



Scottish Information
Commissioner

**Decision 185/2006 Mr Eddie Barnes (Scotland on Sunday) and
the Scottish Executive**

*Minutes of meetings between Ministers and/or officials with
Lord Irvine Laidlaw on his proposals to fund education projects in
Scotland*

Applicant: Mr Eddie Barnes (Scotland on Sunday)
Authority: Scottish Executive
Case No: 200501255
Decision Date: 13 October 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 185/2006 Mr Eddie Barnes (Scotland on Sunday) and the Scottish Executive

Request for minutes of meetings between Ministers and/or officials with Lord Irvine Laidlaw on his proposals to fund education projects in Scotland – whether disclosure would result in prejudice to effective conduct of public affairs under section 30 of the Freedom of Information (Scotland) Act 2002 – whether disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice under section 30(b)(i) – whether disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation under section 30(b)(ii)

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002: section 30(b) (Prejudice to effective conduct of public affairs).

The full text of this provision is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Barnes wrote to the Scottish Executive, requesting a copy of minutes of meetings between Ministers and/or officials with Lord Irvine Laidlaw concerning proposals to fund education projects in Scotland. The Scottish Executive identified four documents that were within the scope of Mr Barnes' request, but refused to disclose the information on the grounds that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice under section 30(b)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Scottish Executive also cited section 30(b)(ii) of FOISA as a reason for withholding the information, stating that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The decision to withhold the information was upheld by the Scottish Executive on review. Mr Barnes was dissatisfied with this response and applied to the Commissioner for a decision.



Background

1. On 8 February 2005, Mr Barnes submitted a request for information by e-mail to the Scottish Executive (the Executive). In his e-mail, Mr Barnes stated that he required “minutes of meetings between Ministers and/or officials with Lord Irvine Laidlaw on his proposals to fund education projects in Scotland.” Mr Barnes asked for details of all discussions which had taken place in the past two years.
2. The Executive responded on 8 March 2005, informing Mr Barnes that the Minister for Education and Young People and the First Minister had met Lord Laidlaw on a number of occasions to discuss the Executive’s “Schools of Ambition” programme. This programme, initiated by the Executive in 2004, sets out a number of proposals for transforming education in Scotland. One of the aspects of the programme is to encourage the participation of local businesses and benefactors in order to provide additional support to individual schools.
3. In its response to Mr Barnes, the Executive refused to provide the information requested on the grounds that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice under section 30(b)(i) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive also cited section 30(b)(ii) of FOISA as a reason for withholding the information, stating that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
4. The Executive stated that in reaching its decision on this matter, it had considered whether it would be in the public interest to release or disclose the information. The Executive informed Mr Barnes that the release of information of this nature would inhibit substantially the willingness of individuals to engage in discussions with Scottish Ministers and officials as part of the deliberative process and this would not be in the public interest as it would reduce the range of opinion and advice available to Ministers.
5. Mr Barnes wrote to the Executive on 9 March 2005, requesting a review of the Executive’s decision to withhold the information requested. Mr Barnes’ letter was acknowledged by the Executive on 21 March 2005, and the outcome of the Executive’s review was sent to Mr Barnes on 24 March 2005.



6. In its letter to Mr Barnes, detailing the outcome of its review, the Executive upheld its original decision and argued that releasing information in this particular case would discourage individuals in the future seeking to become involved in discussions with Ministers and officials where a free and frank exchange of views was necessary. The Executive added that it was not in the interest of the public to curtail opportunities for Ministers and officials to be exposed to a range of policy options and advice.
7. Mr Barnes was dissatisfied with the Executive's response and applied to me for a decision on 29 March 2005. An investigating officer was then assigned to this case. Mr Barnes' appeal was validated by establishing that he had made a written request for information to a Scottish public authority, and had appealed to me only after requesting that the authority review its response to his request.

The Investigation

8. The investigating officer contacted the Executive, giving notice that an appeal had been received and that an investigation into the matter had begun. The Executive was invited to provide comments on the issues raised by Mr Barnes' case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation. The Executive was also asked to provide a detailed analysis of how it had applied section 30 of FOISA, its consideration of the harm test, and its application of the public interest test in relation to the information withheld.
9. In its letter to my investigating officer, dated 11 May 2005, the Executive confirmed that the First Minister met with Lord Laidlaw on three occasions between June 2004 and January 2005, although no records were made other than a note of the meeting of 21 January 2005. The Minister for Education had also met with Lord Laidlaw on a number of occasions but, again, no records were made other than a note of a meeting that took place on 25 January 2005. Both of these documents were withheld, along with two other documents, under sections 30(b)(i) and 30(b)(ii) of FOISA.
10. Further contact took place between the investigating officer and the Executive until March 2006.



The Commissioner's Analysis and Findings

11. Four documents were withheld by the Executive in response to Mr Barnes' request. Document 1 consisted of a note of a meeting held with Lord Laidlaw; document 2 consisted of a minute to the Minister for Education and Young People which listed a number of action points following a meeting with Lord Laidlaw; document 3 consisted of documents including a draft letter to Lord Laidlaw and a brief menu of funding options for benefactors; document 4 consisted of a minute of a meeting between the Minister for Education and Young People and Lord Laidlaw.
12. The Executive refused to release the information to Mr Barnes on the basis of the exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA. These exemptions concern prejudice to effective conduct of public affairs and state that information is exempt information if its disclosure under FOISA 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.
13. In applying the exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA the chief consideration is not whether the information constitutes advice or views, but whether the release of the information would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
14. The Executive's guidance to its staff on the application of section 30(b) of FOISA (<http://www.scotland.gov.uk/Resource/Doc/1066/0022045.pdf>) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive.
15. The guidance also provides examples of the kind of questions that could be considered when taking into account the possible effects that disclosure might have on the provision of advice or the exchange of views:
 - would it make it more likely that the person offering the advice will be unwilling to do so in the future? Would it inhibit that person or any other from offering unwelcome advice?
 - would it make it more likely that the person being advised will not ask for advice in future?
 - would it have a similar inhibiting effect on other people in future?
 - would it make it more likely that advice will be given that is materially different because of the possibility of disclosure?



- will it make people less likely to engage in discussion (oral or written) as part of the deliberative process or would it distort or restrain that discussion?
 - would it result in pressure being brought to bear on officials to provide particular advice?
16. It should be noted in this instance that the Executive has not argued that the release of the information 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, but rather that it *would* have these inhibiting effects, although I will consider whether such inhibition is likely in this decision.
17. I will now go on to consider the application of each exemption in turn.

Section 30(b)(i) – free and frank provision of advice

18. Section 30(b)(i) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
19. In section 30(b)(i) of FOISA the chief consideration is not whether the information itself constitutes advice, but whether the release of the information that has been withheld would inhibit substantially the free and frank provision of advice. In considering the application of any exemption, I must always look at the actual information withheld, not the category of information to which it belongs or the type of situation in which the request has arisen. In other words, I must consider whether the disclosure of *that information* would, or would be likely to, in all the surrounding circumstances, have the substantially inhibiting effect described in section 30(b)(i) of FOISA. It cannot necessarily follow from my requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in the future.
20. In my view, where information is withheld under section 30(b)(i) of FOISA and that information itself contains the free and frank provision of advice, this is likely to constitute stronger grounds in support of the view that the disclosure of such information would, or would be likely to, inhibit the free and frank provision of advice in future. Conversely if the information does not constitute free and frank advice, then the case for withholding is weaker.



21. Having examined the information that has been withheld in this instance, I am of the opinion that the documents in question generally consisted of the free and frank provision of advice, with the exception of document 4 which was simply a note of a meeting held between the Minister for Education and Young People and Lord Laidlaw on 25 January 2005. Document 4 contained notes of the outcome of the meeting and the key points discussed and did not contain what I would consider to be free and frank provision of advice. Consequently, I am of the view that disclosure of this document would not, and would not be likely to, inhibit substantially the free and frank provision of advice. Since I am satisfied that document 4 is not exempt under section 30(b)(i) of FOISA, I am not required to consider the public interest test in relation to this document.
22. Documents 1, 2 and 3 all contain the provision of advice and, having examined the content of these documents, I am of the opinion that disclosing such information could significantly curtail or inhibit the provision of similar advice in future. I am of the view that disclosure of documents 1, 2 and 3, which involved an early stage of negotiations where advice was offered and various options were proposed for consideration, would be likely to inhibit substantially the willingness of individuals to ask for or provide such advice in future and could effectively restrict the range and frankness of any advice offered and options considered. Therefore, I am of the opinion that disclosure of this information would, or would be likely to, inhibit substantially the free and frank provision of advice. Having established that documents 1, 2 and 3 are exempt from disclosure under section 30(b)(i) of FOISA, I must now go on to consider the public interest arguments for and against release of these documents.

Public interest

23. Section 30(b)(i) is subject to the public interest test contained in section 2(1)(b) of FOISA and I must therefore consider whether, in all the circumstances of the case, the public interest in disclosing documents 1, 2 and 3 is outweighed by the public interest in maintaining the exemption.
24. Whilst it is recognised that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, this must be balanced against any potential harm that could be caused by the release of such information as well as the public interest in protecting the integrity of decision making processes. Information can only be withheld under FOISA where the public interest in withholding it is greater than that in disclosure.



25. In relation to the application of section 30(b)(i) of FOISA, the Executive's own guidance considers questions such as whether disclosure of the information would make it more likely that the person offering the advice would be unwilling to do so in the future and whether it would inhibit that person or any other from offering unwelcome advice. It also discusses whether disclosure would it make it more likely that the person being advised would not ask for advice in future or whether it would be more likely that advice would be given that in future which would be materially different because of the possibility of disclosure.
26. Taking into account the content of Documents 1, 2 and 3, the context within which these documents were generated, the sensitivity of the negotiations which were underway and the fact that the information requested concerned the formative stages of proceedings, I am of the view that disclosure of this information would be highly likely to have a detrimental effect on the efficiency and quality of the deliberative process. It is in the public interest for the Executive to be able to undertake discussions and deliberations on sensitive issues as freely and frankly as possible, without fear that the exploration of potential solutions would be subdued or inhibited and I am of the view, in this instance, that the future provision of free and frank advice would be likely to suffer or be inhibited to an extent that would be contrary to the public interest.
27. In reaching the decision that documents 1, 2 and 3 should be withheld, I have considered the desirability of making information available to the public and the general need for transparency and accountability in decision making. I have also taken into account the need for Ministers and officials to be able to discuss matters of substance freely and openly, as well as the timing of this particular request and the sensitivity of the subject matter involved. In all the circumstances, I find that there is no overriding public benefit in the disclosure of this information when weighed against the harm that would be likely to result from its release.
28. I am therefore of the view that the public interest in disclosing documents 1, 2 and 3 is outweighed by the public interest in maintaining the section 30(b)(i) exemption under FOISA.

Section 30(b)(ii) – free and frank exchange of views for the purposes of deliberation

29. Section 30(b)(ii) of FOISA concerns prejudice to effective conduct of public affairs and allows information to be withheld if it would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test.



30. It should be noted that the Executive has not argued that the release of the information would be *likely to* inhibit substantially the free and frank exchange of views for the purposes of deliberation, although I will consider whether such inhibition is likely in this decision.
31. In my view, the standard to be met in applying the harm test in section 30(b)(ii) is high. To qualify for such an exemption, public authorities must be able to show not only that the release of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, but also that such inhibition would be of a substantial nature.
32. As mentioned above, the Executive's guidance to its staff on the application of section 30(b)(ii) of FOISA points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive. When taking into account the possible effects that disclosure might have on the exchange of views, the Executive's guidance suggests considering whether disclosure would make people less likely to engage in discussion (oral or written) as part of the deliberative process or whether it would distort or restrain that discussion.
33. Having examined the content of the information that has been withheld, I am of the view that Document 4 does not fulfil the requirements of section 30(b)(ii) of FOISA and therefore cannot be considered exempt from disclosure under this particular exemption. Document 4 consisted of a record of a meeting and did not contain any information which could be considered as constituting the free and frank exchange of views for the purposes of deliberation and I am satisfied in this instance that disclosure such information would not, and would not be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, as required by section 30(b)(ii) of FOISA.
34. Having established that section 30(b)(ii) of FOISA does not apply to Document 4, I am not required to consider the public interest test in relation to that document. I will now go on to consider whether the disclosure of Documents 1, 2 and 3 would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation under section 30(b)(ii) of FOISA.
35. The content of Documents 1, 2 and 3 consists mainly of proposals and details of negotiations between the Executive and Lord Laidlaw and, in my opinion, that information constitutes the exchange of views for the purposes of deliberation.



36. In its refusal notice, dated 8 March 2005, the Executive informed Mr Barnes that it was of the view that the release of the information would inhibit substantially the willingness of individuals to engage in discussions with the Scottish Ministers and officials as part of the deliberative process and this would reduce the range of opinion and advice available to Ministers.
37. Similarly, in its response to Mr Barnes' request for review, dated 24 March 2005, the Executive stated that releasing the information in this particular case would discourage individuals in the future seeking to become involved in discussions with Ministers and officials where a free and frank exchange of views was necessary.
38. In its submission to me, dated 11 May 2005, the Executive stated that the discussion of policy concerning the funding of education projects in Scotland was still in its early stages at the time of Mr Barnes' request and that to open up the details to the public would have prejudiced the Executive's ability to pursue both this particular initiative and other similar initiatives.
39. The Executive also stated, in its letter of 16 March 2006, that there were still some sensitivities surrounding the information that had been withheld and that negotiations were still underway with Lord Laidlaw regarding his involvement in the Schools of Ambition programme.
40. It should be noted that although information may relate to an ongoing process and may be regarded as politically sensitive, this in itself will not determine whether the information is exempt under section 30(b)(ii) of FOISA. In this instance, Documents 1 and 2 consist of brief notes of meetings and Document 3 consists of a draft letter and other ancillary documents about the Schools of Ambition programme. Having considered the content of Documents 1, 2 and 3, I am satisfied that disclosure of the information would, or would be likely to, result in the harm envisaged by the Executive.
41. Document 1 was dated 21 January 2005, and documents 2 and 3 were dated 27 January 2005. Mr Barnes submitted his initial request to the Executive on 8 February 2005. I therefore accept the Executive's argument that, at the time of Mr Barnes' request and his subsequent request for review, on 9 March 2005, the discussion of policy concerning the funding of education projects in Scotland was still in its early stages.
42. I am also of the view that, had the Executive disclosed Documents 1, 2 and 3 at such a delicate stage of negotiations (i.e. before Lord Laidlaw had been given the opportunity to consider and explore fully all of the proposed options), this could have had a detrimental effect on the future of those negotiations.



43. I am of the view that to have released Documents 1, 2 and 3 into the public domain would have increased significantly the likelihood that those involved in such negotiations would be more circumspect in their deliberations in future as a direct result of this disclosure. In other words, I hold that disclosure of Documents 1, 2 and 3 would, or would have been likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. Therefore, I am of the view that the Executive was correct to withhold Documents 1, 2, and 3 on the basis of section 30(b)(ii) of FOISA.
44. Having established that the Executive was correct to withhold Documents 1, 2 and 3 under section 30(b)(ii) of FOISA at the time it was requested, I will now go on to consider the public interest arguments for and against release.

Public interest

45. As noted above, the section 30(b)(ii) exemption of FOISA is a qualified exemption which means that even if the exemption applies, the application of this exemption is subject to the public interest test. The public interest test is set out in section 2(1)(b) of FOISA. This states that, as regards information which is exempt information by virtue of any provision of Part 2 of FOISA, a person's general entitlement to receive information under FOISA applies only to the extent that the provision does not confer absolute exemption and, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
46. The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (commonly known as the section 60 code) suggests a number of factors which may inform a decision about the public interest. Such factors include the general public interest that information is accessible (i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation) and whether disclosure would contribute to a debate on a matter of public interest.
47. On its website, the Executive stresses the need for engaging with business partners, local communities and parents in the Schools of Ambition programme. In its publication entitled "Ambitious, excellent schools: our agenda for action", published in November 2004, the Executive stated that it aspires to excellence in education and this requires both professional freedom and public accountability. One of its stated aims is "to build, at each level, systems of tough, intelligent accountability that foster ambition and allow proper, informed public scrutiny."



48. In its letter to my Office, dated 11 May 2005, the Executive maintained that the sensitivity surrounding the early stages of policy-making, such as in the Schools of Ambition programme, meant that there was genuine concern that to make ideas public before policy had been fully formulated could be very damaging to the wider confidence of all stakeholders in Scottish education.
49. Having examined Documents 1, 2 and 3, I am of the view that whilst it could be argued that disclosing such information could serve to promote openness, transparency and accountability in the way the Executive operates in its negotiations and discussions regarding initiatives such as the Schools of Ambition programme, in this instance the public interest in such disclosure is outweighed by the public interest in protecting the decision-making process itself (i.e. to allow individuals to engage fully in free and frank discussions and debates with Scottish Ministers and officials as part of the deliberative process).
50. I accept the Executive's arguments that the disclosure of Documents 1, 2 and 3, which involved the initial stage of proceedings, would discourage individuals in the future from seeking to become involved in discussions with Ministers and officials where the free and frank exchange of views is necessary. I am therefore of the view that disclosure of Documents 1, 2 and 3 would have been likely to have compromised the Executive's ongoing deliberations with Lord Laidlaw, since the process was at a very early stage and disclosure would have been likely to have harmed the development of ongoing negotiations concerning the funding of the Schools of Ambition programme.
51. I am therefore of the view that, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.



Decision

I find that the Scottish Executive generally acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in applying the exemptions contained under sections 30(b)(i) and 30(b)(ii) of FOISA to three of the four documents requested by Mr Barnes. However, I find that the Scottish Executive was wrong to withhold Document 4, which consisted of a minute of a meeting between the Minister for Education and Young People and Lord Laidlaw.

I find that the Scottish Executive therefore failed to comply with Part 1 of FOISA in that it breached section 1(1) of FOISA by failing to disclose document 4 to Mr Barnes.

I require the Scottish Executive to provide Mr Barnes with a copy of Document 4 within 2 months from the receipt of this decision notice.

Appeal

Should Mr Barnes or the Scottish Executive wish to appeal against this decision, there is a right of 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.

Kevin Dunion
Scottish Information Commissioner
13 October 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

- (a) ...
- (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