Decision 020/2008 – Mr Robert Henery and the Scottish Ministers

Information on discussions between the Scottish Ministers and the Convention on Scottish Local Authorities relating to the provision of free personal care for the elderly.

Applicant: Mr Robert Henery Authority: Scottish Ministers

Case No: 200600908

Decision Date: 6 February 2008

Kevin Dunion Scottish Information Commissioner

Kinburn Castle Doubledykes Road St Andrews Fife KY16 9DS



Decision 020/2008 - Mr Robert Henery and the Scottish Ministers

Request for information on discussions between the Scottish Ministers and the Convention of Scottish Local Authorities relating to the provision of free personal care for the elderly – Commissioner found that the Scottish Ministers had partially complied with the requirements of Part 1 of FOISA

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 21 (Review by Scottish public authority); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs), and 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 Henery submitted a request to the Scottish Ministers (the Ministers) for information on discussions between the Ministers and the Convention of Scottish Local Authorities (COSLA) relating to the provision of free personal care for the elderly. In response, the Ministers provided Mr Henery with a number of relevant documents, but withheld a further 15 documents on the basis that they were exempt from disclosure under the Freedom of Information (Scotland) Act 2002 (FOISA).

Following his investigation, the Commissioner found that the Ministers partially dealt with Mr Henery's information request in accordance with Part 1 of FOISA, in exempting certain information. However, he ordered the release of certain other information, the disclosure of which he did not accept would be substantially prejudicial to the effective conduct of public affairs in the ways the Ministers had claimed.



Background

- 1. On 26 October 2005, Mr Henery submitted an information request to the Ministers seeking access to information on discussions between the Ministers and COSLA relating to the provision of free personal care for the elderly. Specifically, Mr Henery asked to see documents and correspondence between the Ministers and COSLA relating to the Community Care and Health (Scotland) Act 2002 (the Community Care Act) after it had been published.
- 2. The Ministers sent an email to Mr Henery on 2 November 2005 asking for clarification of his information request.
- 3. Mr Henery's response of the same date indicated that he only wished to see information on discussions between the Ministers and COSLA relating to the provision of free personal care for the elderly (and therefore not those relating more widely to the Community Care Act).
- 4. On 24 November 2005 the Ministers disclosed a number of documents to Mr Henery in response to his request. However, the Ministers' response also indicated that some documents had been withheld because the exemption in section 30(b)(i) of FOISA had been judged to apply to these. The Ministers also informed Mr Henery that they had judged that the public interest in maintaining this exemption outweighed the public interest in the disclosure of the information withheld.
- 5. Mr Henery submitted a request for a review to the Ministers on 4 January 2006. In this, he questioned the Ministers' decision to withhold some of the information he had requested.
- 6. The Ministers notified Mr Henery of the outcome of their review in a letter dated 27 January 2006. This stated that the Ministers had confirmed their decision that the information withheld was exempt from disclosure under section 30(b)(i) of FOISA, and that the public interest favoured the maintenance of this exemption.
- 7. On 9 May 2006, Mr Henery applied to me for a decision as to whether the Ministers had breached Part 1 of FOISA in withholding some of the information he had requested. Mr Henery also complained that in their responses to his request and to his request for a review, the Ministers had given two different explanations as to why they were withholding the information. The case was subsequently allocated to an investigating officer.



8. Mr Henery's appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had applied to me only after asking the Ministers to review their response to his request.

The Investigation

- 9. The investigating officer wrote to the Ministers on 24 May 2006, notifying them that an application had been received and inviting them to comment on Mr Henery's application in terms of section 49(3)(a) of FOISA. The Ministers were asked to provide, amongst other items, a copy of the information that had been withheld from Mr Henery and a detailed analysis of the application to this information of the exemption in section 30(b)(i). The Ministers were also asked to provide an analysis of their consideration of the public interest test in relation to this exemption.
- 10. The Ministers' response was received on 26 June 2006. This provided copies of the information which had been released to Mr Henery and the information withheld, along with background information on the introduction of free personal and nursing care in 2002 and the collaborative arrangements put in place with COSLA and other representative bodies to oversee its implementation. Arguments were put forward in support of the decision to withhold certain information.
- 11. The investigating officer sought clarification of the Ministers' submissions in further exchanges during September and October 2006. The Ministers were also asked to comment on Mr Henery's concern that the justification he had been given by the Ministers for withholding the information in their response to his information request appeared to be contradicted by that in their response to his request for a review.
- 12. In their submissions to my Office, the Ministers stated that they released more than 100 papers in response to Mr Henery's request while they withheld only a small number. Those withheld related to an exercise carried out to agree the distribution of funds to local authorities for the provision of free personal and nursing care.



- 13. In their original responses to Mr Henery, the Ministers relied only on the exemption in section 30(b)(i) of FOISA when withholding this information. In their submissions to my Office, the Ministers indicated that, having considered the papers again, they believed that some of them actually fell outside the scope of Mr Henery's request. Further, the Ministers indicated that they now considered that the exemptions in the following sections of FOISA also applied to (some of) the information withheld:
 - Section 29(1)(a) Formulation of Scottish Administration policy etc
 - Section 30(b)(ii) Prejudice to the effective conduct of public affairs
 - Section 36(1) Confidentiality
- 14. In addition to expressing concern as to apparent contradictions in the Ministers' responses to him, Mr Henery commented in his submissions that the issue at the heart of his request (i.e. the provision of free personal care to the elderly, and in particular assistance with food preparation and charging for that assistance) was one which affected thousands of elderly people receiving personal care and was of general public concern.
- 15. I will consider the arguments advanced by both the Ministers and Mr Henery further in my Analysis and Findings below.

The Commissioner's Analysis and Findings

Mr Henery's concerns regarding responses from the Ministers

- 16. As well as being unhappy about the information which had been withheld, Mr Henery was unhappy that the Ministers had given different reasons for withholding information from him in their initial response and, later, having carried out a review.
- 17. Mr Henery stated that the Ministers initially claimed that the information withheld was of the nature of "internal discussion including advice to Ministers by their officials". Mr Henery has indicated that when he sought a review of this decision, the Ministers' response instead stated that the withheld documents "relate to the analysis of financial information on individual local authorities provided for the purposes of considering funding decisions". Mr Henery stated that these grounds seemed to him quite spurious, which I will consider in my analysis of the exemptions the Ministers have applied, but also that they were contradictory.



- 18. During my investigation, comments were sought from the Ministers on Mr Henery's concerns with the responses he had been given. The Ministers advised that in their view the explanation given to Mr Henery in response to his request for a review expanded rather than contradicted the explanation given in their original reply. The Ministers stated that in both cases the response referred to the exemption under section 30(b)(i) and explained that it affected the Ministers' ability to consider policy and financial issues in an uninhibited way. The Ministers noted that their response to the request for review went on to expand upon the relationship between the Ministers and outside organisations (in this case COSLA) and the effect that disclosure of advice would have on such organisations' willingness to cooperate with the Ministers in the future.
- 19. The terms of section 21 of FOISA should be noted here. This section lays down the requirement on a Scottish public authority to carry out a review where it receives a request to do so, and the requirements it must meet when doing so. Under section 21(4) it is clear, that in carrying out a review a Scottish public authority can respond in one of three ways. These are to:
 - Confirm the decision complained of, with or without such modifications as it considers appropriate;
 - Substitute for any such decision a different decision; or
 - Reach a decision, where the complaint is that no decision had been reached.
- 20. I have noted Mr Henery's submissions on this point and the Ministers' comments. On balance, I am inclined to accept that the Ministers' response to the request for review was an attempt to expand upon its initial response rather than an intentional contradiction of that earlier response. In any event, however, it is clear that the Ministers would have been perfectly entitled to substitute new or additional reasoning for that advanced initially had they considered it appropriate to do so. In the circumstances, therefore, I cannot identify any breach of Part 1 of FOISA in the issue Mr Henery has raised regarding an apparent contradiction in the two responses.

Consideration of documents 1, 2, 6 & 7

21. The Ministers informed me during the course of my investigation that they had come to the view that the information contained in documents 1, 2, 6 & 7 did not fall within the scope of Mr Henery's request, not being correspondence between the Ministers and COSLA. They advised me, however, of the exemptions they would apply to these documents if I considered otherwise.



- 22. Having considered the content of documents 1, 2, 6 & 7, I am unable to agree with the Ministers' view. Mr Henery's request sought information on discussions between the Ministers and COSLA relating to the provision of free personal care for the elderly, specifically "documents and correspondence between [the Ministers] and COSLA relating to [the Community Care Act] after publication of the Act". I think it is only reasonable to interpret the reference to "documents" as meaning documents exchanged between the two parties in the context specified. Documents 1, 2, 6 & 7 were provided by local authorities to COSLA in relation to their provision of free personal care and the funding of this. COSLA was provided with this information in its role as a member of a working group set up to oversee the implementation of the free personal and nursing care policy and the distribution of funds. The group was established by and included representatives of the Ministers. There appears to be do doubt that these documents were exchanged between COSLA and the Ministers for the purposes of the working group. It is clear, therefore, that this information would have informed discussions between the Ministers and COSLA on the matter of free personal care for the elderly, in the context of the working group established for that purpose. I cannot then accept that the information in these documents falls outwith the scope of Mr Henery's request.
- 23. I will therefore consider these documents under with the exemption(s) that the Ministers have applied to them.

Section 36(1)

- 24. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication which falls into this category is communications which are subject to legal professional privilege. Legal professional privilege can itself be split into two categories legal advice privilege and litigation privilege (also known as communications post litem motam).
- 25. Legal advice privilege covers communications between lawyers and their clients, where legal advice is sought or given.
- 26. The exemption under section 36(1) is subject to the public interest test required by section 2(1)(b) of FOISA.
- 27. The Ministers sought to rely on the exemption in section 36(1) of FOISA in relation to the final paragraph in document 2, indicating that this related to legal advice which had been obtained from a particular local authority's solicitors.



- 28. In document 2, the local authority in question provided a summary of the advice provided by its solicitors concerning the Free Personal and Nursing Care Policy. This summary was provided to COSLA in their role as members of the Free Personal and Nursing Care Implementation Group.
- 29. Having considered the information which has been withheld under this exemption and the relevant submissions made by the Scottish Ministers, I am satisfied that this information is subject to legal advice privilege. Although the Council passed this information on to COSLA, who subsequently passed it to the Ministers, I do not consider that legal advice privilege has been waived as a result. It is apparent that this information was passed between the Council, COSLA and the Ministers on the basis that each had a common interest in it and that there was no expectation that the advice would be further shared beyond the members of the working group.
- 30. I am therefore satisfied that the information in the final paragraph of document 2 is exempt in terms of section 36(1) of FOISA. As a result, I am required to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public Interest Test

- 31. In considering the application of the public interest test in respect of this information, the Ministers provided the following arguments to support their conclusion that the public interest in disclosure was outweighed by that in maintaining the exemption:
 - That it would be harmful to the public interest if solicitors and clients could not discuss relevant issues and give and receive legal advice in confidence
 - That the public interest in withholding legal advice was high and that only in particularly compelling cases should release be considered (as I had mentioned in my own decisions)
 - That decision making was informed by legal advice, and the danger in disclosure of such advice was twofold: firstly by unreasonably exposing legal positions to challenge, and secondly by potentially diminishing the range and quality of that advice which would in turn damage the quality of decision making.



- 32. I accept the assertion of the Ministers that there is a public interest in withholding legal advice, due to the strong inherent public interest in maintaining the right to confidentiality of communications between a legal adviser and client. This view is supported by my previous decisions (e.g. Decision 096/2007 Mr John Sexton and the Scottish Executive), and the arguments in favour of maintaining confidentiality which are recorded in the House of Lords case, Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48. Generally, I recognise that there is a compelling public interest in allowing solicitors and clients to be able to discuss relevant issues fully and give and receive legal advice in confidence.
- 33. I appreciate that there is a public interest in understanding the legal position of the local authorities and COSLA in discharging their obligations under free personal care. However, having considered all of the submissions on this matter, while I do accept that the information contained in the final paragraph of document 2 would be of interest to Mr Henery (and potentially to the wider public) and that this is an area of general public concern, I am of the view that the public interest in allowing legal advice to be fully received and discussed in confidence outweighs that in disclosing the information in this case.
- 34. On balance, therefore, I find that the Ministers were correct to rely on the exemption in section 36(1) of FOISA for withholding this information from Mr Henery.

Sections 30(b)(i) and 30(b)(ii)

- 35. For information to be exempt under section 30(b) of FOISA the authority would have to show that its disclosure 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, respectively. As with the other exemptions considered in this case, the exemptions in section 30(b) are subject to the public interest test required by section 2(1)(b) of FOISA.
- 36. As I have said in a number of previous decisions, it is my view that the standard to be met in applying these tests is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether release of the information would inhibit substantially (as the case may be) the provision of advice or the exchange of views. The Ministers' own guidance to its staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive. I take the view that in this context "inhibit" means to restrain, decrease or suppress the freedom with which advice is given, and opinions or options are expressed.



- 37. When considering the application of these exemptions, each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. For example, this would involve considering:
 - The nature of the information, and whether it does actually contain the provision of advice, or an exchange of views
 - The subject matter of the advice or exchange of views
 - The content of the advice or exchange of views
 - The manner in which the advice or exchange of views are expressed
 - Whether the timing of release would have any bearing (releasing advice or views whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once advice had been taken)
- 38. The Ministers applied both of the exemptions in section 30(b) to all of the information withheld. The Ministers provided the same justification for both exemptions, although some additional public interest arguments were advanced in relation to section 30(b)(ii).
- 39. The Ministers indicated that in most instances section 30(b)(i) had been applied in relation to advice, although they regarded it as difficult in many cases to distinguish completely between the tests in section 30(b)(i) and 30(b)(ii), as advice and views had a tendency to overlap. As a result, the Ministers questioned the extent to which drawing such a distinction in this case would be beneficial.
- 40. In justifying their reliance on the exemptions in section 30(b), the Ministers stated that it was crucial for Ministers, through officials, to have the ability when deliberating and forming policy to be able to do so in the most effective manner possible. The Ministers contended that they and their officials should be afforded the ability to have a free and frank exchange of advice or views during policy development, either among themselves or with representatives of external organisations. The Ministers argued that disclosure of advice received from other organisations might mean that in future these organisations might be more reluctant to engage with them. They noted in particular that certain documents (14 and 15) had been marked "confidential" and argued that this supported their view that the information in them should be withheld.

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- 41. It is the Ministers' view that if the information withheld from Mr
 Henery were to be released then officials would feel inhibited in their provision
 of similar advice on future occasions. The Ministers also assert that
 premature or inappropriate disclosure would have the effect of limiting the full
 and frank discussion of policy matters, and that this in turn might distort public
 perceptions of the advice provided by officials and affect the impartiality of the
 advice provided. The Ministers have also indicated that if the information in
 these documents were to be released, then this might result in officials being
 more circumspect in their discussions in future.
- 42. In the course of this investigation, the Ministers made additional, general submissions on that the application of the exemptions in section 30(b), intended to be of relevance to various cases under consideration by me (including this one).
- 43. I have addressed these additional, general submissions already in paragraphs 23 to 31 of my *Decision 089/2007 Mr James Cannell and Historic Scotland*. As these new arguments which have been submitted by the Ministers are not specific to the information under consideration, I do not intend to discuss them further here, other than to say that I have considered them fully, together with the original submissions that the Ministers provided in this case, in reaching my decision on the applicability of the exemptions in section 30(b) of FOISA to the information under consideration here.
- 44. Having considered the information withheld and the relevant submissions made to me, I am not satisfied that release of the information in documents 1 to 13 inclusive, or in the covering emails forming part of documents 14 and 15, would inhibit substantially either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. The information contained within these documents relates to a matter consideration of which had (by the time of Mr Henery's request and certainly by the time of his request for review) been concluded. By that time, agreement on the matter, certainly in respect of the periods covered by the information, had long since been reached and implemented.



- 45. Much of the information within these documents provides a snapshot of the position of particular local authorities at a particular time, and as that time had passed some considerable period before the Ministers dealt with Mr Henery's request, this particular information was by then out of date. The latest period covered by the information withheld ended on 31 March 2004 and Mr Henery's review was carried out in January 2006, nearly two full years later, at a time when consideration of funding for the financial year ending on 31 March 2007 would be well in hand. If this issue were to be subject to further debate among local authorities, COSLA and the Ministers, then it is very likely that new, current information would be obtained to inform this debate. Therefore, in the circumstances, I am unable to accept the Ministers' view that release of the particular information in these documents 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.
- 46. The tone and content of some of the material may be regarded as being critical of, or expressing frustration at, contributions to the process. It may well be that in some places this might be expressed differently in future. However I do not believe that the tenor would be changed and the specific conclusions of regarding particular local authorities would not have been inhibited substantially, if at all
- 47. Indeed, in their submissions to my Office, the Ministers did not provide me with any evidence to show what real harm would be caused (or would be likely to be caused) if this information were to be released. The Ministers intimated that knowledge of disclosure *might* inhibit provision of advice in future, which I consider to fall below the threshold required for either exemption to apply.
- 48. I am satisfied, however, that disclosure of the draft documents forming part of documents 14 and 15 would, or would be likely to, inhibit substantially the future free and frank provision of advice and exchange of views for the purposes of deliberation. The information in question is a draft report with a related draft submission and supporting document and I cannot be satisfied that the information in the drafts is an accurate representation of what is contained in the final documents. I accept the submissions from the Ministers in this instance, to the extent that I agree that if this information were to be released then it could be expected to mean that the freedom with which such advice was prepared and deliberated upon would be severely impaired in future and that officials and outside bodies who contributed to discussions in relation to such advice in future could be expected to be considerably more circumspect.

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- 49. As I am not satisfied that the Ministers relied on the exemptions in section 30(b)(ii) or section 30(b)(ii) correctly in relation to documents 1 to 13 inclusive, or in relation to the covering emails forming part of documents 14 and 15, I require the Ministers to disclose these to Mr Henery.
- 50. I will now consider the public interest test in respect of the documents which I have found to be exempt in terms of section 30(b)(i) and (ii) of FOISA.

Public interest test

- 51. In relation to section 30(b) as a whole, the Ministers advanced the following arguments to justify their view that the public interest in disclosure of the information in the 15 documents withheld would be outweighed by the public interest in maintaining the relevant exemption:
 - That disclosure of financial advice provided to the Ministers from outside organisations such as COSLA would have a detrimental effect on such organisations' future engagement with the Ministers and therefore on the way in which the Ministers consider policy and financial issues affecting the Scottish people, and this would not be in the public interest.
 - That the knowledge of possible disclosure of this information might inhibit provision of advice in the future and impair the candour and freedom, within which papers are prepared, deliberated and revised in future.
 - That there is a strong public interest in ensuring that, where necessary, advice in areas of policy development can take place in a non-public arena which will enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations will be picked over out of context.
 - That it is in the public interest for decision making to be based on the best advice available, with a full consideration of all of the options, including those that may not be immediately considered broadly politically acceptable.
- 52. The Ministers have also given specific public interest test arguments in respect of section 30(b)(ii) and these are detailed below:
 - That communications should not only be considered for protection where they contain extreme or outlandish comments: officials should be able to comment on the position in relation to particular local authorities without concern that the comment will be made publicly available within a small number of years. The Ministers argue that the public interest in protecting frank communications also concerns any underlying effects likely to suppress effective future communication.



- It would not be in the public interest for officials to feel compelled to spend time refining every email to COSLA in case a particular local authority might take exception to a reference to their views or position, as they might in the event of disclosure.
- 53. In considering the information contained within the drafts forming part of documents 14 and 15 and the public interest arguments that have been provided by the Ministers and Mr Henery, I recognise that the matter of the provision of free personal and nursing care is one which attracts significant public interest and concern, as it has since its introduction. From reading the submissions made by Mr Henery, I recognise that his concerns in relation to the policy on free personal and nursing care do not simply lie with his own interests, but with wider concerns about the elderly in Scotland who, he submits, are presently being wrongly charged for care. Mr Henery has also highlighted in his application that this is an issue which is being pursued by campaigning organisations such as Age Concern. It is clear therefore that this is a matter which is not only of interest to the public, but also of significant public concern.
- 54. The information contained in documents 14 and 15 relates to a draft of a report that was prepared for Ministers on the outcome of the joint working group's discussions with local authorities, with (in the case of document 15) a draft submission and draft supporting document for the Ministers. The Ministers did not provide my Office with a copy of the final report, as it was not provided to COSLA and therefore does not fall within the scope of the request. For the purposes of these draft documents, however, I accept that there are strong public interest arguments which favour the maintenance of the section 30(b)(i) and (ii) exemptions.
- 55. I accept the Ministers' view that it is in the public interest for decision making to be based on the best advice available, with full consideration of all of the options, including those that may not be immediately considered to be broadly politically acceptable. I also accept that if I were to require the release of draft reports and submissions such as these this could be expected to have the effect that future communications of substance or relation to discussion of draft documents would be suppressed. The preparation of a draft document is an important step in promoting discussion of, and securing advice on, a matter. It is also important in crystallising views and opinions prior to a final document being prepared. I accept that generally public authorities should be able to prepare and discuss draft documents in a manner which allows them to fully explore the issues in question without concern that issues or discussions which may not feature in a final draft will be released or taken out of context.



56. Set against these strong arguments in favour of the exemption being maintained, I accept (as I have indicated in paragraph 53 above) that there is a general public interest in being informed about this particular issue. I accept that the information in these draft documents would shed light on official thinking in relation to aspects of free personal and nursing care at a particular point in time. On balance, however, I would conclude that the public interest in disclosure of the information in the drafts in documents 14 and 15 is outweighed by that in maintaining the exemptions in sections 30(b)(i) and 30(b)(ii) of FOISA.

Section 29(1)(a)

57. The Ministers also argued that the draft ministerial submission forming part of document 15 was exempt under section 29(1)(a) of FOISA. As I am satisfied that the information in this draft was properly withheld under section 30(b)(i) and (ii), I am not required to (and will not) go on to consider whether the Ministers were correct to rely on this exemption in addition.

Decision

I find that the Scottish Ministers (the Ministers) partially dealt with the information request from Mr Henery in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding from him the following information as specified in the Schedule of Documents supplied to me by the Ministers:

- The final paragraph of document 2 (under section 36(1) of FOISA)
- The draft paper attached to document 14 (under section 30(b)(i) and (ii) of FOISA)
- The draft documents attached to document 15 (under section 30(b)(i) and (ii) of FOISA)

However, I also find that the Ministers failed to deal with Mr Henery's information request in accordance with Part 1 of FOISA in not disclosing some information to Mr Henery, and in doing so the Ministers has breached section 1(1) of FOISA.

I therefore require the Ministers to release the following information to Mr Henery:

- Document 1
- Document 2 (except the final paragraph)



- Documents 3 13 inclusive
- The emails forming part of documents 14 and 15 (without attachments)

I require the Ministers to take these steps within 45 days after the date of intimation of this notice.

Appeal

Should either Mr Henery or the Scottish Ministers 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 6 February 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.

. . .

21 Review by a Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- (2) If-
 - (a) the authority is the Keeper of the Records of Scotland; and
 - (b) a different authority is, by virtue of section 22(4), to review a decision to which the requirement relates,
 - subsection (1) applies with the substitution, for the reference to the twentieth working day, of a reference to the thirtieth working day.
- (3) A requirement for review may be withdrawn by the applicant who made it, by notice in writing to the authority, at any time before the authority makes its decision on the requirement.
- (4) The authority may, as respects the request for information to which the requirement relates-



- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
- (b) substitute for any such decision a different decision; or
- (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.
- (6) The Scottish Ministers may by regulations provide that subsections (1) and (5) and section 47(4)(b) are to have effect as if the reference in subsection (1) to the twentieth (or as the case may be the thirtieth) working day were a reference to such other working day as is specified in (or determined in accordance with) the regulations.
- (7) Regulations under subsection (6) may-
 - (a) prescribe different days in relation to different cases; and
 - (b) confer a discretion on the Scottish Information Commissioner.
- (8) Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if-
 - (a) the requirement is vexatious; or
 - (b) the request for information to which the requirement for review relates was one with which, by virtue of section 14, the authority was not obliged to comply.
- (9) Where the authority considers that paragraph (a) or (b) of subsection (8) applies, it must give the applicant who made the requirement for review notice in writing, within the time allowed by subsection (1) for complying with that requirement, that it so claims.
- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

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30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

. . .

- (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.

. . .

36 Confidentiality

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

. . .