



Scottish Information
Commissioner

Decision 151/2006 Mr Reiner Luyken and the Scottish Executive
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<i>Request for recommendation on Assynt Foundation</i>
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Applicant: Mr Reiner Luyken
Authority: Scottish Executive
Case No: 200600368
Decision Date: 17 August 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Decision 151/2006 Mr Reiner Luyken and the Scottish Executive

Request for copy of report to Deputy Minister for Environment and Rural Affairs – information withheld – section 30(b)(i) and (ii) applied free and frank provision of advice and exchange of views – public interest applied

Facts

Mr Luyken requested a copy of the report to the Deputy Minister for Environment and Rural Affairs dealing with the “Assynt Foundation: Land Reform (Scotland) Act 2003 - Part 2: Community Right to Buy Drumrunie Forest.” The Scottish Executive responded to this request by indicating that the information was exempt by virtue of section 30(b)(i) and (ii) in that disclosure 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. Mr Luyken was dissatisfied with this response and applied for an internal review. The Executive upheld its original position. Mr Luyken applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Scottish Executive failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the information requested by Mr Luyken.

The Commissioner found that the information should be supplied to Mr Luyken.

Appeal

Should either the Scottish Executive or Mr Luyken wish to appeal against this decision, there is a right to 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. Following *Decision 041/2005* Mr Luyken was supplied with a copy of the report “Coigach Community Company Limited: Land Reform (Scotland) Act 2003 - Part 2: Community Right to Buy Drumrunie Forest.” That report referred on several occasions to the competing bid from the Assynt Foundation.
2. On 13 December 2005 Mr Luyken wrote to the Scottish Executive (the Executive) and requested a copy of the “Report to the Deputy Minister for Environment and Rural Affairs dealing with the Assynt Foundation: Land Reform (Scotland) Act 2003 - Part 2: Community Right to Buy Drumrunie Forest” (the Report).
3. The Executive responded to this request on 17 January 2006. The Executive advised that the information was exempt under section 30(b)(i) and (ii) of Freedom of Information (Scotland) Act 2002 (FOISA) because disclosure 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.
4. The Executive indicated that the public interest in disclosure was outweighed by the need to ensure that Ministers can take decisions on the basis of the best available advice and are confident that such advice is given without reserve. The Executive indicated that publication of advice from officials might have an inhibiting effect on officials in future.
5. On 17 January 2006 Mr Luyken requested a review of this decision. He indicated that the standard in applying the public interest test in these sections was high and that submissions to Ministers should not be treated per se as a class of documents that qualify for exemption. Each case should be assessed individually. Mr Luyken indicated that there was a substantial public interest to understand how the Land Reform Act was put into operation in this instance. He also pointed to the release of the same report in respect of Coigach Community Company Limited (considered in *Decision 41/2005*).
6. The Executive responded to the request for review on 10 February 2006. It upheld its original position. The Executive advised that the Ministerial submission contributed to the deliberation process but was not the end of the work. The Executive advised that there was further communication surrounding each application which also impacted.



7. The Executive advised that the information sought was available elsewhere in a more concise form. The Executive indicated that the report was produced as part of the reasoning process but that the details of why the Assynt Foundation application was approved were freely available and could be accessed at the Register of Community Interests in Land website. The Executive provided the link and also a copy of the letter of consent issued to the Assynt Foundation which, the Executive indicated, clearly highlighted why approval was given.
8. The Executive stated that *Decision 041/2005* was not material to these considerations as each case had to be judged on its own merits.
9. Mr Luyken was dissatisfied with this response and on 12 February 2006 applied to my office for a decision.
10. The case was allocated to an investigating officer.

Investigation

11. Mr Luyken'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.
12. The investigating officer contacted the Executive on 24 February 2006 giving notice that an appeal had been received and that an investigation into the matter had begun. The Executive was asked to comment on the issues raised by Mr Luyken's case and to provide supporting documentation for the purposes of the investigation.
13. In particular, the Executive was asked to provide a copy of the information withheld from Mr Luyken, further information about the application of sections 30(b)(i) and (ii) to the information withheld and further analysis on the application of the public interest test.
14. The Executive was also asked to provide information about how its review was carried out and for any guidance it had relied on in deciding whether the information should be released or withheld.



Submissions from the Scottish Executive

15. In its letter of response of 20 March 2006 the Executive provided the investigating officer with the information requested and made a number of submissions in respect of this application.
16. The Executive advised that the Report requested by Mr Luyken was an annex (Annex A) to advice to Ministers on the Assynt Foundation Community Right to Buy Application under the Land Reform (Scotland) Act 2003.
17. The Executive provided some background to Mr Luyken's request. The Executive indicated that Mr Luyken had requested information in respect of the Coigeach Community Company Limited's application to buy Drumrunie Forrest which had not been approved. The Executive advised that three separate applications were submitted by the Assynt Foundation for Drumrunie Forest, Glencansip Forest and Glencansip Lodge. These three applications were considered together and were ultimately approved by Scottish Ministers.
18. The Executive advised that the current Report requested by Mr Luyken did not just refer to the application to buy Drumrunie Forest but considered all three applications from the Assynt Foundation together. The Executive felt that it would serve no purpose to try and exclude the parts of the Report not referring to Drumrunie Forest. To that extent the Executive advised that it had interpreted the request broadly.
19. The Executive is relying on both parts of section 30(b) to withhold this information. It set out a series of submissions in support of its application of section 30(b). I have addressed a number of specific arguments in my analysis and findings below but considered all submissions in reaching my decision on this matter.

Commissioner's analysis and findings

20. The Executive advised that the Report requested by Mr Luyken was an annex (Annex A) to advice to Ministers on the Assynt Foundation Community Right to Buy Application under the Land Reform (Scotland) Act 2003.
 21. Annex A is an appendix to a covering submission. Having considered the content of the covering submission I am content that this information, which primarily relates to presentational issues, is not the information being sought by Mr Luyken. The only exception to this is paragraphs 1 and 7.1 of this document which are reproduced in Annex A. As a result, I am satisfied that the information requested by Mr Luyken is confined to Annex A.
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22. The Executive is relying on section 30(b)(i) and (ii) to withhold the information requested by Mr Luyken. Section 30(b) states that:

Information is exempt if its disclosure:

- 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

23. I am of the view that in order to rely on section 30(b) the information withheld must either amount to an exchange of views (section 30(b)(ii)) or the provision of advice (section 30(b)(i)). It is difficult to see how information not falling within these types of information would engage the exemptions in section 30(b) given that the authority must demonstrate that future practice in these areas would be inhibited by disclosure.
24. The Executive indicated that the Report was very clearly an expression of advice and views. It pointed to paragraphs 4.5 and 4.7 of the Report which, it submitted, contained frank advice and paragraph 4.8 and paragraph 7 as examples of expression of views.
25. The Executive accepted that not every sentence of the Report contained advice or views. The Executive indicated, however, that an attempt to extricate single sentences would, possibly, result in piecemeal information being released and not be of benefit to the public. The Executive indicated that, instead, it had looked at the Report as a whole and considered the effect of its release as a whole.
26. I have looked through the Report and consider that some information does amount to an expression of views or provision of advice. However, it is also clear that most of the Report is purely factual information about the application and the application process.
27. Where a document contains both factual information and advice and opinions section 30(b)(i) and (ii) attempts should be made to extract the factual information and supply this to the applicant. In *Decision 41/2005*, for example, I ordered the release of the document with the exception of a few paragraphs which I considered were exempt under section 30(b).
28. Even if the information falls within the categories identified in section 30(b) the authority must still demonstrate that release of the information would or would be likely to inhibit substantially the free and frank provision of advice or exchange of views.



29. In its submissions to me the Executive argued that it was essential that views from both officials and outwith the Executive continued to be expressed to ensure that dialogue continued on important topics with candour. It argued that it was essential that officials and others were aware that they could offer such unencumbered advice and views. To remove such an awareness by disclosing this Report, it argued, would lead to a reduction of the ability to offer such views. The Executive submitted that there would be a suppressive effect with such reports being less inclusive of all the views and issues.
30. The Executive has submitted that this particular Report discusses a sensitive subject matter and expresses views of not only officials but of others whose views have, with expectations of confidentiality, fed into the process.
31. The Executive indicated that the test in section 30(b)(i) and (ii) was about the effect of release in the future. The Executive accepted that each case must be looked at individually, with consideration of individual circumstances and the public interest assessed on its own merits. With that in mind, the Executive emphasised that it did not see the application of the exemptions in this case to be an attempt to maintain a blanket exemption on reports of this nature. However, the Executive felt that an element to be taken into account in assessing the exemption was the protection of a process.
32. It seems to me from its submissions that the Executive is still attempting to apply section 30(b) to a class of information rather than the specific information being withheld. In *Decision 41/2005* I indicated that release of internal communications in one case should not be taken to imply that such communications will be “routinely” released in the future. The individual circumstances of each case must be taken into consideration.
33. As I emphasised in that case, advice and expressions of opinion are to be exempt from disclosure only where this would have a substantially inhibiting effect in future. In assessing the inhibiting effect disclosure might have the authority should consider:
 - a) the subject matter of the advice or opinion,
 - b) the content of the advice and opinion itself,
 - c) the manner in which the advice or opinion is expressed, and
 - d) whether the timing of release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).



34. I have looked through the information withheld in this case. As I said in paragraph 24 above I consider that the majority of the information is factual. I consider that the actual advice and opinion expressed by officials is minimal. Further, some of the advice and opinions have been published since approval of the Assynt Foundation's application and prior to Mr Luyken's request for information to the Executive.
35. The Executive identified certain paragraphs which it considered to be particularly sensitive and I will briefly address each of these. It pointed to paragraphs 4.5 and 4.7 of the Report which, it submitted, contained frank advice. I consider that the majority of the information contained in paragraph 4.5 is, in fact, factual information. Where advice is provided I do not consider it to be "free and frank" but rather confirmation that the application meets the Executive's criteria for approval. Most of the advice contained in paragraph 4.7 is reproduced in the letter to the Coigeach Community Company Ltd and published on the Register of Community Interests in Land website.
36. The Executive also identified paragraph 4.8 as containing free and frank expression of views. In particular, the Executive pointed to information which was due to be announced and not yet in the public domain. However, a Minute of the Assynt Foundation of 10 January 2006 (prior to Mr Luyken's request for information) publishes this information.
37. I am unable to see how the information contained in paragraph 7 is considered to be sensitive. The Executive has advised that this information was produced via a confidential report but there is nothing to suggest that this was the only information contained in the confidential report or why this particular information is so sensitive (or for that matter confidential). Much of the information set in paragraph 7 is in the public domain and was at the time the request was considered. In any event, given that the Assynt Foundation's application has been approved and the matter is therefore now closed I do not consider that such comments would, in the circumstances, inhibit substantially the free and frank exchange of views or the provision of advice.
38. In all of the circumstances, I consider that the majority of the information within this Report is factual information derived from the original application and feasibility report. I am unable to see how this information would fall within the scope of section 30(b) which refers explicitly to the provision of advice and the exchange of views.



39. The Report does contain some advice and expression of views. However, I have taken into account the timing of Mr Luyken's request which was subsequent to the approval of the Assynt Foundation's application. I have also considered the context in which the advice was given and the views expressed. In most cases, I find that where advice is proffered or opinions expressed they are not free and frank but rather simple confirmation that the application meets requirements and/or criteria. In all the circumstances of the case I am not satisfied that disclosure of this information would or would be likely to inhibit substantially the free and frank exchange of views or provision of advice. I find that the exemptions under section 30(b) are not engaged.

Decision

I find that the Scottish Executive failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in withholding the information requested by Mr Luyken.

The information requested (Annex A) should be provided to Mr Luyken within 45 days of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
17 August 2006