



Scottish Information
Commissioner

Decision 057/2005 – Mr William Alexander and the Scottish Executive

Request for information relating to the commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

Applicant: Mr William Alexander

Authority: The Scottish Executive

Application: 200500979

Date of Decision: 24 November 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 057/2005 – Mr William Alexander and the Scottish Executive

Request for information relating to the commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 – information withheld under section 29(1)(a), (b) and (c) – Formulation of Scottish Administration policy etc. – information exempt under section 25(1) – Information otherwise accessible – information withheld under section 28(1) – Relations within the United Kingdom - information exempt under section 30(a), 30(b)(i) and (ii) and 30(c) Prejudice to effective conduct of public affairs – information exempt under 36(1) – Confidentiality – information exempt under section 38(1)(b) – Personal information.

Facts

Mr Alexander contacted the Scottish Executive to ask for any information it holds regarding the commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. These sections have never been brought into force. The Scottish Executive Justice Department withheld the information requested, relying largely upon the exemptions in section 29(1)(a) and (b).

Outcome

The Commissioner found that the Scottish Executive was justified in withholding some of the information under the exemptions listed above, but that some of the information should be released on the grounds that it did not fall under an exemption. In addition, the Commissioner ordered the release of other information on the basis that, although it was exempt, the information should be released in the public interest.



Appeal

Should either the Scottish Executive or Mr Alexander 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 of receipt of this notice.

Background

1. Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (the Miscellaneous Provisions Act), which have not yet been brought into force, set out arrangements by which rights to conduct litigation and rights of audience can be granted to members of a professional or other body. This would open up competition in the provision of legal services. Bodies seeking such rights for their members must draw up a scheme for approval by the Lord President of the Court of Session and the Scottish Ministers.
2. On 5 January 2005, Mr Alexander contacted the Scottish Executive (the Executive) to ask for any information it held regarding the commencement of sections 25 to 29 of the Miscellaneous Provisions Act.
3. Mr Alexander asked for:
 - a) information including, but not restricted to, details of any advice given to Ministers and notes of meetings;
 - b) this information to include the source of the suggestion that commencement of sections 25 to 29 would be a burden on the courts; whether this view was taken regarding all the courts in Scotland and, if not, which courts;
 - c) information about a meeting or meetings with the Lord President, intimated by officials in January 1997;
 - d) information about a request made by Ross Finnie MSP on 10 January 2003 to the Justice Minister Jim Wallace, asking for clarification on why a commencement order for sections 25 to 29 of the Miscellaneous Provisions Act had not been brought in by the Executive.



4. The Executive replied on 7 February 2005. Its letter informed Mr Alexander that information relating to points a) and b) above was exempt from disclosure under section 29(1)(a) and (b) of the Freedom of Information (Scotland) Act 2002 (FOISA), which allows information to be withheld if it relates to the formulation or development of government policy or to Ministerial communications. The letter also advised Mr Alexander that information relating to c) was not held and that information relating to d) was exempt under section 29(1)(b) apart from a copy of the letter from Mr Finnie and the subsequent reply, which had already been provided to Mr Alexander.
5. Mr Alexander asked the Executive to review this decision (letter wrongly dated 5 January 2005; received by the Executive on 10 February 2005).
6. On 10 March 2005, the Executive wrote to Mr Alexander with the results of the review. While it upheld the original response regarding points c) and d), after review 32 documents relating to points a) and b) were identified where release would be in the public interest, subject to redaction (deletion of information) in some cases. The Executive also looked in more detail at the documents withheld and revised its decision regarding the relevant exemptions in many instances.
7. On 11 March 2005, Mr Alexander applied to me for a decision on the information still withheld from him. He pointed out that the equivalent English legislation was commenced fifteen years ago and argued that there is significant public interest in understanding why, in Scotland, officials have yet to commence part of an Act of Parliament. An Investigating Officer was subsequently assigned to this case.

The Investigation

8. Mr Alexander's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
9. A letter was sent to the Scottish Executive Justice Department on 13 April 2005, giving notice that an appeal had been received and that an investigation into the matter had begun.



10. The Executive was asked to supply:
 - a) copies of all redacted documents provided to Mr Alexander and all documents withheld from him, with an explanation of which exemption had been applied and the reasons for applying the exemption.
 - b) an explanation of why the Executive believed that any information relevant to Mr Alexander's request would be held in the five files on which the Executive's response to him was based and in no others.
 - c) an explanation of how the Executive established that no information was held regarding a meeting with the Lord President which had been planned in January 1997.
11. In response, the Executive
 - a) provided copies of the redacted documents sent to Mr Alexander, with copies of the original unedited documents, and explained why the redactions had been made. Copies of documents completely withheld from Mr Alexander were not provided at this stage.
 - b) provided schedules of documents relating to the five files spanning the period 1995 to 2005 which had been considered in responding to Mr Alexander's request. The Executive explained that these five files were considered because they were listed on the file index held by the relevant branch in the Access to Justice Division and covered the subject matter requested. Since then, the branch had become aware that the pre-1995 papers on this particular topic were held in general files dealing with the commencement of the Miscellaneous Provisions Act, and staff had scrutinised these files too.
 - c) explained that there was nothing in the files to indicate that the meeting with the Lord President had actually taken place. Staff working in the policy area at the time had been contacted and had no recollection of the meeting taking place.
12. Given the number of documents withheld from Mr Alexander, the investigating officer arranged to visit the Justice Department to establish whether it was necessary for copies of each document to be provided. This was useful in gaining an overview of the subject matter and also allowed the investigating officer to verify that documents marked as "outwith scope of request" did indeed meet this description. However, the need to consider the particular exemptions applied to each document meant that the officer was unable to make recommendations to me on the basis of this initial inspection of the files.
13. I note that the investigating officer found a document within one of the files which should have been considered in the response to Mr Alexander's request. This has now been released to Mr Alexander by the Executive.



14. Given the large number of documents involved, the investigating officer asked the Executive to supply Mr Alexander with a complete list of the documents withheld from him, in an attempt to narrow the scope of the investigation to focus on the documents Mr Alexander was most interested in. The Executive agreed to do this. However, after receiving the list, Mr Alexander confirmed that he would like access to every document withheld from him.
15. The Executive then supplied the investigating officer with copies of all documents withheld from Mr Alexander.

The Commissioner's Analysis and Findings

Application of exemptions

16. The Executive has cited 11 different exemptions in relation to the information withheld from Mr Alexander, as below:
 - section 25 (information otherwise accessible)
 - section 28(1) (relations within the United Kingdom)
 - section 29(1)(a), 29(1)(b) and 29(1)(c) (formulation of Scottish Administration policy etc.)
 - section 30(a), 30(b)(i), 30(b)(ii), and 30(c) (prejudice to effective conduct of public affairs)
 - section 36(1) (confidentiality) and
 - section 38(1)(b) (personal information).
17. I commend the decision taken by officials in the Justice Department to release some information even where they believed that an exemption could apply, but where there was no strong public interest in withholding it.
18. Before considering the exemptions cited by the Executive, I will set out the general background to this case. I will then consider whether the exemptions applied can be justified in each case, both in terms of their relevance to the information withheld and taking into account the Executive's arguments that the public interest is best served by withholding the information.



Background to the case

19. As stated above, sections 25 to 29 of the Miscellaneous Provisions Act would extend the right to conduct litigation and the rights of audience to members of a professional or other body, opening up competition in the provision of legal services. Bodies seeking such rights for their members must draw up a scheme for approval by the Lord President of the Court of Session and the Scottish Ministers.
20. Mr Alexander has pointed out that the effect of commencing sections 25 to 29 would be to allow bodies such as trades unions or legal advocacy services to represent clients in court. He believes that this would make legal representation more accessible to people on low incomes who are currently deterred from seeking legal advice from solicitors for fear of the cost.
21. The information already released to Mr Alexander shows that in 1995 the Secretary of State for Scotland had reached agreement with the Lord President that work on the commencement of sections 25 to 29 should start in June 1996. In the first half of 1997, this decision was reversed. The Executive has commented that 1997 sees the beginning of a phase of policy development which has not reached a final decision. The information released to Mr Alexander does not fully reveal all the reasons why sections 25 to 29 have not been commenced.
22. In 2004, the Executive set up a working group to carry out research relating to the legal services markets in Scotland, with membership drawn from a wide range of organisations. Paragraph 18 of the minutes of the first meeting of the group states:

”Rights of audience and rights to conduct litigation had been included as a specific issue in the remit as the Executive wished to clarify the case for commencing Sections 25 to 29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.”

The working group was originally due to report its findings by May 2005, but has yet to produce its final report. It is now expected that the final meeting of the Working Group will be in late November 2005, with the final report to be published some time after that meeting.



The exempted information

23. The information already released by the Executive shows that in 1995 it was agreed that work on the commencement of sections 25 to 29 would start in June 1996. As mentioned above, this decision was reversed in the first half of 1997. The Executive's view (as stated above) is that 1997 saw the beginning of a phase of policy development which has not reached a final conclusion. The Executive has already released most of the information it holds pre-dating January 1997 to Mr Alexander on the grounds that, with the passage of time, there is no longer any public interest in withholding it.
24. The Executive originally redacted the names of MSPs from the documents provided to Mr Alexander, but has now revised this decision and expressed willingness to supply copies of the relevant documents with the redacted areas replaced. The pre-1997 information which has not been provided to Mr Alexander is either outside the scope of Mr Alexander's request or consists of third party personal data, which is exempt from disclosure under section 38(1)(b) of FOISA. The use of this exemption is considered in paragraphs 32 - 34 below.
25. This investigation is therefore mainly concerned with the information recorded between January 1997 and the date of Mr Alexander's request. Eighteen documents from this period have either been fully released, or released with personal data and information outside the scope of Mr Alexander's request redacted. Around 100 documents have been completely or partially withheld under one or more of the exemptions listed above in paragraph 16.
26. I will first examine the application of the exemptions in sections 25, 38, 36(1) and 28, before considering the exemptions in sections 29 and 30, which cover the largest number of documents in this case.

Section 25 – Information otherwise accessible

27. Several documents relating to Mr Alexander's request were withheld by the Executive on the grounds that they are exempt under section 25 of FOISA, which excludes information which is "otherwise accessible" from the general rights of access provided by FOISA. The Executive told Mr Alexander (in its letter dated 10 March 2005) that the papers withheld relate to his petition to the Scottish Parliament's Public Petitions Committee and that Committee papers and correspondence and reports of proceedings are published on the Scottish Parliament's website.
28. Although papers relating to petitions considered by the Public Petitions Committee are published on the Scottish Parliament's website, not every document withheld in this case under section 25 can be found there.



29. The Scottish Parliament has explained that where a petition is being considered by the Scottish Parliament, the Committee will in some cases agree to seek the views of the Executive. These initial letters from the Scottish Parliament to the Executive are seen as administrative documents and are not published on the website. Responses to the Committee's requests have been published on the website since 10 May 2004, with the "Meetings Papers" for the date on which they are considered.
30. The Scottish Parliament has confirmed that its publication scheme does not cover those administrative letters relating to petitions which are not published on the website.

Conclusion

31. I find that the following documents are not available on the Scottish Parliament's website or through the Scottish Parliament's publication scheme and should not have been withheld under section 25 of FOISA:

LGA 1/35 part 3, documents 43 and 49

LGA 1/35 part 4, documents 4, 19, 24, 26, and 31

LGA 1/35 part 5, documents 4, 9, 10, 12, 17, 23, 24, and 25

Section 38(1)(b) – Personal information

32. As mentioned in paragraph 6, after reviewing Mr Alexander's request, the Executive decided that 32 documents could be entirely or partially released. In twelve instances, information was redacted because it was deemed to be third party "personal data" which was exempt from disclosure under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i)) on the basis that release would breach one of the data protection principles.
33. In several cases the information withheld consisted of the names of MSPs and Ministers involved in the correspondence. The Executive has now told my Office that it accepts that where MSPs and MPs are acting in their official capacity the release of their names in correspondence would not breach the data protection principles, and that the exemption has been misapplied in such cases. However, Mr Alexander has informed me that he does not require the Executive to provide copies of the relevant documents with the redacted areas replaced.
34. I have also found two other cases where information has been wrongly withheld under this exemption: documents LGA 1/35 part 4 document 7 and LGA 1/35 part 5 document 6. The information withheld relates to a person acting on behalf of a professional organisation. As with the names of MSPs, the release of the name will not breach the data protection principles. I require the Executive to provide Mr Alexander with an unredacted copy of these documents.



Section 36(1) - Confidentiality

35. Section 36(1) can be applied to information about which a claim of confidentiality of communications could be maintained in legal proceedings. It covers advice from a solicitor to a client and information passed by a client to their solicitor. The public authority, as client, has the right to waive confidentiality of communications, and must waive it where it is in the public interest to do so, as this exemption is subject to the public interest test.
36. The Executive has argued that “Disclosure of legal advice has a high potential to prejudice the Executive’s ability to defend its legal interest. It is in the public interest that the provision of legal advice to the Executive is comprehensive and fully recorded in writing as policy develops. There is a risk that this is compromised by disclosure.” The Executive also stated that “...legal advice must be available which is candid, which considers in detail both negative and positive aspects, and which is not limited by fear of exposure.”
37. I accept that the documents withheld under the exemption in section 36(1) do constitute information about which a claim of confidentiality of communications could be maintained in legal proceedings. It remains for me to consider whether there is greater public interest in releasing this information than in withholding it.
38. I have identified some aspects of this case where there is a strong public interest in access to the information withheld by the Executive, discussed fully in paragraphs 78 - 87. I accept that, to some extent, the release of the documents withheld under section 36(1) would be in the public interest. However, as I have previously stated (Decision 023/2005), there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client and, as a result, I am likely only to order the release of such communications in highly compelling cases. Having considered the information in each document in relation to the public interest issues identified in paragraphs 78 - 87 below, I do not find that there is a compelling reason for these communications to be released and I have therefore decided to uphold the Executive’s use of the exemption in section 36(1) for the following documents:

LGA 1/35 Part 1 documents 4, 16 (in part), and 17 (in part)

LGA 1/35 Part 2 document 47 and 52 (in part)

LGA 1/35 Part 3 documents 28 and 32

LGA 1/35 Part 4 documents 20 and 34



39. I have decided that in the following cases the public interest issues described in paragraphs 79 - 83 outweigh the arguments for withholding information under section 36(1):

LGA 1/35 Part 1 documents 3 and 4

Other exemptions have been applied to both of these documents: these exemptions will be considered later in this decision notice.

Section 28(1) – Relations within the United Kingdom

40. Some documents were withheld from Mr Alexander under section 28(1) of FOISA, which allows information to be withheld if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Executive has argued that officials need to be able to have frank discussions with Whitehall counterparts to inform policy development and that release would prejudice substantially ongoing relations with Whitehall.
41. The main question to consider in relation to this exemption is not the nature or the content of the information in question, but whether the effect of releasing the information would substantially prejudice relations with the UK Government - although, of course, this may turn upon the nature of the information itself.
42. In this case none of the information withheld under section 28 has any protective marking to indicate that the information is in any way sensitive.
43. At a late stage in the investigation, the Executive asked for the views of the Department for Constitutional Affairs (DCA) on the possible disclosure of the documents withheld under this exemption. The DCA advised that disclosure of any of the documents would substantially prejudice relationships between the government of the United Kingdom and the Scottish Executive, by deterring officials from sharing experiences of policy operation in the future. The DCA also pointed out that the documents in question relate to an area of law reform “which remains of considerable interest and debate from a policy perspective at this current time”.



44. I have taken into account the arguments put forward by the DCA as well as those advanced by the Executive when considering whether this exemption should be upheld. However, it seems to me that neither the Executive nor the DCA has considered the exemption in relation to the specific information in each document. They preferred to take a more general view of the matter instead of considering whether the effect of releasing individual documents or pieces of information would cause substantial prejudice to relations between the Scottish Administration and the Government of the United Kingdom. As I have noted in my guidance on the use of this exemption, I require public authorities to justify the use of section 28 on a case-by-case basis, and to consider disclosing the information unless it would cause them real, actual, and significant harm. Regarding Mr Alexander's request, the information withheld under this exemption varies widely in content and sensitivity, and I am disappointed that the exemption appears to have been applied in a wholesale manner for such general reasons.
45. I accept the need for officials in the different UK Administrations to be able to have free and frank discussions about the development of policy. However, in this case the exchanges largely relate to proposed legislative changes in England and Wales (now implemented), and consist of information sharing rather than a full discussion of policy. It seems to me that the release of information which is of an uncontroversial, administrative nature is unlikely to harm relations between the Executive and the government of the United Kingdom and that, for several documents, the exemption cannot be upheld.
46. In other cases, I have accepted the application of the exemption for the reasons cited by the Executive and the DCA. However, after considering the public interest in release, in relation to the issues identified in paragraphs 79 - 83 below, I have decided that only the following documents should be withheld under this exemption:

LGA 1/35 part 1 document 5 (in part), 21 and 24 (in part) (see Appendix 1 for details)

LGA 1/35 part 3 document 25.

47. I consider that the use of the exemption in section 28(1) cannot be justified in relation to the content of the following documents:

LGA 1/35 part 1 documents 9, 25, 26, 32 and 33

As no further exemptions have been applied to document 9 of LGA 1/35 part 1, it should be released. Other exemptions have been applied to the remaining documents: these are considered elsewhere in this decision notice.



Section 29(1)(a) – Formulation or development of government policy

48. Most of the documents in this case have been withheld under section 29(1)(a) or 29(1)(b), often in conjunction with other exemptions. Section 29(1)(a) exempts information if it relates to the formulation or development of government policy, and section 29(1)(b) exempts Ministerial communications. In both cases the public interest in withholding or releasing the information must also be weighed up before taking a final decision.
49. Regarding the exemption in section 29(1)(a), the first question to consider is whether this correspondence relates to the development or formulation of policy. It could be argued that the policy has already been agreed by Parliament and that sections 25 to 29 of the Miscellaneous Provisions Act constitute a record of that policy decision. I think it is more accurate to say that the discussions about implementing sections 25 to 29 constitute the final area of policy development on this matter.
50. It is possible to distinguish several stages within this final area of policy development. The Executive has identified January 1997 as the point at which the current phase of policy development started, and has pointed to submissions made to Ministers in June 1997, March 2001 and February 2003 as evidence that active policy development and review has taken place during this time, even though the policy seems to have been to take no action on commencement of sections 25 to 29 but to keep the issue under review.
51. I accept the Executive's argument that a decision not to act on an issue can constitute a policy. However, I do not accept the Executive's contention that there is a seamless process of policy formulation dating from 1997. In May 1997 Labour won a general election and took power from the former Conservative administration. In 1999 the devolved Scottish Parliament was officially convened with a Labour/Liberal Democrat coalition in power. In both instances officials would have been responsible for briefing Ministers and establishing whether the new administration had a different policy on commencing sections 25 to 29.
52. After considering the information relating to this case it seems to me that a distinct and active phase of policy development on this issue started in February 2003. I have therefore taken the view that officials' discussions on this matter since that time should be regarded as ongoing, active policy development. In most cases, I have not found the public interest in the records of those discussions to be strong enough to overturn the exemption in section 29(1)(a), which allows information about the formulation or development of government policy to be withheld.



53. I regard information pre-dating this period as less sensitive because it belongs to a superseded phase of policy formulation, and I have come to the view that the public interest in the information more readily outweighs the section 29(1)(a) exemption. I consider that, in general, it would no longer compromise policy development if the information withheld under section 29(1)(a) and pre-dating February 2003 was to be released.
54. The Executive is not required to show the release of the information would substantially prejudice the formulation of government policy in order to justify withholding information under section 29(1)(a). However, the fact that harm is less likely to be caused by release of information at this stage is one of the factors I have considered in weighing up whether the public interest would be best served by withholding or releasing the information.
55. As noted above, I am satisfied that in most cases the information withheld under section 29(1)(a) does relate to the formulation or development of government policy, even where the particular stage of policy development to which the information relates has now been superseded. However, there are a few documents which have been wrongly withheld under this exemption as the information within them does not relate to policy formulation or development. These documents are:

LGA 1/35 part 2 document 47

LGA 1/35 part 3 documents 28, 29, 31, 44

Other exemptions apply to some of these documents and are considered elsewhere in this decision notice. Regarding the information in LGA 1/35 part 3 documents 29, 31, and 44, I have found that none of the exemptions cited have been correctly applied. There is therefore no requirement to consider the public interest in withholding or releasing the information, and these documents should be released.

56. After considering the public interest issues identified in paragraphs 78 - 87 below, I have concluded that the exemption in section 29(1)(a) should not be upheld in respect of all or part of the information in the documents listed below. For full details of information to be released see the schedule of documents at Appendix 1.

LGA1/35 part 1 documents 3, 4, 7 (part of document), 8, 10, 12, 13, 16, 17, 18, 19, 20, 24, 25 (part of document), 30, 32, 33, 36, 38, 43

LGA 1/35 part 2 documents 44, 46, 52, 63, 64, 66, 67

LGA 1/35 part 3 documents 24 and 38

LGA 1/35 part 4 documents 7, 10, 11, 19 (manuscript note), 20, 30, 34

LGA 1/35 part 5 document 13

In several instances other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.



57. I have concluded that the exemption in section 29(1)(a) should be upheld for the following documents, as the contents are not of sufficient public interest (as discussed in paragraphs 78 - 87 below) to justify release:

LGA 1/35 part 1 documents 11, 26, 32, 33, and 39

LGA 1/35 part 2 documents 5, 6, 7, and 53

LGA 1/35 part 3 documents 25, 26, 32, 33, 34, 35, and 46

LGA 1/35 part 4 documents 2, 3, 27, 28 (in part), 29, 32, 33 and 35

LGA 1/35 part 5 documents 1, 2, 3, 16, 26

Section 29(1)(b) – Ministerial communications

58. Section 29(1)(b) exempts “Ministerial communications” from disclosure. Section 29(5) explains that “In the definitions of “Ministerial communications” and “Ministerial private office” in subsection (4), “Minister” means a member of the Scottish Executive or a junior Scottish Minister.”
59. Several of the documents withheld by the Executive under this exemption pre-dated 1 July 1999, the date on which the Scottish Parliament and the Executive were officially convened. The Executive has told my Office that it now accepts that, for this reason, the exemption in section 29(1)(b) was wrongly applied to documents 5, 6 and 7 of file LGA 1/35 part 2. I also consider it to have been misapplied to documents 30, 33, 38, and 39 of file LGA 1/35 part 1, which also pre-date the devolved administration. Other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.
60. I am satisfied that the exemption for information relating to Ministerial communications has been correctly applied to document 38, LGA 1/35 part 3, and that in this case the public interest in withholding the information and maintaining the convention of the collective responsibility of Scottish Ministers outweighs the public interest (as identified in paragraphs 78 – 87 below) in releasing it.

Section 29(1)(c) – Provision of advice by Law Officers or request for such advice

61. Information relating to the provision of advice from any of the Law Officers or any request for such advice to be provided can be exempted from disclosure under section 29(1)(c). The Executive has applied this exemption to nine documents. However, seven of those documents relate to advice from the Lord President of the Court of Session, who is not one of the Law Officers covered by this exemption. The Executive has accepted that this exemption was misapplied to documents referring to the Lord President.



62. Two documents (LGA 1/35 part 4, documents 32 and 33) contain advice from the Lord Advocate and clearly fall within the scope of 29(1)(c), while another document (LGA 1/35 part 4, document 35) makes reference to the Lord Advocate's views. I accept that there is a strong public interest in protecting the privacy of communications where advice is provided by other bodies or officials, so that such advice can continue to be provided without inhibition in future and have therefore upheld the decision to withhold this information under the exemption in section 29(1)(c).

Section 30(a) – Prejudice to the convention of collective responsibility of Ministers

63. Section 30(a) exempts information if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. The Executive originally applied this exemption to some information pre-dating the devolved administration in Scotland, but has told my Office that it now accepts that this exemption was misapplied to documents 13 and 14 of file LGA 1/35 part 1. I consider that, for the same reason, this exemption was also misapplied to documents 15, 17, 18 and 19 of this file as these documents date from 1997.
64. Documents 29 and 31 in LGA 1/35 part 3 mention certain Ministers by name but give no information about their views or opinions and therefore could not substantially prejudice the convention of collective responsibility. I do not uphold the application of section 30(a) to the information in these documents.
65. I accept that section 30(a) has been correctly applied to document 53 in LGA 1/35 part 2 and to documents 38 and 50 in LGA 1/35 part 3, and I do not consider the public interest (as discussed in paragraphs 78 - 87) in releasing these documents to be strong enough to outweigh the exemption.

Sections 30(b)(i) and (ii) – Inhibit substantially provision of advice or exchange of views

66. Sections 30(b)(i) and (ii) allow information to be withheld if it would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
67. In applying these exemptions the main consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views. The Executive's guidance to its staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication in future would be less likely, or would be more reticent or less inclusive.



68. The Executive has argued that disclosure of any advice or opinion is likely to constrain officials and other stakeholders from providing candid advice in future, which will substantially prejudice the conduct of public affairs by jeopardising the effectiveness of government. The Executive appears to have treated the exemptions in section 30(b)(i) and (ii) as class exemptions, rather than assessing whether the release of the particular advice or opinion contained within each document would be capable of having an inhibiting effect. I do not accept that the release of any statement of advice or opinion in one case necessarily implies that such information would be released in other cases. Each case brought to me for decision is assessed on the facts and circumstances surrounding that particular case. My views on the use of this exemption are discussed more fully in my decision 041/2005.

69. As the Executive has not provided me with specific reasons why each document withheld under these exemptions would substantially inhibit the provision of advice or opinion in future, I have made my own assessment of the effects of releasing the information, based on the apparent sensitivity of the information and its relationship to the public interest issues identified in paragraphs 78 - 87. I have found that the exemptions in 30(b)(i) and 30(b)(ii) have been misapplied to the following documents:

LGA 1/35 part 3 documents 5, 31, 33, 35, 46;
LGA 1/35 part 4 document 28 (in part)
LGA 1/35 part 5 document 1

70. In the following cases, I have found that the exemptions in sections 30(b)(i) and (ii) were correctly applied, but the public interest issues identified in paragraphs 78 - 87 below outweigh the exemption.

LGA 1/35 part 1 documents 3 and 8
LGA1/35 part 4 document 35
LGA 1/35 part 5 documents 2 and 26

In several instances other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.

71. In the following case, I have concluded that the exemption in section 30(b)(i) should be upheld and part of the information withheld:

LGA 1/35 part 4 document 28 (in part)



72. I have also decided that certain information should be withheld under section 30(b), even although the Executive has not cited this exemption in relation to the documents concerned. I consider that all or part of information in the documents cited below would, if released, be likely to inhibit substantially the free and frank provision of advice or free and frank discussion. Full details are in the schedule of documents at Appendix 1.

LGA 1/35 part 1 documents 16 and 36

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

73. Section 30(c) allows public authorities to withhold information that would “otherwise prejudice substantially the effective conduct of public affairs”. This is a broad exemption, and I expect any public authority citing it to show what specific harm would be caused to the conduct of public affairs by the release of the information.

74. As with sections 30(b)(i) and (ii), I do not consider that the Executive has provided me with sufficient justification for the use of the exemption in 30(c) where it has been applied to documents in this case. I have therefore made my own assessment of the likely effects of releasing the information concerned, based on the nature of the information and its relevance to the public interest issues identified in paragraphs 78 - 87.

75. On this basis I have decided that some of the information in the following documents should be withheld under this exemption:

LGA 1/35 part 1, parts of documents 4, 7, 10, and 16; all of document 17;

LGA 1/35 part 2, documents 63 (in part), 65 and 66 (in part)

LGA 1/35 part 3 document 26

LGA 1/35 part 4, documents 2, 3, and 14

76. I have decided that the public interest (as discussed in paragraphs 78 - 87 below) in the following documents is sufficiently strong to justify their release, even though the exemption in section 30(c) has been correctly applied:

LGA 1/35 part 1 documents 13 and 38

LGA 1/35 part 2 documents 63 (in part), 64 and 66 (in part)

LGA 1/35 part 4 document 10

Other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.



77. I consider that the exemption in section 30(c) has been misapplied to the following documents:

LGA 1/35 part 1 documents 11 and 12
LGA 1/35 part 2 documents 5, 44 and 46

Other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.

Public Interest in access to the information requested

78. I consider the public interest in the information withheld to be mainly focused on the following areas:

a) the reasons for the postponement of legislative measures passed by a democratically elected parliament some 15 years ago.

b) the general debate around the issue of competition in the legal services market.

The delay in commencing sections 25 to 29

79. It is not uncommon for sections of an Act of Parliament to have commencement delayed in this way (at the time of writing, 39 Acts passed between 1990 and 1995 have sections which have never been brought into force). However, it seems to me to be reasonable for citizens to question why legislation has still not been commenced after 15 years. A democratic society is entitled to expect that legislation passed by its elected representatives in Parliament will be brought into force unless there are good reasons to for not doing so, and citizens are entitled to know those reasons unless there is a greater public interest in keeping them secret.

80. Mr Alexander has pointed out that the equivalent legislation came into force in England and Wales 15 years ago under the Court and Legal Services Act 1990, and that plans for increasing competition still further are currently being considered there. He believes that he should be able to challenge the reasons for the delay in Scotland, but cannot do so until he is given access to the facts behind the decision to delay commencement.

81. Documents already released show that, at several points during the last 15 years, Ministers or officials agreed that sections 25 to 29 of the Miscellaneous Provision Act should be brought into effect, and even proposed dates by which work on implementation should start. This strengthens the public interest in gaining access to information which would fully explain why such agreements were overturned or set aside.



82. Mr Alexander is not the only person to have asked why these measures have never been commenced. MSPs on the Scottish Parliament's public petitions committee asked the same question when considering a petition brought by Mr Alexander, and in 2002 the Scottish Consumer Council asked why the present policy view has been taken, expressing surprise that the provisions have never been brought into force.
83. The Executive has stated that it has already advised Mr Alexander of the Executive's reasons for not yet commencing this legislation and that release of the documents considered in this case would add little to the information in the public domain. However, it is clear to me after studying the documents in this case that the reasons for non-commencement have changed over time, and are more complex and varied than the reasons presented to Mr Alexander.

Competition in the legal services market

84. It could be argued that the implementation of sections 25 to 29 of the Miscellaneous Provisions Act has not so far been a matter of widespread national concern in Scotland. However, the issue of opening up competition in the provision of legal services has been increasingly attracting attention (including a draft directive from the European Commission in February 2004) and approaches have been made to the Executive from a range of bodies including the Scottish Consumer Council, the Chartered Institute of Patent Agents and the Office of Fair Trading.
85. The Westminster Parliament has recently announced proposals for reform of the legal profession in England and Wales, following the report received from Sir David Clementi in 2004. The government proposes to allow outside firms to own and run law firms in England and Wales - the so-called "Tesco law". Following the government's announcement, several media reports highlighted the disparity between the legal services market for consumers in England and Wales and those in Scotland.
86. Mr Alexander has argued that proper debate on the issue will not take place without general access to all the relevant information. He believes that commencing sections 25 to 29 would go some way towards obtaining affordable justice for people who have no means of paying high legal fees and who are not successful in obtaining legal aid. Mr Alexander has pointed out the differences between England and Scotland in this respect.



Public Interest – Conclusion

87. I believe that the issues considered above demonstrate a strong public interest in the release of information that would explain why sections 25 to 29 of the Miscellaneous Provisions Act have never been commenced. The exemptions applied to such information must be considered in the context of the public interest in releasing the information.

Conclusion

88. In this case I have found that the Executive was generally justified in applying the exemptions it cited, and my main consideration has been whether the public interest issues identified in paragraphs 78 - 87 are sufficient to outweigh the public interest in upholding the exemptions, or whether the public interest lies in releasing the information. In my view that there is a strong public interest in certain aspects of this matter and I have ordered the release of the information relating to those issues.
89. Where the information is less relevant to the public interest issues identified, and where I agree that an exemption applies to the information, I have generally upheld the Executive's decision to withhold the information.
90. Where the information relates to the active and ongoing development of policy (which I have identified as starting in February 2003), I have considered that the public interest generally lies in upholding the Executive's decision to withhold the information under section 29(1)(a).
91. In a few cases I have found that the Executive was wrong to cite certain exemptions in relation to the information withheld, and I have ordered the release of the information on those grounds.
92. A full list of the information to be released can be found in the appendix to this decision notice.



Decision

I find that the Scottish Executive has not dealt with the Mr Alexander's request for information fully in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA). In withholding some of the information requested by Mr Alexander it has breached section 1(1) of FOISA.

I require the Executive to provide Mr Alexander with the documents specified in the attached appendix.

I am obliged to give the Executive at least 42 days in which to supply Mr Alexander with the information as set out above. In this case, I require the Executive to take these steps within two months of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
24 November 2005



Appendix 1 – information to be released

Information to be released – LGA/1/35 part 1		
Doc No	description	OSIC decision
3	Minute from Mrs MH Brannan of 15 January 1997 to Mr Jamieson enclosing: draft minute from Mrs Brannan to PS/HD and draft letter to the Rt Hon the Lord Rodger of Earlsferry, The Lord President	Release in full
5	Minute from Miss A Bearhop of 22 January 1997 to Mrs Lewis.	Release, with redaction of paragraphs 2 and 5.
7	Minute from Mrs Brannan of 19 February 1997 to Mrs Lewis.	Release paragraphs 3 – 6. Exemptions upheld for other information.
8	Minute from Mrs Lewis of 4 March 1997 to PS/HD.	Release in full
9	Letter from Mrs Lewis of 23 April 1997 to Robert Wright Esq.	Release in full
10	Minute from Mrs M H Brannan of 13 June 1997 to PS/Mr McLeish.	Release with information from paragraph 16 to end of document restored, with exception of 20.1 and 20.2. Redact third last sentence in paragraph 17 “Their application...”. Other redactions upheld.
12	Minute from Alan Johnston PS/Mr McLeish of 18 June 1997 to Mrs M H Brannan.	Release in full
13	Minute from Rahat Nawaz, PS/ Crown Office of 24 June 1997 to Mrs MH Brannan	Release in full
16	Minute from Mrs EJ Lugton of 26 June 1997 to Miss Bearhop.	Release sentences 1 and 4 in paragraph 2.
18	Minute from Mrs MH Brannan of 24 July 1997 to PS/Mr McLeish.	Release. In paragraph 3 words between “...Section 19” and “...repealed,” are outside scope of request, as is all of paragraph 6, and can be withheld if the Executive chooses to do so.
19	Minute from Alan Johnston PS/Mr McLeish of 04 August 1997 to Mrs MH Brannan.	Release up to words “in a year’s time” – the rest is outside scope of request.
20	Letter from Mrs EJ Lugton of 04 September 1997 to Robert Wright Esq.	Release second paragraph and paragraph starting “Sections 25-29...”
24	Minute from Miss A Bearhop of 26 November 1997 to Mrs Lugton enclosing: draft minute from Mrs EJ Lugton to PS/Secretary of State and draft letter from Donald Dewar to The Rt Hon The Lord Irvine of Lairg.	Release paragraphs 1 and 3.
25	Minute from Mrs EJ Lugton of 05 December 1997 to PS/Mr McLeish and PS/Secretary of State enclosing: letter from Donald Dewar to The Rt Hon John Prescott MP	Release paragraph 3, from “Separate Scottish...” to end of paragraph.
30	Letter from Donald Dewar of 12 December 1997 to The Rt Hon John Prescott MP.	Release in full
33	Letter from Donald Dewar of 12 December 1997 to The Rt Hon	Release in full



	John Prescott MP. (duplicate of 30)	
38	Minute from Mrs MH Brannan of 19 May 1998 to PS/Mr McLeish and PS/Secretary of State.	Release paragraphs 5 to 7. Release draft letter from Donald Dewar, attached. Other information outwith scope of request..
43	Letter from Donald Dewar of 28 May 1998 to The Rt Hon The Lord Irvine of Lairg QC	Release in full

Information to be released – LGA/1/35 part 2		
Doc no.	Description	OSIC decision
5	Minute from Mrs MH Brannan of 03 July 1998 to PS/Mr McLeish and PS/Secretary of State enclosing: minute from Mrs MH Brannan to PS/Mr McLeish and PS/Secretary of State and letter from Donald Dewar to The Rt Hon The Lord Irvine of Lairg QC. (main enclosure is duplicate of doc 38 in part 1 of file)	Withhold covering minute. Release paragraphs 5 to 7 of attached minute. Other information outside scope of request.
44	Draft Minute from Mrs MH Brannan of February 2000 to PS/Minister for Justice enclosing: draft letter from Jim Wallace to The Rt Hon Lord Roger of Earlsferry.	Release in full.
46	Draft minute from Mrs MH Brannan of February 2000 to Minister for Justice enclosing: draft letter from Jim Wallace to The Rt Hon Lord Rodger of Earlsferry. (as 44 with comments)	Release in full.
52	e-mail from Gillian Russell of 09 March 2000 to Malcolm Pringle enclosing: draft minute from Mrs MH Brannan to Minister for Justice and draft letter from Jim Wallace to The Rt Hon Lord Rodger of Earlsferry. (as 44 & 46 with comments)	Withhold email. Release attached drafts with exception of section 7 of the minute.
63	e-mail from Mike West of 06 July 2001 to Malcolm Pringle enclosing: Minute from Mrs MH Brannan to Deputy First Minister and letter from Jim Wallace to The Rt Hon Lord Rodger of Earlsferry. (further draft of submission to Ministers at doc 44)	Withhold covering email. Release the attached minute in full.
64	e-mail from Mike West of 22 March 2001 to Micheline Brannan enclosing: draft Minute from Mrs MH Brannan of March 2001 to Deputy First Minister and letter from Jim Wallace to The Rt Hon Lord Rodger of Earlsferry. (draft copy as at 63)	Release both covering email and draft minute in full.
66	e-mail from Mike West of 06 July 2001 to Malcolm Pringle. (duplicate of e-mail at doc 63)	Withhold covering email. Release the attached minute in full.
67	e-mail from Malcolm Pringle of 12 July 2001 to Simon Carr.	Release, apart from last two paragraphs where public interest not strong enough to outweigh exemption.

Information to be released – LGA/1/35 part 3		
Doc no.	Description	OSIC decision
5	Scottish Parliament Written Answer from Jim Wallace of 19 September 2002 to Bill Aitken.	Release information in paragraph 3.
19	e-mail from Alison Dewar of 05 December 2002 to Nigel	Release in full



	Reeder.	
24	e-mail from Roma Menlowe of 07 February 2003 to Mike West forwarding e-mail from Valerie Macniven	Release with redaction of paragraph 5.
26	e-mail from Mike West of 11 February 2003 to Roma Menlowe enclosing: draft submission from Roma Menlowe to Deputy First Minister and letter from Jim Wallace to Rt Hon Lord Cullen.	Release in full
29	e-mail from Alison Dewar of 17 February 2003 to Mairi Caldwell	Release in full
31	e-mail from Sara Stewart of 18 February 2003 to Alison Dewar.	Release in full
43	Letter from Sarah O'Neill of 06 March 2003 to Roma Menlowe enclosing: letter from Martyn Evans to Steve Farrell.	Release in full
44	e-mail from Roma Menlowe of 06 March 2003 to Mike West.	Release. Redact second sentence and last sentence.
49	Letter from John Vickers of 13 March 2003 to Mr S Farrell.	Release in full.

Information to be released – LGA/1/35 part 4		
Doc No	description	OSIC decision
4	Letter dated 21 March 2003 from Roma Menlowe to Steve Farrell (Clerk to the Public Petitions Committee)	Release in full.
7	Letter dated 21 March 2003 from Gareth Heavisides to Mr Michael C Ralph (Chartered Institute of Patent Agents)	Release in full.
10	E-mail dated 20 May 2003 from Roma Menlowe to Mike West	Release in full.
11	E-mail dated 22 May 2003 from Alisdair McIntosh to PS/JD, enclosing Brix Ordinary Note from 22 May 2003 about the "Future Civil Justice Bill"	Release second page (Brix note) redacted to show only first paragraph and fourth bullet point.
19	Letter dated 27 June 2003 from Steve Farrell (Clerk to the Public Petitions Committee) to Roma Menlowe	Release in full, including MS note.
24	Letter dated 2 September 2003 from Mike West to Steve Farrell	Release in full.
26	Letter dated 14 October 2003 from Joanne Clinton (Assistant Clerk to the Public Petitions Committee) to Mike West	Release in full.
28	Brix Briefing Note dated 16 October 2003 (Competition Policy: Rights of Audience and Rights to Conduct Litigation for Members of Professional and Other Bodies)	Release from top to end of paragraph "Work in hand".
30	E-mail dated 30 October 2003 from Mike West to Minister for Justice	Release in full.
31	Letter dated 31 October 2003 from Mike West to Joanne Clinton (Assistant Clerk Public Petitions Committee) (follow up to doc 24)	Release in full.

Information to be released – LGA/1/35 part 5		
Doc No	Description	OSIC decision
4	Letter dated 6 February 2004 from Mike West to James Johnston (Clerk to the Public Petitions Committee)	Release in full.
6	Letter dated 3 March 2004 from Michael C Ralph to Gareth Heavisides	Release in full.
9	Letter dated 9 March 2004 from Dr James Johnston (Clerk to the Public Petitions Committee) to Mike West	Release in full.



10	Copy letter dated 15 March 2004 from W. Alexander (Glasgow) to Dr James Johnston	Release in full.
13	E-mail dated 15 April 2004 from Mike West to Minister of Justice enclosing 2 letters dated 6 February 2004 and April 2004 (draft) from Mike West to Dr James Johnston	Release email. Withhold draft letter as s25 applies.
17	Letter dated 17 May 2004 from Dr James Johnston to Mike West	Release in full.
23	Fax dated 28 May 2004 from W. Alexander to Dr James Johnston	Release in full.
24	Letter dated 30 June 2004 from Dr James Johnston to Mike West enclosing Scottish Parliament Public Petition on "Solicitors Monopoly on paid Court Representation" dated 24 January 2003 and Scottish Parliament Public Petitions Committee dated 23 June 2004, Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (PE601)	Release in full.
25	Letter dated 1 July 2004 from Mike West to James Johnston	Release in full.