

Decision Notice

Decision 077/2016: Mr Tom Gordon and the Scottish Ministers

State aid for T in the Park

Reference No: 201501846

Decision Date: 04 April 2016



Scottish Information
Commissioner

Summary

On 5 August 2015, Mr Gordon asked the Scottish Ministers (the Ministers) for information relating to state aid for T in the Park. The Ministers failed to respond and Mr Gordon asked them to review this decision. The Ministers informed Mr Gordon that they had now published a lot of the information he was seeking and provided him with a website link. The remaining parts of this information were withheld under various exemptions in FOISA.

Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had responded to Mr Gordon's request for information in accordance with FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

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. By way of background, the organisers of the T in the Park festival, DF Concerts (DFC), asked the Ministers for financial assistance for the 2015 event. DFC received £150,000 to help in the transition to a new site at Strathallan in Perthshire.
2. On 5 August 2015, Mr Gordon made a request for information to the Ministers. The information requested was:

“All items of information held in relation to the award of ad hoc state aid SA.42690 to T in the Park as referred to on the Scottish Government’s website:

<http://www.gov.scot/Topics/Business-Industry/Tourism/stateaidinthePark>

This should include, but not be limited to, the application for state aid in respect of T in the Park showing the amount sought and the amount ultimately paid; all risk assessments; all conditions attached to the state aid; all ministerial involvement; and all associated correspondence.”

3. The Ministers failed to respond and, on 14 September 2015, Mr Gordon wrote to them requiring a review in respect of that failure.
4. The Ministers notified Mr Gordon of the outcome of their review on 28 September 2015. They informed Mr Gordon that a lot of the information he was seeking (628 pages of material) had been published on their website, and provided him with a link. The Ministers relied on the exemptions at sections 30(b)(ii), 33(1)(b) and 38(1)(b) of FOISA to withhold information from these pages. They also accepted they had failed to respond within 20 working days and apologised.

5. On 6 October 2015, Mr Gordon wrote to the Commissioner. Mr Gordon applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Ministers' review because he believed it was in the public interest for all of the withheld information to be disclosed. He confirmed that he was confining his application to the information redacted from the first three electronic files on the weblink provided.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Gordon made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 22 October 2015, the Ministers were notified in writing that Mr Gordon had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the information, confirming that they were now relying on the exemptions in sections 30(b) and (c), 33(1)(b) and 36 of FOISA. At the same time, they informed Mr Gordon of this
8. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application, with reference to the exemptions they had applied.
10. The Ministers provided their comments, following which some clarification was sought and obtained in relation to the withheld information.
11. The investigating officer asked Mr Gordon if he had any further comments to make, noting the additional exemptions cited by the Ministers. Mr Gordon confirmed that he did not require the information withheld under section 33(1)(b) of FOISA (a description of which the Ministers agreed could be given to him).

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 30(b)(i) and (ii) - Prejudice to effective conduct of public affairs

13. In order for the Ministers to rely on these exemptions, they must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
14. There is a high standard to be met in applying the tests in the section 30(b) exemptions. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

15. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely there would need to be at least a significant probability of it occurring. Each request must be considered individually.

Factors to consider

16. The Commissioner's guidance states that when assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
 - (i) The identity or status of the author and/or the recipient. There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day to day professional functions, for example, then the risk of substantial inhibition may well be diminished.
 - (ii) The circumstances in which the advice or views were given. The context in which the communication took place might be relevant: for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) The sensitivity of the advice or views. The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies.
 - (iv) Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken.
17. The Commissioner notes that the information withheld under these exemptions consists of Scottish Government internal email exchanges and briefing notes.
18. The Ministers submitted that, for the most part, those inhibited from providing free and frank advice and/or views would be Scottish Government officials. In specific cases, the inhibition would apply to a Cabinet Secretary, Scottish Enterprise staff and DFC staff. The Ministers stated that these individuals would not have expected their comments to be disclosed into the public domain and would very likely either not have made the comments in question, or changed or excluded substantial aspects, had they known the comments would be publicly available.
19. The Ministers explained that much of the withheld information consisted of informal exchanges between officials seeking to develop the Scottish Government's position on whether or not to provide the funding in question, and in some cases the individuals were providing their own personal views. The Tourism and Major Events Team had consulted a number of colleagues for advice on providing funding and it was important that those officials were able to offer free and frank advice or views, both at an initial stage and again on the basis of further information.
20. The Ministers went on to argue that disclosing people's initial comments, not provided on the basis of significant thought or analysis of background information, would be likely to cause significant harm and be misinterpreted, particularly where their views and advice moved on as they were able to consider the options in more detail. If people knew that such comments were likely to be disclosed in future, they would be much more wary of making those types of

comments, without having had the chance to fully consider all the relevant information first. Given that views often needed to be formulated quickly within the Scottish Government, this would make it harder to develop such views based on the input from a range of teams.

21. With regard to the free and frank advice provided to officials, and relayed to the Cabinet Secretary, the Ministers stated that disclosure would be likely to deter State Aid Unit staff (in particular) from providing frank advice at the initial stages of a developing funding proposal. This, in turn, would mean that officials would not be as well informed if they were developing funding proposals with state aid implications.
22. The Ministers noted that the advice provided to the Cabinet Secretary was free and frank advice on a sensitive proposal. Disclosure of this, they argued, would be likely to cause significant harm to effective decision making on policies and funding proposals.
23. The Ministers also highlighted the importance of free and frank discussions on how to draft press lines and which lines to take, if needed, without having to disclose initial draft lines which were not used publicly. They made specific reference to sensitive advice to the Cabinet Secretary about the strategy for handling communications around the grant. Ministers submitted disclosure of this information would, in future, significantly inhibit officials from putting similar comments in writing and from exchanging similar drafts. This, they believed, would make it much harder to agree press lines efficiently and effectively, as people would be more reluctant to produce initial drafts without being confident that their lines to take were correct and reflected the up to date position.
24. The Commissioner has considered all of the submissions made by the Ministers, along with the withheld information. She has considered the nature of the information, including the terms in which views and advice are expressed, and the context in which they were provided.
25. In all the circumstances of this case, the Commissioner accepts that disclosure of the withheld information would be likely to result in substantial inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, as argued by the Ministers. As a result, she is satisfied that all of this information is exempt from disclosure in terms of section 30(b)(i) and 30(b)(ii) of FOISA.
26. The Commissioner must now go on to consider the application of the public interest test, as set out in section 2(1)(b) of FOISA. Before the information can be withheld under this exemption, the Commissioner must be satisfied that the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest test

27. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Ministers' submissions

28. The Ministers submitted that there was a strong public interest in avoiding significant inhibition of officials from providing free and frank advice and views, throughout the development of proposals. If officials did not feel comfortable expressing their views, then key points or issues could be missed in similar situations in future and that would not support the public interest in ensuring effective and sound decisions making.

29. The Ministers also recognised a degree of public interest in disclosing the information, given the level of interest in the grant funding provided to DFC and the fact that disclosure would promote openness and, in some cases, might help inform public debate about the provision of the grant.
30. The Ministers concluded that the public interest in disclosure was outweighed by the strong public interest in allowing officials and Ministers (and external stakeholders, where appropriate) a private space to have free and frank exchanges to help Ministers to reach a final decision based on sound and comprehensive advice.

Mr Gordon's submissions

31. Given the importance of following the public pound and of T in the Park as an employer and contributor to the local economy, Mr Gordon considered the public interest to be firmly in favour of disclosure. Mr Gordon also understood that further information about the funding had entered the public domain since he made his request, for example, through publication of DFC's 2014 accounts and the note of the Education and Culture Committee meeting on 29 September 2015.

The Commissioner's conclusions

32. The Commissioner has considered the public interest arguments put forward by both the Ministers and Mr Gordon. She must consider the implications of disclosure in response to Mr Gordon's request, in other words (at the latest) at the time of the Ministers' review.
33. She considers there is a strong public interest in Ministers being able to receive informed advice to enable them to make informed decisions. In the Commissioner's view, the prospect of disclosure of such advice in the near future would be detrimental to informed decision making and that would not be in the public interest.
34. The Commissioner understands that Mr Gordon, and indeed the general public, have an interest in how public funds are spent. While disclosure would increase transparency and give a wider understanding of the issues considered by Ministers and their officials, she is not persuaded that this outweighs the public interest in withholding the information, as highlighted in the previous paragraph.
35. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information was outweighed by that in maintaining the exemptions in section 30(b)(i) and 30(b)(ii) of FOISA. Consequently, she is satisfied that the Ministers were correct in withholding the information under these exemptions.

Section 30(c) - Prejudice to effective conduct of public affairs

36. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
37. The prejudice in question must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, and not simply

that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

38. The Commissioner notes that the information withheld under this exemption consists of internal Scottish Government briefings and emails, briefings from DF Concerts to the Scottish Government and emails between the Scottish Government and DF Concerts.
39. The Ministers explained that under this exemption they were withholding elements of various versions of DFC's paper justifying their case for receiving grant funding, officials referring to other comments DFC had made by telephone or in meetings, or draft advice to Ministers reflecting DFC's comments.
40. They stated that this was information that DFC had provided in confidence and the redacted elements were particular areas DFC had expressed concerns about disclosing. They provided examples. They highlighted potential harm to the effective conduct of government business if the information were to be disclosed, as it would make DFC and similar businesses more reluctant to share similar information in future. It would also be likely to harm DFC's relationship with partners whose support and input it required to deliver T in the Park.
41. Without such detailed information from stakeholders such as DFC on the issues and costs they were facing, the Ministers explained, it would be extremely difficult to develop a clear position on whether or not financial support could be justified. This would deter such organisations from engaging with the Scottish Government and from providing sensitive information. The process of securing organisations' trust and obtaining key relevant information would therefore be made harder and more time consuming, and the ultimate result might be organisations not receiving funding in future where there was a legitimate public interest in that funding being provided. In turn, there might be wider economic and cultural benefits that would have resulted from funding but which would not then materialise.
42. Having considered the nature and content of the withheld information, and the submissions provided, the Commissioner accepts that disclosing the information would be likely to cause substantial prejudice to the effective conduct of public affairs, given the need for open and productive discussions between the Scottish Government and stakeholders such as DFC and others.
43. The Commissioner therefore accepts that the Ministers were entitled to apply the exemption in section 30(c) of FOISA to the withheld information. As indicated above, the exemption is subject to the public interest test.

Public interest test

The Ministers' submissions

44. The Ministers acknowledged a level of public interest in the grant funding provided to DFC, in order to promote openness and inform debate. They were of the view that this had been for the most part addressed by the disclosure of the unredacted parts of the 628 pages of information published on the Scottish Government website.
45. The Ministers went on to argue that there was a strong public interest in maintaining trust and good working relationships with companies such as DFC, whose activities had a significant positive impact on the Scottish economy. They stated that it was not in the public interest to deter such companies from sharing sensitive information with the Scottish

Government in future, in relation to proposals for funding or any other issues. The Scottish Government needed to be well informed about key issues facing such companies and to have good working relationships with them in order to deliver many of its economic, cultural and tourism related objectives effectively.

46. The Ministers also submitted that there was a strong public interest in not damaging DFC's relationships with its key stakeholders, where information had been provided in confidence based on sensitive discussions with those stakeholders.
47. Mr Gordon's public interest submissions are as noted above, in relation to section 30(b) of FOISA.

The Commissioner's conclusions

48. The Commissioner accepts there is a general public interest in transparency and accountability, particularly in areas involving spending from the public purse.
49. Nevertheless, the Commissioner must also acknowledge the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the effect of disclosure on the relationship of trust and confidence between the Ministers and their stakeholders.
50. On balance, having taken account of all the submissions before her, the Commissioner is of the view that the public interest in withholding the information (and maintaining the exemption in section 30(c) of FOISA) outweighed that in disclosing it.
51. The Commissioner therefore finds that the Ministers were entitled to withhold the information under section 30(c) of FOISA.
52. The Commissioner is not required to go on to consider the application of section 36(2) of FOISA in this case, as she has accepted the application of section 30(c) to all of the information withheld under that exemption.

Section 36(1) of FOISA - Confidentiality

53. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
54. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled.
 - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
55. The Ministers submitted that the information withheld under this exemption was advice from a professional legal adviser acting in that capacity. The material was legal advice on the state aid position of the proposed grant, which had not been disclosed publicly in full or in summary. It was therefore, the Ministers asserted, subject to legal advice privilege.

56. Having considered the content of the withheld information and the circumstances under which it was obtained, as explained by the Ministers, the Commissioner is satisfied that the information meets the conditions set out in above for legal advice privilege to apply.
57. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.

The public interest

58. While accepting a public interest in disclosure in the interests of transparency, and to inform public debate, the Ministers submitted that any such interest was outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, ensuring that Ministers and officials were able to receive legal advice in confidence, like any other public or private organisation. They highlighted a vital public interest in ensuring that they could defend their legal interests.
59. The Ministers believed it was clearly in the public interest that decisions should be taken by the Scottish Government in a fully informed legal context. Ministers and officials therefore needed high-quality, comprehensive legal advice for the effective conduct of their business which needed to be given in context. Without such legal advice, given in the knowledge that it would be kept in confidence, the quality of their decision making would be much reduced.
60. The Ministers went on to submit that there was a public interest in ensuring that the Scottish Government's position on any issue was not undermined by the disclosure of legal advice. Legal advisers, the Ministers stated, needed to be able to present the full picture to their clients, as it was in the nature of legal advice that it often set out the possible arguments both for and against a particular view, weighing up their relative merits.
61. Mr Gordon's public interest submissions are as noted above in relation to section 30(b) of FOISA.
62. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and willful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
63. After careful consideration, the Commissioner is satisfied that none of the considerations set out above (or any others of comparable weight) apply here.
64. 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. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the

Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

65. On balance, the Commissioner accepts that the greater weight should be attached to the arguments which would favour withholding the information. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in disclosing the information was outweighed by that in maintaining the exemption in section 36(1). Consequently, she finds that the Ministers were entitled to withhold the legal advice under that exemption.

The Ministers' handling of the request

66. In his application, Mr Gordon stated that the way in which the Ministers released the information to him (by way of publication on their website) made it extremely hard to know which FOISA exemptions had been applied to which parts of the redacted information.
67. The Commissioner considers it would have been good practice, by way of advice and assistance, for the Ministers to have provided Mr Gordon with a schedule outlining which exemptions had been applied to which redactions. It would be helpful for the Ministers (and indeed all public authorities) to adopt this practice when providing information in response to requests, particularly where there is a large amount of withheld information and different exemptions are being applied to different parts.

Decision

The Commissioner finds that, in the respects specified in Mr Gordon's application, the Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Gordon.

Appeal

Should either Mr Gordon or the Ministers wish to appeal against this decision, they have the right to 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.

Rosemary Agnew
Scottish Information Commissioner

04 April 2016

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.

...

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.

36 Confidentiality

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

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