



Scottish Information  
Commissioner

**Decision 182/2007 Mr Alex Neil MSP and the  
Scottish Ministers**

*Request for copies of documents provided to the First Minister in  
relation to Scottish Enterprise's overspend*

**Applicant: Mr Alex Neil MSP  
Authority: Scottish Ministers  
Case No: 200601514  
Decision Date: 3 October 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 182/2007 Mr Alex Neil MSP and the Scottish Ministers

***Request for all correspondence, minutes and other relevant documentation received by the First Minister on or prior to 19 January 2006 in respect of the identified overspend by Scottish Enterprise in its budget for 2005/6 – Commissioner required disclosure of the information withheld and identified a technical breach of the timescales required by FOISA.***

### Relevant Statutory Provisions and other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General Entitlement); 2 (Effect of exemptions); 10(1) (Time for Compliance) and 30(b)(i) (Prejudice to effective conduct of public affairs).

The full text of each of these provisions is reproduced in Appendix 1 to this decision. Both Appendices 1 and 2 (Appendix 2 is referred to later in this decision) form part of this decision.

### Facts

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Mr Alex Neil MSP requested from the Scottish Ministers (the Ministers) all correspondence, minutes and other relevant documentation received by the then First Minister on or prior to 19 January 2006 in respect of the identified overspend by Scottish Enterprise in its budget for 2005/6.

The Ministers refused to supply Mr Neil with the information which fell within the scope of his request. The Ministers argued that the information was exempt under section 30(b)(i) of FOISA. The Ministers upheld this original decision following an internal review.

After investigation the Commissioner found that the Ministers did not act in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in concluding that the information withheld from Mr Neil was exempt from release under section 30(b)(i) of FOISA. The Commissioner required disclosure of the information withheld.



He also found that the Ministers had breached the timescales required by section 10(1) of FOISA.

## Background

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1. On 2 May 2006 Mr Alex Neil MSP requested from the Ministers a copy of all correspondence, minutes and other relevant documentation received by the then First Minister on or prior to 19 January 2006 in respect of the identified overspend by Scottish Enterprise in its budget for 2005/6.
2. The Ministers responded to Mr Neil's request on 20 July 2006. The Ministers refused to supply Mr Neil with the information which fell within the scope of his request. The Ministers argued that the release of this information would, or would be likely to, inhibit substantially the free and frank provision of advice from departmental officials to Ministers and cited section 30(b)(i) in withholding the information.
3. Mr Neil wrote to the Ministers on 11 August 2006 expressing his dissatisfaction with this response and requested that the Ministers review their decision. Mr Neil also expressed dissatisfaction at the Ministers' failure to respond to him within the 20 working day period allowed.
4. On 4 September 2006 the Ministers responded to Mr Neil's request for review upholding its original decision to withhold the information under section 30(b)(i) of FOISA. The Ministers also apologised for the delay in dealing with his original request explaining that this was due to the time taken to identify all the information covered by Mr Neil's request and to consider how FOISA applied to the information concerned.
5. Mr Neil was dissatisfied with this response and on 19 September 2006 applied to me for a decision.
6. Mr Neil's application was validated by establishing that he had made a request for information to a Scottish public authority and had appealed to me only after asking the authority to review its response to that request.



## The Investigation

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7. A letter was sent to the Ministers on 2 October 2006, giving notice that an application had been received and that an investigation into the matter had begun, as required by section 49(3)(a) of FOISA. The Ministers were invited to comment on matters raised by the applicant and on the application as a whole, including its handling of the request and details of the reasoning for the application of the exemption in section 30(b)(i) to the information withheld.
8. The Ministers replied on 6 November 2006 enclosing their statements on the case and supporting documentation. In this letter, the Ministers explained that they only held one document which fell within the scope of Mr Neil's request.
9. On 2 May 2007, the Ministers wrote to my Office providing further general submissions on the application of the exemptions contained in section 30(b) of FOISA. They indicated that these should be taken into consideration in relation to any ongoing cases where either of the exemptions in section 30(b)(i) or (ii) had been raised, and so I have had regard to these submissions in reaching my decision below.

## The Commissioner's Analysis and Findings

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10. In coming to a decision on this matter, I have considered all of the information and submissions that have been presented to me by both Mr Neil and the Ministers and am satisfied that no matter of relevance has been overlooked.
11. Only one document was identified by the Ministers as containing information relevant to Mr Neil's request. This is an email to the then First Minister which provided background information and lines to take on the subject of Scottish Enterprise in advance of First Minister's Questions on 19 January 2006. Only part of this document relates to spending, and it is this part which falls within the scope of Mr Neil's request.
12. The Ministers provided details of the searches undertaken that led to the identification of this document. I am satisfied that were sufficiently wide-ranging and thorough to allow the identification of the information requested by Mr Neil.



### **Section 30(b)(i) - Prejudice to effective conduct of public affairs**

13. The Ministers submitted that the information withheld is advice to the First Minister, and it is exempt from disclosure under section 30(b)(i) of FOISA.
14. Section 30(b)(i) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. In applying this exemption, the chief consideration should not be whether the information constitutes advice, but whether the release of the information would or would be likely to have the effect set out in the statute – i.e. substantial inhibition of the free and frank provision of advice.
15. As I have said in previous decisions, it is my view that the standard to be met in applying the tests contained in section 30(b)(i) is high. The Ministers' own guidance to their staff on the application of the exemptions in 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.
16. In decision 166/2006 (Mr Martin Williams of The Herald and the Scottish Executive) I discussed in detail my views on the issues that should be considered in deciding whether the exemption in section 30(b)(i) (along with that in section 30(b)(ii)) applies. I will not repeat my comments in full in this decision notice, but they can be summarised as follows. Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case. The nature of the information in question must be considered, rather than considering "advice" as a category of information. If the information withheld does not in itself constitute advice, the argument for exemption under section 30(b)(i) may be weaker.
17. My consideration of the Ministers' application of the exemption under section 30(b)(i) has also been informed by the recent case in the Court of Session of the Scottish Ministers v Scottish Information Commissioner (re Alexander's Application) 2007 S.L.T. 274. The Court's conclusions made clear that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of this exemption.



18. I have also taken into consideration the comments on this exemption made in the Ministers' letter to my Office of May 2007. I have given a broad summary of these in my decision 089/2007 (Mr James Cannell and Historic Scotland). In that decision, I also responded in some detail to the Ministers' general comments on the application of this exemption. I will not repeat my arguments or those of the Ministers in this decision, but I have had regard to these when considering the application of this exemption to the document under consideration in this case. In particular, it should be clear that I cannot as a rule accept an automatic presumption that harm will be caused by the release of information simply because it falls into a particular category.
19. In this particular case, the Ministers submitted that officials regularly advise on a very wide range of issues and they would be likely to feel constrained from offering full and frank advice on future occasions if they were concerned that their comments would be made public in such circumstances.
20. The Ministers argued that it is imperative that an arena is preserved within which officials can freely provide them with views and advice. While acknowledging the content of the particular piece of advice under consideration in this case to be relatively neutral, the Ministers took the view that the release of this advice would be likely to inhibit substantially the free and frank provision of advice in future.
21. In particular, the Ministers argued that the effect of releasing such information would be the suppression of effective communication in future, stating for example, that advice or discussion would be oral instead of being written down.
22. Mr Neil rejected the idea that release of this document would substantially inhibit the free and frank provision of advice to Ministers.
23. Having reviewed the information withheld by the Ministers in the light of the submissions made by both the Ministers and Mr Neil and my general observations above, although I am satisfied that it contains advice to the First Minister, I am not satisfied that its disclosure in response to Mr Neil's request would be likely to inhibit substantially the provision of free and frank advice in future.
24. In reaching this view, I have noted that the nature of the advice is not particularly sensitive. It provides information that was intended to be used in response to questions in Parliament about the overspend. The questions and responses provided can be seen in the official report of the Scottish Parliament. The person providing the advice would therefore have done so in the expectation that the substance of the advice, if not the advice itself would enter the public domain.



25. Since Mr Neil's information request was made after the questions on the matter of overspend, for which the advice was provided, were responded to. In these circumstances, I find it difficult to accept that there is an ongoing risk that disclosure would inhibit substantially the free and frank provision of advice.
26. I also agree with the Ministers that the advice provided in this email is neutral, both in content and tone. I do not accept that the disclosure of an email of this nature would be likely to lead the official concerned to be less likely to offer advice of this type in future, or that disclosure would have such an effect on other officials.
27. By the time of Mr Neil's request, officials, whose job it is to provide advice to Ministers, would have been well aware for some time of the existence of freedom of information law, and the possibility of information they generate being disclosed under FOISA. They should also be aware that information is considered on a case by case basis. I take the view that those providing advice to the First Minister can well distinguish between advice of this type and more sensitive advice, which would be likely to be subject to an exemption under FOISA.
28. In the light of the above observations, I am not satisfied that disclosure of the information withheld by the Ministers in this case would or would be likely to inhibit substantially the provision of such advice in future.
29. I therefore conclude that the Ministers incorrectly applied the exemption in section 30(b)(i) in this case. I now require the information withheld to be provided to Mr Neil.

### ***Application of the public interest test***

30. Section 30(b)(i) is a qualified exemption, which means that when it is judged to apply, its application is subject to the public interest test required by section 2(1)(b) of FOISA. The public interest test requires an authority to consider whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in the disclosure of the information. Section 2(1)(b) provides that exempt information should only be withheld where the public interest in doing so outweighs the public interest in disclosure. Where the two are evenly balanced, the information should be disclosed.
31. Although I have concluded that section 30(b)(i) was applied incorrectly by the Ministers, I have in this case considered the public interest test as if, contrary to my view, the exemption in section 30(b)(i) does apply to the information withheld.



32. The Ministers' submissions on the public interest were expressed in very similar terms to those on the separate test associate with the exemption under section 30(b)(i). They submitted that there is a strong public interest in maintaining the integrity of the process of giving free and frank advice. The knowledge of possible disclosure might inhibit provision of advice in the future and impair the candour and freedom within which papers are prepared in future.
33. The Ministers stated that there is a strong public interest in ensuring that, where necessary, advice about matters on which they need to take decisions can be given in a non-public arena. This will enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations will be picked over out of context. The Ministers also argued that it is in the public interest for decision-making to be based on the best advice available, with full consideration of the options, including those that may not be immediately considered to be broadly politically acceptable.
34. The Ministers acknowledged that the public interest test must be considered on a case by case basis. However, in this instance, where the information relates to an important process (provision of briefing for First Minister's questions), the Ministers argued that there can be a public interest in protection of a process in itself.
35. Mr Neil has argued that the key issue for consideration in this is whether Scottish Enterprise made the First Minister aware of the overspend that it was forecasting at that stage.
36. Mr Neil explained that on 19 January 2006 he asked a parliamentary question to the First Minister on this subject. Mr Neil believed that the First Minister had either not been informed of the pending overspend or that the First Minister's reply had been misleading.
37. I have reproduced the parliamentary question posed by Mr Neil on 19 January 2006 and the First Minister's reply in Appendix 2 to this decision.
38. As I have previously noted, I do not accept that advice to Ministers should always be withheld, or that the process rather than the content deserves protection in every case. I do not accept that the release of any statement of advice or opinion in one case necessarily implies that such information would be released in other cases. Each case brought to me for decision is assessed on the facts and circumstances surrounding that particular case.





39. That said, in cases where I have accepted that disclosure would be likely to inhibit substantially the free and frank provision of advice, I accept that such inhibition would be contrary to the public interest. I agree with the Ministers that it is in the public interest that Ministers' ability to take decisions that are fully informed by frank advice. Such advice contributes to effective government.
40. However, in this instance, the content of the information in questions is itself, as acknowledged by the Ministers 'neutral'. I therefore do not accept that disclosure of such neutral advice would have the inhibiting effect as suggested by the Ministers.
41. In this case, Mr Neil has also raised a matter of significant public interest in favour of disclosure of the information he requested. At the time of Mr Neil's request, there was widespread interest reflected in extensive media coverage about overspend by Scottish Enterprise.
42. Scottish Enterprise is responsible for significant amounts of public spending, and it is a matter of real public concern where such a body significantly exceeds its budget. It is legitimate to seek to establish what information was available to the First Minister in relation to this matter when responding to questions in the Scottish Parliament
43. Following my consideration of the content of the document withheld and the public interest arguments discussed above, I am satisfied in this case that the public interest in disclosing the information would outweigh the public interest in maintaining the exemption in section 30(b)(i), if, contrary to my view, this exemption were to be judged to apply.
44. In summary, I find that the Ministers acted incorrectly in applying section 30(b)(i) in withholding this information in response to Mr Neil's request. However, had this exemption, contrary to my view, been correctly applied, I would consider the public interest in disclosure of this information to outweigh that in the maintenance of the exemption.

### ***Technical breaches of FOISA***

45. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information.
46. In this instance the Ministers failed to respond to Mr Neil's initial request within the 20 working day period allowed, and so it failed to comply with section 10(1) of FOISA.
47. I note that the Ministers provided an explanation for this delay and apologised to Mr Neil in its response to his request for a review. I do not require any further action to be taken in response to this decision.



## Decision

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I find that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in concluding that the information withheld from Mr Neil was exempt from release under section 30(b)(i) of FOISA. I have concluded that the exemption in section 30(b)(i) was wrongly applied, and so the Ministers breached the requirements of section 1(1) of FOISA by withholding this information.

I now require the Ministers to provide a copy of the document withheld from Mr Neil to him within 45 days of the receipt of this decision.

I also find that the Ministers breached the requirements of Part 1 of FOISA by failing to respond to Mr Neil's initial request within the relevant 20 working day period set out in section 10(1) of FOISA. I do not require any remedial action to be taken by the Ministers in respect of this breach.

## Appeal

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Should either Mr Neil or the Ministers wish to appeal against the Commissioner's 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**3 October 2007**



## APPENDIX 1

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

#### 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 –
- (a) section 25;
  - (b) section 26;
  - (c) section 36(2);
  - (d) section 37; and
  - (e) in subsection (1) of section 38 –
    - (i) paragraphs (a), (c) and (d); and
    - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

#### 10 Time for compliance

- (1) ... a Scottish public authority receiving a request for which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
- (a) ... the receipt by the authority of the request.
- ....



### **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;

...



## APPENDIX 2

First Minister's Question Time Thursday 19 January 2006

(<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-06/sor0119-02.htm#Col22550>)

*“**Alex Neil (Central Scotland)(SNP):** Will the next meeting of the Cabinet discuss the cash crisis at Scottish Enterprise? Will the First Minister confirm what the shortfall in the Scottish Enterprise’s budget for this year is? Will he also tell us what impact the immediate cut of 15 per cent in local enterprise company budgets will have on businesses in Scotland and individuals who rely on support from, or supply services to, Scottish Enterprise?”*

***The First Minister:** The financial year for Scottish Enterprise is, of course, not over. Alex Neil should remember that. We should ensure that Scottish Enterprise knows its budget and that it implements its decisions within that budget. That is what we expect Scottish Enterprise to do. That is its responsibility, and it is properly audited for that purpose. I expect Scottish Enterprise to meet its budget targets.”*