



Scottish Information
Commissioner

**Decision 155/2006 Mr K Lachlan Muir and the
Scottish Executive**

Request for written submissions on the European Convention

**Applicant: Mr K Lachlan Muir
Authority: Scottish Executive
Case No: 200600566
Decision Date: 17 August 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 155/2006 – Mr K Lachlan Muir and the Scottish Executive

Request for written submissions on the European Convention – one document was released and the other three documents were withheld. The Commissioner was not satisfied that the exemptions relied on to withhold one of the documents had been used correctly by the Executive and ordered this document to be released.

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 28(1) (Relations within the United Kingdom); 30(b)(ii) (Prejudice to effective conduct of public affairs).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Muir wrote to the Scottish Executive (the Executive) for all documentation and correspondence relating to the Convention on the Future of Europe. The Executive responded initially stating that to locate and retrieve this information would cost more than the prescribed amount for responding to requests for information, as set out in regulation 4 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations). Mr Muir revised his request and asked for all written submissions and letters to the UK's various representatives on the European Convention. The Executive responded, released one document (document four) and a background paper, all other information was withheld under sections 28, 29 and 30 of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Muir wrote to the Executive, explaining he was dissatisfied with its response and asked it to review its decision. On review, the Executive upheld its original decision that the information was exempt, although only on the basis of the exemption contained in section 30(b)(ii). (During the investigation, the Executive re-instated the application of the exemption in section 28(1) to one of the documents which had been withheld from Mr Muir during the investigation.)

Mr Muir was dissatisfied with the response he received from the Executive and submitted an application for a decision by the Scottish Information Commissioner in order to obtain the information which had been withheld from him.



Following an investigation, the Commissioner found that the Executive partially failed to deal with Mr Muir's request for information in line with Part 1 of FOISA.

Background

1. Mr Muir wrote to the Executive on 13 October 2005 and asked for all Scottish Executive documentation and correspondence relating to the Convention on the Future of Europe.
2. The Executive responded in writing to Mr Muir on 7 November 2005 stating that to provide the information he had requested would cost more than the prescribed amount for responding to requests for information, as set out in the Fees Regulations and invited Mr Muir to revise his request.
3. On 1 December 2005, Mr Muir narrowed the scope of his request and asked the Executive to provide him with the Executive's written submissions and letters to the UK's various representatives on the European Convention.
4. The Executive responded in writing to Mr Muir on 9 January 2005. It released one document (document four) to Mr Muir and, for information, a background paper, but refused to release the other documents which it withheld under sections 28 (relations with the UK), 29 (formulation of Scottish administration policy) and 30 (conduct of public affairs) of FOISA.
5. Mr Muir wrote again to the Executive on 17 January 2006 stating he was dissatisfied with its response to his revised request and asked it to review its decision. Mr Muir provided detailed reasoning why he considered that the Executive had been wrong to apply the exemptions in question.
6. The Executive responded in writing on 20 February 2006 to Mr Muir's request for review. The Executive upheld its original decision to withhold the documents, but only on the basis of the exemption under section 30(b)(ii) of FOISA.
7. Mr Muir wrote to my Office on 10 March 2006, stating that he was dissatisfied with the outcome of the Executive's review and applying to me for a decision in relation to the Executive's decision to withhold the documents. Mr Muir provided detailed reasoning why the documents should be released.
8. The case was then allocated to an investigating officer and the application validated by establishing that Mr Muir had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.



The Investigation

9. The investigating officer wrote to the Executive on 3 April 2006, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the Executive as required under section 49(3)(a) of FOISA. The Executive was asked to supply my Office with, amongst other items, a detailed analysis of its application of section 30(b)(ii) of FOISA and copies of the information withheld.
10. The Executive responded in writing on 21 April 2006 providing its comments on the application and a copy of the four documents that it considered to have fallen within the scope of Mr Muir's request, one of which had already been released to Mr Muir.
11. The Executive wrote to my Office again on 6 June 2006, claiming that section 28(1) of FOISA additionally applied to document two being withheld by it from Mr Muir.
12. The investigating officer wrote to the Executive on 7 July 2006 asking why the number of documents considered in the original request had been substantially reduced when Mr Muir had revised his request, given that the Executive had originally refused to provide Mr Muir with information on the basis of excessive costs.
13. The Executive responded in writing to my Office on 14 July 2006 stating that there were so few documents that fell with the scope of Mr Muir's enquiry as there were very few UK representatives in the Convention.
14. In order to ensure that the Executive had provided all the documents that fell within Mr Muir's request, the investigating officer asked the Executive to confirm how it had interpreted Mr Muir's revised request.
15. The investigating officer emailed the Executive on 19 July 2006 asking it to clarify its understanding of the words 'written submission' and the names of the UK representatives in the Convention. These words were the substance of Mr Muir's revised request. The investigating officer also made further enquiries relating to the Executive's use of the exemptions.
16. The Executive emailed the investigating officer on 31 July 2006 confirming the interpretation of the revised request (see paragraph 20 below) and upholding its use of the exemptions under FOISA.



The Commissioner's Analysis and Findings

17. I shall first consider whether the Executive has provided all the associated documentation falling within Mr Muir's request. I shall then go onto consider the application of sections 28(1) and 30(b)(ii) to the documents. In coming to this decision, I have taken account of the submissions made to me by both the Executive and Mr Muir.

Documents falling within the Scope of the Request

18. In relation to a separate, ongoing, investigation, the Executive provided my Office with a large number of documents on the Convention of the Future of Europe. Therefore, I considered whether any of these documents should have fallen within the scope of Mr Muir's request.
19. As mentioned above, the investigating officer also questioned how Mr Muir's initial request for all documentation and correspondence relating to the Convention on the Future of Europe could attract a fee over the prescribed amount for responding to requests for information, as set out in the Fees Regulations, yet only four documents fell within the scope of his refined request.
20. In considering in detail Mr Muir's revised request, it can be broken down into two parts; 'written submissions' and 'UK's various representatives on the European Convention'.
- My interpretation of the term 'written submissions' would encompass formal letters from the Executive; the Executive confirmed my interpretation in its email of 31 July 2006. When I looked at the other submissions my Office has received on the European Convention there were numerous emails, but few formal letters.
 - The second part of the enquiry related to UK representatives on the European Convention, of which there are 11 in total. The Executive confirmed in its email of 31 July 2006 that I had identified the correct individuals. When I cross-referenced the names of the UK representatives with the other submissions on the European Convention my Office had received, none of the UK representatives names appeared on this list.
21. Therefore, I am satisfied that the Executive has provided my Office with all the documents held by it which fall within the scope of Mr Muir's request.
22. The Executive commented in its letter of 21 April 2006 that it may have interpreted the scope of Mr Muir's revised request too broadly and questioned whether they were correct to have considered documents 1 and 3 as being within the scope of the request.



23. Mr Muir makes it clear that what he is looking for are submissions made to the UK representatives on the convention during that body's deliberations, and in particular relating to what the Executive hoped would be achieved by the Convention, what efforts they made to have direct input and what steps they had to have their views taken on board.
24. Document one incorporates a request for a meeting on wide range of issues, whilst document three relates to the Youth Convention. In my view neither of these two documents fall within the scope of Mr Muir's request as they do not incorporate the information Mr Muir was looking for as detailed in the point above. Consequently the consideration of documents one and three are excluded from this decision.

Section 28(1) – relations within the United Kingdom

25. In its response to Mr Muir on 9 January 2006, the Executive withheld the three documents under section 28 of FOISA. The Executive decided not to rely on this exemption on review, but subsequently chose to rely on the exemption in relation to document two, following consultation with the Department for Constitutional Affairs (DCA).
26. In terms of section 28(1), information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. In this case, the information in question is contained in a document from the Scottish Administration to the Government of the United Kingdom, both of which fall within the definition of an administration in the United Kingdom as set out in section 28(2). The exemption in section 28(1) is subject to the public interest test contained in section 2(1)(b) of FOISA.
27. In its letter of 6 June 2006, the Executive commented that, having consulted with the DCA, it came to the view that section 28(1) could be appropriately be applied to document two. The Executive commented that there is an interest in Scottish Ministers being able to feel that they can write to the Westminster Government freely on any terms and that these communications must be allowed to take place in a climate that allows for a candid and frank expression of views so as to protect and promote the unique position of Scottish Ministers vis-à-vis the Westminster Government. The Executive also commented that document two contains sensitivities over the expected role of devolved administrations.
28. However, in a letter dated 31 July 2006 to my Office, the Executive also commented that the actual contents of document two is only part of the picture and what is relevant is whether the release of such a document would prejudice substantially or be likely to prejudice substantially relations between the two administrations.



29. In this case document two withheld under section 28 has no protective markings to indicate that the information is in any way sensitive.
30. It seems to me that the Executive has not considered the exemption in relation to the specific information in the document, but that it has preferred to take a more general view of the matter instead of considering whether the effect of releasing the document would, or would be likely to, prejudice substantially relations between the Scottish Administration and the Government of the United Kingdom. As I have noted in my guidance on the use of this exemption, I require public authorities to justify the use of section 28 on a case-by-case basis, and to consider disclosing the information unless it would cause them real, actual, and significant harm. I also note that the substance of the document withheld under this exemption already appears to be in the public domain.
31. I accept the need for officials in the different UK Administrations to be able to have free and frank discussions about the European policy. However, having taken account of both the content of this particular document and the general arguments from the Executive about the release of such documents, it seems to me that the release of this document is unlikely to prejudice substantially relations between the Executive and the government of the United Kingdom and that, for this document, the exemption cannot be upheld.
32. Since I am satisfied that this information is not exempt under section 28(1) of FOISA, I am not required to consider the public interest test in relation to the use of this exemption.

Section 30(b)(ii) – free and frank exchange of views for the purposes of deliberation

Submissions from the Scottish Executive

33. In its submissions to my Office, the Executive stood firm on its view that the documents should be withheld under section 30(b)(ii) of FOISA. The Executive expanded upon its reasoning as to why the document should be withheld as the investigation progressed.
34. In summary, the Executive has argued that disclosure of the information would:
 - undermine the ability of Scottish Ministers to have the frank exchanges with the UK government necessary to keep maintaining Scottish interests in this area
 - be likely to inhibit substantially the free and frank exchange of views in future for the purposes of deliberation on European issues



- inhibit substantially the free and frank exchange of views for the purposes of deliberation on the basis that these documents detail an exchange of views that have contributed to the deliberations and the development of policy in this area and that failure to engage in such debate would substantially impact upon the quality of the policy outcome.
35. The Executive also commented that, in considering this exemption, it looked at the future inhibiting release, rather than just at the content: “The question is not whether the Minister has expressed views on the Future of Europe ..., but rather whether the First Minister would continue to have the ability to air views and approaches and comments on extremely important, constitutional and sensitive matters to the right people in the right environment at the right time.”

Submissions from Mr Muir

36. Throughout his correspondence with the Executive and then my Office, Mr Muir has provided detailed arguments as to why the documents should be released.
37. In his request for review of 17 January 2006 to the Executive, Mr Muir detailed why the information should not be withheld under section 30 of FOISA. Specifically, Mr Muir commented in his letter that the deliberations of the Convention belong to a period in the past and there have been significant political developments since that time. He also commented that the submissions belong to an extraordinary and unprecedented period of EU policy development, which is now at end, so ongoing advice and deliberation are not an issue and unlikely to be inhibited by disclosure.
38. In Mr Muir’s letter to my Office of 10 March 2006, he provided additional arguments as to why the information should be released. In particular, he stated that the discussions on the Future of Europe were conducted entirely in public and that it is therefore possible to access speeches made by the UK’s representatives as well as amendments tabled by them, successfully or otherwise. He also commented that it seems odd that the governments of 25 states were willing to make submissions to the Convention in public, but that the Executive believes that its own contributions to the debate should be kept secret.
39. In terms of section 30(b)(ii), information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The exemption is subject to the public interest test contained in section 2(1)(b) of FOISA.



40. In my view, the standard to be met in applying the harm test in section 30(b)(ii) is high. To qualify for such an exemption, public authorities must be able to show not only that the release of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, but also that such inhibition would be of a substantial nature.
41. The Executive's guidance to its staff on the application of section 30(b)(ii) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive.

Would disclosure of the documents have a future inhibiting effect?

42. I accept the fact that in certain instances the release of the substance of information would, or would be likely to, have the substantially inhibiting effect as set out in section 30(b)(ii) of FOISA. For example, if the content of the information withheld could be considered to express views and approaches and comments on extremely important, constitutional and sensitive matters then it is possible that the information could be withheld under this exemption. However, document two is innocuous and routine and it is difficult to see how the inhibiting effect of disclosing the contents of this document in this case would, or would be likely to, inhibit substantially the Ministers from expressing such views in future. The document was written before April 2002. Even if, at the time, the document was considered to discuss sensitive matters, time has now passed and there have been numerous intervening events including referenda, various elections and other important negotiations, including those which took place during the UK's presidency of the EU in the latter part of 2005.
43. As mentioned above, the Executive has submitted that it considered the future inhibiting release, rather than just the content, when deciding not to release the document. The document was written before FOISA came into effect and it is unlikely that much thought was given as to what would happen to the document once FOISA came into force. However, any similar document written following any disclosure of the withheld information in this case would be in the knowledge that FOISA has introduced a new regime regarding information held by public bodies and that, while an exemption provides for the free and frank exchange of views for the purposes of deliberation, participants should be aware that there is no guarantee that what they write would not be disclosed, especially if there is a public interest in disclosure.



44. I am of the opinion that there is nothing in the content of document two that could be considered so sensitive as to justify them being withheld on the basis that the release of the information would (or even would be likely to) inhibit substantially the free and frank exchange of views for the purposes of deliberation. In addition, I do not believe that there is anything which would have been likely to have been omitted from the document if it had been known at the outset that the document would be the subject of an information request under FOISA.
45. I am therefore of the view that the Executive's application of the exemption under section 30(b)(ii) of FOISA was not justified in this instance and that the release of document two would not and would not be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation. Since I am satisfied that document two is not exempt under section 30(b)(ii) of FOISA, I am not required to consider the public interest test in relation to the use of this exemption.

The refusal notice issued by the Executive

46. In its refusal notice dated 9 January 2006, the Executive advised Mr Muir that the information which he had requested was exempt from disclosure under "sections 28 (relations with the UK), 29 (formulation of Scottish administration policy) and 30 (prejudice to the effective conduct of public affairs)" of FOISA.
47. In terms of section 16(1)(c) and (d) of FOISA, a refusal notice must specify the exemption in question and state (if not otherwise apparent) why the exemption applies.
48. In all, there are nine exemptions contained in sections 28, 29 and 30. It was unclear from the refusal notice, which of these were being relied on by the Executive (in the end the Executive only relied on two of them). As a result of the Executive not making it clear which specific exemptions it was relying on, Mr Muir, in his request for review, argued against the use of each of the nine exemptions in detail.
49. As a result of the lack of specificity and reasoning given by the Executive in its refusal notice, I find that the Executive failed to comply with sections 16(1)(c) and (d) of FOISA.



Decision

I find that the Scottish Executive (the Executive) has not dealt with Mr K Lachlan Muir's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), in that it misapplied the exemption in sections 30(b)(ii) and 28(1) of FOISA to document two withheld and consequently failed to comply with section 1(1) of FOISA.

I require the Executive to release document two withheld from Mr Muir.

I cannot require the Executive to take any action until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require the Executive to release the information to Mr Muir within 2 months of the date of this decision notice.

I also find that the Executive failed to comply with Part 1 of FOISA in failing to issue a refusal notice in accordance with section 16(1)(c) and (d) of FOISA. However, I do not require the Executive to take any remedial action in relation to these breaches.

Appeal

Should either the Executive or Mr Muir wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 45 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
17 August 2006



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

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

28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means-
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a)
- (b) would, or would be likely to, inhibit substantially-
 - (i) ...
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c)