

Decision Notice



Decision 078/2009 Mr David Rule and the Scottish Parliamentary Corporate Body

Festival of Politics and correspondence with Paul Henderson Scott

Reference No: 200801618
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Summary

Mr Rule requested from the Scottish Parliamentary Corporate Body (the SPCB) all minutes of meetings which had discussed the Festival of Politics 2008 and all correspondence between Mr Paul Henderson Scott and the Scottish Parliament. The SPCB responded by directing Mr Rule to its website for some of the information requested, supplying certain documents subject to the redaction of personal data and withholding one document in its entirety on the basis that it was exempt under section 33(1)(b) of FOISA. Following a review, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPCB had partially failed to deal with Mr Rule's request for information in accordance with Part 1 of FOISA, by incorrectly applying section 33(1)(b) of FOISA to one document (the disclosure of which he did not accept as being substantially prejudicial to the SPCB's commercial interests) and by failing to respond to Mr Rule's request for review within the timescale set out in section 21(1) of FOISA. The Commissioner required the SPCB to supply Mr Rule with a copy of the withheld document.

The Commissioner was satisfied, however, that the SPCB had taken adequate steps to locate all the information which fell within the scope of Mr Rule's request and in that respect complied with Part 1.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy).

The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code).

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

Background

1. On 12 September 2008, Mr Rule wrote to the SPCB requesting the following information:

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“...the minutes of all meetings of the Scottish Parliamentary Corporate Body, and any parliamentary committee, which discussed the Festival of Politics 2008...”, and

“... all correspondence between Paul Henderson Scott and the Scottish Parliament.”

2. Prior to responding to Mr Rule’s request the SPCB directed him to its website, on which published its minutes and papers, and specifically to the minutes which fell within the scope of his request. The SPCB also requested clarification as to whether he sought the actual papers on the Festival of Politics.
3. On 16 September 2008, Mr Rule confirmed that he sought the actual papers on the Festival of Politics, and specifically from the SPCB meetings of 6 February and 14 May 2008 (papers 6 and 31 respectively).
4. The SPCB responded on 2 October 2008, informing him that paper 31 was now available on its website (and therefore was exempt under section 25 of FOISA as information otherwise accessible) and provided him with a link to the document in question. With respect to paper 6, the SPCB informed Mr Rule that the document was exempt under section 33(1)(b) of FOISA on the basis that its content was commercially sensitive. The SPCB provided Mr Rule with copies of correspondence which fell within the scope of the second part of his request, subject to the redaction of personal information.
5. On 3 October 2008, Mr Rule wrote to the SPCB requesting a review of its decision. In particular, Mr Rule requested that paper 6 be released subject to the redaction of monetary values. In subsequent correspondence (7 October 2008) Mr Rule indicated that he was not satisfied he had been provided with all the information which fell within the second part of his request, noting in particular his surprise that there was no correspondence between Mr Scott and the SPCB relating to the organisation of the 2006 event.
6. The SPCB notified Mr Rule of the outcome of its review on 4 November 2008. In relation to paper 6, the SPCB upheld its original decision without amendment. In relation to the second element of Mr Rule’s request the SPCB conducted a further search of its records and located one additional letter relating to the organisation of the 2006 event, which it supplied subject to redaction of personal information.
7. On 7 November 2008, Mr Rule wrote to the Commissioner’s Office, stating that he was dissatisfied with the outcome of the SPCB’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Rule had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

9. On 26 November 2008, the SPCB was notified in writing that an application had been received from Mr Rule and asked to provide the Commissioner with any information withheld from the applicant. The SPCB responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the SPCB, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular the SPCB was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to section 33(1)(b), and to provide certain information on the searches it had conducted and its handling of the request.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Mr Rule and the SPCB and is satisfied that no matter of relevance has been overlooked.
12. Within his application to the Commissioner, Mr Rule raised three areas of dissatisfaction. Firstly, Mr Rule felt that the SPCB was incorrect in its application of section 33(1)(b) of FOISA to paper 6. Secondly, he was not satisfied that he had been provided with all the information which fell within the second part of his request. Lastly, Mr Rule raised concerns about the manner in which his request had been dealt with.

Section 33(1)(b) – commercial interests and economy

13. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). A public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely to, be substantially prejudiced by disclosure of the information. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.
14. The Festival of Politics was held for the first time in 2005 and, following the success of the first festival, it has been held in each subsequent year. The SPCB explained that in December 2007 it had agreed that the Festival should be held each year in August until 2010.



15. One document considered by the SPCB in relation to the Festival (paper 6) was withheld from Mr Rule under section 33(1)(b). Paper 6 invites the SPCB to consider whether sponsorship should be sought for the Festival of Politics 2008 and, if so, to agree specific sponsorship packages. The proposed sponsorship packages are set out in detail in the Annex to that document.
16. The SPCB considered the organisation of the Festival of Politics to involve the carrying on of a commercial activity. It argued that the holding of the Festival went beyond the provision of services required for the effective fulfilment of its statutory functions. The Festival of Politics is seen by the SPCB as a successful means of involving members of the public in Parliament. It pointed out that it considered the holding of the Festival to go beyond simply being a financial interest of the SPCB, rather engaging its commercial interests, noting that it was competing with a number of other commercially-run festivals held at the same time in Edinburgh.
17. The SPCB identified certain information contained in the paper 6 about the issues arising in obtaining sponsorship and the details of packages offered to potential sponsors, advising that none of this information was made publicly available to those potential sponsors. It indicated that details of sponsorship packages were only given to sponsors once discussions had reached a certain stage, and then only on a strictly confidential basis.
18. The SPCB indicated its intention that the sponsorship package for the Festival of Politics in 2009 (and probably 2010) would be the same as that offered for 2008. The SPCB submitted that should paper 6 be made public it would potentially give other (potentially competing) festivals and major events a commercial advantage in negotiating future sponsorship deals with commercial organisations, to the substantial prejudice of its commercial interests.
19. The SPCB highlighted that current economic conditions had made the securing of commercial sponsorship for events such as the Festival of Politics extremely difficult, even at the time of the 2008 Festival. Given the subsequent further deterioration in the economy and the implications of this for many commercial organisations, it anticipated that obtaining sponsorship from such sources would continue to be extremely challenging for the foreseeable future.
20. The SPCB went on to argue that if its ability to negotiate sponsorship for the Festival of Politics were to be compromised by publication of the sponsorship details, this would substantially increase the proportion of the cost of the event's production that had to be met from Parliamentary funds. It took the view that this would ultimately affect the viability of the Festival itself. It provided details of the respective contributions made by itself and commercial sponsorship towards meeting the costs of the event.
21. The Commissioner, having taken into account the information supplied by the SPCB, accepts in this instance, given the importance and nature of sponsorship for this particular event, that the SPCB does have a commercial interest within this specific context.



22. There is no definition of "substantial prejudice" in FOISA. However, the Commissioner's view is that for substantial prejudice to exist the damage caused (or likely to be caused) by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near (certainly the foreseeable) future, and not at some unspecified distant time.
23. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied. If a public authority is applying this exemption, the Commissioner would expect it to be able to show what kind of harm would result (in terms of both nature and magnitude) and why this would be the expected outcome if the information in question were released.
24. The Commissioner notes that the content of paper 6 does not reveal any specific financial packages, but rather generic strategies for engaging possible sponsorship and packages for which sponsorship would be sought. While noting that there may be considerable competition for sponsorship among festivals in Edinburgh, and that a deteriorating economic climate may have made potential sponsorship all the more scarce, the Commissioner is not persuaded by the SPCB's arguments that substantial prejudice to its commercial interests would, or would be likely to, accrue on disclosure of the content of this document. He is prepared to acknowledge that the information might be of interest to others seeking event sponsorship in a similar environment, in that it casts some light on processes, risks and what sponsors might be offered. Given the level of detail of strategies and packages contained in document 6, however, and noting the complete absence of financial information from the document, the Commissioner does not accept that the information would confer a significant competitive advantage on other festivals, or that it would be otherwise capable of having a substantial effect on the SPCB's commercial interests.
25. As the Commissioner has found that paper 6 is not exempt under section 33(1)(b) of FOISA, he is not required to go on to consider the public interest test contained in section 2(1)(b) of FOISA.

Adequacy of searches

26. Mr Rule's second area of concern was that the information he had been provided with was incomplete. In particular, Mr Rule highlighted that he not only sought correspondence with Mr Paul Henderson Scott with reference to the Festival of Politics, but ALL correspondence between Mr Scott and the Scottish Parliament.
27. The SPCB submitted that when Mr Rule's initial request was received it had been interpreted as a request for the correspondence relating to the Festival of Politics and it was only at review stage that the wider scope of the request became apparent. It was at this stage that the SPCB realised Mr Henderson had been involved in the Festival of Politics in 2006.



28. In response to the investigating officer's queries regarding the searches undertaken, the SPCB indicated that while checking for correspondence relating to the 2006 Festival it had also checked more widely for general correspondence involving Mr Henderson. The searches had been undertaken by the member of staff with prime responsibility for the 2008 Festival of Politics and had included searches for all relevant e-mail and hard copy files by date, file title and any reference to Paul Henderson Scott. The SPCB indicated that while these checks had extended to the offices of the Chief Executive and the Presiding Officer, no correspondence had been found outwith the Events Team.
29. In response to Mr Rule's concerns the SPCB submitted that all the information covered by the relevant part of his request had been located and released to him. While appreciating that Mr Rule might expect there to be significant correspondence, the SPCB advised that correspondence with potential contributors to the Festival of Politics (such as Mr Scott) tended to be fairly brief, consisting of an initial approach (by either party), an initial discussion as to the content (often carried out verbally on the phone), an email finalising administrative arrangements and a final thank you letter. In Mr Scott's case, it submitted that the correspondence had fallen into this pattern: it surmised that a reference to "earlier correspondence" in the 2006 letter might well in fact have been to an earlier discussion.
30. The SPCB also pointed out that the resources allocated to the organisation of the Festival of Politics in 2006 had not allowed for significant correspondence. It advised that that the individual responsible for organising the 2006 event had left the Parliament for a new post in that year, at which point the vast majority of their email correspondence had been deleted. With reference to this deletion, the SPCB explained that in 2006 it was not clear whether the Festival would run again and in that context it had not appeared unreasonable to dispose of information about a completed event.
31. The Commissioner has taken account of the searches undertaken by the SPCB, its acknowledgement that it interpreted Mr Rule's request too narrowly when first dealing with his request but took steps at review stage to widen its searches, and its explanations as to why no further information was located. While noting Mr Rule's expectation that correspondence with Mr Scott might extend beyond his involvement in the Festival of Politics, the Commissioner is satisfied in the circumstances that the SPCB conducted adequate searches to locate all the information which fell within the scope of his request.
32. The Commissioner also notes in terms of good practice the SPCB's submission that its Information Management Team is currently working with the Events Team to develop a records retention schedule which will include documentation relating to the Festival of Politics.

Handling of Mr Rule's request

33. Mr Rule also raised concerns about the handling of his request. In particular he was not satisfied that the SCPB adhered to the timescales set out in section 21(1) of FOISA.
34. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review, subject to exceptions which are not applicable here.

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35. Mr Rule submitted his request for review by email on 3 October 2008. The SPCB responded to his request for review on 4 November 2008.
36. The Commissioner finds that the SPCB failed to respond to Mr Rule's request for review within the 20 working days allowed under section 21(1) of FOISA. In failing to comply with this timescale the SPCB failed to comply with Part 1 of FOISA.
37. Mr Rule also raised concerns relating to the conduct of the SPCB's review, in particular that the same individual had responded to his initial request and his request for review.
38. Paragraph 66 of the Section 60 Code, provides that "[W]here a requirement for review concerns a request for information under the general right of access, the review should generally be handled by staff who were not involved in the original decision."
39. The SPCB submitted that procedurally, the replies to reviews were drafted by members of staff in SPICe, the Scottish Parliament Information Centre, and this would normally be undertaken by one of two individuals. This, the SPCB submitted, did not reflect the fact that these two individuals undertook the review, but rather they were responsible for the administrative work required by its review procedures. It explained that in Mr Rule's case one of these individuals had replied to the initial request and also prepared the reply to the review, although he had not actually carried out the review. It accepted, however, that the impression might have been given by both responses being signed by the same individual that proper procedures were not in place, indicating that it planned to update its procedures so that the same member of staff would not in future reply to both a request and the subsequent request for review.
40. Given the explanations provided by the SPCB, the Commissioner is satisfied that Mr Rule's review was in fact conducted appropriately. He acknowledges, however, that the administrative process followed may well have created a contrary impression and welcomes the SPCB's intention to improve procedures in the interests of clarity.

DECISION

The Commissioner finds that the Scottish Parliamentary Corporate Body (SPCB) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Rule.

The Commissioner finds the SPCB took adequate steps to locate and provide Mr Rule with all of the information falling within the scope of his request and in that respect complied with Part 1.

However, by incorrectly applying section 33(1)(b) to one of the documents identified (paper 6) and failing to respond to Mr Rule's request for review within the specified timescales, the SPCB failed to comply with Part 1 of FOISA and in particular with sections 1(1) and 21(1) respectively.

The Commissioner therefore requires the SPCB to supply Mr Rule with a copy of paper 6, by 28 August 2009.



Appeal

Should either Mr Rule or the SPCB 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
13 July 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).