

# Decision Notice



Decision 121/2009 Ms Sheila Lynch and the Scottish Ministers

Information regarding communication between First Minister Alex Salmond  
and Mr Andrew Wilson of the Royal Bank of Scotland

Reference No: 200901079

Decision Date: 3 November 2009

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**Kevin Dunion**

Scottish Information Commissioner

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



## Summary

Ms Lynch requested from the Scottish Ministers (the Ministers) information as to the number of times Alex Salmond, First Minister has met, spoken or corresponded with Andrew Wilson of the Royal Bank of Scotland. Information was also requested as to the number of times Mr Salmond's special advisers met or corresponded with Mr Wilson. The Ministers responded by disclosing some information to Ms Lynch, but relied on the exemption in section 33(1)(b) of FOISA for withholding other information from her. Following a review, Ms Lynch remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that disclosure of the information would, or would have been likely to, prejudice substantially a particular company's commercial interests and that, on balance, the public interest in maintaining the exemption outweighed the public interest in the disclosure of the information. He therefore found that the Ministers had been entitled to withhold the information from Ms Lynch.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 15 (1) (Duty to advice and assistance) and 33(1)(b) (Commercial interests and the economy).

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

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1. On 24 March 2009, Ms Lynch wrote to the Ministers requesting information on the number of times Alex Salmond, First Minister, has met, spoken with or corresponded with Andrew Wilson of the Royal Bank of Scotland and on the number of times his special advisers have met with or corresponded with Mr Wilson. Ms Lynch also asked to be provided with a copy of any correspondence which existed.
2. Ms Lynch did not receive a response to her request and so submitted a request for a review to the Ministers on 25 April 2009 asking that they review their failure to respond to her request.



3. A response to Ms Lynch's request for a review was provided on 12 May 2009. Within this response, the Ministers provided information as to the number of occasions on which Mr Salmond's special advisers met or corresponded with Mr Wilson. Information was also given as to details of when an email was sent between Mr Salmond's special adviser and Mr Wilson. The Ministers also gave Ms Lynch details of when Mr Salmond himself had spoken to Mr Wilson, and confirmed that Mr Salmond had also written to him. The Ministers provided Ms Lynch with a copy of the letter, although certain information was redacted under the exemption in section 33(1)(a) of FOISA. The email sent between the special adviser and Andrew Wilson was also disclosed subject to redaction of information which the Ministers considered was not within the scope of Ms Lynch's request.
4. Ms Lynch wrote to the Ministers on 14 May 2009, requesting a further review of their decision. In particular, Ms Lynch considered that the public interest in disclosing the information withheld in the letter outweighed that in maintaining the exemption in section 33(1)(a). Ms Lynch also questioned the Ministers' conclusion that certain information in the email between the special adviser and Andrew Wilson was outwith the scope of her request.
5. The Ministers notified Ms Lynch of the outcome of their review on 29 May 2009. Within this response, the Ministers explained that, having reconsidered Ms Lynch's request, they had concluded that the information which had been redacted from the email between the special adviser and Mr Wilson did fall within the scope of her request and should be released to her. This email was subsequently provided to Ms Lynch, subject to redaction of personal contact details, for which the Ministers did not rely on any exemption. (Ms Lynch confirmed, during the investigation, that she was content for the personal contact details to be withheld.) The Ministers explained that they considered that redaction of the information from the letter between Mr Salmond and Mr Wilson was correct and they upheld their decision to rely on the exemption in section 33(1) for withholding this. (It is clear from the text of this letter and, indeed, from the text of their earlier letter dated 12 May 2009, that the Ministers intended to cite the exemption in section 33(1)(b) rather than in section 33(1)(a).)
6. On 11 June 2009, Ms Lynch wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Ministers' review in respect of their reliance on section 33(1) of FOISA for redacting information from the letter and annex which was disclosed to her. Ms Lynch applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Ms Lynch 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

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8. On 12 June 2009, the Ministers were notified in writing that an application had been received from Ms Lynch and were asked to provide the Commissioner with the information withheld from Ms Lynch. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. 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 provide submissions on their reliance on an exemption to withhold information in the letter between Mr Salmond and Mr Wilson.
10. A response was received from the Ministers in which they explained that they had originally stated in their response to Ms Lynch's request and request for a review that the information in the letter and annex was being withheld under section 33(1)(a) of FOISA. The Ministers advised that they had made a mistake in citing this exemption and wished to rely on the exemption in section 33(1)(b) of FOISA instead.
11. Further submissions were sought and received from the Ministers on their reliance on section 33(1)(b) of FOISA.
12. The submissions provided by both the Ministers and Ms Lynch will be fully considered in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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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 Ms Lynch and the Ministers and is satisfied that no matter of relevance has been overlooked.

### **Section 33(1)(b) – Commercial interests and the economy**

14. The Ministers have confirmed they have relied on the exemption in section 33(1)(b) for information which was redacted from a letter and annex which was sent by Mr Salmond to Mr Wilson.
15. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (the definition of 'person' includes a public authority). This is a qualified exemption, and is subject to the public interest test required by section 2(1)(b) of FOISA.



16. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests would or would be likely to be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
17. Even where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
18. The Ministers have argued that release of the information would, or would be likely to, substantially prejudice the commercial interests of the company named in the letter and annex. The Ministers have explained that they consider that the company's trading activities would be substantially negatively affected by the release of the withheld information. (The Commissioner is unable to set out these arguments in full, as this could lead to the identity of the company in question becoming known.)
19. In justifying why they consider that substantial prejudice would be caused to the trading activities of this company, the Ministers have stated that if the information were to be disclosed, it would impact on staff morale (leading to the company being unable to retain key staff). Disclosure would also lead to suppliers to the company and customers of the company being concerned about the viability of the company.
20. The Ministers also submit that if the information were to be disclosed, the negative impact on the company's trading activities would be almost immediate.
21. The Ministers have provided a copy of communications between the Ministers and a senior member of staff of the company. The communications show the senior member of staff expressing concern that if the information were to be released, this would impact on the company.
22. In considering the Ministers' reliance on the exemption, the Commissioner has first considered whether the company whose details have been withheld have relevant commercial interests, and he is satisfied that they do. Commercial interests will generally relate to any commercial trading activity a company undertakes, such as the sale and purchase of products or services, commonly for the purpose of generating revenue. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that this is the case here.
23. In coming to a view, the Commissioner has had regard to the views expressed in numerous decisions and reiterated in his briefing on *Commercial interests and the economy*. This says:



“The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner’s view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.

FOISA sets out that the exemption can be applied where release would be ‘likely’ to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied.”

24. The Commissioner accepts that the harm lies in the fact that if, at the time, it was made publicly known that this particular company had received assistance from the First Minister through his correspondence with the Royal Bank of Scotland, then this in itself would cause concern to its stakeholders, which could in turn impact on their commercial interests. The harm would come about through identifying the company concerned.
25. Taking account of the specific arguments advanced by the Ministers, together with the substance of the withheld information, the Commissioner is satisfied that the information is exempt from disclosure under section 33(1)(b). The Commissioner accepts that release of the information at the time of Ms Lynch’s request for a review would, or would be likely to, have prejudiced substantially the commercial interests of the company in question for the reasons given by the Ministers. The Commissioner also accepts that release of this information could cause this substantial prejudice to the commercial interests to occur in the near future.

### **Public interest test**

26. As the Commissioner is satisfied that all of the redacted information has been correctly withheld under the exemption in section 33(1)(b) of FOISA, he is required to go on to consider the application of the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in disclosing it is outweighed by the public interest in maintaining the exemption.
27. In her application to the Commissioner, Ms Lynch has set out what she considers to be the public interest in release of the withheld information. Ms Lynch considers that if the First Minister sees fit to intervene in a company’s affairs by writing to a majority government owned bank to ask that the bank work together with the unnamed person or company to address the issues faced by a key player in an unidentified Scottish industry, then the public interest is lies in releasing that information.
28. Ms Lynch goes on to argue that, the First Minister cannot rely on the exemption in section 33(1)(b) when he himself acknowledges that the intervention he is making is to address an issue in a key Scottish industry. Ms Lynch states that, conversely, if a Scottish company is in such a position that it requires the intervention of the Scottish Government to assist it, and the Scottish Government does intervene, the public interest must be served in knowing what the background and reasoning for the intervention was.



29. Ms Lynch has asked in her application to the Commissioner that where the Commissioner does not accept the public interest test arguments that she has put forward, would he accept that the public interest would be served by knowing in what sector the company primarily operates.
30. The Ministers have provided a submission as to their consideration of the application of the public interest test. The Ministers have explained that they accept that there would be some public interest in knowing that a business has sought government intervention with the banks in order to continue the appropriate financing necessary to maintain its business. However, the Ministers state that, in the current climate of recession, there is a far greater public interest in withholding that information as it would endanger the viability of what has been a significant player in a key Scottish industry. The Ministers comment that many businesses are struggling to access continued funding to maintain their viability following the changes in the banking industry, and it would clearly not be in the public interest to allow the identification of a single business, jeopardising its previously successful stance in the key Scottish industry and the employment of its staff, when it is in the same position as many others at this time.
31. The Ministers have also sought to address the points raised by Ms Lynch and they recognise that there may be some public interest in knowing why companies seek interventions from the First Minister to seek contacts in the banking industry during this time of economic turmoil, and in knowing when the First Minister makes such intervention. However, the Ministers argue that it is important to distinguish between what is merely 'of interest to the public' and what 'is in the interest of the public'. The Ministers submit that in this context it is far more in the interests of the public to withhold the information to ensure that the company in question continues to trade successfully in Scotland.
32. The Ministers submit that, on balance, they consider that the public interest would be best served by the continued withholding of the company's details so as not to put at risk the viability of this business.
33. The Commissioner accepts Ms Lynch's view that where the First Minister decides to intervene on behalf of a company to enable it to make contacts in the banking industry, there is a public interest in knowing why this is the case.
34. However, he also acknowledges and agrees with the argument advanced by the Ministers, that, in this time of recession, where many businesses (both large and small) are struggling to secure finance to facilitate the continued survival of their business, it is in the interests of the public that a key player in an important Scottish industry should be assisted in securing necessary finance. The Commissioner also upholds the argument of the Ministers that the public interest would be best served by continuing to withhold the details of the company so that the future viability of the company is not put at risk.
35. On balance, therefore, the Commissioner finds that, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA. In reaching this conclusion the Commissioner has taken account of Ms Lynch's request as detailed in paragraph 29 above.



36. The Commissioner notes that the information request by Ms Lynch was for a copy of documents. He notes that in the case of Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, 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 that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
37. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Ms Lynch and the Ministers that the Ministers questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the Ministers have subsequently had with the Commissioner that the Ministers were unclear as to what the information requested sought.
38. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.

## DECISION

The Commissioner finds that, in respect of the matters specified in the application, the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Lynch.

## Appeal

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Should either Ms Lynch 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**  
**3 November 2009**





## Appendix

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### 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.

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- (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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- (2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

##### 33 Commercial interests and the economy

- (1) Information is exempt information if-

...



- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).