

Decision Notice



Decision 070/2009 Ms Rhona Brankin MSP and Learning & Teaching
Scotland

Provision of physical activity in schools

Reference No: 200800204
Decision Date: 17 June 2009

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Ms Brankin, requested from Learning & Teaching Scotland (LTS), information relating to the provision of physical activity in schools. LTS responded by advising Ms Brankin that it considered the information exempt from disclosure in terms of section 30(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). This decision was upheld upon review. Ms Brankin remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that LTS acted in accordance with Part 1 of FOISA by withholding some of the information under consideration under section 30(b)(i) and (ii) of FOISA. However, he could not accept that the disclosure of the remaining information would (or would be likely to) substantially inhibit the free and frank provision of advice or the free and frank exchange of views, and therefore found that it had been incorrectly withheld under these exemptions. He required LTS to disclose this information to Ms Brankin.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs).

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

Background

1. On 17 April 2008, Ms Brankin wrote to LTS requesting the following information:
“. . . any correspondence, e-mails or notes of meetings or conversations between the Scottish Government and [LTS] regarding provision of physical activity in schools since May 2007. ”
2. LTS responded on 19 May 2008, confirming that it held the information requested but considered it to be exempt under sections 30(b)(i) and (ii) of FOISA, on the basis that disclosure would inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. LTS also concluded that on balance the public interest lay in favour of non disclosure of the information requested.



3. On 22 May 2008, Ms Brankin wrote to LTS requesting a review of its decision on public interest grounds, given the high level of interest shown in the media regarding the issue of physical activity in schools.
4. LTS notified Ms Brankin of the outcome of its review on 23 June 2008. LTS upheld its original decision to withhold the information requested in terms of the exemptions in section 30(b)(i) and (ii) of FOISA.
5. On 11 August 2008, Ms Brankin wrote to the Commissioner's Office, stating that she was dissatisfied with the outcome of LTS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Brankin had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 19 August 2008, LTS was notified in writing that an application had been received from Ms Brankin and asked to provide the Commissioner with any information withheld from the applicant. LTS responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted LTS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, LTS was asked to justify its reliance on section 30(b)(i) and 30(b)(ii) of FOISA.
9. In its response, LTS maintained its view that the information requested by Ms Brankin was exempt from disclosure under the exemptions in section 30(b)(i) and 30(b)(ii) of FOISA. In its submission, LTS presented its reasons for relying on these exemptions and also provided its arguments with respect to the public interest test. These arguments are considered in detail in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Ms Brankin and LTS and is satisfied that no matter of relevance has been overlooked.



Consideration of section 30(b)(i) and (ii)

11. In order for LTS to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(ii) of FOISA, it would have to show that disclosure of the information under FOISA 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.
12. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in section 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the principle consideration is not whether the information constitutes advice or opinion (although that may well be relevant), but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice or the exchange of views.
13. The Commissioner's approach to these exemptions is made clear in a number of his decisions and overall was upheld by the Court of Session decision in *The Scottish Ministers v The Scottish Information Commissioner [2006] CSIH 8*. In considering either exemption, the Commissioner must 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. It cannot necessarily follow from the Commissioner requiring release of one particular piece of information that information of that general variety will require to be disclosed routinely in the future.
14. The Commissioner looks for authorities to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Additionally, the harm in question must take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
15. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of either exemption it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.

LTS's submissions relating to section 30(b)

16. LTS has applied either or both of the exemptions in section 30(b)(i) and (ii) to withhold a number of documents, listed in the schedule of documents attached to this decision. In coming to this conclusion, LTS stated that it took into consideration the context of the request, confirming a key role for LTS as being to provide advice which informs the policy of the Scottish Government. LTS went on to quote from its remit as follows: "*LTS will, drawing on evidence from research and external evaluation, provide sound, coherent advice to Ministers on support for continuous improvement in Scottish education...*"



17. LTS went on to add that its advice was provided in the knowledge that it would be a free and frank exchange and that in the case of physical education and formulation of draft outcomes, the information requested informed policy in these areas. LTS argued that the main consideration in this case was whether or not there was an exchange of views: in its view, the iteration of drafts and information from emails demonstrated that there had been an exchange.
18. Focusing on its relationship with the Scottish Government, LTS contended that a significant level of trust had to exist in providing advice on an ongoing basis. Any compromise in the level of trust was, in its view, likely to substantially inhibit a key element of its remit and role on an ongoing basis. It went on to state that in order for it to carry out its remit appropriately, this level of trust was vital if third parties were to provide their views in a full and frank manner.
19. LTS also stated that in its view the timing of the request was important. Formulation of the draft outcomes and experiences (the curriculum guidance it was working on in this area), of which it considered physical activity (including physical education) to be an important part, was essentially “work in progress”. At the time of making its submissions, LTS confirmed that the draft outcomes and experiences were due to be finalised in January 2009. LTS added specifically that its work on physical education was integral to the drafting of the outcomes and as such was part of this “work in progress”.
20. In LTS’s view, the release of information in early drafts in response to Ms Brankin’s request could have influenced the views of third parties who were asked to comment as part of an overall consultation, and potentially force an early and unwanted change in the position taken by the Scottish Government in shaping of its policy on physical activity.

Conclusions on section 30(b)(i) and (ii)

21. Having considered the information being withheld, along with LTS’s submissions, the Commissioner notes that the information includes both the provision of advice and the exchange of views for the purposes of deliberation. However, as noted above, the primary consideration is not whether the information contains advice or views, but whether its disclosure would have, or would be likely to have, either or both of the substantially inhibiting effects specified in section 30(b) of FOISA.
22. LTS in its submissions took the view that all the information it held and which fell within the scope of Ms Brankin’s request should be withheld under either or both of section 30(b)(i) or (ii). However, the Commissioner is unable to accept that release of certain of the information under consideration here, as more particularly detailed in the attached schedule, would inhibit officials substantially from carrying out their professional duties in relation to the giving of advice or views in future. Having considered the information, he has also concluded that certain of it, again as detailed in the schedule, does not in fact fall within any of the descriptions of information specified in Ms Brankin’s request and therefore does not require to be considered further in this decision.



23. The Commissioner notes that several of the documents withheld by LTS appear to relate to routine exchanges between different officials in LTS and the Scottish Government, of the kind that would be expected given LTS's remit and known Government policy, and of no particular sensitivity given that consideration of this particular policy area would have been expected at the time (and given the general issues such consideration would be expected to cover). Although it is evident from the content of some of these exchanges that both advice and views have been expressed, the Commissioner is not persuaded that there is anything particular in the character of any of this information from which it could be concluded that its disclosure would, or would be likely to, substantially inhibit officials from providing advice or views freely and frankly in similar circumstances in the future.
24. The Commissioner further notes that the documents in question have been produced during 2007 and 2008. It is assumed that officials would at that time have been well aware of the existence of FOISA and the possibility of information they generated being requested and disclosed under it.
25. Having considered LTS's arguments, therefore, the Commissioner is unable to accept that disclosure of the information described above in this particular case 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. Therefore, he requires the disclosure of the information specified as to be disclosed in the schedule attached to this decision.
26. The Commissioner has also concluded, however, that LTS was correct to apply the exemptions in section 30(b)(i) and (ii) to other elements of the withheld information.
27. A key aspect of LTS's decision to withhold the information in question related to the timing of the request. At the time of the request, the work being carried out regarding physical activity in schools formed part of ongoing work concerning the production of curriculum guidance on health and wellbeing. At the time of the request and the request for review, LTS argued that this was a "work in progress", its concern being that disclosure of early drafts at that time could influence the views of third parties who had been asked to comment as part of an overall consultation, and potentially force an early and unwanted change in the position taken by the Scottish Government in the shaping of its policy on physical activity.
28. The Commissioner accepts that officers preparing draft reports of the type under consideration in this case might in future be substantially inhibited from full and frank expression of advice and/or views by the prospect of disclosure at a time when the matters under consideration were still current. Not all the documents here, however, are draft reports. The Commissioner notes that some of the information relates to email exchanges between certain officials. On consideration of these documents, and taking account again of the timing, the Commissioner has concluded that they represent a level of candour from which the officials would have justifiably expected that their contributions of advice and views would not be made publicly available during the period of time when the matter under consideration could still be considered a "work in progress": in the circumstances, he accepts that their disclosure at the time of the request or the request for review would, or would be likely to, substantially inhibit the future provision of advice or (as the case may be) exchange of views for the purposes of deliberation.



29. The Commissioner also noted the question of timing in relation to the information he has found not to be exempt under section 30(b). Given its routine nature, however, he does not consider timing to be material to the disclosure of this particular information.
30. The Commissioner is therefore satisfied that the information in a number of the documents withheld and referred to in the schedule would be exempt under one or both of the exemptions in section 30(b). On this basis, he is required to consider the application of the public interest test as outlined in section 2(1)(b) of FOISA to these particular documents.

Public interest test

31. In its submissions, LTS acknowledged that the interest to the public in the withheld information could be wide ranging, including those involved in physical education, health bodies, and parents and young people with an interest in physical activity. However, LTS went on to argue that the formulation of draft outcomes and experiences, including health and wellbeing (which includes physical education), was currently subject to an ongoing process of “trialing” in schools and engagement with groups such as business, universities, parents, health bodies and others. LTS went on to state that the process of engagement was wide ranging in its means and comprehensive in its approach, with an overall deadline for finalisation of the draft outcomes and experiences (as indicated above) early in 2009.
32. LTS contended that the extent of the engagement meant that there were significant opportunities for interested parties to participate as part of a formal and agreed process of shaping the final draft outcomes and experiences on health and wellbeing, and that disclosure would not enhance the debate or add to the level of public scrutiny which was already in place. Moreover, LTS asserted that disclosure of early drafts and accompanying information could potentially alter the views and stance of the Scottish Government at too early a stage in the process.
33. In considering the public interest test in relation to the information the Commissioner concludes were exempt under one or both of the exemptions in 30(b) of FOISA, he accepts 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, but this must be balanced against any detriment to the public interest as a consequence of disclosure. In the case of information which is considered to be exempt under the exemptions in 30(b), information can only be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (and therefore withholding the information).



34. The Commissioner recognises that there is a substantial public interest in ensuring that officials, when they are in the process of formulating (or contributing to the formulation of) government policy, are able to advise and discuss matters of substance freely and openly without the fear of inappropriate disclosure, particularly at a time when that disclosure could prejudice the policy development process substantially. Taking account of the actions taken to engage the various potentially interested sectors, groups and individuals in the consultation process, on balance the Commissioner takes the view in this case that the relatively limited additional public interest that might served by disclosure would be outweighed by the substantial harm he accepts would be likely to follow as a consequence. Accordingly, the Commissioner has concluded that the public interest in disclosure is outweighed by that in favour of maintaining (as appropriate) the exemptions contained in section 30(b)(i) and/or (ii) of FOISA.

DECISION

The Commissioner finds that Learning & Teaching Scotland (LTS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Brankin.

The Commissioner finds that LTS acted in accordance with Part 1 of FOISA by withholding certain of the information, as specified in the schedule of documents attached to this decision, in terms if either or both exemptions in section 30(b)(i) and (ii) of FOISA.

However, the Commissioner also finds that LTS incorrectly applied the exemptions in section 30(b)(i) and/or (ii) to certain of the information under consideration in this case, also as specified in the attached schedule of documents. By withholding these documents, LTS failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires LTS to provide Ms Brankin with the information detailed in the attached schedule of documents as information to be disclosed, by 1 August 2009.



Appeal

Should either Ms Brankin or LTS 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
17 June 2009



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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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; or

...



Schedule of Documents

Doc	Exemption(s) applied/ whether within scope of request	Exemption(s) upheld Yes/No	PI favours disclosure? Yes/No	Decision and any steps required
1	30(b)(i)	No	N/A	Disclose
2	30(b)(i)	No	N/A	Disclose
3	30(b)(i)	Yes	No	Withhold
4	30(b)(i)	No	N/A	Disclose
5	Outwith scope	N/A	N/A	Outwith scope
6	Outwith scope	N/A	N/A	Outwith scope
7	30(b)(i)	Yes	No	Withhold
8	30(b)(i)	No	N/A	Disclose
9	Emails 30(b)(i) & (ii)	No	N/A	Disclose
9a	Attachment 30(b)(i) & (ii)	Yes	No	Withhold
10	30(b)(i) & (ii)	No	N/A	Disclose
11 - 25	Outwith scope	N/A	N/A	Outwith scope
26	30(b)(i) & (ii)	Yes	No	Withhold
27 - 28	Outwith scope	N/A	N/A	Outwith scope
29	30(b)(i) & (ii)	Yes	No	Withhold
30	Outwith scope	N/A	N/A	Outwith scope
31	30(b)(i)	Yes	No	Withhold
32	30(b)(i)	No (except email 31/08/07 09:57, considered under	N/A	Disclose (except 09:57 email)



		31 above)		
33	Covering email 30(b)(i) & (ii)	No	N/A	Disclose
33a	Attachment 30(b)(i) & (ii)	Yes	No	Withhold
34	Email 30(b)(i) & (ii)	No	N/A	Disclose
34a	Attachment 30(b)(i) & (ii)	Yes	No	Withhold
35	Email 15/11/07 16:21 30(b)(i) & (ii)	No	N/A	Disclose
35a	Email 15/11/07 16:15 30(b)(i) & (ii)	Yes	No	Withhold
36	30(b)(i) & (ii)	No	N/A	Disclose
37	30(b)(i) & (ii)	Yes	No	Withhold
38	Covering email 30(b)(i) & (ii)	No	N/A	Disclose
38a	Attachment 30(b)(i) & (ii)	Yes	No	Withhold
39	30(b)(i) & (ii)	Yes	No	Withhold
40	30(b)(i) & (ii)	No	N/A	Disclose
41	Same as 40	N/A	N/A	Same as 40
42	Covering email 30(b)(i) & (ii)	No	N/A	Disclose
42a	Attachment 30(b)(i) and (ii)	Yes	No	Withhold
43	30(b)(i) & (ii)	No	N/A	Disclose
44	Covering email 30(b)(i) & (ii)	Yes	No	Withhold
44a	Attachment 30(b)(i)	No	N/A	Disclose



	& (ii)			
45	Outwith scope	N/A	N/A	Outwith scope