



Scottish Information
Commissioner

Decision 203/2006 Mr Chris Ballance MSP and the Chief Constable of Strathclyde Police
<i>Request for correspondence with Scottish Law Officers pertaining to use of Scottish Airports by CIA</i>

Applicant: Mr Chris Ballance MSP

Authority: Strathclyde Police

Case No: 200600436

Decision Date: 15 November 2006

**Kevin Dunion
Scottish Information Commissioner**

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Decision 203/2006 Mr Chris Ballance MSP and the Chief Constable of Strathclyde Police

Request for correspondence with Scottish Law Officers pertaining to use of Scottish Airports by CIA – section 30(b)(ii) applied – section 30(c) applied – section 30(b)(ii) upheld – public interest in disclosure outweighed by public interest in withholding it

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 10(1) (Time for compliance); 30(b)(i), 30(b)(ii) and 30(c) (Prejudice to the effective conduct of public affairs).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Chris Ballance MSP requested correspondence between Strathclyde Police and the Scottish Law Officers pertaining to the possible use of Scottish Airports by flights operated or sponsored by the CIA. The Chief Constable of Strathclyde Police (the Police) failed to respond within 20 working days and Mr Ballance requested a review. The Police subsequently responded to Mr Ballance's initial request and to his request for review. The Police advised that the information was being withheld as it was exempt.

Following an investigation, the Commissioner found that the information was exempt and had been correctly withheld by the Police. The Commissioner also found there were a number of procedural breaches in the way in which the Police had dealt with the request.

Background

1. On 24 November 2005 Mr Ballance contacted Strathclyde Police and requested the following information:



- Copies of all correspondence and related memorandums as between Strathclyde Police and Scottish Law officers or their staff, pertaining to the possible use of Scottish Airports by flights operated or sponsored by the CIA, which have been written or exchanged in the period 1 January 2005 to 24 November 2005.
2. The Police wrote to Mr Ballance on 22 December 2005 and subsequently on 16 January 2006 to apologise for the delay in responding to his request and to advise, on both occasions, that a response would be sent within the next few days.
 3. By 30 January 2006 Mr Ballance had still received no substantive response to his request for information. He emailed the Police on that date and requested that the email be regarded as a formal request that the Police review its decision not to supply the information Mr Ballance had requested on 24 November 2005.
 4. The Police acknowledged Mr Ballance's request for review on 30 January 2006.
 5. On 19 February 2006 the Police responded to Mr Ballance's initial request for information. The Police advised that the information was exempt by virtue of section 30(b)(i). The Police indicated that Assistant Chief Constable Learmonth had written to Mr Ballance on 31 October 2005 and on 16 November 2005 responding to his letter of 20 October 2005. The Police advised that prior to writing to Mr Ballance consultation had taken place between Strathclyde Police, the Crown Office and Procurator Fiscal Service and the Scottish Executive. The Police advised that these exchanges were considered exempt.
 6. The Police went on to consider the public interest test. I will address these submissions in my analysis and findings below.
 7. The Police advised that if Mr Ballance was dissatisfied with this response he should seek an internal review.
 8. On 27 February 2006 the Police responded to Mr Ballance's request for review. The Police acknowledged its failure to respond to Mr Ballance's initial request within 20 working days. The notice stated that the review had only considered the failure to respond within 20 working days and not the substantive response sent on 19 February 2006.



9. Mr Ballance was dissatisfied with this response and made an application to the Scottish Information Commissioner for a decision as to whether the Police had dealt with his request for information in terms of FOISA. The case was allocated to an investigating officer and the application validated by establishing that Mr Ballance had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

The investigation

10. The officer formally contacted the Police on 7 March 2006 in terms of section 49(3)(a) of FOISA asking it comment on the application as a whole. Given that the Police's review had addressed only its failure to respond within 20 working days it was given an opportunity to review informally its refusal to supply the information to Mr Ballance.
11. The Police took up this offer and on 28 March 2006 wrote to Mr Ballance setting out its conclusions on review. The Police advised that rather than relying on section 30(b)(i) it was relying on section 30(b)(ii) and section 30(c) to withhold the information requested. The Police set out its submissions in respect of the application of these exemptions.

Scope of the investigation

12. There was some disagreement between the parties on the scope of Mr Ballance's request for review and therefore of this application. Mr Ballance advised me that he had requested an internal review of the failure of the Police to supply the information requested. In its notice of review of 27 February, however, the Police only addressed its failure to respond within 20 working days.
13. Under FOISA, an authority's failure to respond within 20 working days is deemed to be a refusal to supply the information requested. Mr Ballance's request for review was broadly worded and explicit that he was requiring the Police to review its refusal (deemed or otherwise) to provide the information requested.
14. In the circumstances I consider that on receipt of the Police's notice of review of 27 February 2006 Mr Ballance was entitled to apply directly to my Office and ask me to investigate the Police's failure to supply the information requested. However, in order that there was no doubt on this matter, Mr Ballance made a subsequent application to my Office to make clear that he wished me to investigate the refusal of the Police to supply the information requested.



15. As a result, I consider that the Police should have addressed its failure to supply the information requested (deemed refusal or otherwise) in its notice of review dated 27 February 2006.

Commissioner's analysis and findings

16. I consider it helpful to provide some context to the information being considered in this application and to confirm its scope. On 20 October 2005 Mr Ballance wrote to the Chief Constable of Strathclyde Police about newspaper reports regarding the use of both Glasgow and Prestwick airports by flights being operated by the CIA. In particular, he sought a meeting to discuss this matter further. The Assistant Chief Constable of Strathclyde Police responded to the points raised by Mr Ballance in a letter of 16 November 2005.
17. Following receipt of this letter Mr Ballance made the request for information to the Police forming the basis of this application. In its response to this request, the Police advised that prior to responding to Mr Ballance on 16 November 2005 consultation had taken place between Strathclyde Police, the Crown Office and Procurator Fiscal Service and the Scottish Executive. The Police advised that the content of these exchanges were considered exempt.
18. During the course of the investigation the Police were reminded that Mr Ballance's request sought information pre-dating 16 November 2005 and sought correspondence from 1 January 2005 to 24 November 2005. The Police advised that the only information held by the Police relevant to Mr Ballance's request for information were the exchanges that took place following receipt of Mr Ballance's letter of 20 October 2005. This needs to be clearly understood; the Police have informed me that with the exception of the exchange regarding a response to Mr Ballance, it holds no other information which would fall within the terms of Mr Ballance's request.
19. Mr Ballance has requested correspondence between Strathclyde Police and the Scottish Law Officers or their staff. For the sake of clarification, the Scottish Law Officers are the Lord Advocate and the Solicitor General for Scotland (see section 48 of the Scotland Act 1998). The Lord Advocate is the Ministerial Head of the Crown Office and Procurator Fiscal Service. However, the Lord Advocate and Solicitor General for Scotland are also the principal ministerial advisers to the Scottish Executive on legal matters. Due to the dual nature of their functions, staff of these Officers will comprise staff at the Crown Office and Procurator Fiscal Service and staff at the Scottish Executive.



20. Having reviewed the information in this matter I am satisfied that the exchanges withheld fall within the scope of Mr Ballance's request in that they are correspondence between the Police and staff of the Scottish Law Officers.

Application of section 30(b)(ii)

21. The Police advised, on review, that they were relying on section 30(b)(ii) to withhold the information requested. Section 30(b)(ii) states that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
22. The Police stated in its initial response that advice had been sought from the Crown Office and Procurator Fiscal Service and from the Scottish Executive. The Police indicated that advice had been provided frankly with consideration given to all aspects of the matter under review. The Police submitted that the most candid advice could only be given between Agencies where there was no fear of its disclosure. The Police argued that disclosure of the information sought would inhibit substantially the quality of such advice with the effect that it would inhibit the consulting parties from providing the fullest assessment of the legal position. The Police indicated that section 30(b)(ii) applied in that the type of information being withheld was an exchange of views.
23. I have considered the information being withheld in this case and consider that the information amounts to both the provision of advice and the exchange of views, in that views are proffered and advice sought and provided. In my view, the Police should have sought to rely on both parts of section 30(b).
24. Even if the information falls within the categories identified in section 30(b), the public 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 for the purposes of deliberation.
25. In *Decision 41/2005* I emphasised that section 30(b) cannot be applied to a class of information and must be applied to the specific information being withheld. 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.



26. As I said, 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:
- the subject matter of the advice or opinion,
 - the content of the advice and opinion itself,
 - the manner in which the advice or opinion is expressed, and
 - 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).
27. In this particular case, I have considered the content of the material being withheld and recognise that advice was being sought and views proffered on a matter of complexity and sensitivity. I am satisfied that in this particular instance it was important that both views and advice could be as free and frank as possible. I have also considered the timing of the request. Mr Ballance sought this information just over a week after he had received a formal response from the Assistant Chief Constable.
28. In all the circumstances, I am satisfied that disclosure of this information would or would be likely to inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation.
29. Section 30(b) is subject to the public interest test required by section 2(1)(b) of FOISA and therefore I must go on to consider whether in all the circumstances of this case the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.
30. The Police made several submissions in respect of the public interest. The Police indicated that on the one hand release of the information would contribute to the quality and accuracy of public debate, particularly in such a high profile case such as this which was undoubtedly of great interest to the public. However, the Police also considered that the matter was complex and sensitive and that views and advice between Agencies needed to be exchanged without the fear of disclosure. In the circumstances, the Police concluded that the public interest in disclosing the information was outweighed by the public interest in withholding it.



31. I have considered carefully the information being withheld in this case. I recognise that the issue as a whole is of great interest to the public and that there will naturally be an interest in the exchanges between the Police and the Crown Office and Scottish Executive in formulating a response to Mr Ballance's original letter. However, this has to be balanced against the harm that is likely to result if the Police could not seek appropriate advice and assistance in matters of sensitivity such as this or if such views or advice were no longer recorded. I consider that although the issue as a whole may be of public interest, the actual content of the information withheld adds little to the public understanding of the issue itself. It addresses only how to respond appropriately to an earlier letter from Mr Ballance; a response which was then given shortly before the information request. The public benefit in disclosing the actual information withheld in this case does not outweigh the harm that could result to the processes of deliberation between the Police and the Law Officers in such cases.
32. In all the circumstances, I am satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.
33. Given that I have upheld the application of section 30(b) to all information withheld in this case, I do not propose to consider the application of section 30(c).

Decision

I find that the Police complied with Part 1 of FOISA in withholding the information requested by Mr Ballance.

I find that the Police failed to comply with Part 1 of FOISA in failing to respond to Mr Ballance's initial request for information within 20 working days as required by section 10(1).

I find that the Police failed to comply with Part 1 of FOISA in considering only its failure to respond within the statutory time limit and not its failure to supply the information requested as part of its review under section 21(1).

I do not require the Police to take any remedial action in respect of these breaches.



Appeal

Should either the Police or Mr Ballance 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.

Kevin Dunion
Scottish Information Commissioner
15 November 2006



APPENDIX

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving an information request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request
 - (b) ...

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