



Scottish Information
Commissioner

**Decision 016/2008 Mr Tom Gordon and the Scottish Parliamentary
Corporate Body**

Reports, recommendations and briefing papers arising from Project Flora

Applicant: Mr Tom Gordon

Authority: The Scottish Parliamentary Corporate Body

Case No: 200700785

Decision Date: 30 January 2008

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 016/2008 Mr Tom Gordon and the Scottish Parliamentary Corporate Body

Request for reports, recommendations and briefing papers arising from Project Flora – request refused under sections 30(b)(i) and (ii), 33(1)(b) and 36(1) of FOISA – application of sections 30(b)(i) and (ii) and (in part) 33(1)(b) upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests); 36(1) (Confidentiality).

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 Gordon asked the Scottish Parliamentary Corporate Body (the SPCB) to supply “all reports, recommendations and briefing papers arising from Project Flora”. The SPCB refused to supply the requested information in reliance on sections 30(b)(i) and (ii), 33(1)(b) and 36(1) of FOISA. Following a review which confirmed the SPCB’s original decision without modification, Mr Gordon applied to the Commissioner for a decision. During the investigation, the SPCB agreed to disclose a small amount of information to Mr Gordon. In respect of the remaining information at issue, the Commissioner concluded that the SPCB had dealt with Mr Gordon’s request in accordance with Part 1 of FOISA, in that the information was properly exempt under section 30(b)(i) and (ii) and (in part) section 33(1)(b). He did not require the SPCB to take any further action.



Background

1. On 22 February 2007, Mr Gordon emailed the SPCB requesting "...a copy of all reports, recommendations and briefing papers arising from Project Flora".
2. On 2 April 2007, the SPCB advised Mr Gordon that his request had been refused in reliance on sections 30(b)(i) and (ii), 33(1)(b) and 36(1) of FOISA.
3. Mr Gordon asked the SPCB to review its decision on 3 April 2007. He stated:

"While I appreciate that some of the material may be exempt from disclosure, I do not believe the parliament's application of a blanket exemption is justified. I would expect material to be exempted only where there is a substantial reason for doing so, and for redactions to be minimal. Wholesale refusal seems disproportionate."
4. On 2 May 2007, the SPCB notified Mr Gordon that it had completed a review of its original decision, and had concluded that the decision should be confirmed without modification.
5. Mr Gordon wrote to my office on 29 May 2007, expressing dissatisfaction with the SPCB's decision. He stated his view that the SPCB's application of the FOISA exemptions had been disproportionate and in a blanket fashion.
6. Mr Gordon's application was validated by establishing that he 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 that request.

The Investigation

7. On 21 June 2007, the SPCB was notified in writing that a valid application had been received from Mr Gordon. The SPCB was asked to supply a copy of the withheld information.
8. On 5 July 2007, the requested information was received from the SPCB. In addition, the SPCB supplied a detailed paper, prepared during its consideration of Mr Gordon's request, setting out its reasoning in applying the stated exemptions.
9. The case was allocated to an investigating officer.



10. On 24 July 2007, the investigating officer wrote to the SPCB to invite any additional submissions it wished to make on Mr Gordon's application (in accordance with the requirement in section 49(3)(a) of FOISA for the Commissioner to invite an authority's comments when investigating an application under section 47(1)). The investigating officer also made some specific enquiries, including enquiries regarding the scope of the information captured by Mr Gordon's request.
11. The SPCB responded on 24 August 2007, providing further explanation of its reasons for withholding the information at issue and responding to the investigating officer's specific enquiries. At this stage, the SPCB also advanced arguments that it considered the information to be exempt under section 36(2) of FOISA.
12. The SPCB's submissions are set out in detail and considered fully under "the Commissioner's Analysis and Findings" below.

The Commissioner's Analysis and Findings

13. In coming to a decision on this matter, I have considered all the information and submissions that have been presented to me and I am satisfied that no matter of relevance has been overlooked.
14. "Project Flora" (as it was termed by the SPCB) arose out of the project to build the Scottish Parliament (the Holyrood Project). As is widely known, the Holyrood Project was characterised by escalating costs and construction delays. The purpose of Project Flora was to assist the SPCB in determining whether it should pursue claims arising out of the Holyrood Project, and if so against whom, bearing in mind the potential benefits and costs. External legal and technical advice was obtained to support this work.
15. The process and conclusions reached by Project Flora were summarised in the following public documents:
 - Letter from the Presiding Officer to Members of the Scottish Parliament dated 21 February 2007 (see pages 3-4) (http://www.scottish.parliament.uk/corporate/spcb/publications/Holyrood_closeout_letter.pdf).
 - "Holyrood Project Close-Out Summary Report to SPCB" ("the Summary Report") (see paragraphs 30-56 and Annex B) (http://www.scottish.parliament.uk/corporate/spcb/publications/Holyrood_closeout_report.pdf).



16. The information at issue represents the stream of advice to the SPCB from its internal and external advisers; it includes a number of internally generated reports, along with reports and letters from external advisers.
17. The SPCB began its submissions to me by offering some comment on the context of the information at issue. It explained that the Project Flora decisions allowed the closure of the Holyrood Building Project to be announced, but that the process of completing the closure process remained ongoing and was still raising important and sensitive commercial issues (with implications for public money and the SPCB's reputation, and which were interrelated) that required resolution. It advised, however, that the documentation could and would be reviewed when the work was completed, with a view to releasing as much further information as possible as part of its publication scheme.
18. The SPCB then went on to justify its reliance on the various exemptions. I will consider these arguments in depth under each individual exemption.

Information disclosed – individual consultants' fees

19. The SPCB relied on section 33(1)(b) of FOISA as a basis for withholding information concerning the individual fees charged by its various external advisers, arguing that disclosure of this information would substantially prejudice those parties' commercial interests.
20. During the course of the investigation, I asked the SPCB to reconsider its position in this regard. I noted that the global cost of the legal and expert advice had been disclosed. The individual fees at issue did not include detailed itemised costings. In addition, those fees were presumably peculiar to this specific project and dependent upon a number of unknown variables, such as the scope of the work required, the numbers of staff involved, and billable hours worked. It was difficult to see how disclosure of such information could in any discernable way assist the various companies' competitors, in future unspecified and most likely unrelated tendering exercises, to their detriment.
21. On further consideration, and after conferring with the consultants, the SPCB agreed to disclose this subset of information to Mr Gordon. Accordingly, I do not intend to consider this information further in this decision notice.



Section 36(1) – Confidentiality of communications

22. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories – legal advice privilege and litigation privilege.
23. Legal advice privilege “covers communications between lawyers and their clients whereby legal advice is sought or given” (paragraph 10, *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2005]1 AC 610).
24. Litigation privilege applies to documents created in contemplation of litigation (also known as communications *post litem motam*), including documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation. Litigation need never actually take place for litigation privilege to apply, and the privilege continues to apply after litigation has been concluded.
25. In relying to section 36(1), the SPCB stated:
 - The documents at issue included actual legal advice from legal advisers and advice which was prepared by others with a view to litigation. This information was subject to legal professional privilege.
 - A summary of this advice was disclosed in February 2007. The SPCB recognised that partial disclosure of, or public reference to, confidential advice might give rise to implied waiver in relation to the whole material.
 - However, the SPCB argued that there had been no such implied waiver in the current circumstances. The information was disclosed by the SPCB after careful consideration in order to address the public interest, but in full contemplation that it was maintaining privilege over the remainder of the advice and the advice as a whole.
 - The SPCB remained some way from resolving all affairs with the various parties and the matters remained sensitive with the potential for legal claims. The SPCB would not impliedly or openly waive privilege where the information was so relevant possible future action on related Holyrood Project matters.



26. Bearing in mind that the purpose of Project Flora was to ascertain whether the SPCB had grounds to pursue legal action against those involved in the construction process, and that legal advice was obtained on this issue, legal professional privilege is of obvious relevance. The various documents providing or summarising that advice are clearly covered by legal advice privilege.
27. Other documents comprise expert reports prepared by construction and management consultants. I am satisfied that these reports were prepared for the purpose of, and in reasonable contemplation of, litigation against those involved in the construction process. The reports are therefore covered by litigation privilege, and the fact that litigation did not eventuate does not alter that status.
28. However, a claim to confidentiality of communications can only be maintained in legal proceedings if the right to confidentiality has not been waived.
29. As acknowledged by the SPCB, the letter from the Presiding Officer and the Summary Report (see paragraph 15 above) summarise the privileged advice referred to in paragraphs 26 and 27 above. It is legitimate in these circumstances to query whether the SPCB has impliedly waived privilege in respect of at least some of the information at issue by “deploying” the legal and expert advice; the question to consider is whether the SPCB summarised the content of the information at issue in order to evidence, or provide authority for, the position it was advancing.
30. However, while I acknowledge the obvious relevance of legal professional privilege in this case, I have not found it necessary to reach a decision on the question of implied waiver, because in my view section 30(b)(i) and (ii) of FOISA provided strong grounds at the time of Mr Gordon’s request for withholding the information at issue.

Section 30(b)(i) and (ii) – Effective conduct of public affairs

31. In the following comments, I consider the application of the exemption in section 30(b)(i) and (ii), and, as required by section 2(1)(b) of FOISA, whether the overall public interest lies in favour of withholding or disclosure of the information at issue.



Application of the exemption

32. Sections 30(b)(i) and (ii) of FOISA exempt information where its 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, respectively. The underlying purpose of this provision is to protect the effective conduct of public affairs.
33. As noted in *Decision Notice 105/2007 Paul Hutcheon and the Scottish Executive*, these exemptions acknowledge that the prospect of disclosure of information which reveals internal thinking processes may be detrimental to the ultimate quality of decision making within a public authority, and that this could lead to less candid and robust discussions, insufficient records being created, hard choices being avoided and, ultimately, the quality of government being undermined.
34. Relevant factors to consider when assessing the likely inhibitory effect of disclosure include:
 - i. The subject matter of the advice or opinion.
 - ii. The content of the advice and opinion.
 - iii. The manner in which the advice or opinion is expressed.
 - iv. Whether the timing of release would have any bearing.
35. In relying to section 30(b)(i) and (ii), the SPCB advised as follows:
 - The documents contained advice and views on sensitive matters, expressed in a very frank manner.
 - In light of the context described above, the sensitivity of the documents had not yet diminished.
 - The documents revealed “internal thinking processes”, disclosure of which would be detrimental to the ultimate quality of decision-making within the SPCB.
 - Disclosure would inhibit substantially the full and frank provision of ongoing advice and the exchange of views in relation to the Holyrood Project; in particular, would be likely to inhibit the provision of such advice or views in writing. Written material was important to the closure of this complex project, to allow issues to be absorbed and reflected upon.



- Were disclosure to take place, officials would feel constrained in recording information and advice to assist the SPCB in taking decisions on the finalisation of the substantial matters that remained ongoing, with significant risk in consequence to the quality of SPCB governance.
 - Although there was some purely factual information, the nature of the information as a whole made it difficult to release factual sections without releasing non-factual information and therefore redaction was not possible.
36. The information at issue in this case comprises a full, free and frank analysis of the SPCB's legal and commercial position with respect to a number of the contractors involved in the Holyrood Project. It is apparent that the SPCB faced a complicated and potentially risky legal and commercial situation; the information at issue contains advice and options regarding the SPCB's strategy for negotiating that situation.
37. While the Holyrood Project was, at the time of Mr Gordon's request, substantially completed, it would appear that there were certain ongoing issues remaining outstanding, of relevance to the subject matter of the information withheld and potentially requiring further free and frank advice and comment.
38. The subject matter and content of the information at issue (detailed advice and options regarding the SPCB's strategy for negotiating a complicated and potentially risky legal and commercial situation); the manner of expression of that information (full, free and frank); and the relevant context (whereby certain legal and commercial issues remained ongoing at the time of Mr Gordon's request); all lead me to conclude that the SPCB was justified in exempting the information withheld under sections 30(b)(i) and (ii) of FOISA.
39. In my view, the information at issue could not have been disclosed without some degree of (real or perceived) legal and commercial risk to the SPCB. In view of this, disclosure would have had a substantial negative effect on the terms in which advice on this subject continued to be conveyed to the SPCB, and the extent to which that advice was conveyed in verbal as opposed to written form. Given the ongoing nature of certain aspects of the Holyrood Project, I accept that it was important, at the time of Mr Gordon's request, to protect the channel of communication between the SPCB and its internal and external advisers.



40. In this case, therefore, I accept that the tests in section 30(b)(i) and (ii) of “substantial inhibition” to the free and frank provision of advice and exchange of views has been met. On the heels of disclosure of the information at issue, the SPCB’s advisers would have been extremely cautious about the manner and terms in which further advice was conveyed for fear that disclosure of such advice would undermine the SPCB’s legal / negotiating position vis à vis the relevant consultants and contractors. Such inhibition would have impeded good decision-making and proper record-keeping, thereby prejudicing the effective conduct of public affairs.
41. I note that the information at issue does contain some factual, process-related and advisory material that is already in the public domain as a result of the disclosure of the Presiding Officer’s letter and the Summary Report. Given that it is already in the public domain, its extraction and disclosure from the documents at issue could do no harm.
42. However, I accept the SPCB’s submission that this information and the remaining undisclosed advisory materials are sufficiently interlinked to make its extraction and disclosure administratively difficult. Furthermore, disclosure of information that is effectively already in the public domain would serve no practical benefit; that is, it would not serve to enhance public understanding or debate of the issues. I am therefore not inclined to require partial disclosure of the information at issue.

Public interest

43. Even where the exemptions in section 30(b)(i) and (ii) is applicable, I must still consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information at issue.
44. There are strong public interest considerations favouring disclosure of the information at issue. As noted above, the Holyrood Project was characterised by escalating costs and construction delays, prompting high levels of public and political concern, and inquiries by the office of the Auditor General (see http://www.audit-scotland.gov.uk/utilities/search_report.php?id=290) and the Rt Hon Lord Fraser of Carmyllie QC (see http://www.holyrood inquiry.org/FINAL_report/report.htm).
45. There is undoubtedly a strong public interest in knowing:
 - i. That the SPCB has thoroughly investigated the potential liability of the contractors; and
 - ii. Why the SPCB decided not to instigate legal action against any of the contractors, which could potentially have resulted in the recovery of public money.



46. The SPCB has submitted that the public interest in this case has been addressed by disclosure of the Presiding Officer's letter and the Summary Report, together with previous publications on the Holyrood Project, including, presumably, the reports by the Auditor General and Lord Fraser.
47. I note that I will not always be sympathetic to the argument that the public interest in disclosure of information at issue in any given case has been addressed because other information is already in the public domain.
48. I have considered the decision of the Information Tribunal in the case of *Lord Baker of Dorking v Information Commissioner and the Department for Communities and Local Government*, EA/2006/0043, 1 June 2007, which concerned the withholding of officials' advice to the Deputy Prime Minister on a planning application.
49. The Tribunal was considering the application of regulation 12(4)(e) of the UK Environmental Information Regulations 2004. Regulation 12(4)(e) provides an exception to the general right of access where requested information comprises "internal communications", unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information" (regulation 12(1)(b) refers). It had already been accepted by the parties that the information in dispute comprised "internal communications", and the Tribunal's consideration of the case was restricted to the application of the public interest test.
50. The appellant submitted that disclosure of the disputed information would contribute to public understanding of the basis for the Minister's decision and would assist in informing public debate about the merits of that decision. While the respondents recognised some public interest in disclosure on this basis, they argued that the value of the contribution was reduced by the fact that the planning inspector's report, the submissions by third parties to the Minister, and the detailed decision letter were already in the public domain, and by the fact that there was ample scope for the public to participate in the decision-making process.
51. The Tribunal appeared to be sympathetic to the appellant's counter-argument that "the point of transparency in decision making ... is that the public comes to know what lies behind the decision, not just what appears in the finely drafted, and possibly defensive, language of the decision letter". The Tribunal commented:



“...that one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; that the outcome is in some way “spun” (to adopt the term whose very invention illustrates this tendency towards cynicism and mistrust). Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point” (paragraph 24).

52. Similarly, I might conclude in a particular case that, notwithstanding whatever information may already be in the public domain, there is a public interest in disclosure of the “whole picture” i.e. background, internal or source information.
53. In this particular case, however, I am not minded to reach such a conclusion.
54. The Presiding Officer’s letter and the Summary Report give a very full account of the process followed and conclusions reached by Project Flora. It is clear from this material:
 - i. What steps the SPCB took to investigate the potential liability of the contractors; and
 - ii. Why it ultimately decided not to instigate legal proceedings.
55. In view of this, and taking account of the legally and commercially sensitive nature of the information at issue, and the fact that certain aspects of the Holyrood Project remained ongoing at the time of Mr Gordon’s request, on balance I have concluded that the weight of the public interest at that time lay in favour of protecting the channel of communication between the SPCB and its internal and external advisers. I accept that some degree of confidentiality was necessary at that time to ensure the SPCB continued to receive full, free and frank advice, in accordance with the norms of good decision-making and record-keeping.
56. I observe that had there been inconsistencies between the publicly available information and the detailed advice conveyed to the SPCB – or had the publicly available information presented a partial and potentially misleading account of that advice – this would have substantially increased the public interest in disclosure of the detailed advice. However, the publicly available information appears to be a fair representation of the advice, and therefore, I remain of the view that the advice was properly withheld at the time of Mr Gordon’s request.



Section 33(1)(b) – Commercial interests (individual consultant’s daily rate)

57. Having concluded that the information at issue was properly exempt from release under section 30(b)(i) and (ii) of FOISA, I have – for the most part – not found it necessary to consider the SPCB’s arguments in relation to section 33(1)(b) of FOISA.
58. However, there is one item of information more properly exempt under section 33(1)(b) and remaining to be considered, taking account of the disclosure of certain pricing information considered at paragraphs 19-21 above. This item of information is located in Annex 2 to SPCB (2005) Paper 126 and comprises the current daily rate charged by one of the external consultants.
59. Under section 33(1)(b), information is exempt if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person.
60. In relation to section 33(1)(b), the SPCB maintained that disclosure of the information at issue would prejudice the commercial interests of a third party (i.e. the consultant in question). It suggested that this information would give an insight into the party’s charging structures which would be likely to prejudice their ability to compete effectively in tendering exercises against competitors whose charges were not widely known.
61. In this case, I accept that disclosure of the consultant’s current daily rate would substantially prejudice their ability to compete in future tendering exercises. Price is obviously not the only consideration taken into account in awarding public and private sector contracts, but it is an important one. It would be to the consultant’s competitors’ advantage – and conversely, to the consultant’s disadvantage – to know their current daily rate, as competitors could submit a tender undercutting that rate.
62. Section 33(1)(b) is, of course, subject to the public interest test in section 2(1)(b) of FOISA (see Appendix for full text).
63. However, I have been unable to identify any public interest considerations favouring disclosure of the consultant’s current daily rate. There is a general public interest in disclosure of information regarding expenditure of public funds. However, I consider this interest has been met by disclosure of the total fees paid to each of the individual consultants, including this one (see paragraphs 19-21 above).

Section 36(2) – Actionable breach of confidence

64. Having concluded that the information at issue was properly exempt from release under sections 30(b)(i) and (ii) and 33(1)(b) of FOISA, I have not found it necessary to consider the SPCB’s arguments in relation to section 36(2).



Decision

I find that the SPCB acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tom Gordon, on the basis that the requested information was properly exempt from release under sections 30(b)(i) and (ii) and 33(1)(b) of FOISA.

Appeal

Should either Mr Gordon or the SPCB 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
30 January 2008



Appendix

Relevant statutory provisions

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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers
- (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.

33 Commercial interests and the economy

- (1) Information is exempt information if-
 - ...
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

36 Confidentiality

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