



Scottish Information
Commissioner

**Decision 228/2007 Mr Neill Garrard and the
Scottish Ministers**

*Legal advice and other information on draft Special Constables
Regulations and related matters*

**Applicant: Mr Neill Garrard
Authority: Scottish Ministers
Case No: 200601568
Decision Date: 10 December 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 228/2007 Mr Neill Garrard and the Scottish Ministers

Legal advice and other information on draft Special Constables Regulations and related matters – information withheld (confidentiality of solicitor/client communications and formulation or development of government policy) – authority’s decision generally upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2 (Effect of exemptions); 16(1), (2) and (3) (Refusal of request); 29(1)(a) (Formulation of Scottish Administration policy etc.) and 36(1) (Confidentiality)

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

Facts

Mr Neill Garrard requested a copy of legal advice and certain other information on the draft Police (Special Constables) (Scotland) Regulations 2006 (the Special Constables Regulations) and related matters. The Scottish Ministers (the Ministers) responded by providing him with some of the information he had requested and exempted other items of information under various exemptions in FOISA. Following a review, which upheld the Ministers’ original position, Mr Garrard remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had generally dealt with Mr Garrard’s request for information in accordance with Part 1 of FOISA, by withholding information either on the basis of confidentiality of solicitor/client communications or because it related to the formation or development of government policy. He also found, however, that the Ministers had committed certain technical breaches of FOISA in their responses to Mr Garrard.



Background

1. On 11 June 2006, Mr Garrard wrote to the Ministers requesting the following information:
 - Any legal advice obtained or received by the (then) Scottish Executive, the Justice Department or their agents pertaining to or in relation to the draft Special Constables Regulations; and
 - Any documents (being legal advice or otherwise) pertaining to or making reference to the implications of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 or the Part-Time Work Directive on any person(s) holding the office of constable otherwise than under a contract of employment.
2. On 19 July 2006, the Ministers wrote to Mr Garrard in response to his request for information. In that response, the Ministers claimed that the information which had been identified as relevant to Mr Garrard's request was exempt information. The Ministers claimed exemptions under sections 25(1) (Information otherwise accessible), 29(1)(a) (Formulation of Scottish Administration policy, etc), 30(b) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality) of FOISA. However, to be helpful, the Ministers provided Mr Garrard with copies of information considered exempt under section 25(1).
3. The Ministers also advised Mr Garrard that they did hold other relevant documents, but that these had been supplied to them in confidence by the UK Government. To that end, they did not consider that information to be held in terms of section 3(2)(a)(ii) of FOISA.
4. Mr Garrard asked for a review of the Ministers' decision in a letter dated 25 July 2006. In particular, Mr Garrard questioned the applicability of the various exemptions claimed by the Ministers.
5. On 1 September 2006, the Ministers wrote to Mr Garrard notifying him that the review had upheld the original decision of 19 July 2006.
6. On 20 August 2006, Mr Garrard wrote to my Office, stating that he was dissatisfied with the Ministers' decision to withhold information under sections 29(1)(a), 30(b) and 36(1) of FOISA and applying to me for a decision in terms of section 47(1) of FOISA.



7. The application was validated by establishing that Mr Garrard had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

8. On 4 October 2006, the Ministers were informed in writing that an application had been received from Mr Garrard and invited to comment on that application in terms of section 49(3)(a) of FOISA. They were also asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded with the comments and information requested, and the case was then allocated to an investigating officer.

Submissions made by the Scottish Ministers

9. The Ministers advised that there were 23 documents relevant to Mr Garrard's request. The Ministers claimed seven of these were exempt under section 25(1) of FOISA, but advised that copies of or links to these had been supplied to Mr Garrard. The withholding of these documents was not, in any event, raised by Mr Garrard in his application to me and therefore I will not consider them further in this decision.
10. Two documents were withheld under section 28(1) of FOISA. The Ministers stated that these documents had been supplied to them in confidence as part of the "official side" of the Police Negotiating Board (PNB) and that disclosure would substantially prejudice relations with other members, including the Home Office.
11. All of the remaining documents (14 in number) were withheld under section 29(1)(a) of FOISA, on the basis that they related to the consideration of ongoing policy options in relation to the Special Constables Regulations. With one exception, they were also withheld under section 36(1) of FOISA, as exchanges between client and solicitor in relation to the provision of legal advice. Finally, the Ministers argued that the exemption in section 30(b)(ii) of FOISA applied to these 13 documents, while that in section 30(b)(i) also applied to four of them.
12. The Ministers also advanced arguments as to why it considered the public interest to favour the maintenance of the above exemptions and I will consider these arguments, insofar as I am required to do so, in my analysis and findings below.



Submissions made by Mr Garrard

13. Mr Garrard stated that his principal cause for dissatisfaction was that he considered the public interest in maintaining the exemptions to be outweighed by that in disclosing the information. In support of these arguments, he presented reasons why he challenged the legality of the Special Constables Regulations. In addition, he presented reasons why he disagreed with the Ministers' application of the exemptions in section 30(b) of FOISA in a number of respects.
14. Mr Garrard was also dissatisfied with the content of the Ministers' response to him because he believed that these responses did not meet the requirements of section 16(1) of FOISA, in that the Ministers had not identified which relevant information it held and applied exemptions (and the reasons for them applying) specifically to those documents. In addition, he argued that the Ministers had failed to state why they believed it to be in the public interest to claim those exemptions and therefore had failed to comply with section 16(2) of FOISA.
15. Finally, Mr Garrard highlighted the Ministers' admitted failure to respond to his initial request for information within the timescale laid down by section 10(1) of FOISA.

The Commissioner's Analysis and Findings

16. Having considered the information withheld and the submissions of both parties in determining this case, I am satisfied that no matter of relevance has been overlooked.
17. I will consider the documents withheld in relation to the exemptions applied by the Ministers. As Mr Garrard has not raised in his application whether section 3(2)(a)(ii) of FOISA applies, I have not considered the matter further.
18. Further, I will not consider the two documents withheld by the Ministers under section 28(1) of FOISA. In any event, having considered these, I can find nothing in them that would fall within the scope of Mr Garrard's request.



Consideration of section 36(1) of FOISA

19. The Ministers applied section 36(1) of FOISA to a total of 13 documents.
20. Section 36(1) of FOISA states that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communications which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege (also known as communications post litem motam).
21. Legal advice privilege covers communications between lawyers and their clients, where legal advice is sought or given. Litigation privilege is wider and applies to documents created by a party to potential litigation in contemplation of litigation, such as expert reports prepared on their behalf and legal advice given in relation to the potential litigation.
22. The information which the Ministers withheld from Mr Garrard under this exemption consists of thirteen documents written either by solicitors in the then Office of the Solicitor to the Scottish Executive (OSSE), or by other civil servants in the then Scottish Executive to solicitors in OSSE, in relation to the draft Special Constables Regulations. The documents discuss the preparation of the draft Special Constables Regulations, along with changes made or proposed to be made to them, and include specific policy instructions to the legal advisor (OSSE) from the client.
23. In this particular case, the members of staff in OSSE who had been consulted were qualified solicitors and provided legal advice in the form of legal opinion and/or proposed amendments to the draft Special Constables Regulations, in response to instructions from the other civil servants. All of this was professional legal advice within a relationship where the legal adviser had been asked to provide an opinion in a professional capacity to a client. I am satisfied, therefore, that it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the information is covered by the exemption contained in section 36(1) of FOISA.
24. However, as noted above, the exemption in section 36(1) is subject to the public interest test set out in section 2(1)(b) of FOISA, and I must now go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.



The Public Interest

25. The Ministers argue that any public interest in the information being disclosed is outweighed by the public interest in ensuring that legal advice within the Scottish Government can be given and received in confidence. They argue that their decisions must be taken, where appropriate, in a fully informed legal context setting out the arguments for and against a particular issue: without this, they argue, the quality of their decision making would be restricted and this would not be in the public interest.
26. The Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds.
27. In Decision 023/2005 (*Mr David Emslie and Communities Scotland*) and a number of subsequent decisions on section 36(1), I have concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely to order the release of such communications in highly compelling cases only.
28. The public interest issues in favour of releasing the information might include enhancing scrutiny of the legality of the actions of a public body and, by extension, effective oversight of expenditure of public funds and obtaining value for money. It might also be in the public interest to order disclosure where it would make a significant contribution to debate on a matter of public interest.
29. Against any public interest arguments for disclosure, however, must be weighed any consequent harm to the public interest. It is in the public interest that an authority can communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice to defend its position adequately should that become necessary. It is also in the public interest that a public authority can receive the most comprehensive legal advice about its proposed actions.
30. I take the view that for the disclosure of information to be in the public interest that it needs to be in the interest of the public for it to be released. In this case, the information relates to the proposed regulation of the Special Constabulary in Scotland. As such, I accept that there may be a degree of wider public interest in the legality of the Ministers' actions in this as in any other sphere.



31. Mr Garrard has provided detailed arguments as to why he considers that the legal advice should be released. I have studied these submissions with interest and understand that he is concerned that the Ministers, in enacting the proposed Special Constables Regulations, would have acted beyond their powers (i.e. have acted *ultra vires*). It is on this basis that Mr Garrard takes the view that the public interest favours the release of the legal advice.
32. It is beyond my remit as Commissioner to comment on Mr Garrard's assertions on the legality of any actions the Ministers took or might have taken in relation to the proposed Special Constables Regulations, but I am still required to consider where the public interest lies in this case.
33. As noted above, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds and I consider that there would require to be compelling countervailing arguments for disclosure to outweigh that public interest.
34. Having read both the draft Special Constables Regulations and the information to which section 36(1) has been applied, and having taken account of Mr Garrard's submissions, I do not accept the public interest is served by releasing such legal advice. The Ministers obtained legal advice on the proposed Special Constables Regulations and appear to have been satisfied enough with that advice to send them (with necessary amendments) out to consultation. There was ample opportunity for anyone with concerns in relation to these draft regulations to make them known through the consultation process and I am aware that Mr Garrard made his views known by making a submission to the Ministers in response to the consultation. It is difficult to see how the opportunities for public scrutiny which were given would have been enhanced by making this information available..
35. Having balanced the respective public interests, I have concluded that the public interest that I accept exists in disclosure of the information is outweighed by the public interest maintaining the exemption, i.e. in ensuring that the Ministers and their solicitors can discuss relevant issues and give and receive legal advice in confidence. I accept their contention that the quality of their decision making would be restricted in the absence of such comprehensive advice, and that this would not be in the public interest. Therefore, I am satisfied that on this occasion the Ministers correctly applied the public interest test in withholding the information in the documents withheld under section 36(1) of FOISA.
36. Given that I am satisfied that the information in these documents is exempt from disclosure under section 36(1) of FOISA, I am not required to consider whether (as the Ministers have argued) it is also exempt under either section 30(b)(i) or section 30(b)(ii) of FOISA.



Consideration of section 29(1)(a) of FOISA

37. The remaining document, to which the Ministers have applied section 29(1)(a) only, is a copy of the draft Special Constables Regulations. The Ministers submitted that this document related to the consideration of ongoing policy options in relation to the implementation of the Special Constables Regulations. The draft includes “tracked changes” made on 7 August 2005, which show amendments to an earlier draft.
38. The draft Regulations were subject to a consultation process begun on 12 January 2006 and ending on 10 March 2006. I have accepted in previous decisions (for example, *Decision 006/2007 MacRoberts and the Scottish Ministers*) that certain consultations and the responses received relate to the formulation of policy. The consultation process permits interested parties and the public to comment on proposals and inform the policy process.
39. In this case I am prepared to accept that the carrying out of consultation on the proposed Special Constables Regulations indicated that the relevant policy had not yet been set and that views informing and formulating policy were still being sought.
40. It would therefore be fair to identify the amended draft Special Constable Regulations themselves – coming as they did prior to consultation – as part of the formulation of the Ministers’ policy as regards Special Constables.
41. Read in conjunction with the correspondence in documents withheld under section 36(1) of FOISA, it is apparent that the draft Special Constables Regulations themselves, as amended by the “tracked changes”, manifest the opinions, options and deliberations discussed by officials in deciding what the Special Constables Regulations ought to contain and generally how Ministers’ intentions in this policy area should be implemented. In my view, this creates an intimate link between the pre-consultation draft and the formulation of policy. I therefore accept the Ministers’ view that the pre-consultation draft of the Special Constables Regulations relates to the formulation of government policy.
42. Having concluded that the information in the amended draft Special Constables Regulations is subject to the exemption in section 29(1)(a) of FOISA, I must go on to consider whether, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining that exemption.



The Public Interest

43. In relation to section 29(1)(a), the Ministers have argued that there is a strong public interest in high quality decision making. In areas of policy formulation and development, they believe that the public interest lies in allowing rigorous and frank debate about the merits and demerits of alternative courses of action, their merits, demerits and possible implications, on the basis of high quality advice. They argue that Ministers' and officials' freedom and candour in doing so will be affected by the prospect of disclosure in the near future, when it may undermine or constrain the Government's view on settled policy or policy still under discussion and development, and distort public perceptions of advice provided by officials (with the prospect that officials may come under public or political pressure not to challenge ideas in the formulation of policy).
44. The Ministers only placed a summary of consultation responses in the public domain in January 2007, some time after Mr Garrard's request was dealt with by the Ministers. At that point, the policy of which the making of the Special Constables Regulations formed part clearly remained in formulation.
45. I have taken the view (*Decision 057/2005 Mr William Alexander and the Scottish Ministers*) that legislation which has been passed by Parliament constitutes a record of a policy decision. Generally, I would take the same view in relation to delegated legislation which has been approved by the Minister. As such, I am likely to agree that drafts of legislation, prior to being subject to the scrutiny of the relevant legislative process, are likely to be policy information which politicians and their advisors are still formulating. Generally, I would accept that they should be free to explore a range of options in formulating that policy.
46. In this particular case, I accept that it would be interesting to know what changes the proposed Special Constables Regulations had been through in the course of the process of drafting. However, that is not the same as being in the public interest. In my view, the public interest in this case lies in enhancing scrutiny of the legislative process and the accountability of Government. This will be very substantially achieved by both the consultation process and any subsequent debate on the proposed Special Constables Regulations in the Scottish Parliament. The mere provision of one version of the draft Regulations, without the context given by other information which I have accepted is exempt under section 36(1) of FOISA, would do little to enhance scrutiny or the accountability of Ministers.



47. It could well be in the public interest to release similar information in other cases, but in this case I am of the view that it was entirely reasonable (at least at the time the Ministers dealt with Mr Garrard's request, which is the material time for the purposes of my investigation) for the Ministers to be allowed space to formulate their policy in relation to Special Constables. Having considered the information and the relevant submissions, therefore, I would conclude that the balance of public interest lies in the information being withheld and the exemption maintained.
48. In the circumstances, therefore, I am satisfied that the Ministers correctly applied the exemption in section 29(1)(a) of FOISA to the draft under consideration.

Consideration of section 16 of FOISA

49. In his application to my Office, Mr Garrard makes clear and cogent arguments as to his dissatisfaction with the Ministers' failure to comply with section 16 of FOISA. Basically, his concerns relate to the generality of the Ministers' responses to him, which he asserts are not specific to the information under consideration, with the result that it is not immediately apparent why the exemptions apply (which cannot be stated accurately in the abstract). This lack of specification, he argues, prevents public scrutiny of the Ministers' responses, as it becomes impossible to determine what documents the Ministers are referring to, leading to unnecessary requests for review and applications to me. He also makes the point that the Ministers do not state why they believe it to be in the public interest for the exemptions in sections 29(1)(a), 30(b) and 36(1) to apply.
50. A refusal notice under section 16(1) of FOISA must meet certain basic requirements and in particular must:
- a) Disclose that the authority holds the information requested;
 - b) State that it claims that information to be exempt;
 - c) Specify which exemption is claimed; and
 - d) State why the exemption applies.

Section 16(3) provides that the obligation to make a statement under section 16(1)(d) (as to why the exemption applies) does not require the authority to disclose information which would itself be exempt information, and I think it has to follow from this and the general scheme of FOISA that the requirement to disclose that information is held (section 16(1)(a)) does not require the disclosure of information the authority would regard as exempt.



51. Wherever the exemption claimed is not absolute, section 16(2) requires that the refusal notice must state the authority's reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
52. Mr Garrard describes the Ministers as having only implied that they held the relevant information, rather than stating that they did. He believes that section 16(1) requires the authority to provide particulars of each document withheld (to the extent that this information is not itself exempted) and to deal with exemptions on a document by document basis. I accept that there is a degree of force to this. While I would also argue that a refusal notice under section 16(1) should convey all the necessary information in as straightforward and concise a manner as possible, the authority should always endeavour to provide a notice that enables the applicant to understand why their request has been refused. Where a request is not for a specific document, it will generally be appropriate for the authority, in complying with section 16(1)(a), to provide the applicant with at least an indication of the kind of information that is being withheld (although I do not agree that in all cases this will most helpfully be conveyed in the form of a description of each individual document), without of course disclosing the content of information that is considered to be exempt.
53. In this particular case, it could be said that the Ministers did not at any point state specifically that they held information falling within the scope of Mr Garrard's application, or give any particulars of the documents in question. I think it is, however, self-evident from the Ministers' refusal notice and from their response to Mr Garrard's request for review that they were confirming they held information which was claimed to be exempt (and for that matter stating which exemptions were considered to apply) and, given the terms of the request, it is difficult to see what further information they could have provided about the documents being withheld which would have provided any meaningful assistance to Mr Garrard in taking his request (or his application to me) forward. Therefore, in the circumstances I do not accept that the Ministers failed to comply with section 16(1)(a), (b) or (c) of FOISA in responding to Mr Garrard's request.



54. I think there is rather more force in Mr Garrard's argument that the Ministers failed to comply with section 16(1)(d) and section 16(2). Mr Garrard's particular concern regarding section 16(1)(d) relates to section 30(b), but I have to say that the Ministers' refusal notice of 19 July 2006 lacked any reasoning as to why any of the information requested was deemed to be exempt. Clearly, an authority is not required to disclose exempt information in explaining an exemption, but it must tell the applicant why it believes the exemption to apply and (except in the relatively rare case where to say more would be to disclose exempt information) this will generally require more than a simple restatement of the terms of the relevant exemption. Much the same goes for the public interest, and it is difficult to think of circumstances where it will be either adequate or necessary to do nothing more than restate the terms of section 2(1)(b) of FOISA.
55. As I have indicated in the previous paragraph, the Ministers' refusal notice provided no explanation of why it considered the information withheld to be exempt under sections 29(1)(a), 30(b) and 36(1) of FOISA. It also failed to provide any reasons in support of the Ministers' conclusions on the public interest in respect of the three exemptions (none of which confer absolute exemption). In the circumstances, I can see no justification for this and must conclude that the Ministers' refusal notice failed to meet the requirements of either section 16(1)(d) or section 16(2) of FOISA.
56. While I have concluded that the Ministers did breach section 16 of FOISA in certain respects, it is still clear to me that the information in question was properly exempted by the Ministers. In the circumstances, therefore, I can see no purpose being served in requiring the Ministers to take steps now which would ensure that they complied with the relevant requirements retrospectively and, therefore, I do not require the Ministers to take any action in relation to the breaches in question.

Decision

I find that the Scottish Ministers (the Ministers) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Garrard. In particular, I find that the Ministers were justified in applying the exemptions in sections 29(1)(a) and section 36(1) of FOISA to the information withheld, insofar as I found that information to fall within the scope of Mr Garrard's request.



I also find, however, that the Ministers failed to comply with the requirements of Part 1 of FOISA, by failing to provide reasons either why the information withheld was exempt under sections 29(1)(a), 30(b) or 36(1) of FOISA , as required by section 16(1)(d) and section 16(2) of FOISA respectively.

For the reasons set out above, I do not require any further action from the Ministers in relation to these breaches.

Appeal

Should either Mr Garrard or the Scottish 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.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
10 December 2007



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

(...)

2 Effect of exemptions

- (1) To information which is exempt 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.



16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
 - (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
 - (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.
- (...)

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
 - (a) the formulation or development of government policy;
 - (b) Ministerial communications;
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
 - (d) the operation of any Ministerial private office.



36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.