



Scottish Information
Commissioner

**Decision 060/2005 – Mr David Elstone and the Scottish Executive;
Mr Martin Williams of The Sunday Herald and the Scottish Executive**

***Request for information about Scottish Ministers' decision not to
"call in" a planning application for Trearne Quarry, Ayrshire.***

**Applicants: Mr David Elstone /
Mr Martin Williams of The Sunday Herald**

Authority: The Scottish Executive

Case No: 200501390 / 200501309

Decision Date: 29 November 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 060/2005 –Mr David Elstone and the Scottish Executive; Mr Martin Williams of The Sunday Herald and the Scottish Executive

Request for “all paperwork” (Elstone) / “all correspondence” (Williams) surrounding the decision taken by the Scottish Ministers over the planning application for Trearne Quarry, Gateside, North Ayrshire – information withheld under section 30 (a), (b) and (c) (effective conduct of public affairs) – whether request should have been treated under the Environmental Information (Scotland) Regulations 2004.

Facts

Mr Elstone asked the Scottish Executive (the Executive) to supply all paperwork surrounding the decision taken by Scottish Ministers not to “call in” the planning application for a waste disposal and ecological conservation area at Trearne Quarry, Gateside, North Ayrshire.

Mr Williams later made a virtually identical request, asking the Executive to supply all correspondence surrounding this decision.

The Executive refused to supply this information to Mr Elstone and to Mr Williams on the basis that it was exempt under section 30(a), (b) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Executive also stated that the release of this information could prejudice substantially North Ayrshire Council’s consideration of the planning application, which had not yet been concluded.

Outcome

The Commissioner found that in some instances the Executive had insufficient grounds for withholding the information in question under the exemptions in section 30(b). The nature of the information withheld was such that its release would not be likely to inhibit substantially the free and frank provision of similar advice or the free and frank exchange of views for the purposes of deliberation.

The Commissioner found that where the Executive had withheld information under section 30(a), this was not justified by the nature of the information.

The Commissioner did not accept the Executive’s arguments relating to the application of the exemption in section 30(c).



The Commissioner requires the Executive to provide Mr Elstone and Mr Williams with some of the information withheld from them, as detailed below in this decision notice.

Background

1. On 9 January 2005 Mr David Elstone asked the Executive to supply copies of all the paperwork surrounding the decision taken by the Executive not to “call in” the planning application for a waste disposal and ecological conservation area at Trearne Quarry, Gateside, North Ayrshire.
2. The Executive replied on 28 January 2005, confirming that relevant information was held but withholding it under section 30(a),(b) and (c) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive also believed that the release of the information could prejudice substantially North Ayrshire Council’s (the Council) consideration of the planning application, which was still before the Council.
3. Mr Elstone asked for a review of this decision on 3 March 2005. The Executive replied on 30 March 2005, confirming its decision and arguing that the public interest in maintaining the exemption outweighed the public interest in the disclosure of the information. The Executive added that, as the Council had not yet issued a decision on the planning application, it could prejudice substantially any future involvement of the Scottish Ministers if the information were released at this stage.
4. Mr Elstone applied to me for a decision on 9 April 2005. He queried the Executive’s view that the public interest lay in withholding the information, pointing out that there has been considerable opposition to the planning application locally. He disputed the statement that the planning process was still being completed by the Council.
5. On 9 March 2005 Mr Martin Williams submitted a request to the Executive which was almost identical in its wording to Mr Elstone’s request. He asked the Executive to supply all “correspondence” surrounding the decision not to “call in” the Trearne Quarry planning application.
6. The Executive replied to Mr Williams on 15 March 2005, confirming that relevant information was held but withholding it from Mr Williams under section 30(a), (b) and (c) of FOISA. The Executive also believed that the release of the information could prejudice substantially the Council’s consideration of the planning application, which was still before the Council.



7. Mr Williams asked for a review of this decision on 16 March 2005. The Executive's response of 31 March 2005 confirmed the decision, adding that, as the Council had not yet issued a decision on the planning application, it could prejudice substantially any future involvement of the Scottish Ministers if the information were released at this stage.
8. Mr Williams applied to me for a decision on 6 April 2005, appealing against the Executive's decision to withhold the information requested. He also stated that an officer at the Council had told him that planning permission had definitely been granted for the Trearne Quarry planning application, and that it was wrong for the Executive to claim that release of the information could now prejudice the Council's decision on the matter.
9. Both Mr Elstone's and Mr Williams' applications were accepted. As their requests and the Executive's responses were almost identical it was agreed with the applicants that their cases would be conjoined. An investigating officer was allocated to the case.

The Investigation

10. Both applications were validated by establishing that Mr Elstone and Mr Williams had made their requests to a Scottish public authority, and had appealed me only after requesting the authority to review its response to their requests.
11. A letter was sent to the Executive on 5 May 2005, informing it that Mr Elstone and Mr Williams had submitted similar appeals to me which would be the subject of a single investigation covering both cases.
12. The Executive was asked to supply copies of the submission to Ministers regarding the planning application, their response and other related exchanges of correspondence. It was also asked for copies of any correspondence with the Council which would support its statement that the planning application process had not yet been concluded by the Council.



13. The Executive supplied:
 - a) The submission to the Deputy Minister for Communities
 - b) Interdepartmental exchanges about the possible implications of the Nature Conservation Act
 - c) A minute providing internal advice on the planning case merits
 - d) Interdepartmental exchanges about implications of planning application for protected species
 - e) Note of a meeting with the Deputy Minister for Environment and Rural Development
 - f) A minute providing internal advice on the planning case merits
14. These submissions will be referred to as “13(a), 13(b)” etc. in this decision notice.
15. The Executive also supplied a file note from March 2005 showing that North Ayrshire Council had confirmed to the Executive that the Council had still to issue the letter of consent for the planning application.

Other information considered

16. Document 13(a) refers to “ministerial correspondence” received by the Executive in connection with the planning application. The investigating officer asked for copies of this correspondence in order to establish whether it might fall within the scope of the applicants’ information requests.
17. The Executive supplied copies of the letters, but commented that this correspondence was not considered to fall within the terms of Mr Williams’ request, which related solely to correspondence etc. about the decision not to call in the planning application. The letters are from opponents of the planning application. The Executive pointed out that the decision to clear the planning application back to the local authority was taken following scrutiny of national and development plan policy, and although this correspondence was taken into account, the letters received did not raise any national planning issues warranting Ministers’ involvement.
18. Although Mr Williams requested “all correspondence” and Mr Elstone requested “all paperwork” surrounding the Ministers’ decision, both applicants further defined their request as follows: “The paperwork would include all memos, emails and minutes of meetings etc” (Mr Williams) and “This paperwork would include all internal memos, emails, minutes of meetings etc.” (Mr Elstone). It seems clear that both applicants were primarily interested in the Executive’s internal correspondence about the decision.



19. However, both requests use the phrase “would include”, which leaves room for relevant information not defined as internal memos, emails or minutes of meetings. The Executive has stated that the correspondence was taken into account in the decision-making process, even if it did not raise any issues warranting Ministers’ involvement. On balance I take the view that this correspondence is relevant to Mr Williams’ and Mr Elstone’s requests and that their requests are sufficiently broadly phrased to allow me to consider these letters for release along with the other information specified in paragraph 13 above.
20. In this decision notice the correspondence described in paragraphs 16 – 19 above will be referred to as “the Ministerial correspondence”.

The Commissioner’s Analysis and Findings

21. All the information withheld by the Executive and listed above in paragraph 13 has been withheld under section 30(b) and 30(c) of FOISA, with the exception of the information in 13(e), which has been withheld under section 30(a). Section 30 exempts information from disclosure if this would prejudice the effective conduct of public affairs.
22. The Ministerial correspondence has not been withheld under any exemption, as the Executive considered that it did not fall within the scope of the applicants’ requests. However, the Executive has stated that if the information is to be released, it would wish to redact the names and addresses of individuals writing in a personal capacity.

Application of section 30(a)

23. Document 13(e) is a note of a meeting with the Deputy Minister for Environment and Rural Development, withheld under section 30(a) which exempts information if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.
24. The Scottish Ministers operate on the basis of collective responsibility. Decisions reached by the Executive are binding on all its members. Ministers are expected to abide by them and defend them as necessary. Such decisions, however, are normally announced and explained as the decision of the Minister concerned. Collective responsibility also applies to junior Scottish Ministers even though they are not members of the Executive.



25. The meeting note shows that the Deputy Minister for Environment and Rural Development sought advice from officials in connection with three planning proposals, one of which was the Trearne Quarry planning application. Trearne Quarry lies within the Deputy Minister's constituency. The Executive has acknowledged that there is a fine line between the roles of constituency MSP and Minister, but argues that "the document's release may cause them to collide, resulting in looser adherence to the convention of collective responsibility".
26. It is clear that the advice sought and provided in relation to the Trearne Quarry development focused on the correct procedures for an MSP to follow when responding to concerns raised by constituents about a planning application. At no point in this note are any of the Deputy Minister's views or opinions recorded. During the meeting advice relating to Ministerial responsibilities was sought, but it is not evident that this was in connection with the Trearne Quarry development. In my view this part of the document does not fall within the scope of Mr Elstone's or Mr Williams' requests.

Conclusion

27. It seems to me that there is no information in this document relevant to Mr Elstone's or Mr Williams' requests, which, if released, would undermine the convention of the collective responsibility of Scottish Ministers by revealing the Deputy Minister's position on the issue. I have therefore concluded that section 30(a) does not apply to this information and paragraphs 1 and 2 of 13(e) should be released to Mr Elstone and Mr Williams, after redacting the name of another case discussed at the meeting from paragraph 1.

Application of section 30(b)

28. I next considered whether the remaining information is exempt under sections 30(b)(i) and 30(b)(ii), which allow information to be withheld if it 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 I have said in a previous decision (015-2005), in my view the standard to be met in applying the tests in sections 30(b)(i) and 30(b)(ii) is high. To qualify for the exemptions in 30(b)(i) and 30(b)(ii), the question is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views. The Executive's own guidance to its 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, or would be more reticent or less inclusive.



30. The Executive believes that any factor inhibiting the provision of advice from officials would be to the detriment of effective government and therefore not in the public interest. It has argued that the routine release of internal communications, such as those withheld in this case, would make officials feel less able to set out clearly their analysis of all the issues on a policy area, including comments which they only feel able to make in the knowledge that they remain confidential.
31. In my view it is important for public authorities to treat each request for information on a case by case basis. Release of internal communications in one case should not be taken to imply that such communications will be “routinely” released in future. The individual circumstances of each case must be taken into consideration and the public interest in each case assessed on its own merits. It is also important that, since FOISA came into force, officials within Scottish public authorities accept that previous assumptions of confidentiality may have to be re-assessed in line with the new legislation.
32. It seems to me that in most cases the advice and expressions of opinion in the withheld documents are of a factual nature, e.g. summarising the proposal for Ministers, considering the implications of planning policies or legislation, and making a recommendation for Ministers’ consideration. I do not accept that the release of such straightforward, factual advice would substantially inhibit officials from participating in this type of correspondence in future.
33. The Executive has acknowledged that there are often clear public interest arguments for disclosure of information which would enhance public understanding of decision making procedures, but argues that in this case the release of information revealing the advice and opinions of officials involved in that process would, in future, inhibit officials from providing a clear analysis of all the issues on a policy area, which would be to the detriment of effective government and therefore would not serve the public interest.
34. As I have said above, I do not accept that, for the most part, the release of the information in the documents withheld would have such a substantially inhibiting effect on the future performance of officials. It follows that I do not accept the public interest arguments put forward by the Executive regarding this information. I also believe that there is a strong public interest in releasing such information. Decision makers should be prepared to justify the basis on which planning decisions are based and to be accountable for the reliability of any research upon which they depend. Such openness can only improve accountability and so increase public confidence in the decision-making process.



35. However, I consider that documents in 13(b) and 13(c) and paragraph 9 of the annex to 13(a) contain exchanges which, if released, would be likely to inhibit the exchange of similar advice and requests for advice in future. The information is therefore exempt under section 30(b) of FOISA. I must then consider whether there is sufficient public interest in this information to justify its disclosure even though the exemption in section 30(b) applies. In doing so I have considered the need for officials to be able to raise such concerns without inhibition, and the public interest in ensuring that the decision-making process is transparent and accountable.
36. On this occasion I have concluded that there is insufficient public interest in the contents of the documents in 13(b) and 13(c) to override the exemption in section 30(b), and that the Executive are justified in withholding the information in these documents.
37. However, I consider that there are strong public interest arguments in favour of releasing the information in paragraph 9 of the annex to 13(a). This paragraph summarises the Planning Department's conclusions on whether the proposed development at Trearne Quarry constitutes a significant departure from the structure plan. In this case I have identified several reasons to support the view that the public interest lies in disclosing this information.
38. The planning guidance issued by the Executive in Scottish Planning Policy 1 (SPP1) states that:
- ” The development industry, local communities and individuals have a right to a high quality [planning] service that is fair, open, transparent and efficient.” (paragraph 70)
- Decision makers should be prepared to justify the basis on which planning decisions are taken. Such openness can only improve accountability and so increase public confidence in the decision-making process.
39. The Trearne Quarry planning application received objections from more than 900 individuals, showing that there was considerable public interest in the outcome of the decision. The proposed development was notified to the Executive as a significant departure from North Ayrshire Council's structure plan. However, the Executive did not uphold this view. Given the significance of this decision in terms of the agreed planning policies for North Ayrshire, I believe there is a strong public interest in disclosing the Executive's reasons.



Conclusion

40. I do not accept that the documents in 13(d), 13(f) and, for the most part, 13(a) should be withheld under section 30(b) of FOISA. However, I uphold the decision to withhold documents 13(b) and 13(c) under this exemption. I consider that paragraph 9 of the Annex to 13(a) is exempt under section 30(b) of FOISA, but that the public interest in disclosing the information is greater than the public interest in upholding the exemption.

Application of section 30(c)

41. Section 30(c) allows information to be withheld if its release would, or would be likely to, prejudice substantially the effective conduct of public affairs. All the information listed in paragraph 13 above, with the exception of 13(e), has been withheld under this exemption.
42. In its submission, the Executive argued that release of this information could prejudice the Council's deliberations on the planning application, which had been referred back to the Council by the Executive and is described in the Executive's letter to my office of 6 June 2005 as "still very much a 'live' issue".
43. The Council has confirmed to the investigating officer (in a letter dated 3 August 2005 and a subsequent phone call) that planning permission for the development at Trearne Quarry has been granted, subject to the completion of a legal agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997. The Council did not consider that the release of information held by the Executive could now prejudice any decision taken by the Council about the planning application.
44. Given the Council's views, I do not accept the argument advanced by the Executive that the release of this information would substantially prejudice the effective conduct of public affairs as regards the Council's ability to finalise agreement regarding the planning application.
45. The Executive's comments on this case note that the planning process could yet require the involvement of Scottish Ministers. However, officials in the Planning Division of the Executive have confirmed that although it is possible for planning applications to be "called in" at any point until the Section 75 agreement is finalised and the letter of consent to the planning application is issued, in practice it would be rare for this to happen when an application reaches this stage.



46. I do not accept that the release of the information requested by Mr Elstone and Mr Williams would be likely to prejudice the outcome of any decision by Scottish Ministers in the highly unlikely event that this planning application is recalled to them for further consideration. I therefore do not accept the argument advanced by the Executive that the release of this information would substantially prejudice the effective conduct of public affairs regarding the possible future involvement of Scottish Ministers.

Ministerial correspondence

47. As noted above in paragraph 19, I have taken the view that this correspondence should be considered in relation to Mr Elstone's and Mr Williams' requests, as it was taken into account during the decision-making process. As I have said in a previous decision (012-2005), there is a substantial public interest in ensuring that the whole planning process is as open and transparent as possible, and access to the representations of those who either support or object to an application is a key part of the transparency and accountability of this process.
48. I accept that the names and addresses of individuals writing in a personal capacity fall under the definition of personal data in the Data Protection Act 1998 and are therefore exempt under section 38(1)(b) of FOISA. As these letters of complaint were not created in response to an invitation for submissions on the planning application, I do not consider that the writers would have had an expectation that their views would be made public, and therefore to release this information would be a breach of the data protection principles. In the context of the Executive's discussions about the planning application, the most important aspects of this correspondence are the issues raised by the writers, rather than their identities.
49. I have therefore concluded that the Ministerial correspondence should be released to Mr Elstone and Mr Williams after removing the names and addresses of individuals writing in a personal capacity rather than in their role as elected representatives.

EIRs or FOISA?

50. The Executive was also asked to comment on whether the information requested should have been considered under the Environmental Information (Scotland) Regulations 2004 (EIRs) rather than FOISA.
51. The Executive informed me that there are no records of any deliberations about whether to apply FOISA or EIRs in this case, but that as the information requested comprises internal deliberations about the planning process itself rather than specific environmental issues, it was considered under FOISA.



52. It seems to me that some of the information withheld may meet the description of "environmental information" as laid down in the EIRs, which includes "Measures and activities affecting, or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements". However, I accept that the information is held by the Executive only in as far as it relates to consideration of the planning process carried out by the Council, and as such can be considered under FOISA.
53. In reaching this conclusion I have taken into account whether more or less information would be released to the applicants under the EIRs rather than FOISA. It seems to me that my decision would be unchanged if I had considered the exceptions in the EIRs equivalent to the exemptions in FOISA which were cited by the Executive. Therefore no disadvantage is caused to the applicants in this case by accepting that their requests have been considered under FOISA rather than the EIRs.

Decision

I find that the Executive has not fully dealt with the requests from Mr Elstone and Mr Williams for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paragraphs 22 - 50 above.

I require the Executive to release the following information as detailed in paragraph 13 above:

- 13(a) – item 1 in Executive's schedule of documents
- 13(d) – item 4 in Executive's schedule of documents
- 13(e) – item 5 in Executive's schedule of documents, with redaction specified in paragraph 28 above
- 13(f) – item 6 in Executive's schedule of documents

I also require the Executive to release the Ministerial correspondence described in paragraphs 16 – 20 above, with the redactions specified in paragraph 49.

Kevin Dunion
Scottish Information Commissioner
29 November 2005