



Scottish Information
Commissioner

**Decision 098/2006 Mr Jim Mather MSP and the
Scottish Executive**

*Communications between the Scottish Executive and the European
Commission with regard to the tendering of the Clyde and Hebrides
lifeline ferry services*

**Applicant: Mr Jim Mather MSP
Authority: The Scottish Executive
Case No: 200502580
Decision Date: 06 June 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 098/2006 Mr Jim Mather MSP and the Scottish Executive

Communications between the Transport Minister and the European Commission relating to the tendering of lifeline ferry services –section 29(1)(a) the formulation of government policy - section 30(b) free and frank exchange – section 32(1)(a)(ii) international relations –section 27(1) future publication – consideration of the public interest

Facts

Acting on behalf of Mr Jim Mather MSP, Ms Elizabeth Lloyd requested copies of correspondence between the Minister for Transport and the European Commission Vice-President responsible for Transport on the need for tendering of the Clyde and Hebrides ferry services, and information relating to a meeting on 9 December 2004. The Scottish Executive (the Executive) refused to supply this information on the grounds that it was exempt under sections 32(1) and 30(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive stated that the public interest in maintaining these exemptions outweighed that in release. Ms Lloyd then requested a review of this decision. Before a response was supplied, the Executive published the letters within the document "*Clyde and Hebrides Lifeline ferry services: the Scottish Executive's consideration of the requirement to tender*". Even so, the Executive's subsequent response to the request for review upheld its initial decision in full. Ms Lloyd then made an application for decision on this matter.

Outcome

The Commissioner found that the Scottish Executive had acted in breach of Part 1 of FOISA by refusing to supply the letters between the Minister and the Commissioner in response to Ms Lloyd's initial request. He found that the exemption in section 32(1)(a)(ii) had been incorrectly applied to these. He also found that these letters were not exempt from release under section 27(1) at the time when the Scottish Executive considered and responded to the request.



The Commissioner found that the Executive had acted in accordance with Part 1 of FOISA by withholding the remaining information relevant to this request. He found that the exemptions in section 29(1)(a) and 30(b)(ii) of FOISA applied to the relevant document, and that the public interest in maintaining these exemptions outweighed that in release.

The Commissioner did not require any remedial steps to be taken in response to this decision.

Appeal

Should either Mr Mather or the Executive 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 of receipt of this notice.

Background

1. On 8 December 2004, the Scottish Parliament debated the Executive's plans for tendering of the Clyde and Hebrides ferry services currently operated by Caledonian MacBrayne. During the debate, the Transport Minister (then Nicol Stephen MSP) informed MSPs that the advice given to Ministers was that tendering was required in order to comply with an EU Regulation on maritime cabotage.
2. However during the debate, doubts were expressed about the need for tendering and a motion supporting the Executive's plans was defeated. The Transport Minister agreed to discuss the Parliament's concerns with the European Commission and, thereafter, return to Parliament.
3. The following day (9 December 2004), the Transport Minister met with M. Jacques Barrot, the European Commission Vice-President responsible for transport (the Commissioner), to discuss the matter during a scheduled visit to Brussels. Following this meeting, a series of letters was exchanged between the Transport Minister and the Commissioner on the need for tendering.



4. The Scottish Parliament debated the tendering of the Clyde and Hebrides ferry services again on 14 September 2005. During this debate, the Parliament agreed to a motion acknowledging that the tendering of the Clyde and Hebrides lifeline ferry services was required to protect these services. The tendering process was initiated soon after (and is ongoing at the time of issuing this decision.)
5. Two days prior to this second debate, the Executive published a document entitled *Clyde and Hebrides Lifeline ferry services: the Scottish Executive's consideration of the requirement to tender* (the information pack). This set out the Executive's consideration of possible alternatives to tendering, and its conclusion that tendering was indeed required. Annex F to this document incorporated the correspondence between the Transport Minister and the Commissioner on the need for tendering.

The request for information

6. Acting on behalf of Jim Mather MSP, Elizabeth Lloyd emailed the Minister for Transport on 10 August 2005. This email referred to three questions in the European Parliament concerning communications between the European Commission and the Executive on the need for tendering of the Clyde and Hebrides ferry services. The European Commission's answer referred to two letters sent by the Commissioner in response to questions put to him by the Transport Minister.
7. Ms Lloyd's email to the Transport Minister requested the following information:
 - a) the two letters referred to in the [European] Commission's answer dated 27 January and 19 April 2005 and the initial letters sent to the European Commission by the Minister
 - b) briefings provided to the Minister prior to the meeting on 9 December 2004
 - c) Notes, minutes or briefings relating to the meeting on 9 December 2004
8. The Executive's response was provided in a refusal notice dated 22 August 2005. This confirmed that the information was held but informed Ms Lloyd that it was exempt from release. Items a) and b) were judged to be exempt under section 32(1)(a)(ii) of FOISA which applies where release would or would be likely to prejudice substantially relations between the United Kingdom and any international organisation or international court. Items b) and c) were judged to be exempt under section 30(b) of FOISA because release would be likely to inhibit substantially the free and frank provision of advice. The Executive stated that the public interest in maintaining these exemptions outweighed that in release.



9. Ms Lloyd wrote to the Executive to request a review of this decision on 24 August 2005. Her letter set out a number of reasons why she believed that the public interest test had been wrongly applied by the Executive, and maintained that the information should be disclosed.
10. On 12 September 2005, the Executive published the information pack in advance of the Parliamentary debate on 14 September. Annex F to this document includes a series of seven letters exchanged between the Commissioner and successive Transport Ministers (Nicol Stephen MSP and later Tavish Scott MSP). These included the four letters requested by Ms Lloyd in part a) of her request.
11. The Executive notified Ms Lloyd's of the outcome of its review in a letter dated 21 September 2005. This stated that the Executive upheld its initial decision in full, including in respect of the application of the exemption in section 32(1)(a)(ii) to letters that had since been released. The Executive stated that the release of these letters followed confirmation that the European Commission would be content for them to be made public and that relations would not be prejudiced. The reviewer also confirmed that despite the points made in Ms Lloyd's request for review, the Executive still found that the public interest had been correctly considered.
12. Ms Lloyd (once again on behalf of Jim Mather MSP) applied for a decision by me on 28 September 2005, expressing dissatisfaction with the Executive's responses to the request on the grounds that
 - a) publication of the letters was contrary to the reasons given for withholding them in the first instance; and
 - b) as the letters and the other information requested had been withheld on the same grounds, the remaining information should now be released.

Investigation

13. The application for decision was allocated to an investigating officer and then validated by establishing that Ms Lloyd, acting on behalf of Mr Mather, had made a valid information request to a Scottish public authority (i.e. the Executive) under FOISA and had appealed to me only after asking the Executive to review the response to the request.
 14. The investigating officer wrote to the Executive on 29 September 2005 informing it that an appeal had been received and that an investigation into the matter had begun. The Executive was invited to comment on the case in terms of section 49(3) of FOISA. The Executive was also asked to supply:
-



- a) Copies of any information falling under the scope of parts b) and c) of the request (i.e. briefings supplied to the Transport Minister, and notes, minutes or other briefings relating to the meeting of 9 December 2004).
 - b) Detailed explanation of the reasons for the application of the exemptions in section 32(1)(a)(ii) and section 30(b) of FOISA to the information requested (including the letters).
 - c) Detailed explanation of the reasons for the Executive's judgement that the public interest in maintaining the exemptions outweighed that in release.
 - d) Copies of documents relating to the handling of the request, and any correspondence with the European Commission relating to the disclosure of any of the information under consideration.
15. The Executive's response to this request was received on 24 October 2005. Further background information and documentation was supplied in response to further requests from my office in March and April 2006.
16. Ms Lloyd was also invited to make a submission on this case, and in particular in relation to the public interest, in March 2006. Her comments have also been taken into consideration in my findings below.

Information falling under the scope of the request

17. The Executive advised my office that, alongside the letters already published, only one document had been identified as falling under the scope of the request. This was an email exchange relating to the preparation of a briefing to be sent to the Commissioner in advance of the meeting of 9 December. A copy of this document was supplied.
18. I understand that the briefing to which the emails relate was never sent to the European Commission. However, the Transport Minister was one of the addressees of the email exchanges, and so the text of the briefing falls under the scope of part b) of the request, which sought briefings provided to the Minister in advance of the meeting. I conclude that the entire exchange also falls under the scope of part c) of the request for information, which sought any notes, minutes or briefings relating to the meeting of 9 December 2004.
19. The Executive has confirmed that no briefing was provided to the Transport Minister to assist his own preparation in advance of the meeting. Furthermore, no notes or minutes (either formal or informal) were taken either during or after the meeting. Instead, the Transport Minister's (published) letter to the Commissioner of 23 December 2004 was prepared with the intention of recording the key matters discussed.



20. In explaining to my office why so little relevant information was held in relation to the meeting of 9 December 2004, the Executive has emphasised that this took place in unusual circumstances. It was arranged at very short notice following the Parliamentary debate of 8 December 2004, and there was no time to prepare specific briefing as would normally be the case. The Executive has confirmed that it has examined all paper and electronic records related to this issue and that none relating to Ms Loyd's request have been destroyed and no other relevant information is held. In the circumstances (and having considered all the steps taken by the Executive to establish that this was the case) I have no indication that any further relevant information needs to be considered by me.

The Executive's submissions on the letters (part (a) of the request)

21. The Executive's submissions pointed out that its correspondence with Ms Lloyd had occurred in parallel with its preparation of the information pack. This preparation had included discussions concerning whether the letters should be published, in part due to concerns about damaging the working relations between the Executive and the European Commission. Although there was an expectation among officials that the letters would be published, the decision to publish was not confirmed by the Transport Minister until 30 August 2005, 8 days after the response was issued to Ms Lloyd.
22. The Executive suggested that in hindsight, it should have relied upon the exemption in section 27(1) of FOISA (which applies where information is intended for publication within 12 weeks) in relation to these letters.
23. No submissions were made in support of the original application of the exemption in section 32(1)(a)(ii) to the letters.
24. Internal documents were supplied by the Executive which demonstrated that the decision to publish the letters had not been confirmed at the time when a response was supplied to Ms Lloyd.

The Executive's submissions on the unpublished document

25. The Executive's submissions confirmed that it considered the email exchange supplied to my office to be exempt from release under sections 30(b)(i) and 30(b)(ii) of FOSIA. These exemptions apply where release of information would or would be likely to inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, respectively.



26. The Executive noted that the email exchange related to what was, at the time of Ms Lloyd's request, still a live and politically sensitive issue. The exchanges include a frank discussion of options regarding the form of a briefing intended for sending to the European Commissioner, which would (had it been sent) have set the tenor of these discussions.
27. While the need for tendering of the Clyde and Hebrides ferry services has since been agreed by the Scottish Parliament, the Executive informed me that it felt that there was a very real risk that officials would be inhibited from engaging in such exchanges in future if they were conscious that they would in future be publicly available, particularly where such a short period had elapsed.
28. The Executive also submitted that this information fell under the scope of the exemption in section 29(1)(a), which applies to any information that relates to the formulation or development of government policy.

The Executive's submissions on the public interest

29. In its submissions on the public interest, the Executive stated that there was a significant public interest in ensuring that policy formulation was allowed to take place in an arena which would engage rigorous and frank debate about the merits and demerits of particular courses of action without fear that these would be viewed out of context.
30. The Executive also confirmed that it had judged that release of this information would cause real harm to relations between the Executive and the communities served by Caledonian MacBrayne's ferry services. It suggested that the handling of complex and sensitive issues such as the continuation of ferry services to fragile communities required a private arena in which communications both within the Executive and with other parties could take place.

Ms Lloyd's submissions on the public interest

31. In her request for an internal review (made before the letters were published), Ms Lloyd questioned the Executive's decision on the public interest as it related to this case on a number of grounds. She noted that it was particularly important that discussions concerning Caledonian MacBrayne should take place with politicians and communities affected by the services and the proposed tender. She noted also that if the public was to be satisfied with the decision regarding tendering, it was vitally important that the public was fully informed of actions taken by the Executive, and the arguments and questions put to the European Commission.



32. In a further submission to my office, Ms Lloyd noted that the subsequent release of the letters between the Minister and the Commissioner demonstrated that there was significant public interest in the release of information relating to the Clyde and Hebrides ferry services. She noted that the information released lacked context, without the information accompanying and providing background to it. She argued that it was in the public interest that the information still withheld should now be released.

The Commissioner's analysis and findings

33. My consideration of this case rests on two separate matters. The first is primarily now a technical issue. Did the Executive act in accordance with Part 1 of FOISA when it withheld the letters requested by Ms Lloyd just days before they were published? The second matter relates to the document that the Executive continues to withhold. Have the exemptions in Part 2 of FOISA, and the public interest test been correctly applied in relation to this? I will address these two sets of questions in turn below.

The letters between the Minister and the Commissioner

34. The Executive's response informed Ms Lloyd that these letters were exempt from release under section 32(1)(a)(ii), which applies where release would or would be likely to prejudice substantially relations between the UK and an international organisation or court, in this case, the European Commission.
35. In response to the request for a review of this decision, the Executive confirmed that, in its view, this exemption had been properly applied when the request was first considered. It noted that the subsequent publication had followed confirmation that the European Commission would be content for the letters to be made public.
36. However, despite requests for any relevant documentation from my office, no evidence has been supplied which suggests that the Executive's understanding of the European Commission's view on disclosure of the letters was either changed or confirmed between the point of Ms Lloyd making the initial request, and the point where the letters were published.



37. Furthermore, the letters from the Transport Minister to the European Commissioner dated 23 December 2004 and 24 February 2005 explicitly refer to the possibility of making the correspondence available to Parliament and other interested parties. We might therefore assume that both the Minister's letters and the Commissioner's responses were drafted in the awareness that future publication was at least possible. Furthermore, none of the evidence supplied to my office suggests that the Commissioner had expressed any concerns or objections concerning the proposed publication.
38. The Executive informed me in the course of the investigation that it now considered that the exemption in section 32(1)(a)(ii) had been misapplied in this instance. In the absence of any evidence in support of its initial application, I agree with this assessment and find that the Executive failed to act in accordance with section 1(1) of FOISA by refusing to supply the letters to Ms Lloyd on these grounds.
39. However, the Executive has submitted that it should instead have withheld the information from Ms Lloyd under the terms of section 27(1) of FOISA. This exemption applies to information that is
- a) being held with a view to being published no later than 12 weeks from the date when the information request is received; and
 - b) it is reasonable in all the circumstances that the information is withheld until the date of publication.
40. In this case, the letters were published less than 5 weeks from the date of the request. The publication of the letters was clearly under ongoing consideration at this point but the final decision to publish was taken by the Minister after a response had been issued to Ms Lloyd.
41. I do not agree that section 27(1) applied when the Executive issued its response to Ms Lloyd, because when the request was made the information was not being held with a view to publication. For it to be so held the decision on whether the information was to be published would have to have been taken prior to the request being received.
42. I turn now to consider the remaining unpublished document (the document) that the Executive has identified as falling under the scope of Ms Lloyd's request for information. This comprises of a series of emails incorporating and commenting upon a briefing prepared for sending to the European Commission (but ultimately never sent) in advance of the Transport Minister's meeting with the Commissioner. The Executive has relied upon sections 29(1)(a) and 30(b)(i) and (ii) in withholding this information.



The application of section 29(1)(a)

43. The exemption in section 29(1)(a) is wide-reaching in that it applies to any information that relates to the formulation or development of Executive policy. The Executive did not cite this exemption in its correspondence with Ms Lloyd. However, it is clearly relevant to the information contained in this document.
44. The contents of the document relate to the development of the Executive's policy in relation to the tendering of the Clyde and Hebrides Ferry services. Therefore, I must conclude that this exemption does apply to its entire contents.
45. Section 29(1)(a) is of course a qualified exemption, and so before reaching a decision to withhold, a judgement must be reached on whether the public interest in doing so outweighs that in release. I consider the public interest in paragraphs 54 – 63 below, after first considering the application of the exemptions in section 30(b).

The application of sections 30(b)(i) and (ii)

46. These exemptions apply where release of information would inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation respectively.
47. This document contains an exchange of views between Executive officials, about the form and content of the briefing for the European Commission.
48. I accept that release of this document would be likely to inhibit in a real and substantial way future exchanges among officials about the handling of meetings of this type and what the Executive hopes to achieve through them.
49. I have therefore concluded that the exemption in section 30(b)(ii) applies to the contents of this document. However, I am not satisfied that the exemption in section 30(b)(i) applies in this instance. This is because I am not persuaded that any of the contents of this document can be construed as advice.

Consideration of the public interest

50. The submissions from the Executive and Ms Lloyd in relation to this information have raised two contradictory views on the public interest. In both cases the submissions did not address the public interest in the context of the relevant exemptions independently.



51. The Executive has emphasised the need for policy formulation and discussion on a sensitive and significant topic to be allowed to proceed in a “private arena”. It has argued that the loss of this space would harm the quality of government by making officials feel inhibited from engaging in rigorous and frank debate.
52. The Executive has also noted that release at the time of the request would have undermined the Minister’s commitment to report back to Parliament, and could have provoked unease among Caledonian MacBrayne staff and the communities served by its ferries.
53. Ms Lloyd, on the other hand has argued that it is in the public interest that all information relating to the Executive’s communications with the European Commission on this matter to be publicly available. She has pointed out that the Transport Minister was representing the will of the Scottish Parliament in his communications with the European Commission, and suggested that release of documentation relating to these is essential to show Parliament and the public what action was taken.
54. I commented at length on the question of the public interest as it relates to section 29(1)(a) in my decision 075/2006 (Mr Paul Hutcheon and the Scottish Executive), and I will not repeat these arguments in detail here. However, that decision made clear that I do not accept that information relating to the formulation of policy should be automatically withheld on the basis of an assumption that the public interest requires that process to proceed in a private and protected sphere. I expect public authorities to look at the particular content of the information when considering the balance of the public interest as it applies in any particular case. Factors that may affect the consideration on the public interest will include the sensitivity of the subject matter, or the timing of the request, or how closely the information relates to the formulation of the relevant policy.
55. In this case the Executive was clearly seeking to formulate a policy with regard to the future operations of the Clyde and Hebrides ferry services which would be acceptable to Parliament and to the European Commission. This was and is a matter of considerable public interest, and the issue of whether the Executive was required to put these operations out to tender is of significant interest.
56. However Government can reasonably argue that there is also a public interest in it being able to explore its policy and negotiating positions. This does not mean that all information should be withheld, but it does mean that the balance of whether or not disclosure is in the public interest will depend upon issues of policy sensitivity, whether the information is being sought at a time when policy formulation and development on the matter was still ongoing at the time of the request, and the content of the information being sought.



57. On balance my view is that release would harm the policy making process on a highly sensitive matter which, at the time of the request, the Executive was actively seeking to come to a resolution, and where an undertaking had given to report back to Parliament (something that had not yet happened at the time of Ms Lloyd's request). I would have to be persuaded that a demonstrable public benefit would follow from release in order to require disclosure in such circumstances.
58. However, I do not believe that release of this document would serve to significantly enhance public understanding or aid debate on this topic. The short notice for the meeting of 9 December 2004 meant that the types of documents that would normally be expected to be created in advance of a significant high level meeting between the Executive and the European Commission were not prepared. The contents of the document under consideration are brief and limited.
59. I conclude that the public interest in disclosing the information is outweighed by maintaining the exemption at s29(1)(a)
60. Similarly having concluded that the effect of release could be to inhibit substantially the exchange of views within the Executive, I find that the public interest in disclosing the document does not outweigh the public interest in maintaining the exemption at s30(b)(ii). The content of the document is not such that the public interest in disclosure outweighs the harm which would occur if officials felt unable to explore the nature of the wording which they would wish to put forward in sensitive negotiations, as in this case over the need to tender for these ferry services.



Decision

I find that the Executive acted in breach of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to supply copies of the letters requested in Part a of Ms Lloyd's request on behalf of Mr Mather. I find the Executive acted incorrectly in applying the exemption in section 32(1)(a)(ii) to this information, and so it breached the requirements of section 1(1).

I note that these letters have since been published by the Executive and so I do not require further copies to be supplied to Mr Mather.

However, I do not find that these letters were exempt from release under section 27(1) of FOISA at the time when the request was received, or when the Executive issued its response to Ms Lloyd.

I find that the Executive acted in accordance with Part 1 of FOISA in refusing to supply the remaining information requested by Ms Lloyd in parts b and c of her request on behalf of Mr Mather. I find that this document is exempt from release under the terms of sections 29(1)(a) and 30(b)(ii) of FOISA, and that the public interest in maintaining these exemptions outweighs that in disclosure.

However, I do not find that any other exemption applies to this document.

I do not require any remedial steps to be taken in response to this decision.

Kevin Dunion
Scottish Information Commissioner
06 June 2006