(1)(b) of FOISA to a substantial proportion of the report. For section 38(1)(b) of FOISA to apply, the withheld information must be personal data.
42. “Personal data” are defined in section 1(1) of the DPA as “data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller” (the full definition is set out in Appendix 1).
43. The Commissioner is satisfied that she has accepted the withholding of all the personal data to be found in the report under section 36(2) of FOISA. There is information, described in paragraphs 30, 31 and 32 above, which she has not found to be covered by section 36(2). In considering whether any of this might be deemed to be personal data, she has taken full account of NHS Grampian’s views on the risk of identification, bearing in mind the relatively small number of surgeons involved and the small teams within which they operate. She is still of the view that the individuals concerned could not be identified from this information, taken by itself or with other information and taking account of all means reasonably likely to be used to achieve that end.

44. The Commissioner acknowledges that it may be possible to identify particular practitioners with particular surgical procedures, but it does not follow that protocols and other documents relating to these procedures relate any more to these practitioners than to any other practitioners who might perform the same procedures. Nowhere has it been suggested by NHS Grampian that any of these documents relate uniquely to the work of particular NHS Grampian surgeons, and it is certainly not apparent from the names of the documents (all that is under consideration here) that they do. The Commissioner can identify no basis on which any documentation of this kind could reasonably be said to “relate” to any individual surgeon, for the purposes of the definition in section 1(1) of the DPA.
45. The Commissioner must express her concern, however, that this was the only exemption applied to the content of the report initially. It is quite clear to her not all of the withheld information could reasonably be described as personal data – the fact that NHS Grampian took this approach suggests that greater care should have been applied to its handling of the request.

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

46. Section 30(c) exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b) FOISA. This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from such disclosure.
47. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
48. The Commissioner takes the view that it is important for public authorities to treat each request for information individually. Disclosure of information in one case should not be taken to imply that information of a particular type will routinely be released in future. The circumstances of each case, including the content of the information under consideration and the time of the request, must be taken into consideration.
49. NHS Grampian applied this exemption because it believed disclosure of the information in section 8 would cause substantial prejudice to ongoing action and investigations following on from the report, and would thus undermine its ability to carry out due process. Referring to the nature of the withheld information and the need for further investigation, NHS Grampian submitted that disclosure at this time (and potentially later, although that is not the Commissioner’s concern at present) would harm both the processes and the individuals concerned.
50. The Commissioner has considered these submissions carefully. They are less than ideally complete in their reasoning. The Commissioner would generally expect better if a Scottish public authority is serious in seeking to uphold an exemption. That said, in addition to information bearing directly on particular individuals and derived from the evidence summarised in section 7 of the report (which she has accepted as having been properly



withheld under section 36(2) of FOISA), section 8 does contain content which comments freely on professional practice within the area under review. In the context described by NHS Grampian, disclosure of such information might reasonably be expected to undermine the processes described by NHS Grampian, to the substantial prejudice of public affairs.

51. On the other hand, there is information in section 8 which has no bearing on any specific individual, which either places the conclusions in context or comments on the service at a generic or even corporate level. The Commissioner fails to see how disclosure of these would have the damaging effects claimed by NHS Grampian, and there is really nothing in NHS Grampian's submissions which suggests that it should.
52. In this latter category, the Commissioner would place the following paragraphs of section 8 (in some cases, subject to redaction – these will be identified to NHS Grampian):  
1, 2 (redacted), 3, 4 (redacted), 6, 12, 27, 31, 32, 33, 35, 43, 44, 45, 46, 47, 48, 53 (redacted)  
In addition, subject to redaction of the heading on page 51 of the report, there would appear to be no harm evidenced from disclosure of the headings in this section.
53. Consequently, the Commissioner does not accept that section 30(c) of FOISA has been properly applied to the above information and requires its disclosure. With regard to the remainder of section 8, she accepts that section 30(c) was properly applied. She must now consider the public interest test in relation to this remaining withheld information.

#### *Public interest test*

54. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. In other words, even where the exemption applies, the information must be disclosed unless, in all the circumstances, the public interest in maintaining the exemption outweighs that in disclosure.
55. Ms Stalker's public interest arguments are summarised above, where the Commissioner considers the application of section 36(2) of FOISA.
56. NHS Grampian did not consider disclosure of the information withheld under section 30(c) would add to the public interest, which it believed had been served adequately by disclosure of the recommendations and other parts of the report disclosed already. Disclosing the redacted information into the public domain, it submitted, would severely prejudice the rights and confidentiality of individuals and severely interfere with ongoing investigations and other processes within NHS Grampian. By extension, disclosure would undermine NHS Grampian's role in promoting effective practice and setting and enforcing effective standards.
57. Having considered the matter carefully, the Commissioner accepts the reasoning set out above. Although the information under consideration here does not relate directly to specific individuals, she has accepted the real potential for its disclosure causing substantial prejudice to the processes described by NHS Grampian and thus to the effective conduct of public affairs. This would not be in the public interest.
58. The Commissioner acknowledges that disclosure would cast some light on the RCS's reasoning, as highlighted by Ms Stalker, and thus contribute to the public interest in scrutiny of this kind being conducted effectively. On balance, however, she is not satisfied that this outweighs the public interest in the outstanding aspects of this matter being concluded fairly and effectively, in line with NHS Grampian's submissions. In other words, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA

outweighs that in disclosure of the information to which that exemption has been properly applied.

### **Failure to comply with timescales in FOISA**

59. In her application to the Commissioner, Ms Stalker expressed dissatisfaction with the time NHS Grampian took to respond to her request for review.
60. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt of the requirement. Ms Stalker submitted a requirement for review on 3 December 2014, but NHS Grampian did not respond until 26 February 2015, well outwith the period allowed by FOISA. The Commissioner therefore finds that NHS Grampian breached the requirements of section 21(1).

### **Final comments**

61. NHS Grampian has also referred in submissions to section 34 of FOISA. The basis for applying this exemption has never been made entirely clear, and the connection between the scope of this exemption and the functions of NHS Grampian must be considered remote, to say the least. In the circumstances, the Commissioner cannot find any basis for considering its application further. NHS Grampian also applied section 30(b) of FOISA to elements of the withheld information, but the Commissioner has found these to have been properly withheld under section 36(2).
62. Generally, the Commissioner would urge NHS Grampian (and other public authorities) to provide discrete, comprehensive arguments in support of each exemption applied to withhold information. Much of the time in this case was spent establishing, with a reasonable degree of clarity, which exemptions were being applied to which information, and why. NHS Grampian's submissions should have made this clear from the outset.
63. In the Commissioner's view, NHS Grampian should also have considered more rigorously whether information could be disclosed without compromising its legitimate concerns about the sensitivity of aspects of the report. This does not appear to have been given the attention it required: the Commissioner is open to arguments that no intelligible information will be left for disclosure after redaction of what can properly be withheld under exemptions, but these must be fully considered and justified.

## **Decision**

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The Commissioner finds that Grampian Health Board (NHS Grampian) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Stalker.

The Commissioner finds that NHS Grampian failed to respond to Ms Stalker's request for review within the timescales set down in section 21(1).

She also finds that NHS Grampian was entitled to withhold information under the exemptions in sections 30(c) and 36(2) of FOISA.

However, by incorrectly withholding other information in the report under exemptions in sections 36(2) and 30(c), NHS Grampian failed to comply with Part 1 (and in particular section 1(1)) of FOISA. This information is described in paragraphs, 30, 31 and 52 of this decision, and will also

be identified in a marked-up copy of the report which will be supplied to NHS Grampian.

The Commissioner therefore requires NHS Grampian to provide Ms Stalker with the incorrectly withheld information identified above in this decision notice, by 18 April 2016.

## **Appeal**

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Should either Ms Stalker or NHS Grampian 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 NHS Grampian fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that NHS Grampian has failed to comply. The Court has the right to inquire into the matter and may deal with NHS Grampian as if it had committed a contempt of court.

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

**2 March 2016**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

...

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

#### 2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

#### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

#### 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.

#### 36 Confidentiality

...

- (2) Information is exempt information if-

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

### **38 Personal information**

(1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or

...

(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;

...

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