

Decision Notice



Decision 077/2010 Mark Howarth and the Scottish Ministers

Scottish Government's commitment to provide an additional 1000 police officers

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www.itspublicknowledge.info

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Summary

Mr Mark Howarth (Mr Howarth) requested from the Scottish Ministers (the Ministers) information on the Additional Police Capacity Programme. The Ministers responded by stating that they did not hold part of the information, by releasing part of the information, and by advising Mr Howarth that the remainder of the information was considered exempt from disclosure in terms of sections 29(1)(a), 30(b)(i) and (ii) and 38(1)(b) of FOISA.

Mr Howarth accepted the Ministers' application of section 38(1)(b) of FOISA (personal data) but following a review in which the Ministers released some further information to him, Mr Howarth remained dissatisfied and applied to the Commissioner for a decision with regard to the remainder of the exempted information.

During the course of the investigation the Ministers additionally cited section 30(c) of FOISA, and withdrew their reliance on section 30(b)(i) of FOISA. They also argued that Mr Howarth's request was invalid for the purposes of section 8(1)(c) of FOISA.

Following an investigation, the Commissioner found that the information request was valid. He also found that the information should not have been withheld from Mr Howarth and ordered the Ministers to disclose the information to him.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 8(1)(c) (Requesting information); 29(1)(a) and (4) (Formulation of Scottish Administration policy etc.) and 30(b)(i) and (ii) and (c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. (The Appendix forms part of this decision.)

Background

1. On 26 August 2008, Mr Howarth wrote to the Ministers requesting the following information:
 - a) all minutes, papers and reports prepared by or for the Additional Police Capacity Programme Board;



- b) all invoices and associated paperwork received by the Scottish Government from police forces for any of the additional 150 centrally-funded new officers due to have been recruited between January and March 2008;
 - c) all correspondence between the Scottish Government and ACPOS with regard to those officers.
2. The Ministers responded on 24 October 2008. They disclosed some information in response to part a) of Mr Howarth's request, while withholding the remainder of the information in this part of the request in terms of the exemptions at sections 29(1)(a), 30(b)(i) and (ii) and 38(1)(b) of FOISA. The Ministers also provided the information it held in relation to part b) (subject to the redaction of personal data in terms of section 38(1)(b) of FOISA, which Mr Howarth accepted) and advised Mr Howarth that it did not hold any information in relation to part c) of his request.
3. On 30 October 2008, Mr Howarth wrote to the Ministers requesting a review of their decision. He questioned whether the exemptions in sections 29 and 30 of FOISA had been correctly applied to the withheld information and whether the balance of the public interest had been correctly assessed.
4. The Ministers carried out a review and notified Mr Howarth of the outcome on 25 November 2008. The Ministers released some further information to Mr Howarth but withheld the remainder under the exemptions at sections 29(1)(a), 30(b)(ii) and (c) and 38(1)(b) of FOISA.
5. On 19 May 2009, Mr Howarth wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Howarth provided detailed submissions to the Commissioner on why he was of the view that the remainder of the information should not be withheld under sections 29(1)(a), 30(b)(ii) and (c) of FOISA. (He did not question the fact that personal data had been redacted under section 38(1)(b) – as a result, the Commissioner will not go on to consider this point.)
6. The application was validated by establishing that Mr Howarth 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

7. On 22 May 2009, the Ministers were notified in writing that an application had been received from Mr Howarth and were asked to provide the Commissioner with the information which had been withheld from Mr Howarth. The Ministers provided the information on 17 June 2009, and the case was then allocated to an investigating officer.



8. The investigating officer contacted the Ministers on 3 July 2009, giving them an opportunity to provide comments 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 justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers provided submissions on 3 August 2008 (these are addressed below). The Ministers advised the Commissioner that they no longer wished to rely on the exemption in section 30(b)(i), but that they now wished to rely on the exemption in section 30(c) in relation to some of the information (see below).
10. On 13 August 2009 the investigating officer contacted Mr Howarth to seek his views on the Ministers' submissions and, in particular, his views on the public interest test.
11. Mr Howarth provided comments on 26 August 2009.
12. The investigating officer subsequently discussed the case with the Commissioner on 23 September 2009. As a result of that meeting, it was agreed that the further submissions should be sought from the Ministers, as it appeared to the Commissioner that the exemptions had been applied on a class basis to entire, or almost entire, documents.
13. The investigating officer wrote to the Ministers on 8 October 2009, advising them that the Commissioner would be unlikely to uphold the use of the exemptions in relation to all of the information which had been withheld and asked that they look again at the information and advise the Commissioner as to which specific parts they would still wish to withhold. The Ministers were provided with examples of the type of information that the Commissioner would be likely to order to be disclosed and were asked to provide case specific arguments as to why it would not be in the public interest to disclose such information.
14. On 30 October 2009, 13 November 2009 and 20 November 2009, the Ministers contacted the investigating officer by telephoned, asking for further time to respond to the letter of 8 October 2009. The Ministers indicated that they were likely to release most, if not all, of the withheld information to Mr Howarth.
15. As a substantive response had still not been received by 25 November 2009, the Commissioner issued a further letter to the Ministers, requiring the Ministers to provide a response by no later than 9 December 2009.
16. The Ministers contacted the Commissioner on 9 December 2009. However, instead of providing him with the submissions which the Commissioner had requested, the Ministers advised him that, having considered the Court of Session ruling in the case of *Glasgow City Council v Scottish Information Commissioner* (issued on 30 September 2009) (the Court of Session Opinion)¹, they now regarded the original request to be invalid. (The Ministers' arguments on validity are addressed in more detail below.)

¹ <http://www.scotcourts.gov.uk/opinions/2009CSIH73.html>



17. The investigating officer acknowledged this letter on 10 December 2009, reiterating that the Ministers had not yet provided the comments, etc. asked for in letters of 8 October 2009 and 25 November 2009 and asking that they do so along with providing their detailed submissions on the issue of validity.
18. After various discussions between the Commissioner and the Ministers on both the wider validity issue and on validity in respect of several specific appeals to the Commissioner, the Ministers confirmed that they considered Mr Howarth's information request (and subsequent application) to be invalid. The Ministers have not, however, provided the Commissioner at any stage with the additional comments which he sought in his letters of 8 October 2009 and 25 November 2009. In the circumstances, the Commissioner considers he has no option but to proceed to a decision without those additional comments.

Commissioner's analysis and findings

19. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Howarth and the Ministers and is satisfied that no matter of relevance has been overlooked.

Validity of the appeal

20. As noted above, the Ministers indicated during the investigation that they considered Mr Howarth's request to be invalid. This was on the basis of the Ministers' interpretation of the Court of Session Opinion referred to in paragraph 16. The Ministers contended that Mr Howarth had not described the information he was seeking, as required by section 8(1)(c) of FOISA, characterising the request as broadly framed and unfocused. In the Minister's view the request did nothing more than indicate where the information Mr Howarth might be interested in might be found, which could not be equated with describing the information requested. The Ministers highlighted the importance, as noted in the Court of Session Opinion, of identifying precisely the information sought by the applicant, emphasising that (irrespective of how they might have dealt with these requests prior to that Opinion) they remained entitled to revisit that position in the light of the Opinion and consequently treat the requests as invalid.
21. The Ministers also submitted that, as a journalist, Mr Howarth should be able to formulate a clear request in terms of FOISA and that the Court Opinion makes clear that consideration can be given to the person making the request and the degree to which he/she might be assumed to be able to make a valid request, describing precisely the information he/she requires.



22. The Commissioner has considered Mr Howarth's request in the light of the Ministers' submissions and the Court of Session Opinion. He has also referred to the guidance which he has subsequently issued on the validity of requests, in the light of the Court of Session Opinion².
23. He notes that the statutory requirement, under section 8(1)(c) of FOISA, is confined to a description of the information requested. He takes the view that the purpose of the description is to allow the public authority to identify and locate the information and that the purpose of the reference in FOISA to "information" is to relieve the applicant from specifying particular documents, since he or she cannot be expected to know in what form information is held. The principal objective of the whole FOISA regime is to make information accessible, provided it can be identified and located at a cost that is not excessive, and provided it does not fall within one of the statutory provisions (such as that in section 14) or statutory exemptions.
24. Where an applicant has made a request for a copy of a document, and it is reasonably clear in the circumstances that it is the information recorded in the document which the applicant wants, the public authority should respond to the request as a request properly made under FOISA.
25. In this case, the Commissioner considers Mr Howarth's descriptions of the information he wants are sufficiently clear to enable its identification and location, which must be the primary consideration in determining whether such a description is valid. The description is extensive and, in the view of the Commissioner, clearly meets what is required by section 8(1)(c) of FOISA.
26. Furthermore, the Ministers have not explained why the description is problematic. Since they have provided the Commissioner with the information withheld, the difficulty cannot be one of identification: whatever effect the Court of Session decision may have had on the applicable law, it cannot have affected the matter of identification as a question of fact.
27. The Commissioner therefore considers that the request is valid in terms of section 8(1)(c) of FOISA
28. The Commissioner will now go on to consider the specifics of Mr Howarth's application.

Background to the application

29. Mr Howarth's request relates to the Scottish National Party's 2007 manifesto commitment to provide an additional 1000 police officers in Scotland's communities by redeployment, retention and recruitment. The 2007 manifesto states:

"There is no doubt that we could be doing more to fight crime and make Scotland's communities safer. Creating a safer Scotland will be a top priority for the Department of Justice, with all our actions focused on cutting crime and reducing the fear of crime.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/CourtofSessionGuidance2010/Validrequests.asp>



It is essential that we have sufficient police on local streets. That's why we will set out plans in our first Budget for Scotland for 1000 more police and will encourage Chief Constables to focus these new resources on community policing. We want to see these new police officers becoming part of the fabric of communities and through local knowledge and by building stronger relationships with families and businesses in the local area, they will be in a better position to deter crime, solve crime and make you and your family feel safer as you go about your daily business.

Visible policing plays a vital role in reducing the fear of crime, which can be as destructive as the level of crime, which is why we are putting the emphasis on front line police.”³

30. Immediately after the election, the Additional Policing Capacity Programme Board (the Board) was set up by the Ministers to consider how the additional capacity should be delivered with the objective of meeting the commitment to 1000 additional officers.
31. This approach attracted considerable media and parliamentary interest. However, in January 2008, the Ministers announced amendments to the 2008/2009 Budget Bill to allocate full funding to the commitment to 1000 additional police officers. The final meeting of the Board was held in January 2009.

Scope of the application

32. The application covers the information in 12 documents, numbered 14 – 21 and 23 – 26. The information in five of these documents was withheld in its entirety, i.e.:
 - Board update paper 1 from December 2007 (document 14)
 - Board presentation paper of the same date (document 15)
 - Board update papers 4, 5 and 6 from June 2008 (documents 23, 24 and 25)
33. The Ministers disclosed redacted versions of the remaining seven documents to Mr Howarth, i.e.:
 - the Minutes of the first three Board meetings from December 2007, March 2008 and June 2008 (documents 16, 21 and 26)
 - the agenda of the March 2008 Board meeting (document 18)
 - Board update papers 2 and 3 from March 2008 and the covering emails for each (documents 19 and 20)
 - terms of reference and remit paper inviting the Board's comments, from December 2007 (document 17)
34. Except for the agenda (document 18), all of the documents referred to in paragraph 33 were heavily redacted.

³ <http://www.snp.org/system/files/manifesto+programme.pdf>



35. The Ministers applied the exemption in section 29(1)(a) of FOISA to all of the information which they withheld from Mr Howarth. In addition, they applied the exemption in section 30(b)(ii) to the information contained in the Annexes to documents 20 and 24, and the exemption in section 30(c) to the redactions in the Minutes, i.e. documents 16, 21 and 26.

Section 29(1)(a) of FOISA

36. Information is exempt by virtue of section 29(1)(a) of FOISA if it falls into a particular class of information, i.e. if the information relates to the formulation or development of government policy. In considering this exemption, the authority is not required to consider the significance of the content of the information, nor the effect of disclosure. The information will be exempt from disclosure simply because it relates to the formulation or development of government policy.
37. The Ministers have applied this exemption to all of the information withheld from Mr Howarth. They submitted that the withheld material relates to the development of a revised approach to meeting the objective of increasing police capacity, in the context of six identified strands. They argued that, at the time of Mr Howarth's initial request and review request, this was very much a "live" matter and would continue to be a matter of political significance until the next Scottish Parliamentary elections.
38. The Ministers also commented that, while the 2008/9 budget removed the requirement to demonstrate additional capacity through the identified strands, they remain highly valid in terms of policy development, and the commitment remains to deliver on these strands throughout the course of this Parliament. They therefore considered that the withheld information relates to the continuing development of the government's policy on additional police officers.
39. Mr Howarth, on the other hand, argued that the work of the Board did not relate to the formulation or development of government policy. He considered that the role of the Board is supervisory, in that it was convened to oversee the delivery of governmental policy, which had already been arrived at.
40. Having considered the information, together with the submissions from the Ministers and from Mr Howarth, the Commissioner is satisfied in each case that the information all relates to the development of the government's policy with respect to the commitment to provide an additional 1000 police officers. The use of the words "relates to" in the exemption, in the view of the Commissioner widens the scope of the exemption to the work being carried out by the Board. He is therefore satisfied that the information is exempt under section 29(1)(a) of FOISA.

Section 29(1)(a): public interest test

41. The exemption in section 29(1)(a) is subject to the public interest test set out in section 2(1)(b) of FOISA. This means that, even if the information is exempt, it can only be withheld if the public interest in maintaining the exemption (and thereby withholding the information) outweighs the public interest in disclosing the information.



The Ministers' submissions on the public interest

42. The Ministers acknowledged that because additional police capacity is a key commitment of the Scottish Government, which has attracted considerable attention in the Parliament and in the media, there is significant public interest in the disclosure of information relevant to the policy development.
43. However, they also submitted that there is also a vital public interest in officials, both from the Government itself and from other key parties, having a private space in which to consider fully all available options and to debate all relevant issues.
44. The Ministers argued that, if the information were to be disclosed, officials from the organisations represented would exercise an increased degree of caution in preparing similar types of documents in future, meaning that, potentially, the views expressed and the conclusions drawn could be substantially different. The Ministers suggested that options to be debated might be discussed far less critically and that fear over release of details might incline officials to play down or even ignore any concerns they might have concerning the achievability of some of the policing strands, thus rendering the policy-making process less robust.
45. The Ministers stated that they believed if papers such as Board papers setting out developing thinking on how to meet the objective, as well as the follow up minutes, were understood to be subject to release while policy development was still ongoing, the way the issue might appear in the press would have a stronger influence on officials' thinking than longer term policy-making.
46. If the withheld information were released while the issue remained 'live', the Ministers argued that there would be the inherent danger that certain arguments may be taken out of context, open to misrepresentation or perceived to be misleading. They added that it is explicit that the Board's role is to be non-political and suggested that early or premature release of the information would be highly likely, even if incorrectly, to politicise its role as well as that of the individual members and their organisations, by revealing particular views and opinions.
47. Finally, the Ministers submitted that they would contend there is a strong public interest in maintaining the confidence of the stakeholders represented on the Board. They suggested that if individuals and organisations contributing to policy debate and discussion believed that contributions made or opinions expressed in what was understood to be a private policy-making environment were likely to be released they would be far less willing to contribute in such a way, to the detriment of effective policy development and the public interest.

Mr Howarth's submissions on the public interest

48. Emphasising the role and composition of the Board, Mr Howarth contended that its role is supervisory rather than integral. He pointed out that it was convened to oversee the delivery of government policy which had already been arrived at and that this particular policy's parameters were immovable, being based on hard statistical measures, i.e. 1000 officers over four years made up of 150 in year one, 450 in year two, 200 in year three and 200 in year four.



49. He was of the opinion that the origins of the policy were political, in that the figure of 1000 extra officers was contained in the SNP's election manifesto of 2007. However, he was of the view that the Board's membership is entirely non-partisan and impartial, comprising public servants with no political affiliation. He therefore contended that it would be unlikely that the members' opinions or contributions would cause them the type of public embarrassment which would inhibit their future effective participation.
50. Mr Howarth cited *Decision 010/2009 Paul Martin MSP and the Scottish Ministers*⁴ and argued that much of the information withheld under section 29(1)(a) of FOISA in that decision was done so on the basis that the information related to the early development of the government's policy on additional police officers from the commitment contained in the SNP manifesto. Mr Howarth pointed out that the request for information in that case had been made on 10 December 2007, only one month after the Justice Secretary unveiled details of the police numbers pledge and gave evidence to the Justice Committee. Therefore, all the information requested preceded that date and some was relatively recent.
51. However, Mr Howarth noted that his request was made more than eight months later, on 26 August 2008, following several announcements that the first tranche of 150 officers had been delivered. Therefore, Mr Howarth asserted, essentially the information covered by his request was the Board's assessment of how that first tranche had been achieved.
52. Mr Howarth believes that the public interest is best served by scrutinising the Ministers' claims that they have delivered on targets. If the Ministers would not allow scrutiny of this figure, once they had declared unambiguously that the target had been met, when do they consider that this matter may be examined?
53. Mr Howarth asserted that the alternative would mean that the public must accept unquestioningly every assurance that manifesto commitments have been met, while simultaneously being barred from seeing the evidence. He submitted that such a situation is unhealthy for democratic government and will only foster mistrust in the system.

The Commissioner's findings on the public interest

54. The Commissioner has taken account of the arguments provided by both the Ministers and by Mr Howarth.
55. He finds that the arguments made by the Ministers are largely generic, applicable to any information which concerned the formulation of policy. Of itself, that does not mean that such broad arguments are not relevant or should not be given weight, but he finds that they are not persuasive in the circumstances of this case.

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800469.asp>



56. Considering the circumstances of this case, applying the Ministers' broad arguments means that they are of the view that it would not be in the public interest to release certain information even though it is already in the public domain. It also demands that the Commissioner should conclude that, on balance, the public interest would be better served by withholding relatively innocuous, factual information, for example, a note of a visit having been taken by the Cabinet Secretary to Tulliallan Police College on 10 March 2008. Yet that visit was referred to in the Ministers' press release and was widely reported in the media at the time. The Commissioner cannot agree that release of such information would be contrary to the public interest.
57. Furthermore, the Commissioner does not share the view that disclosure would have the effects alleged by the Ministers such as inhibiting consideration of options or politicising the role of the Board. The nature of the information in this case and the manner in which it has been recorded does not lend itself to the conclusion that those involved in formulation and development of this policy or indeed in formulation and development of policy more generally would act in a manner contrary to the public interest, e.g. by declining to participate in deliberation or failing to consider options, as a result of disclosure of this specific information.
58. In *Decision 057/2005 Mr William Alexander and the Scottish Executive* the Commissioner considered the application of section 29(1)(a) of FOISA and found that it was possible to distinguish several stages within the final area of policy development. He found certain information to be less sensitive because it belonged to a superseded phase of policy formulation, and found that whilst section 29(1)(a) applied to documents created in the earlier phases, generally the public interest in disclosure outweighed the maintenance of the exemption.
59. In this case the first "batch" of police officers had been delivered over five months before Mr Howarth made his information request (the public announcement was made in March 2008⁵), so in that respect it can be said that the policy had been formulated and developed and was being delivered. Although further activity on delivering the policy was still to take place and this might, in the light of experience, include policy development through review, refinement or revision, the Commissioner does not accept that disclosure of the information requested would have the inhibiting effect on that process (or any other) as suggested by the Ministers and so disclosure would not be contrary to the public interest on those grounds.
60. The Commissioner must also give weight to the wide public interest in the issue of community policing in Scotland. This was a prominent commitment by the Government. There has been considerable public discussion as to how the commitment would be met, such as would these be new recruits, how would they be deployed and over what period? This information would provide insight to the process of advice and decision making on such matters, which would be in the public interest.
61. Given that the Ministers have not been able to persuade him that withholding the information would be in the public interest, and having found that there is a public interest in disclosure, the Commissioner, finds that the public interest in disclosing the information outweighs that in maintaining the exemption.

⁵ <http://www.scotland.gov.uk/News/Releases/2008/03/10111342>



62. The Commissioner will now go on to consider the application of the exemptions additionally applied to some of the information.

Section 30(b)(ii) of FOISA

63. In order for the Ministers to be able to rely on the exemption contained in section 30(b)(ii) of FOISA, they have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. As with section 29(1)(a), the exemption in section 30(b)(ii) of FOISA is subject to the public interest test.
64. The Ministers have applied this exemption to the Annexes attached to documents 20 and 24, which consist of tables of measurements for assessing improvements in community policing, drawn up by the Board's Community Policing Sub-group and intended for the Board to consider and agree.
65. The Ministers submitted that these annexes highlight multiple issues against various measures and that the comments against the criteria are frequently free and frank and clearly written for the purpose of deliberation by the Board.
66. They contended that release of the information would substantially inhibit officials from compiling papers in such a manner and from, e.g. openly discussing the levels of risk involved, the potential difficulties in explaining criteria to the public or raising doubts as to the robustness of certain analyses. The Ministers assert that the comments not only reflect ongoing policy development and uncertainty about approach, but are also candidly expressed and reflect the lack of expectation of publication. They suggest that early or premature release would expose the Board to criticism about apparent confusion and division when in reality an open debate on policy development was underway.

Would disclosure cause substantial inhibition?

67. The Commissioner has considered the information contained in both of the Annexes in question and notes that it is made up of mostly factual information in the form of a list of methods of measuring targets, the pros and the cons of each of these methods of measurement and the way in which the information could be collated for each option. In addition to this the Annexes (when read together) also indicate which of the available options were preferred by the Board.
68. Guidance issued by the Commissioner states that where advice or views are communicated and received as part of the individuals' expected day-to-day professional functions, as is the case here with both the Sub-group and the Board functioning in their expected professional capacity, then the risk of substantial inhibition resulting from the release of that information may well be diminished.



69. The Commissioner has also taken account of the fact that the recommendations made to the Board in these Annex tables cannot be directly linked back to specific individuals, but rather are the collective recommendations of the sub-group as a whole. There is, in the view of the Commissioner, no “candid expression” within these recommendations from any particular individual.
70. Where an authority seeks to exempt information under section 30(b)(ii), it must be able to demonstrate that there is a real risk or likelihood that harm will follow disclosure of the information. The authority will be expected to be specific about the harm that would be caused by disclosure and give reasons for expecting these harmful consequences to occur in the near or foreseeable future. If there is only a remote possibility that the conduct of public affairs will be harmed by officials or other parties being inhibited from providing advice or views, then the exemption will not apply.
71. The Commissioner is not satisfied that the disclosure of the information as contained within these Annex tables would (or would be likely to) substantially inhibit officials from compiling future papers in the manner described by the Ministers or otherwise inhibiting substantially the free and frank exchange of views for the purposes of deliberation.
72. He therefore finds that the Ministers incorrectly applied the exemption in section 30(b)(ii) of FOISA to the information contained in the two Annex tables attached to documents 20 and 24.
73. As the Commissioner has concluded that the exemption in section 30(b)(ii) is not engaged, he is not required to go on to consider public interest test in section 2(1)(b) of FOISA.

Section 30(c) of FOISA

74. The exemption in section 30(c) of FOISA allows public authorities to withhold information which would “otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. In this context, “otherwise” relates (by way of exclusion) to the substantial inhibition referred to in section 30(b)(i) and (ii).
75. However, section 30(c) remains a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information. This exemption is also subject to the public interest test.
76. This exemption has been applied by the Ministers to three sets of Board meeting minutes (documents 16, 21 and 26).
77. The Ministers argued that the disclosure of the minutes would damage their relationship with their stakeholders. They reiterated that various stakeholders have played, and continue to play, a central role in the development of the policy, and that they considered that maintaining good relations with them crucial to a successful outcome.



78. The Ministers considered that release of the minutes, reflecting the contribution of the various stakeholders, would substantially prejudice their relationship with them. They contended that the relationship relied on a high level of trust and that there was an expectation of a degree of confidence. They asserted that if these minutes were subject to “early” or “premature” release, the likelihood of stakeholder co-operation in future would be prejudiced with external parties less willing to engage with them in the development of policy.
79. The Ministers submitted that the release of these minutes would substantially inhibit both stakeholders and officials of the Scottish Government and from fully contributing to the process. The Ministers maintained that the minutes contain a full record (which they asserted was also free and frank in places) of the various Board meetings. Were such minutes to be released, the Ministers argued, it would be very likely that a far more abbreviated record would be maintained in future.
80. Having considered these submissions in detail, it appears to the Commissioner that the arguments being put forward by the Ministers in relation to substantial inhibition in contributing to the process and in relation to an abbreviated record are broadly of the same type which they put forward in support of the application of 30(b)(ii).
81. The arguments appear to hinge on the participants (mainly stakeholders, but also Board officials), being inhibited by the idea of their contributions to discussions/debates etc. being open to public scrutiny, to such an extent that they would be less willing to engage with the Ministers in the development of policy and, in effect, be less likely to offer advice, exchange views or give input to the Board in future projects.
82. The Commissioner would reiterate that the use of the word “otherwise” in this exemption signifies that this exemption is to be used in situations other than those envisaged by the exemptions in section 30(a) and (b). He is not persuaded by the Ministers that the prejudice to the effective conduct of public affairs arising as a result of substantial inhibition in contributing to the process and in relation to an abbreviated record is intrinsically different from that which they are claiming under 30(b)(ii). While, given the use of the word “otherwise” in section 30(c), the Commissioner considers that he is not required to go on to consider the Ministers’ arguments in relation to these specific types of inhibition, he has, nonetheless, considered them and has come to the conclusion, for the reasons set out earlier, that disclosure would not, and would not be likely to, prejudice substantially, the effective conduct of public affairs.
83. The Ministers have also argued that disclosure would, or would be likely to, prejudice substantially their relationship with the stakeholders involved (see paragraph 78). The Commissioner, having taken account of the information which has been withheld, and the submissions made by the Ministers, finds it difficult to accept that such prejudice would occur,



84. As is already in the public domain, the stakeholders in question include representatives of the Scottish Police Convenors Forum, the Association of Chief Police Officers in Scotland, the Scottish Police Services Authority, the Scottish Police Federation and Her Majesty's Inspectorate of Constabulary for Scotland. Given the importance of this policy area to these bodies, the Commissioner cannot accept that they would be less likely to work with the Ministers on this issue should the information be disclosed. The representatives are there in a professional capacity. Account must also be taken of the fact that the majority of the comments in the minutes (particularly where the minutes reflect discussion which has taken place) are not attributable to any one person.
85. As such, the Commissioner is not satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the effective conduct of public affairs (here, the Ministers' relationship with the stakeholders in question).
86. As the Commissioner does not accept that the information in question is exempt under section 30(c) he is not required to go on to consider the public interest test under section 2(1)(b).

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 Howarth. He finds that Mr Howarth's information request is valid and that, in withholding information under exemptions in sections 29(1)(a), 30(b)(ii) and 30(c) of FOISA, the Ministers failed to comply with section 1(1).

The Commissioner therefore requires the Ministers to disclose to Mr Howarth the information withheld from him (as referred to in paragraphs 32 and 33 above) by 16 July 2010.



Appeal

Should either Mr Howarth 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
26 May 2010



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 –

- (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.

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which –

...

- (c) describes the information requested.

...



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;

...

(4) In this section-

"government policy" means-

(a) the policy of the Scottish Administration; and

(b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

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; or

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

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.