

Decision Notice



Decision 099/2009 Mr David Rule and the Scottish Ministers

Review into handling of a previous information request

Reference No: 200900361

Decision Date: 10 August 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr David Rule requested from the Scottish Ministers (the Ministers) a copy of a report into the Ministers' handling of a previous information request made by him. The Ministers responded by withholding the information under section 30(b) and (c) of FOISA. Following a review, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Rule's request for information in accordance with Part 1 of FOISA, by incorrectly applying the exemptions in sections 30(b)(i) and (ii) and 30(c) to the withheld information. He required the Ministers to release the information to Mr Rule.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 30 (b)(i) and (ii) and 30(c) (Prejudice to effective conduct of public affairs).

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

Background

1. On 30 November 2008, Mr Rule emailed the Ministers requesting a copy of a review conducted by the Ministers and recommendations contained therein. The review in question related to the Ministers' response to a previous information request submitted by Mr Rule in August 2008 to which a response had been provided by the Ministers on 1 October 2008.
2. The Ministers responded on 23 December 2008. The Ministers advised Mr Rule that they considered the information to be exempt from disclosure in terms of section 30(b) and (c) of FOISA.
3. On 7 January 2009, Mr Rule wrote to the Ministers requesting a review of their decision. In particular, Mr Rule considered that the release of information on how requests should be handled would not inhibit the effective conduct of public affairs.
4. The Ministers notified Mr Rule of the outcome of its review on 5 February 2009 upholding their earlier decision that the information was exempt from disclosure in terms of section 30(b) and (c) of FOISA.



5. On 21 February 2009, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Rule had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 27 February 2009, the Ministers were notified in writing that an application had been received from Mr Rule and asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded by providing submissions on their application of the exemptions in question and their application of the public interest test contained in section 2(1)(b) of FOISA. The Ministers noted that they considered certain parts of the report to be exempt from disclosure in terms of in section 30(b)(i) and (ii) of FOISA and the report in its entirety to be exempt under section 30(c).
10. During the course of the investigation, the investigating officer also contacted Mr Rule to invite him to comment on the Ministers' application of the exemptions in section 30(b) and (c) of FOISA and why he considered the public interest would be best served by the release of the requested information.
11. The submissions of both Mr Rule and the Ministers are described in more detail, where relevant, within the analysis and findings section below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Mr Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.



Consideration of section 30(b)(i) and (ii)

13. In order for the Ministers to be able to rely on the exemptions contained in section 30(b)(i) and (ii) of FOISA, they would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation, respectively.
14. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of the exemption it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
15. The Ministers have applied these exemptions to the part of the report specifically addressing the timeline of responding to Mr Rule's original request for information and the report's recommendations.
16. The Ministers contended that these parts of the report contain free and frank views and advice relating to the performance of the teams who were involved in the handling of the original request.
17. The Ministers contended that the disclosure of these parts of the report would substantially inhibit a reviewer from being completely free and frank when recording conclusions and recommendations. Similarly, the Ministers contended that disclosure would substantially inhibit those whose work is being reviewed from being completely free and frank in their co-operation with the review.
18. The Ministers stated that the exemptions in section 30(b)(i) and (ii) had been applied to the parts of the report which make specific criticisms of particular teams who had dealt with Mr Rule's original request. The Ministers considered it important that future review reports should continue to be critical where appropriate, to ensure that Scottish Government staff can learn lessons from such reviews.
19. In considering these exemptions, the Commissioner will look at the actual information withheld, not simply the category of information to which it belongs or the situation in which the request has arisen. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that such information will require to be disclosed routinely in the future. The Commissioner looks for authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.



20. As the Commissioner has said in previous decisions, in his view the standard to be met in applying the tests contained in sections 30(b)(i) and (ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views. The Ministers' own guidance to their staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.
21. The Commissioner notes the Ministers' reasons for withholding these parts of the report and has considered the actual content of the information itself. The Commissioner has initially considered whether the information consists of advice, or views exchanged for the purposes of deliberation.
22. In his briefing on the section 30(b)(i) and (ii) exemptions¹, the Commissioner notes that:

The information withheld under section 30(b)(i) and (ii) is likely to be advice or views. Although FOISA does not require this, it is difficult to find examples of other kinds of information for which these would be the most appropriate exemptions.

'Exchange of views' (30(b)(ii)) implies that the views of more than one party were involved in the process during which the information was created. This makes it less likely that the exemption in 30(b)(ii) can apply to information which is simply presented as a report in situations where the author will not be involved in any subsequent discussion, or where the information is a statement of fact.
23. The Commissioner notes that the parts of the report to which these exemptions have been applied primarily comprise factual information on the process of dealing with Mr Rule's earlier information request along with the conclusions and recommendations of the report's author.
24. The Commissioner does not therefore consider that the information itself contains any exchange of views for the purposes of deliberation, although he accepts that the recommendations in the report constitute advice on the authority's handling of requests made under FOISA. However, as noted above, the primary consideration is not whether the information contains advice or views, but whether its disclosure would have, or would be likely to have, either or both of the substantially inhibiting effects specified in section 30(b) of FOISA.
25. The Ministers, in their submissions, took the view that both the reviewer and those whose work was being reviewed would be substantially inhibited from being completely free and frank when recording conclusions and recommendations or from being completely free and frank in their cooperation with the review respectively.
26. The Commissioner is unable to accept however that officials would be substantially inhibited from cooperating with a review of this nature given that the information under consideration is essentially factual in nature and the review process would have involved officials presenting the reviewer with factual information with which to formulate the report.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp>



27. Similarly, the Commissioner does not agree that a reviewer would be substantially inhibited from recording conclusions given the factual nature of the information being recorded and the tone and content of the recommendations within the report.
28. The Commissioner is therefore unable to conclude that release of the relevant parts of the report would, or would be likely to, inhibit substantially the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
29. As the Commissioner has concluded that the exemptions in section 30(b)(i) and (ii) are not engaged, he is not required to go on to consider the application of the public interest test under section 2(1)(b).

Consideration of section 30(c)

30. The Ministers applied the exemption in section 30(c) to the review report in its entirety.
31. 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 here to differentiate this particular exemption from the other types of substantial prejudice - such as substantial inhibition to the free and frank provision of advice or exchange of views – covered in other parts of section 30.) This is also a qualified exemption, and so a public authority finding that certain information falls within the scope of the exemption it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
32. Authorities should be able to demonstrate that the risk of damage caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused, or likely to be caused, must be of some real and demonstrable significance - not simply marginal - and must occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
33. The Ministers firstly noted that there is no obligation under section 20 or 21 of FOISA or in the section 60 Code of Practice, for an authority to produce a report of a review. The Ministers stated that their internal guidance advises reviewers to keep a record of the review process, partly to demonstrate that a request has been fully reconsidered and how conclusions have been reached, but mainly to pass on to staff any lessons about the handling of FOI requests which are highlighted by the review. Where it is identified that procedures have not been properly followed, this helps the Ministers to take necessary steps to prevent a similar occurrence in future.



34. The Ministers contended that it is therefore essential that a reviewer feels able to be completely open and frank in recording their conclusions and recommendations without having to worry about whether these will be made public. The Ministers noted that the information withheld in this case makes a number of criticisms about the way particular teams fulfilled their role in the handling of the request and these comments were not written with any expectation that they would be made public. Similarly, the teams who were the subject of the review gave their cooperation to the reviewer in the expectation that any criticism would remain within the Scottish Government.
35. The Ministers stressed that they were not suggesting that information of this nature should automatically be withheld. However, they argued that, if this report, or others which make significant criticisms were to be disclosed, there would be two main negative outcomes. Firstly, the cooperation of those whose work was being reviewed in future would be less free and frank and, whilst not seeking to frustrate the purpose of the review, their contribution would be limited to that necessary to meet the requirements of FOISA and would be likely to be aimed more at defending their actions than enabling useful lessons to be learnt from the review. Secondly, the Ministers contended that reviewers would feel inhibited in how frank they can be in recording their conclusions and recommendations, thus diluting the lessons which can be learned.
36. The Ministers submitted that any reduction in the comprehensiveness of review reports would significantly prejudice the effective conduct of public affairs and if it became apparent that they would have to routinely disclose review reports, they would have to consider amending their guidance to discontinue the practice of keeping a written record of a review and instead may have to advise that policy teams are given oral feedback instead.
37. The Commissioner has carefully considered the content of the review report under consideration in this case. He has first of all noted that the arguments presented in relation to section 30(c) appear to raise issues that are primarily relevant for the consideration of the exemptions in section 30(b). He has considered this exemption on the basis that that the harm the Ministers anticipate from disclosure is not only to the free and frank exchange of views or advice, but more widely in relation to the effective conduct of their review process under FOISA.
38. However, the Commissioner cannot accept that the report under consideration is of such sensitivity that disclosure would have the effect described by the Ministers. Consequently, he does not accept that disclosure of this information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The prejudice envisaged, which entails the discontinuance of the production of such written reports to be replaced by oral feedback instead is not in the Commissioner's view justified by disclosure and therefore should not be regarded as inevitable or likely.



39. Any sensible reading of the report would show that it is a thorough and well-written account. Far from containing trenchant criticism it is largely factual and does not apportion blame but indicates where improvements can be made. Disclosure would not be likely to affect the nature or tenor of such a report, which shows the Ministers taking their freedom of information responsibilities seriously and would not justify the discontinuance of the production of such a report. The avoidance of such prejudice is entirely within the control of Ministers through the management of their officials.
40. As the Commissioner has concluded that the exemption in section 30(c) is not engaged, he is not required to go on to consider the application of the public interest test under section 2(1)(b).
41. The Commissioner therefore requires the Ministers to supply the information withheld from Mr Rule

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Rule. By wrongly withholding the report requested by him under sections 30(b)(i) and (ii) and (c) of FOISA the Ministers breached the requirements of section 1(1). Consequently, the Ministers failed to comply with Part 1 of FOISA

The Commissioner therefore requires the Ministers to disclose the information withheld from Mr Rule by 24 September 2009.

Appeal

Should either Mr Rule 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
10 August 2009



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.

...

- (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 –

...

- (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-

...

- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.