

Decision Notice



Decision 106/2010 Mr Tom Gordon and the Scottish Ministers

Correspondence between the First Minister and a named individual

Reference No: 200901315
Decision Date: 22 June 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Gordon requested from the Scottish Ministers (the Ministers) information relating to correspondence between the First Minister, or his office, and a named individual. The Ministers responded by advising Mr Gordon that the information was withheld under sections 30(c) and 38(1)(b) of FOISA. Following a review, Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, in the course of which the Ministers withdrew their reliance on section 38(1)(b) of FOISA in respect of the withheld information, the Commissioner found that the Ministers had failed to deal with Mr Gordon's request for information in accordance with Part 1 of FOISA by withholding the information under section 30(c). He did not accept that disclosure of the information would, or would be likely to, prejudice substantially the effective conduct of public affairs. He required the Ministers to disclose the information to Mr Gordon.

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); 8(1)(c) (Requesting information) and 30(c) (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 25 January 2009 Mr Gordon sent an email to the Ministers, requesting a copy of all correspondence between the First Minister, Alex Salmond, or his office, and a named individual, or his/her office, since May 2007.
2. The Ministers responded to the request on 4 February 2009, refusing to comply with the request on the basis that it was vexatious (and therefore subject to section 14(1) of FOISA) and supplying arguments in support of this assertion.



3. On 23 February 2009, Mr Gordon wrote to the Ministers requesting a review of their decision. The Ministers responded on 23 March 2009, confirming that a review was being undertaken but advising that it would not be completed "within the 20 working day deadline normally applicable to internal FOI reviews".
4. Mr Gordon received no further correspondence from the Ministers in respect of his request for review and on 22 April 2009 wrote to the Commissioner, stating that he was dissatisfied with this failure and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. Following an investigation and *Decision 062/2009 Mr Tom Gordon and the Scottish Ministers*, in which the Ministers were required to provide a response to Mr Gordon's request for review, a review was carried out by the Ministers.
6. The Ministers notified Mr Gordon of the outcome of their review on 10 July 2009, withholding the information requested under the exemptions in sections 30(c) and 38(1)(b) of FOISA.
7. On 21 July 2009 Mr Gordon wrote to the Commissioner again, 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.
8. The application was validated by establishing that Mr Gordon 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

9. On 24 July 2009, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from Mr Gordon. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on the exemptions in sections 30(c) and 38(1)(b) of FOISA. They were also asked to comment on submissions made by Mr Gordon in relation to information he considered should have been located by the Ministers in response to his requests (but which did not appear to have been so located).
11. A full response was received from the Ministers. In this response, they advised that they were relying on section 30(c) only in relation to the withheld information.



12. During the investigation, the Ministers indicated that they considered Mr Gordon's information request to be invalid. Their submissions on this and all other points relevant to this decision will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. 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 Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.
14. As indicated above, the Ministers indicated in the course of the investigation that they considered Mr Gordon's request to be invalid. This followed the decision of the Court of Session in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73*, in which the Court emphasised that FOISA gives a right to information rather than documents. The Ministers contended that Mr Gordon had not described the information he was seeking, as required by section 8(1)(c) of FOISA, characterising the request as broadly framed and unfocused. In the Minister's view, the request did nothing more than indicate where the information Mr Gordon might be interested in might be found, which could not be equated with describing the information requested. The Ministers highlighted the importance, as noted in the Court of Session decision, of identifying precisely the information sought by the applicant, emphasising that (irrespective of how they might have dealt with the request prior to that decision) they remained entitled to revisit that position in the light of the decision and consequently treat the request as invalid.
15. The Commissioner has considered Mr Gordon's request for information in the light of the Ministers' submissions and the Court of Session decision referred to above. Clearly, it refers to "all correspondence" between the First Minister or his office and the named individual (or his/her office) within a specified timeframe and the Commissioner considers that description of the requested information (which is quite specific as to the individual and period in question) to have been sufficiently clear to enable its identification and location, which must be the primary consideration in determining whether such a description is valid. Also, since the Ministers provided the investigating officer with the withheld information, the Commissioner cannot accept that the difficulty experienced by the Ministers in this case was in fact one of identification: whatever effect the Court of Session decision may have had on the applicable law, it could in any event have no effect on the matter of identification as a question of fact. Further, given that the information was clearly capable of identification (and thereby location), he does not consider the specification of any subject-matter to have been necessary in the circumstances, as the Ministers appeared to suggest. In any case, the subject matter of the correspondence will not be something the applicant is necessarily in a position to know.



16. In addition, the Commissioner notes the Ministers' attempts in their submissions to distinguish documents from information: in particular, they submit that they were wrong in the past (prior to the Court of Session decision) to interpret requests of this kind broadly and thus to search for and consider disclosing the documents requested without identifying the information sought. In this case, however, while noting the Ministers' submissions on this point, the Commissioner must also take into consideration paragraph 45 of the Court of Session's Opinion. Here, the Court states that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document which is relevant. As indicated above, he considers it to have been clear in this case that the applicant was seeking the information in the specified correspondence.
17. The Commissioner is therefore satisfied that the request submitted by Mr Gordon was sufficiently clear, and in particular that it described the information requested as required by section 8(1)(c) of FOISA. Consequently, he is satisfied that the request (and therefore the subsequent application to the Commissioner) was valid.

Section 30(c) – Prejudice to effective conduct of public affairs

18. Section 30(c) of FOISA applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" signifies that this exemption is to be used other than in the situations envisaged by the exemptions in section 30(a) and (b). However, section 30(c) remains a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm (which must be substantial) would, or would be likely to, be caused to the effective conduct of public affairs by release of the information.
19. The exemption in section 30(c) is subject to the public interest test set out in section 2(1)(b) of FOISA.
20. The Ministers withheld all of the information caught by Mr Gordon's request under this exemption. They submitted that the Scottish Government had an interest in ensuring the effective conduct of public affairs and in encouraging the ongoing development of Scotland's economy. They argued that the Government took a keen interest in matters such as those covered in the withheld information and that it would prejudice substantially the conduct of public affairs if it were to withdraw or be more circumspect in the terms of its written correspondence on them.
21. The Ministers asserted that the Government required a certain degree of private space for free and frank exchange without fear of censure or public scrutiny, which would in itself act as a discouragement to open and honest communication with Government and by Government. They submitted that, particularly in relation to the effective conduct of public affairs in such sensitive matters as the economy, health and justice, the absence of an environment allowing free and frank exchange and discussion could jeopardise the Government's ability to best represent the interests of the people of Scotland. It was imperative, the Ministers contended, that the First Minister and the Scottish Government felt free to discuss matters of national interest with correspondents and vice versa.



22. Having considered the Minister's arguments on the question of substantial prejudice to the effective conduct of public affairs, the Commissioner is not persuaded in this case that such prejudice would have occurred, or would have been likely to occur, as a consequence of disclosure of the withheld information in response to Mr Gordon's request for information or his request for review. The Commissioner does not, therefore, accept that the Ministers were correct to consider the withheld information exempt under section 30(c) of FOISA. Consequently, he does not consider them to have been correct to withhold the information under that exemption.
23. In summary, the reason for this conclusion is that the correspondence with the named person is similar to, and on the same subject matter, as correspondence with that same named person from another Cabinet Minister. That other correspondence has been disclosed by the Ministers in full, in response to another information request.
24. The Commissioner is aware of no inherent reason why the disclosure of correspondence of this nature and content created by the First Minister should be more susceptible to the generation of substantial prejudice to the effective conduct of public affairs than that created by any other Scottish Minister, of a similar nature and content. He can identify no particular such reason in the circumstances of this case and none has been drawn to his attention by the Ministers.
25. The Commissioner has also considered the respective timings of the Ministers' decisions in relation to these two sets of correspondence. It is not at all obvious why the Ministers considered it necessary to withhold Mr Salmond's correspondence in July 2009 (the first point at which they decided to do so under a FOISA exemption) while releasing substantially similar correspondence from another Minister the following month. The Commissioner has been able to identify nothing occurring in the period of approximately five weeks between the two decisions which, on any reasonable interpretation of events, would have made disclosure less potentially prejudicial by the later date, and none has been drawn to his attention.
26. Given the nature of the withheld information, the Commissioner does not consider it possible to set out in greater detail the reasons for his conclusions on the question of substantial prejudice in a public document without giving at least a strong indication of the substance of what has been withheld and thus potentially breaching section 45 of FOISA. However, he will provide the Ministers with further details of the correspondence concerned in a covering letter to this decision notice.
27. While the Commissioner is not, in the circumstances, required to go on to consider the application of the public interest test, he believes it would be helpful to do so.

Public Interest test

28. The public interest test in section 2(1)(b) of FOISA requires the disclosure of exempt information (unless it is absolutely exempt by virtue of section 2(2)) where, in all the circumstances of the case, the public interest in disclosure the information is not outweighed by that in maintaining the relevant exemption. Where information is exempt under section 30(c), therefore, it is subject to the public interest test.



29. Having considered the respective public interest arguments, on balance the Commissioner concludes that (even if the section 30(c) exemption applied) in all the circumstances of this case, the public interest in disclosing the withheld information would not be outweighed by the public interest in maintaining that exemption. Therefore, he would not consider the information to have been correctly withheld under that exemption.
30. Given the nature of the withheld information, the Commissioner does not consider it possible to set out his consideration of the relevant public interest arguments adequately in a public document without giving at least a strong indication of the substance of what has been withheld and thus potentially breaching section 45 of FOISA. He will therefore record that consideration in a covering letter to the Ministers to accompany this decision. In summary, however, he finds that the subject matter of the correspondence is of significant public interest, and a matter on which subsequent public statements have been made by the First Minister. It is a matter of considerable public interest that Ministers' earlier actions and views on this matter should be known, even were the section 30(c) exemption to apply.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gordon. In withholding the information under section 30(c) of FOISA, the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to release the withheld information to Mr Gordon, by 6 August 2010.

Appeal

Should either Mr Gordon 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
22 June 2010



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.

...

8 Requesting information

- (1) Any reference in this Act to “requesting” information is a reference to making a request which –

...

- (c) describes the information requested.

...



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.