

Decision Notice



Decision 087/2011 Mr Tommy Kane and the Scottish Ministers

Meetings and correspondence

Reference No: 201100043
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Summary

Mr Tommy Kane (Mr Kane) requested from the Scottish Ministers (the Ministers) a range of information in relation to meetings between the Scottish Government and the Scottish Futures Trust (SFT) and/or KPMG. The Ministers disclosed some information and withheld the remainder under sections 25, 29 and 30 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review in which an additional piece of information was disclosed, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in which the Ministers disclosed additional information to Mr Kane, the Commissioner's decision considered whether the Ministers had identified and considered all information falling within the scope of Mr Kane's information request. He found that the Ministers had acted in accordance with Part 1 of FOISA by withholding the remaining information on the grounds that it was exempt from disclosure under section 30(b)(ii) of FOISA.

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); and 30(b)(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 28 July 2010, Mr Kane emailed the Scottish Ministers (the Ministers) requesting the following information for the period from 10 September 2008 to July 2010:
 - a. A list of meetings taking place between the Scottish Government and the Scottish Futures Trust (SFT) in relation to the report published in July 2010 by the SFT considering potential models of ownership for Scottish Water (the SFT report).
 - b. Any minutes and/or notes from any meetings between the Scottish Government and the SFT and/or the consultants KPMG in relation to the SFT report.



- c. Any correspondence between any Scottish Government officials and Ministers with the SFT and/or consultants KPMG in relation to any issue concerning Scottish Water and the SFT report. This should include e-mail, letters and reports written and exchanged.
2. The Ministers responded on 26 August 2010, providing a list of meetings in relation to part a) of Mr Kane's request and disclosing some information in relation to other parts of his request. The Ministers indicated that the SFT report had been withheld on the grounds that it was already reasonably accessible to Mr Kane on the SFT website, and so it was exempt from disclosure under section 25 of FOISA. The Ministers withheld the remaining information on the grounds that it was exempt from disclosure under sections 29(1)(a) and 30(b)(ii) of FOISA.
3. On 6 September 2010, Mr Kane emailed the Ministers requesting a review of their decision to withhold information considered exempt under sections 29(1)(a) and 30(b)(ii). He argued that the status of Scottish Water is of utmost importance and concern to the Scottish public and that any discussions regarding its future ownership are deserving of full transparency and accountability.
4. The Ministers notified Mr Kane of the outcome of their review on 13 October 2010. They upheld their previous decision with respect to the application of the exemptions in sections 29(1)(a) and 30(b)(ii). However, the review did identify and supply one document which should have been disclosed.
5. On 6 January 2011 Mr Kane emailed the Commissioner, stating that he was dissatisfied with the outcome of the Ministers 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 Mr Kane 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 11 January 2011, the Ministers were notified in writing that an application had been received from Mr Kane and they were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested. This comprised 8 documents which contained the information that had been identified as falling within the scope of Mr Kane's request (in some cases alongside other information which fell outwith the scope of the request). The Ministers provided a schedule which confirmed which parts of the 8 documents had been disclosed to Mr Kane, and indicated that exemptions within sections 25, 29(1)(a) and 30(b) were considered to apply to the parts which had been withheld. The case was then allocated to an investigating officer.



8. On 4 February 2011, the Ministers were asked to provide any comments they wished to make on Mr Kane's application (as required by section 49(3)(a) of FOISA). In particular, the Ministers were asked to provide further details of the searches they had undertaken in order to identify information falling within the scope of Mr Kane's request, and to justify their reliance on any provisions of FOISA they considered relevant to the withheld information (with particular reference to sections 25, 29(1)(a) and 30(b)).
9. The Ministers replied on 25 February 2011, providing comments and information as requested. In further communications with the Ministers, the investigating officer took further steps to establish whether all relevant information had been identified by the Ministers. These led to the identification of further relevant information contained in a 9th document. The Ministers submitted that this information was exempt from disclosure under section 30(b)(ii) of FOISA.
10. During the investigation, the Ministers disclosed further information that had previously been withheld to Mr Kane. They also provided copies of four letters to Mr Kane (redacted to exclude parts that fell outside the scope of his request) in order that he could see the full context of information that been supplied before as extracts. Mr Kane confirmed receipt of this information.
11. Following these additional disclosures, the Ministers maintained that they had properly identified all information within the 9 documents which fell within the scope of Mr Kane's request, and appropriately excluded from their disclosures parts which fell outwith the scope of Mr Kane's request.
12. The Ministers maintained that the only remaining information which fell within the scope of Mr Kane's request for information was contained in documents 1, 3 and 9, and this information was exempt from disclosure.
13. Mr Kane has confirmed that he does not require a decision from the Commissioner in relation to the information (concerning pricing) that was withheld in document 3. He confirmed that his continuing dissatisfaction relates to the Ministers' decision to withhold information which would contribute to a full understanding of the process and of the communications between the Scottish Government and SFT in relation to the policy development that was taking place.
14. Mr Kane's submissions were sought and received on the matters raised by this case, and in particular as to why he considered the public interest test favoured disclosure of the information being withheld under sections 29(1)(a) and 30(b) of FOISA.
15. In the light of the above, the Commissioner's decision in this case will focus on the remaining withheld information in order to:
 - a. Determine whether the Ministers have identified and considered all information falling within the scope of Mr Kane's information request, and
 - b. Consider whether the withheld information contained in documents 1 and 9 was properly withheld under the terms of sections 29(1)(a) and 30(b)(ii) of FOISA.



16. The submissions received from both Mr Kane and the Ministers are (where relevant) summarised and considered in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Kane and the Ministers and is satisfied that no matter of relevance has been overlooked.

Information falling with the scope of the request

18. Mr Kane did not accept that the Ministers had identified and provided to him all the information falling within the scope of his request. He highlighted that references contained within the supplied to him which suggested that further relevant information may be held.
19. As noted above, the investigating officer requested and received submissions from the Ministers on the searches they had undertaken. The questions asked highlighted and sought comments on particular references within the documents supplied to the Commissioner which suggested that further information might be held.
20. The Ministers' responses addressed all of these questions and explained the steps taken to identify information falling within the scope of Mr Kane's request. The Ministers indicated that they had searched their records management system (and provided the search terms used) and contacted the relevant individuals to identify any information falling within the scope of Mr Kane's request. They provided copies of their correspondence concerning Mr Kane's request and background information on the subject matter under consideration, supporting their assertion that no further information was held.
21. During the investigation, the Ministers undertook additional steps to check the extent of information held, and the investigating officer reviewed a number of documents to reach a view as to whether they contained information falling within the scope of Mr Kane's information request. As noted above, one additional document was identified as containing some information falling within the scope of Mr Kane's information request.
22. Having considered the Ministers submissions and responses to the investigating officer's questions, the Commissioner is satisfied that by the end of the investigation, the Ministers had taken appropriate and adequate steps to identify all the information falling within scope of Mr Kane's request, and that the only information located was that contained within the 9 documents under consideration in this case. On balance of probabilities, the Commissioner is satisfied that no further relevant information is held.



23. The Commissioner is also satisfied that, by the end of the investigation, the Ministers had correctly identified the information which fell within the scope of Mr Kane's information request within documents 2 to 8. The information in documents 2 and 3 was disclosed to Mr Kane in full, other than the pricing information which Mr Kane has excluded from consideration in this decision.
24. The information in documents 4, 5, 6 and 7 was not supplied in full to Mr Kane. However, the Commissioner has concluded that redacted parts of these documents contained information which fell outwith the scope of his request and so did not fall to be considered or disclosed by the Ministers when responding to Mr Kane's request.

Documents 1 and 9

25. These two documents are internal emails which refer to and include notes concerning meetings between the Scottish Government and the SFT. To the extent that these emails contain notes of these meetings, they fall within the scope of Mr Kane's requests. Where these emails relate to other matters, the information has been excluded from consideration.
26. Within document 1, only the first email (timed 16:46) provides a note of the relevant meeting and falls within the scope of Mr Kane's information request. The other emails within this document relate to other matters and so fall outside the scope of the request and have been considered no further.
27. Within document 9, the information falling within the scope of Mr Kane's request is contained in the second email (timed 16:50), excluding the first and third paragraphs of that email.
28. The Ministers have argued that references to the views of a third party within the relevant parts of document 9 should also be excluded from consideration on the grounds that Mr Kane's request referred only to meetings between the Government and SFT. However, the Commissioner is unable to accept this narrow interpretation of the request. He recognises that Mr Kane referred to meetings between two parties, but notes that he did not limit his request to only meetings involving only those two parties, or to information setting out the views only of those parties. In what follows, he has therefore considered all of the content of the email timed 16:50, excluding the first and third paragraphs.
29. The Ministers have applied the exemptions in sections 29(1)(a) and 30(b)(ii) to the relevant information in document 1 and that section 30(b)(ii) to the relevant information in document 9. The Commissioner first considered the application of section 30(b)(ii) to this information.

Information withheld under section 30(b)(ii) of FOISA

30. In order to rely on the exemption laid down in section 30(b)(ii), the Ministers must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.



31. As the Commissioner has said in previous decisions, his view that the standard to be met in applying the tests contained in section 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion (although this may also be relevant) but whether the release of the information would, or would be likely to, inhibit substantially the free and frank exchange of views.
32. The Ministers submissions have commented on the particular content of the relevant parts of documents 1 and 9. In each case they noted that the comments in the emails were unofficial records of discussions, expressing the views of the writers on options in advance of fuller briefings being provided to Ministers. They maintained that disclosure of such information would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
33. The Commissioner has considered the withheld information carefully in the light of the Ministers' submissions. He notes that the relevant emails do not contain formal minutes or records of the meetings concerned, but rather provide informal records of the discussions between representatives of the Scottish Government and external organisations. The content also includes the opinions of the writers of the emails, which are expressed in frank terms. The Commissioner considers it to be clear that these are records created for internal purposes, to share information about the discussions at and outcomes of the meetings concerned, and to inform consideration of the matters discussed.
34. The Commissioner accepts that disclosure of this particular information would or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation. He considers that such inhibition would be likely to affect those participants in future meetings of this type, within the discussions themselves as well as in recording and sharing their recollections of the discussions and opinions on the outcomes of such discussions.
35. As a result, the Commissioner finds that the exemption in section 30(b)(ii) was correctly applied by the Ministers to the withheld (and relevant) information within documents 1 and 9.

Public interest test

36. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption is found to have been correctly applied, the Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).
37. The Ministers acknowledged that there was a public interest in ensuring that the expenditure of public funds is conducted in a fair and transparent manner. They recognised that in considering the options for Scottish Water's future the Scottish Ministers are undoubtedly seeking to pursue options that will ensure best value for the Scottish people.



38. The Ministers stated that much information on possible options for Scottish Water is already in the public domain. In this case, however, they maintained that because of this, the public interest is outweighed on this occasion by the needs of Ministers and officials to have the private space to consider in a free and frank manner discussions and advice on possible options for the future. The Ministers went on to comment that the Scottish Government needs to be able to secure best value for public expenditure and ensure that money is being spent advantageously for the people and the economy of Scotland. Therefore, on balance the Ministers considered that the public interest favoured the withholding of the information at this time.
39. In his submissions Mr Kane noted that a policy development process had been going on for a number of years in relation to the future of Scottish Water. He highlighted the historical, political and international context for the debate about future ownership of Scottish Water and maintained that if the Scottish Government is involved in policy discussions in this area, then those discussions are a matter of public interest and should be open and accountable. He went on to state, however, that such discussions have mainly taken place privately and have not included the public.
40. Mr Kane queried how a full and frank policy development process and a free and frank exchange and dissemination of views and ideas could take place without the input of the wider populace and their elected representatives. He stated that the policy development process appeared to involve a very narrow stratum of Scottish society, including parties which would be potential beneficiaries of any ownership change. He argued that the policy development process should be open to the rigours of democratic principles.
41. He explained that he was undertaking research to track the policy development process and consider the position of key stakeholders. He noted that the Scottish Government is a key stakeholder, and his aim was to establish whether its private activities reflected its public statements claiming that it had no plans to change the ownership status of Scottish Water. He noted that, notwithstanding such statements, the Ministers had commissioned reports which may well influence such a change.

Conclusions regarding the public interest

42. The Commissioner has considered all of the submissions made with respect to the public interest test carefully. He recognises that the future of Scottish Water, a provider of essential services to all Scottish households, is a matter of significant public interest. The Commissioner finds himself in agreement with much of what Mr Kane says about the importance of any policy development process on this matter being open and accountable.
43. Disclosure of the information would offer some insight into discussions involving the Scottish Government and SFT, who was involved and what matters were discussed, and the processes leading to the publication of the SFT report.



44. Nonetheless, having reviewed the withheld information, the Commissioner considers it would make only a very limited contribution to public understanding of policy development and the wider public interest identified by Mr Kane. The information under consideration is brief and limited, and the Commissioner does not consider that it would offer any significant insights into the views of Ministers or other stakeholders on the future of Scottish Water, or any policy development process.
45. The Commissioner recognises that the general public interest in public authorities being open and accountable for their activities is a factor favouring disclosure in this case. However, since the information under consideration would contribute little to the (real and serious) public interest that Mr Kane has identified, the Commissioner has only given limited weight to the public interest in disclosure of the information under consideration.
46. With respect to the public interest in maintaining the exemption in section 30(b)(ii), the Commissioner has recognised that disclosure in this case would be likely to inhibit participants in meetings of the type to which the information under consideration relates, and it would be likely to make officials more circumspect when recording their recollections and opinions of such meetings.
47. The Commissioner accepts that such inhibition would be contrary to the public interest, by risking the effective information sharing within government, and between the government and external organisations, to the detriment of the effective conduct of government business, and policy formulation.
48. Having balanced the public interest for and against disclosure in this case, the Commissioner has concluded on balance that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.
49. The Commissioner therefore concludes that the Ministers acted in accordance with Part 1 of FOISA by withholding the parts of documents 1 and 9 that fell within the scope of Mr Kane's information request.
50. Having reached this conclusion, the Commissioner has not gone on to consider whether the exemption in section 29(1)(a) was also applicable to the relevant parts of document 1.

DECISION

The Commissioner finds that, with respect to the matters considered in this decision notice, the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tommy Kane.

Decision 087/2011
Mr Tommy Kane
and the Scottish Ministers



Appeal

Should either Mr Kane 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
12 May 2011



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-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or