

Decision Notice



Decision 124/2008 Mr Martin Steele and the Scottish Ministers

Correspondence with the Forestry Commission Scotland

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Summary

Mr Martin Steele requested copies of correspondence between the Scottish Government and the Forestry Commission Scotland (FCS) regarding a visit by the Sports Minister to the Carron Valley Forest from the Scottish Ministers (the Ministers). The Ministers withheld the information under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA). This decision was upheld upon review. Mr Steele 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 Steele's request for information in accordance with Part 1 of FOISA, by withholding the requested information under section 30(b)(i) and (ii) of FOISA. He required the Ministers to release the withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) (Effect of exemptions) and 30(b)(i) and 30(b)(ii) (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. Before setting out the details of Mr Steele's information request, it will be helpful to provide some background information. The Carron Valley Forest is situated near Kilsyth, North Lanarkshire and in 2004 the Carron Valley Development Group (CVDG) obtained funding for the development of a 10km mountain bike trail in the Carron Valley Forest, which was completed in November 2005. CVDG planned an official launch on Monday 27 March 2006 to be conducted by the (then) Sports Minister. The group was notified on Friday 24 March 2006 that the Sports Minister's attendance had been cancelled.
2. On 14 August 2007, Mr Steele emailed the Ministers requesting copies of correspondence between the Scottish Government and the FCS relating to the visit which was due to be made by the Sports Minister to the Carron Valley Forest on Monday 27 March 2006.



3. The Ministers responded on 29 October 2007 withholding the information requested under the exemptions in section 30(b)(i) and (ii) of FOISA.
4. On 2 November 2007, Mr Steele wrote to the Ministers requesting a review of their decision as he did not consider that the emails should have been withheld.
5. The Ministers notified Mr Steele of the outcome of their review on 22 November 2007. They upheld their decision to withhold the information requested, and concluded that the exemptions in sections 29(1)(b) and 29(1)(d) of FOISA applied to the information in addition to those previously cited.
6. On 2 January 2008, Mr Steele wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to him for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Steele 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

8. On 29 January 2008, the Ministers were notified in writing that an application had been received from Mr Steele and were asked to provide the Commissioner with copies of the withheld information. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, providing them with an opportunity to comment 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 provide comments on:
 - the searches undertaken to locate the requested information,
 - why they considered the exemptions claimed applied to the information withheld; and
 - their consideration of the public interest test in relation to the information withheld.
10. The Ministers responded on 27 March 2008. Their response stated that they no longer wished to rely upon the exemptions in sections 29(1)(b) and (d) of FOISA, and so the requested information (four emails in two documents (Documents 1 and 2)) was solely being withheld under section 30(b)(i) and (ii) of FOISA. The Ministers provided detailed responses to the investigating questions. The Ministers also provided general arguments regarding their interpretation of section 30(b) of FOISA



11. The investigating officer also contacted Mr Steele on 2 April 2008 to invite him to comment on the case and why he considered the public interest would be served by the release of the requested information. Mr Steele responded on 14 April 2008, providing detailed background information and comments on the case.
12. The Ministers released the first email within Document 2 to Mr Steele on 13 May 2008, as they no longer considered that the information was exempt from disclosure under FOISA.
13. On 21 May 2008, the investigating officer asked the Ministers to undertake further searches for the information Mr Steele requested as the withheld emails referred to other documents not provided to the Commissioner.
14. The Ministers responded on 6 June 2008, confirming that their searches had located one additional document (Document 3) which contained one email. They submitted that this document was also exempt under sections 30(b)(i) and (ii) of FOISA.
15. The submissions of both Mr Steele and the Ministers are described in more detail, where relevant, within the analysis and findings section below.

Commissioner's analysis and findings

16. In coming to a decision on this matter, all of the information withheld and submissions presented to the Commissioner by Mr Steele and the Ministers have been considered and he is satisfied that no matter of relevance has been overlooked.

Information under consideration in this decision

17. The Ministers initially identified two documents, which comprised four emails exchanged between the Scottish Government and FCS, as the information requested by Mr Steele. During the investigation, the Ministers reconsidered their decision to withhold these documents in their entirety and disclosed one of the emails contained in Document 2 to Mr Steele. This decision will consider Document 1 and the remaining emails within Document 2, which the Ministers still claim to be exempt from disclosure.
18. During the investigation, the Ministers were asked to provide details of the searches undertaken to locate the information requested by Mr Steele. Their attention was drawn to references within one email to earlier exchanges, and the fact that another email appeared to ask questions to which a response might have been expected. The Ministers were asked to conduct further searches to determine whether they held any additional information that would fall within the scope of Mr Steele's request.



19. As a result of additional searches, a further email, Document 3, was identified. The Ministers indicated that they were unsure as to whether this document fell within the scope of Mr Steele's request. The Commissioner has considered the content of this document and he is satisfied that it does fall within the scope of Mr Steele's request, and so he has considered Document 3 in what follows.
20. The Ministers' additional searches did not identify any additional documents, and they noted that additional correspondence referred to within Document and 2 may have been exchanges within the FCS, and responses to the questions asked in Document 1 may not have been received or retained by the Scottish Government.
21. Following these additional searches, the Commissioner is satisfied that the steps taken to locate relevant information in this case were reasonable, and that the documents located include all those that were held at the time of Mr Steele's request.

Application of section 30(b)(i) and (ii) of FOISA

22. In order for the Ministers to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(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.
23. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(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.
24. The Ministers have applied the exemption in section 30(b)(i) and (ii) to withhold all the withheld information contained in Documents 1, 2 and 3. They stated that the information constitutes free and frank advice, expresses free and frank views for the purposes of deliberation and that release would substantially inhibit effective communication between officials in the future.
25. The Ministers also noted the specific context in which the emails were exchanged, identified particular content within the emails which stated the advice and opinions of individuals of the parties.
26. The Ministers submitted that disclosure of specific communications, often containing advice and discussion, would be likely to inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation. They stated that it is very likely that exchanges of this nature would be jeopardised if these communications were considered suitable for release. The Ministers argued that officials would 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. They submitted that this would be to the substantial detriment to the policy and decision-making process.



27. The Ministers submitted that, had the documents under consideration been written in the expectation of publication, it would be likely that the nature of the advice offered in this case would have been different, and certain parts may not have been recorded.
28. Alongside their case-specific correspondence with the Commissioner, the Ministers supplied a revised version of general arguments that had previously submitted in relation to section 30(b) of FOISA.
29. The Commissioner addressed general comments on these exemptions that were put to him in May 2007 in paragraphs 23 to 31 of *Decision 089/2007 Mr James Cannell and Historic Scotland*. The revised general submissions that were received in this case raised a number of the issues addressed in *Decision 089/2007*, but also put forward additional arguments concerning the exemptions in section 30(b). These new arguments and the Commissioner's comments on these are set out in detail *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*.
30. The Commissioner will not repeat the Ministers' general submissions or the discussions set out in these two decisions here, other than to say that they have been considered fully, together with the case-specific arguments submitted by the Ministers, in reaching his decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration. In particular, it should be clear that the Commissioner 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
31. The Commissioner's consideration of this case has also been informed by *Decision 166/2006 Mr Martin Williams of The Herald and the Scottish Executive*. In this case, the Commissioner discussed in detail his views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. These are not repeated 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 and content of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information
 - If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker.
32. The Commissioner has also had regard to the decision in the Court of Session appeal: *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 these exemptions.



Conclusions on section 30(b)

33. Having considered the withheld information and the Ministers' submissions, the Commissioner notes that the withheld information does include both the provision of advice and the free and frank exchange of views for the purposes of deliberation. However, as noted above, the primary consideration is not whether the information contains advice and 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.
34. The Commissioner has considered carefully the Ministers' comments with regard to the likelihood of inhibition to the particular type of advice and views under consideration in this case. The Commissioner accepts that awareness of the possibility of disclosure might lead officials to take care in recording their views or advice, and pay more attention to the manner of expression. He does not suggest that the implementation of FOISA should or would have no effect on the way in which officials record their advice and views.
35. The issue is whether the effect would be adverse by way of causing, or likely to cause, officials to be substantially inhibited in the provision of advice or the exchange of views. If, on the other hand, the effect of disclosure was to increase the care given when offering advice and views to ensure they are justifiable and measured, and provide an accurate representation of the issues being addressed, then this is unlikely to be adverse and would not represent substantial inhibition.
36. In this case the Commissioner does not believe that disclosure would, or would be likely to have, a substantially inhibiting effect. The Commissioner has noted that the emails under consideration were exchanged in March 2006, a time at which it can be assumed that officials would be well aware of the existence of freedom of information law, and the possibility of information they generated being requested and disclosed under FOISA. He notes that the information is specific to the circumstances of the events of March 2006. He has also noted that, by the time of Mr Steele's request in August 2007 (18 months after their creation and the event to which they relate), there had been a change of government, and so the Minister concerned was no longer in post. He is not persuaded that these specific officials, or officials generally would, or would be likely to be inhibited substantially in giving future advice or exchanging views, as a result of disclosure,
37. Given the time that passed between the creation of the emails under consideration and Mr Steele's information request, and the comments above, the Commissioner does not accept that either of the exemptions in section 30(b) of FOISA applies in this case. Having drawn this conclusion, the Commissioner is not required to consider the public interest contained in section 2(1)(b) of FOISA in this case. However, the Commissioner considers in this case that it would be helpful for him to set out his views on this test as if, contrary to his views, he had found that the exemptions in sections 30(b) did apply.



The Ministers' submissions on the public interest

38. In their submissions, the Ministers argued that while the general issue mountain bike trails may be of public interest, the withheld information is solely of interest to Mr Steele and members of the CVDG. They submitted that any public interest in these documents was outweighed entirely by the public Interest in maintaining the exemption.
39. The Ministers also submitted that there is a strong public interest in decisions and judgements being made based on the provision of high quality advice and consideration of all available information and options, however unpalatable. They argued that in order to provide this advice, officials need to debate options rigorously, to expose all their merits and demerits and to understand their possible implications, in this case the relative merits and possible repercussions of a ministerial visit. They maintained that officials' candour in doing so will be affected by their assessment of whether the content of their discussions will be disclosed in the future. The Ministers also suggested that "inappropriate" disclosure may also distort the public perception of advice provided by officials, and the prospect of disclosure may also affect the impartiality of advice provided.
40. The Ministers went on to state that it is in the public interest for Ministers to be able to rely on high quality advice, particularly in decision-making where issues are of a highly contentious nature, e.g. in this case discussions about the attendance or otherwise of a Minister at an engagement. They stated that they consider there to be a strong public interest in maintaining the integrity of the process of giving advice of the sort in this case. They argued that the inhibition and loss of candour that the knowledge of possible disclosure might create would in turn be likely to have a detrimental effect on the efficiency and quality of decision making.
41. The Ministers stated that one aspect of this is the public interest in protecting the impartiality of the Civil Service, and that this applied where a particular release of official advice might create the risk those officials may come under political or public pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision-making.
42. The Ministers acknowledged that the public interest test must be considered on a case by case basis, but they stated that it can also be that information relates to an important and ongoing process (in this case, consideration of Ministerial attendance at an unofficial event), and there can be a public interest in protecting the process itself. The submitted that there is a public interest in protecting internal communications in cases where the likely effect of releasing information would be the suppression of communication in future, e.g. because advice and deliberations would be oral instead of written down. They suggested that the public interest should not be applied to protect internal communications only where officials have used strong or trenchant language, since this approach would appear to focus on rigorous, outlandish or unusual statements. Rather, they argued, the focus should be on the real impact of releasing information.
43. Finally the Ministers considered that there was an danger that relations with CVDG and FCS could be jeopardised if the information under consideration were disclosed in this particular case.



Mr Steele's submissions on the public interest

44. Mr Steele provided some background on the development of the mountain bike trail in the Carron Valley, the CVDG, and its relationship with the FCS. He noted that following the Minister's withdrawal from the opening event, an explanation relating to health and safety concerns was communicated to the CVDG by its local MSP. However, it was submitted that no concerns about health and safety or other matters had been raised with the CVDG prior to the launch of the mountain bike trails, and that work had been undertaken to bring the trail in line with FCS standards in the weeks following a risk assessment in November 2005. Mr Steele pointed out that the trails had been fully open to the public and had been for some months at the time of the launch.
45. Mr Steele indicated also that CVDG had heard that the Minister was "very unhappy" with the last minute withdrawal from attending the event, and with the handling of this incident. Mr Steele indicated that he believed that inaccurate information had been supplied to the Minister in order to leave no option but to withdraw from the event. He suggested that it was clearly in the public interest for these documents to be available.

Conclusions on the public interest

46. Having considered all the public interest arguments put to him in this case (as if, contrary to his conclusions above, he had found that the exemptions in section 30(b) of FOISA applied), the Commissioner has come to the decision that the public interest in maintaining these exemptions (if they did apply) would be outweighed by the public interest in disclosure of the information.
47. The documents under consideration reveal the advice put to the Minister which resulted in her decision not to attend the launch of the mountain bike trail. The Commissioner understands that no opportunity was afforded to the CVDG to respond to the FCS comments and no official explanation was given to the CVDG why the Minister decided not to attend the launch event.
48. The Commissioner considers that, although this matter is of interest to a relatively small group, the release of these documents is in the public interest because the effect of disclosure would be to finally account for the unexplained and abrupt withdrawal of the Minister from an event that she had been expected to attend.
49. It is clear that this decision was one that aggrieved the CVDG, and which has contributed a strained relationship between it and FCS. While the Commissioner recognises that disclosure in this case is likely to have implications for this relationship, he does not consider this to be a reason weighing heavily in favour of non-disclosure. Indeed, he considers that continued non-disclosure in this case could contribute further to strained relationships as a consequence of speculation on the part of CVDG on the reasons for the Minister's decision.



50. The Commissioner has also considered the relationship between the Ministers and FCS. The Commissioner does not accept that disclosure would affect that relationship in the way suggested. He takes the view that the FCS will recognise that disclosure was required in this case in response to a request made under FOISA. Given that the FCS has a duty to advise the Scottish Ministers on relevant matters, the Commissioner does not expect that such advice would cease to be provided. As noted above, the Commissioner accepts that the knowledge of disclosure such as this might lead officials to take care in the recording of their advice or views, he does not accept that disclosure in this case would lead to such advice or views not being supplied in future.
51. In conclusion, the Commissioner has found that there is a significant public interest in Ministers and officials being accountable for their actions, particularly where these actions affect other individuals and groups. He has concluded that the nature of the harm anticipated in this case i.e. that an official may write a memo somewhat differently, or communicated his concerns not in writing, is not such that the information providing a reason for the events of March 2006 should be withheld. In reaching this conclusion, the Commissioner again noted that Mr Steele's request was made some time after the event and after a change of government. Given the time that had passed in this case, the Commissioner found that the public interest in favour of withholding the information was less than had less time passed, or had the same Minister remained in post.

Summary

52. In summary, the Commissioner finds that the Ministers acted incorrectly in applying the exemptions in section 30(b)(i) and (ii) in withholding information in response to Mr Steele's request. He has also noted that, had he found that these exemptions applied, he would have concluded that the public interest in disclosure of the documents under consideration in this case outweighs the public interest in maintaining the exemptions.
53. Having concluded that the Ministers misapplied the exemptions in section 30(b) of FOISA, the Commissioner has found that the Ministers breached the requirements of Part 1 and section 1 (1) of FOISA by withholding this information in response to Mr Steele's request. He requires the Ministers to provide copies of the information withheld to Mr Steele.

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 Steele. By withholding the information under consideration on the grounds that it was exempt in terms of sections 30(b)(i) and (ii) of FOISA, the Commissioner finds that the Ministers did not comply with section 1(1) of FOISA.

The Commissioner requires the Ministers to release the withheld information to Mr Steele by 10 November 2008.



Appeal

Should either Mr Steele 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
25 September 2008



Appendix

Relevant statutory provisions

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.

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 or advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or