

Decision Notice



Decision 132/2009 Mr David Rule and the Scottish Ministers

Correspondence with specified governments

Reference No: 200801850

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Summary

Mr Rule requested from the Scottish Ministers (the Ministers) copies of correspondence between the First Minister's Office and specified governments (and departments thereof) from May 2007. In response, the Ministers released some information but withheld the remainder under section 32(1)(a)(i) and (iii) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which further information was released to Mr Rule, the Commissioner found that the Ministers had partially complied with Mr Rule's request in accordance with Part 1 of FOISA. The Commissioner upheld the Ministers' reliance on section 32(1)(a)(i) of FOISA in withholding the requested information. The Commissioner also found that the Ministers had failed to comply with section 10(1) of FOISA. He did not require the Ministers to take any action.

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); 10(1) (Time for compliance); 32(1)(a)(i) (International relations)

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 29 September 2008, Mr Rule emailed the Ministers requesting the following information:

“All correspondence of the First Minister's Office as of May 2007 with governments and government departments of the following seven countries: Canada, China, France, Norway, Slovakia, Spain and Sweden. I also request all correspondence with embassies and consulates, based within the United Kingdom, of the same countries as listed above over the same time period. In the case of Canada please be sure to include all correspondence with the Government and Parliament of Quebec. In the case of Spain please be sure to include all correspondence with the Government and Parliament of Catalonia. “



2. As the Ministers had not responded to his request for information, Mr Rule requested a review of their failure to respond on 31 October 2008. He also sent an additional reminder on 3 December 2008 that a response was still to be provided to his requirement for review.
3. The Ministers acknowledged Mr Rule's correspondence and confirmed on 5 December 2008 that they would respond to his request in the next few weeks.
4. The Ministers wrote to Mr Rule on 6 January 2009. The Ministers provided Mr Rule with a number of pieces of correspondence from and to the First Minister's Office. The Ministers advised Mr Rule that they were withholding four letters that fell within the scope of his request under section 32(1)(a)(i) and (iii) of FOISA.
5. On 19 January 2009, Mr Rule wrote to the Ministers requesting a review of their decision. In particular, Mr Rule considered that some of the information he had requested had not been provided and he did not consider that the exemptions cited by the Ministers justified withholding the four letters.
6. The Ministers notified Mr Rule of the outcome of their review on 16 February 2009 upholding their original decision to withhold the information under the exemptions in section 32(1)(a)(i) and (iii) of FOISA. The Ministers also confirmed that the requested information had been extensively searched for, and no other relevant information had been identified.
7. On 24 February 2009, Mr Rule wrote to 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. Mr Rule also expressed dissatisfaction with the length of time the Ministers had taken to respond to his request.
8. The application was validated by establishing that Mr Rule 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 12 March 2009, the Ministers were notified in writing that an application had been received from Mr Rule and were asked to provide the Commissioner with any information withheld from him. 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 provide detailed submissions as to the searches they had undertaken to identify the requested information and why certain information was not held. Specific questions were asked regarding:



- Confirmation of the time period and countries/embassies that formed part of the search terms.
- Correspondence that had been referred to in the released information but had not been identified by the Ministers.
- The systems and paper based records that were searched and which search terms were used to search these locations.
- An overview of the search process undertaken.

The Ministers were also asked to justify their reliance on any provisions of FOISA that they considered applicable to the information being withheld.

11. The Ministers responded on 14 May 2009 providing an explanation of the searches that had been undertaken in order to identify all relevant information falling within the scope of Mr Rule's request. At that stage, the Ministers also indicated their intention to release two of the four remaining withheld letters to Mr Rule (these were subsequently provided to Mr Rule on 24 June 2009). The Ministers also stated that they wished to apply the exemption in section 32(1)(b)(i) of FOISA to justify withholding the remaining two letters and provided submissions to support their reliance on this exemption.
12. On 12 June 2009, the Ministers wrote to the Commissioner noting that they were still wishing to rely on the exemptions in section 32(1)(a)(i) and (iii) of FOISA and providing submissions in support of their reliance on these exemptions.
13. During the course of the investigation, the investigating officer also contacted Mr Rule inviting him to provide his comments on the public interest in disclosure of the information under consideration.
14. The submissions made by both Mr Rule and the Ministers are summarised (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

15. 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 Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.

Searches undertaken by the Ministers



16. In his application to the Commissioner and in his review request to the Ministers, Mr Rule expressed dissatisfaction that not all the information he had requested had been identified and provided. Mr Rule questioned the searches undertaken by the Ministers, identified some countries for which no correspondence had been found and references to other correspondence within the released information that had not been provided to him.
17. The Ministers provided a detailed explanation of the searches they had undertaken in order to identify all relevant information falling within the scope of Mr Rule's request. In summary, the Ministers commented that officials in the International and Europe Divisions of the Scottish Government provided names of the relevant Heads of Government, Consuls General and Ambassadors. These names were used to search the First Minister's correspondence log and to retrieve any documents identified in the log from paper files.
18. The Ministers also commented that the First Minister's email inbox was searched by country and for the time period concerned. Officials in the International and Europe Divisions also undertook searches of the electronic systems to identify any further correspondence. In addition, the Ministers commented that the First Minister's emails, invitations and responses are only normally kept for 3 months, after which correspondence is destroyed. The Ministers noted that it was possible some of these arrangements were agreed by telephone without a written record being created. Finally, the Ministers confirmed that records had been searched (where appropriate) from 1 May 2007 to the date of the Mr Rule's request.
19. Having considered the Ministers' submissions detailing the breadth of the searches they undertook in order to identify all relevant information that fell within the scope of Mr Rule's request, the office practices and the fact that the First Minister's electronic information is destroyed after three months, the Commissioner is satisfied that the Ministers do not hold any further information that would fall within the scope of Mr Rule's request. The Commissioner has concluded that the Ministers took reasonable steps to identify the relevant information they held and were correct to inform Mr Rule that they held no further information falling within the scope of his request.

Section 32(1)(a)(i) – International relations

20. The Ministers have relied on the exemption in section 32(1)(a)(i) of FOISA to withhold two letters which were received by the First Minister. The Commissioner is mindful of the need to avoid disclosing the withheld information in his decision. Since the Ministers have not revealed to Mr Rule which of the countries specified in his request sent the correspondence under consideration, the Commissioner cannot do so in his decision. This means that this decision cannot include full details of the Ministers' submissions, nor the Commissioner's full reasoning in this case.
21. Section 32(1)(a)(i) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between the United Kingdom and any other State.



22. For the purposes of this exemption, the Commissioner accepts that the other country (whose representatives in the UK wrote the letters) falls within the meaning of another State, within the definition in section 32(3) of FOISA (reproduced in the Appendix below).
23. In order to claim this exemption, the Commissioner takes the view that the damage caused (or likely to be caused) by disclosing information would have to be both real and significant, as opposed to hypothetical or marginal. It would have to occur in the near future, not in some distant time. For harm to be “likely”, the Commissioner takes the view that there must be a significant probability that the required degree of harm would occur.
24. In his briefing on the section 32(1) exemption¹, the Commissioner emphasises that in considering the application of this exemption, authorities should be aware that it is the international relations and interests of the United Kingdom as a whole which should be at risk of substantial prejudice from the release of information, not simply those of a component region, part, or sector of the UK, or indeed those of the public authority itself. Authorities should therefore only consider the application of this exemption if it can be clearly demonstrated that substantial prejudice to the international relations or interests of the entire UK would, or would be likely to, result from the release of information.
25. The Commissioner also states that the exemption requires the public authority to concentrate on the potential impact that release may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information. There may be circumstances where potentially controversial information concerning one state or international organisation may have little or no impact on their relations, whilst seemingly innocuous information relating to a second may have a substantial impact. This may depend on the political relations and diplomatic sensitivities that exist at the time, or may depend on cultural, religious or legislative differences. Authorities should therefore consider the content of the information only in terms of the impact that it may have on particular relations or interests were it to be released.
26. Even if a negative reaction is anticipated from the release of information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice substantially international relations. There may be circumstances where the release of information may cause diplomatic annoyance or irritation, but would not result in significant, long term harm to the relations between countries. The timing of release may also be an issue, and the risk of substantial prejudice may well diminish as time passes.
27. In their submissions, the Ministers contend that the exemption in section 32(1)(a)(i) applies to the withheld information, which requires to be assessed in the context of the political/diplomatic situation between the UK and the other country.
28. Given the nature of the correspondence, the Ministers considered that it was difficult if not impossible to isolate Scotland’s interests from those of the UK in terms of relations with the other country and these relations are to a considerable extent determined at a UK level (foreign affairs being a reserved matter).

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.asp>



29. The Ministers also noted that, within the letters, reference to UK and Scottish policy is conjoined. The Ministers suggested that it was very likely that the country in question would conflate UK and Scottish policy interests and that therefore, even though the information might be released under Scottish law, this would reflect on the UK as a whole.
30. The Ministers commented that although the two withheld letters primarily concern Scottish relations with the other country, they contend that if the letters were to be released, relations between the UK and the other country would be prejudiced substantially.
31. The Commissioner has considered the information in the withheld letters and he accepts that this information relates to a matter which would have an impact on international relations for the whole of the UK.
32. The Commissioner is also satisfied that if the withheld information were to be disclosed it would, or would be likely to, prejudice substantially relations between the UK and the other country. The Commissioner has also taken account of the Ministers' submissions on the nature of relations with the other country and the relations between the matter under discussion and wider political questions. It is apparent from reading the withheld letters, together with information which is available in the public domain, that the subject of the letters is still highly sensitive. This factor also supports the substantially prejudicial effect upon relations between the UK and the other country which in the Commissioner's view would result if they were disclosed.

The public interest test

33. The exemption in section 32(1)(a)(i) of FOISA is subject to the public interest test contained in section 2(1)(b). Therefore, having found that the withheld information is exempt under section 32(1)(a)(i), the Commissioner is required to go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
34. The Ministers acknowledged that there is a public interest in the content of Ministerial and diplomatic correspondence. However, they also consider that any public interest in the release of the information is strongly outweighed by that in withholding the information in terms of the importance of maintaining good relations - especially at Ministerial and diplomatic levels - with foreign governments.
35. The Ministers contend that if the information was released then it would prejudice substantially the relations between the two countries. The Ministers commented that Scotland and the other country have good social, cultural and business links and there is a strong public interest in ensuring that these relations are maintained and strengthened, as considerable time and effort has been invested in establishing a relationship with the other country, and release of the information could jeopardise this evolving relationship.
36. The Ministers went on further to explain that the release of the letters would be viewed negatively by the other country and could damage relationships permanently as they were not written in expectation of release into the public domain. The Ministers argued that this has the potential to harm Scotland's economic growth and consequential benefits to Scotland



37. The Ministers submitted that, given the critical importance of relations between the UK and the other country in terms of culture, education, business, economy etc, they considered that anything prejudicial to these relations, such as the release of information of this nature, would not be in the public interest.
38. In his submissions to the Commissioner, Mr Rule argued that the public interest was best served by the release of the information, principally in the interests of transparency and accountability of government. Mr Rule did not consider that the Ministers had put forward a coherent argument as to why the sensitive nature of any opinions contained within the letters would mean that the public interest is best served by withholding the information. Mr Rule did not consider the manner in which any opinions were expressed within the letters to be significant to the public interest, rather it is the opinions themselves which are of significance.
39. Mr Rule agreed that it was important that such relations should be maintained and strengthened and that the two countries should continue to enhance their social, cultural and business links. However, Mr Rule considered this only lends support to the idea that communication between the administrative bodies should be open to public scrutiny, so that the public can be sure that their interests are protected.
40. Mr Rule noted that from the Ministers' submissions that considerable time and effort had been invested in establishing a relationship with the other country and he considered this only supported the view that the nature of the relationship should be known to the public. He submitted that the public interest cannot be best served if the nature of the relationship is completely secret and not open to wider scrutiny.
41. Mr Rule also considered that the general claim that it is important to maintain good relations at the Ministerial level with foreign governments is certainly true, but he did not consider it inconsistent with the accountability of those Ministers to their electorate that any diplomatic involvement of those Ministers may be of particular public interest, given that international relations are a reserved matter in the sense of the Scotland Act 1998.
42. The Commissioner acknowledges the inherent public interest in correspondence between Governments and that such communications should be open to public scrutiny. The Commissioner also accepts that there is a public interest in understanding the nature and content of correspondence to and from the First Minister's Office and foreign governments and their representatives and the Commissioner accepts that some parts of the information under consideration would perhaps go some way towards fulfilling this interest.
43. However, this public interest has to be balanced against any negative or damaging impact that could ensue and the need to maintain and foster good international relations with other countries. The Commissioner accepts the Ministers' argument that there is a public interest in fostering and maintaining good relations with the other country, not just in the short term but also for long term stability and co-operation. The Commissioner also accepts that the release of information which would, or would be likely to, prejudice substantially these relations in future would not be in the public interest.



44. In balancing the relevant public interests and taking into account the matter under discussion, the Commissioner is of the view that there is a greater public interest in maintaining the exemption in section 32(1)(a)(i) of FOISA. The Commissioner considers the greater public interest to be in allowing Ministers and officials from both countries to express in private sensitive views relating to matters which are the subject of ongoing discussion and potential disagreement and which would be likely, if aired in public, to prejudice substantially international relations.
45. On balance, therefore, the Commissioner finds that the public interest in disclosure of the withheld information is outweighed by that in maintaining the exemption in section 32(1)(a)(i) of FOISA.
46. As the Commissioner is satisfied that the Ministers were correct to rely on section 32(1)(a)(i) of FOISA for withholding this information from Mr Rule, he is not required to consider the application to the information of the exemptions in sections 32(1)(a)(iii) or 32(1)(b)(i).

Failure to respond within timescales laid down in FOISA

47. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request, or subsequent clarification of that request, to comply with a request for information, subject to certain exceptions which are not relevant in this case.
48. The Ministers failed to respond to Mr Rule's request within this timescale, and only responded once Mr Rule had reminded the Ministers that he required a response to his request.
49. The Commissioner therefore finds that the Ministers failed to respond to Mr Rule's request for information of 29 September 2008 within the 20 working days allowed under section 10(1) of FOISA and thereby failed to comply with Part 1 of FOISA.

Recent Court of Session Opinion

50. The Commissioner notes that the information request by Mr Rule was for correspondence of the First Minister's Office and 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.



51. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Mr Rule 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.
52. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Rule.

The Commissioner finds that the Ministers correctly withheld the information under section 32(1)(a)(i) of FOISA. However, he finds that the Ministers failed to respond to Mr Rule's request for information within the timescales laid down in section 10(1). In failing to do so, the Ministers breached Part 1 of FOISA. The Commissioner does not require the Ministers to take any action in respect of this breach in response to this particular application.

Appeal

Should either Mr Rule or the 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
16 November 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

(...)

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

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

(.....)

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

10 Time for compliance

(1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

....

32 International relations

(1) Information is exempt information if-

(a) its disclosure under this Act would, or would be likely to, prejudice substantially-

(i) relations between the United Kingdom and any other State;

(.....)



(3) In subsection (1)-

(.....)

"State" includes-

- (a) the government of any State; and
- (b) any organ of such a government,

and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.