



Scottish Information
Commissioner

**Decision 208/2007 – Coupers Seafoods Ltd and Scottish Enterprise
Grampian**

Funding to company in respect of fish processing factory

**Applicant: Coupers Seafoods Ltd
Authority: Scottish Enterprise Grampian
Case No: 200600915
Decision Date: 5 November 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 208/2007 – Coupers Seafoods Ltd and Scottish Enterprise Grampian

Information on funding to named company in respect of fish processing factory

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2 (effect of exemptions); 30(b) and (c) (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

Coupers Seafoods Ltd (Coupers) made a request to Scottish Enterprise Grampian (SEG) for details of the provision of funding for a fish processing plant.

SEG refused to supply this information, citing various exemptions under FOISA, and upheld this position on review. Coupers applied to the Commissioner for a decision in relation to SEG's application of section 30(b) and 30(c) of FOISA, which relate to aspects of the effective conduct of public affairs.

Following an investigation, the Commissioner found that while SEG had applied section 30(b) of FOISA correctly to certain of the information withheld, it had also misapplied the exemptions in section 30(b)(i), 30(b)(ii) and 30(c) to certain other information and therefore had withheld that information incorrectly. He required the release of that information.



Background

1. On 31 August 2005, Burnett and Reid, Solicitors, requested information in relation to the following from SEG on behalf of their clients Coupers:
 - The provision of public funding by SEG, either directly or indirectly, to any company which bought from a specified fish processor (“Company A”) their Fraserburgh or Peterhead factories in order to fund either the acquisition or renovation of those premises (request 1);
 - Whether such a company leased either factory to another specified fish processor (“Company B”) (and the level of rent relating to that transaction) (request 2);
 - Whether Company B had been sold the Peterhead factory at a price which could be considered less than the market value (request 3);
 - The sale of the Fraserburgh factory, in particular what price the company who acquired it from Company A sold it for and to whom and on what date (request 4); and
 - Any further information which would be relevant to answer the questions raised in a letter of 24 March 2004 from Burnett and Reid to SEG (request 5).
2. SEG replied on 28 September 2005 providing information in response to Coupers’ requests 1, 2, 4 and 5. In relation to request 3, it stated that no information was held. SEG withheld the information in one document under section 30(b)(i) and (ii) of FOISA, the information in another under section 25(1) and certain information in others under section 33(1)(b).
3. Burnett and Reid requested a review of SEG’s decision on behalf of Coupers on 10 November 2005. They requested clarification of aspects of the refusal notice and expressed dissatisfaction on the use of exemptions, considering in particular that the information in question was more than 3 years old. The outcome of the review was communicated in a letter of 12 December 2005, which upheld the decision of SEG to withhold certain information and provided clarification in respect of the documentation withheld. Certain additional documents, previously withheld, were released to Coupers, but SEG also now argued that section 30(c) of FOISA, rather than section 30(b)(i) and (ii), should have been applied to one of the documents withheld (document 2 in item 32).



4. Coupers were dissatisfied with this response and on 12 May 2006 made an application to the Commissioner for a decision as to whether SEG had dealt with their information request in accordance with FOISA. The case was allocated to an investigating officer and the application validated by establishing that Coupers had made a valid information request to a Scottish public authority and had appealed to me only after asking the authority to review its response to the request. SEG is a company wholly owned by Scottish Enterprise, a Scottish public authority listed in schedule 1 to FOISA, and therefore is itself a Scottish public authority for the purposes of section 3(1)(b) of FOISA.

The Investigation

5. The investigating officer formally contacted SEG on 24 May 2006 in terms of section 49(3)(a) of FOISA, asking for its comments on the application (including its reasons for applying the exemptions claimed) and for the information withheld in relation to this case. Scottish Enterprise responded on behalf of SEG on 29 June 2006 with its comments and the withheld information.

Submissions of Scottish Enterprise Grampian

6. SEG withheld several documents in item 32 under section 30(b) of FOISA. It explained that those documents reflected internal advice and discussions on the merits of Company B's request for funding. SEG stated that these documents revealed much of the "thinking process" of SEG and Aberdeenshire Council in relation to this matter. Release of such information, SEG contended, would mean that staff would be inhibited in future from providing frank advice or engaging in frank debate and this inhibition would be detrimental to robust decision making. The substantial nature of the inhibition, SEG argued, derived from the fact that such projects potentially affected important issues such as significant numbers of jobs and major injections of public money.
7. SEG also argued that it believed the public interest to be better served by effective decision making on the use of public funds and the retention of jobs, rather than the release of further information. SEG stated that it had released information about the finalised project and that this released information was sufficient to safeguard the public interest in knowing the recipient, the funding bodies, their decision making processes, the amount of funding and the purposes of that funding.



8. In relation to section 30(c), under which one document had been withheld, SEG advised that the document contained significant detail of Company B's business proposal. It argued that in order to conduct effectively its function of improving economic development it needed to ensure that businesses were able to discuss proposals with it, even at a very informal stage of development, without the content of those discussions becoming more widely available. It did not consider the public interest in release of this document to outweigh the harm that would be likely to be done to its ongoing relationship with business as a consequence of release.
9. Responding to Burnett and Reid's point about the passage of time (see paragraph 18 below), SEG pointed out that this had enabled the release of certain information. However, following consultation with Company B, it had concluded that it did not permit the release of the remaining information withheld.

Submissions of Burnett and Reid on behalf of Coupers

10. Burnett and Reid explained that their clients had an interest in whether the law on state aid in articles 87 and 88 of the European Union Treaty had been complied with in connection with the devolution of the undertaking of Company A in 2002.
11. In their letter of 12 May 2006, Burnett and Reid expressed their dissatisfaction with paragraph 6 of Scottish Enterprise's review letter of 12 December 2005. In particular, they were dissatisfied because in the absence of disclosure of the relevant documents it would not be possible to know whether section 30 and section 2(1)(b) of FOISA properly applied to them.
12. Secondly, Burnett and Reid questioned whether it necessarily followed that disclosure of documents revealing a thinking process would substantially inhibit advice or exchange of views.
13. Thirdly, the documents in question were at least 3 years old, and, Burnett and Reid contended, such communications would have been made by persons in a official capacity acting in good faith to record matters of fact and honest opinion in accordance with the law as they understood it, and it could not be said that such persons would be inhibited substantially in advising and exchanging views by the thought that such communication may be made public three years later.



14. Fourthly, in respect of document 2 of item 32, Burnett and Reid pointed out that SEG had not used the exemption in section 33(1)(b) of FOISA but had argued that the document revealed significant detail of a company's business proposal. As it had not been argued that the company's commercial interests would be substantially prejudiced by disclosure, it followed that disclosure could not be seen to prejudice substantially the effective conduct of public affairs.
15. It will be noted from paragraph 16 above that Coupers' application referred only to section 30 of FOISA and the relative arguments in respect of the public interest. Therefore, my consideration of SEG's application of exemptions to the information withheld will be confined to the section 30 exemptions cited and the information withheld under those exemptions.

The Commissioner's Analysis and Findings

Application of section 30(b)(i) and section 30(b)(ii)

16. SEG applied the exemptions in section 30(b) of FOISA to item 32, which consists of 34 documents. From item 32, SEG withheld the following documents

Documents 2, 4, 5, 6, 7, 9, 10, 11 (in part), 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 31 and 33.
17. SEG did not differentiate between section 30(b)(i) and 30(b)(ii) in respect of the documents withheld in item 32: consequently, I have considered whether either or both of these exemptions apply to the information withheld.
18. The exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA concern prejudice to the effective conduct of public affairs and specify that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation respectively. These exemptions are subject to the public interest test required by section 2(1)(b) of FOISA.



19. In their submissions to me, Burnett and Reid made the point that the mere fact that a document contains advice or the expression of views does not bring it within the exemption in section 30(b), nor does the fact that the documents reveal “a thinking process”. Broadly, I accept this. The test is not whether the information constitutes advice or a view (although this will generally be relevant), but whether the release of that particular information would, or would be likely to, have the relevant substantially inhibiting effect. Therefore, in considering either of these exemptions, I must look at the actual information withheld, not the category of information withheld or the type of situation in which the request has arisen. It cannot necessarily follow from my requiring release of one particular piece of information that information of that general variety will require to be disclosed routinely in the future.
20. In this connection, I look for authorities demonstrating a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
21. The standard to be met in applying the harm test in section 30(b), therefore, is high. SEG argued that the substantial nature of the harm derived from the fact that situations of the kind under consideration here involved the retention of a significant number of jobs and the injection of a substantial amount of money. The harm would be substantial if decision making in this area were to be prejudiced. While I accept the general proposition that such harm could indeed be substantial, I do not think it follows that the release of all of the information withheld would necessarily have that effect.
22. I have also taken account of the time which elapsed between the creation of the information requested and Coupers' request for information being dealt with by SEG. In some cases at least, I accept that this will have reduced the potential inhibitive effect of release of the information in question to such an extent that the relevant exemption no longer applies.
23. Having considered the content and purpose of the information withheld under section 30(b) I note that it includes material which:
 - is routine and administrative in nature;
 - simply relates to the process of informing persons of outcomes, or of what is happening in a process, without any apparent controversy, and ensuring that various officials, persons, departments and organisations are aware of certain issues or lines to take;



- contains advice or information of a factual nature only: this may include advice or information about the situation, but not to an extent that is not common knowledge or reasonably obvious to an informed observer;
- is information which is the public domain, and was at the time Coupers' request for review was dealt with by SE; or
- represents the normal exchange of officials in the course of their work, expressed in a manner I would not regard as likely to be affected significantly by disclosure.

Generally, in this case, I have not accepted information falling within the above categories as engaging the section 30(b) exemptions.

24. In all the circumstances, therefore, I do not accept the arguments put forward by SEG for withholding certain documents under the exemptions in section 30(b)(i) and/or section 30(b)(ii). My own view is that, if some of this information were disclosed, officials would certainly be aware that information from their own communications might be required to be disclosed, and that it is likely that this would be borne in mind in future communications of this kind. However, I am not convinced that any future inhibition in expressing or recording advice or views that would or would be likely to occur would be of a substantial nature. Other factors would come into play, for instance, the officials' own commitment to a high quality public service, including the provision of accurate and realistic advice, and the increasing recognition that accountability for decisions or action means that at least some of the relevant information may be released into the public domain.
25. However, I also consider that certain information withheld by SEG can be described as free and frank and that this information meets the requirements of the relevant part or parts of section 30(b). In these cases, I accept that the relevant exemption or exemptions in section 30(b) apply.
26. In the following paragraphs, I shall specify the items (and parts of items) which I consider to fall within the terms of section 30(b) of FOISA.

item 32/4

27. Item 32/4 is an email with comments on a paper to be presented at a SEG Board sub-group meeting. Having examined this email, I do not think that its disclosure could reasonably be expected to have the substantially inhibiting effect required to engage either exemption. Within these emails I cannot find comments that I would categorise as frank or candid. There is also information which I think could be categorised as relatively routine information about the relevant Board process. I am therefore of the view that Document 32/4 does not fall within either exemption in section 30(b) of FOISA.



Item 32/5

28. Item 32/5 is an email exchange between SEG and Scottish Enterprise. Having examined the content of these emails, neither of which contains candid views nor robust advice, along with the relevant submissions from SEG, I do not accept that their disclosure could reasonably be expected to have the substantially inhibiting effect required for the purposes of these exemptions. It is my opinion that Document 32/5 does not fall within the exemption under either section 30(b)(i) or 30(b)(ii) of FOISA.

Item 32/6

29. Item 32/6 is an email with comments on a paper to be presented at an SEG Board sub-group on 12 July 2002. Although it is an email within which the writer expresses a view about the project, I do not consider that it contains anything which would bring it within the scope of section 30(b)(i). In respect of section 30(b)(ii), the view is not frank, in the sense that it expresses a candid or potentially unwelcome view, and I can find nothing in it which could be said to give rise to the relevant kinds of inhibition as a consequence of disclosure. In my view, this email could be said to represent a normal exchange expressed in such a manner that its disclosure could not reasonably be expected to have the effect required to engage section 30(b)(ii).
30. I am therefore of the view that Document 32/6 does not fall within the exemption in either section 30(b)(i) or 30(b)(ii) of FOISA.

Item 32/7

31. Item 32/7 is an email on the same subject as items 32/4 and 32/6. Given its subject matter and terms, I do not think that this email could be said to fall within the scope of section 30(b) (i). In respect of section 30(b) (ii), the views expressed are not frank, in the sense of being a candid or potentially unwelcome view, and considering the content I am not of the view that disclosure could reasonably be expected to have the inhibiting effect required to engage the exemption. Whilst there may be situations where views expressed in such a context – i.e. on a proposal to be considered by such a Board – would engage the exemption, in all the circumstances I do not consider item 32/7 to do so.



32. Within item 32/7 is an email of 10 July 2002 [12:40]. In respect of section 30(b), the views in this email are not frank, in the sense of being a candid or potentially unwelcome view, and I am not of the view that a future correspondent would or would be likely to be substantially inhibited in expressing advice or if this were to be disclosed. I also note that much of the factual information in the email of 10 July 2002 [12:40] can be found within disclosed item 32/28, which suggests that this is information which SEG regards as capable of disclosure.

Item 32/9

33. Document 32/9 is an internal SEG file note. The note is not advice and I cannot identify anything within it from which it would be reasonable to conclude that its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice as required by section 30(b) (i). I accept, however, that in part this item falls within section 30(b)(ii): it is a note that has been added to the file to record deliberations by the SEG personnel in connection with whether the project complies with the State Aid provisions, and I am satisfied from their content that the fourth and seventh sentences of the note would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation. However, I do not regard the remainder of this note as falling within the terms of section 30(b)(ii): there is nothing in the content of the remaining sentences and paragraphs which persuades me that their disclosure could reasonable is expected to have the required effect.

Item 32/10

34. Item 32/10 is a handwritten note of 16 July 2002 recording the discussions in an internal telephone conversation. This information seems to me to represent the normal exchange of officials in the course of their work, expressed in a manner I would not regard as likely to be affected significantly by disclosure. Having read this note, I do not regard it as such that its release would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation or that such inhibition would be of a substantial nature, or that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice.



Item 32/11

35. This item is part of a report to the Industrial Cases Committee of Aberdeenshire Council (July 2002). The majority of this document has been released by SEG: only certain figures have been redacted. Having considered the nature of these figures and the time when they were supplied relative to the time of the request, along with the relevant submissions from SEG, I accept that release of the redacted information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation and that such inhibition would be of a substantial nature. Therefore, I accept that section 30(b)(ii) applies to the redacted figures.

Item 32/12

36. Item 32/12 is an email from Aberdeenshire Council to SEG. The email (18 July 2002 [12:14]) discusses the proposed contributions of those involved in the project and how they relate to the State Aid provisions. Whilst I accept that such an email is an example of the writer considering options, I do not consider that release would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation or the free and frank provision of advice, or at least that any such inhibition would be of a substantial nature. The information is similar in nature to that which has already been released and as far as I can see is of a factual nature and, in content and expression, represents the normal exchange of an official in the course of their work in a project which by necessity involves consideration and exploration of funding options and issues.
37. The email from the Executive (12 July 2002 [12:27]) provides advice in respect of the State Aid provisions. However, I am not satisfied that this email falls within section 30(b)(i) or 30(b)(ii). This email represents an official giving advice on the subject of State Aid with respect to a proposed project. In this context, and having considered fully its subject matter, content and all relevant submissions, I do not accept that disclosure of the email, which is entirely a considered and reasoned interpretation of the situation, would substantially inhibit either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Item 32/13

38. This item is an email exchange which discusses the project.
39. I accept that in part this exchange of emails is candid and expresses views about the project and its requirements and that it falls within the exemption in section 30(b)(ii). Having considered its subject matter, content and all relevant submissions, I accept that release of the following email would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation or that such inhibition would be of a substantial nature:



Email 23 July 2002 [08:54]

40. However, in my view the release of the remaining emails from item 32/13 would not, or would not be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation.
41. The remaining emails are the normal exchanges of various officials in the course of a project which by necessity involved the exchange of views and exploration of funding options and the issues associated with such funding. Whilst some emails may express a view which is relatively candid about the situation, I do not find any expression or content which would not reasonably be expected in this context. Some of the emails contain information that is administrative and relate to the awareness of various persons of current information or arrangements. In all the circumstances, I cannot accept that substantially inhibition in either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation could reasonably be expected to follow from disclosure of this information.

Item 32/14

42. Item 32/14 is an email exchange which contains some of the material already considered in item 32/13. In my opinion, having considered its subject matter, content and all relevant submissions, the release of the email of 23 July 2002 [08:32] in item 32/14 would not, and would not be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation or advice.
43. The email of 23 July 2002 [08:50] is a report on the issues surrounding funding of the project. Despite the fact that this email considers what could be regarded as negative points I do not think that its release would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation or advice. Whilst this email may express a view which is candid, I do not find any expression or content which would not reasonably be expected in the context, or which in any other sense could be said to give rise to a reasonable expectation of the relevant kinds of inhibition.



Item 32/15

44. Item 32/15 comprises three emails and is an exchange between SEG and Scottish Enterprise. The information is similar in nature to that which has already been released and as far as I can see is of a factual nature and, in content and expression, represents the normal exchange of officials in the course of their work in a project which of necessity involves consideration and exploration of funding options and issues. In the circumstances, I regard the majority of the content of the emails as not being such that release would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation.
45. However, I accept that in the email of 23 July 2002 [18:17], the third (starting “we discussed”) and fourth (starting “Overall”) paragraphs fall within section 30(b)(ii). Having considered the subject matter and content of these paragraphs, along with all relevant submissions, I accept in the circumstances that their disclosure would, or would be expected to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.

Item 32/16

46. This item is an email (24 July 2002 [07:45]) with a comment by the then Chief Executive of SE. This is a robust comment on a matter of some sensitivity and in all the circumstances I accept that this email falls within the exemption of section 30(b)(ii) (though not, given its nature, section 30(b)(i)) of FOISA. The other emails in item 32/16 have been dealt with in my consideration of item 32/15 (above)

Item 32/17

47. This is an email (24 July 2002 [11:34]) and an attached draft letter from the solicitors acting for Aberdeenshire Council in respect of the project. The email is a narration of arrangements agreed and issues to be resolved. Having read the email, I do not accept that it raises any issues which would bring it within the scope of either exemption in section 30(b) of FOISA.
48. Attached to the email is a letter from the solicitors which summarises the position reached and what still needs to be completed by the respective parties. In the circumstances, I do not regard its subject matter or content as being such that its release would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation or that such inhibition would be of a substantial nature.



Item 32/18

49. Item 32/18 is a joint letter from Aberdeenshire Council to the then Scottish Executive, written on behalf of both it and SEG, with an attached email (dealt with under item 32/8).
50. This letter seeks confirmation of eligibility in respect of funding and I do not see that release of it would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. In considering any exemption, I must look at the actual information withheld, not the category of information to which it belongs or the type of situation in which the request has arisen. The content of this letter, which is largely factual and relates to interpretation in respect of grants, would not, I believe, have any significant inhibiting effect on practice in either area.

Item 32/19

51. Item 32/19 is a duplicate of item 32/18, which I have considered above. I do not require to consider it again.

Item 32/20

52. Item 32/20 includes an email from Johnston and Carmichael (26 July 2002 [21:32]) about the remaining requirements for the project. This email relates to factual questions requiring to be answered by a person involved in the project in respect of the project. With the exception of point 3, which I accept is information of such a nature that its recording would be unlikely in future (to the potential detriment of similar processes) were disclosure to take place, I can find nothing in the content of this email which could reasonably be said to fall within either exemption in section 30(b). In all the circumstances, however, I can accept that the information in point 3 falls within both of the relevant exemptions.
53. The second email in item 32/20, of 29 July 2002 [09:49], simply confirms an individual's availability for a meeting and therefore does not, in my opinion, fall within either section 30(b) exemption.

Item 32/21

54. The email of 29 July 2002 [5:05] does not engage either section 30(b) exemption, being a routine email about meeting facilities.



55. The email of 30 July 2002 [10:59] deals with issues that SEG wants to discuss at the meeting. As far as I can see this information involves requirements for the project and things that require to be satisfied, all of which would be expected of officials engaged in this enterprise. Given its context, subject matter and content, I do not accept that release of this information would, or would be likely, to inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Item 32/23

56. This is a letter from then Scottish Executive to Aberdeenshire Council and SEG on funding, which responds to the joint letter (item 32/18). Most of the content of this letter provides general guidance about funding and State Aid, which could be applied to the particulars of the project. The writer does offer comments and advice in this letter, including comments about facts in already released documents, but there is nothing in its content or in the wider context to persuade me that release of this information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Item 32/24

57. This includes an email with attachment from Johnson and Carmichael to other accountants in relation to the project. This information is factual and relates to particular aspects of the project. I do not accept that it falls within section 30(b). Given its subject matter and content, and having considered all relevant submissions, I do not accept that release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Item 32/25

58. This item is the SEG response to item 32/24. Given my conclusions in respect of item 32/24, I do not accept that release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.



Item 32/26

59. Item 32/26 is a discussion paper of 11 August 2002. Having considered the information in this item along with all relevant submissions made to me, I accept that disclosure of the majority of it 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. I accept that disclosure of this information in response to Coupers' information request would have had a substantially inhibiting effect on consideration of like issues in the future and on the adequate recording of issues and options. However, I do not consider the first three paragraphs of this discussion paper (under the heading "BACKGROUND"), which are largely factual, to engage the exemption.

Item 32/27 (duplicates item 32/31)

60. This Document (which is the same as item 32/31) is the Report to the Industrial Cases Committee (21 August 2002) of Aberdeenshire Council. It provides a summary of the steps taken and required within the project, setting out changes from the arrangements envisaged and agreed at a previous meeting (with the reasons for those changes). In all the circumstances, having considered the subject matter and content of the information and all relevant submissions made to me, I do not accept that release of the majority of the information in item 32/27 would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
61. The paragraph 3.12 in this item does, however, express advice and a view which I think (given its nature and content) would, if released in response to Coupers' request, have had a substantially inhibiting effect on the future provision of advice and exchange of views in this area. I am therefore satisfied that it falls within the two section 30(b) exemptions.

Item 32/33

62. This item is an email exchange from January/February 2004 about an aspect of the project. In my view, much of this information is factual and could be discerned from public documents in respect of the various transactions that made up the project. Looking at the content and manner of expression, I do not accept that release of this item would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.



Public interest

63. Section 30(b) is subject to the public interest test contained in section 2(1)(b) of FOISA and therefore I must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. I shall now consider the public interest in respect of the items above which I have decided fall within the terms of section 30(b)(i) or 30(b)(ii).
64. There is a general public interest in making information available to the public and a general need for transparency and accountability in decision making, but this must be balanced against harm which could be caused by the release of information and the public interest in protecting the integrity of decision making processes. Information can only be withheld under FOISA where the public interest in withholding it is greater than the public interest in disclosure.
65. The public interest arguments in favour of disclosure include:
- increasing transparency within the decision-making process; and
 - providing greater scrutiny of the decision-making process.
66. The public interest arguments against disclosure include:
- Inhibition of the general decision-making process with a consequent detrimental effect on the efficiency and quality of that deliberative process;
 - Inhibition of the general decision-making process with a consequent detrimental effect in respect of the use of public money, exploration of options and employment within a local area.
67. I have given consideration to the submissions by both Burnett and Reid, on behalf of Coupers Ltd, and SEG on the question of balancing the public interest in this case. I have considered the desirability of making information available to the public and the general need for transparency and accountability in decision making, especially involving the use of public money. I have also taken into account the need for officials to be able to discuss matters of substance freely and openly.
68. I note that SEG has released some information and copies of all the public legal documents which effect the transactions that make up the project in question – these are items 15, 16, 17, 19, 22. I am satisfied that this information increases transparency on the nature of the funding and the bodies involved and goes some way towards increasing transparency and scrutiny of the process, and in those respects serves the public interest.



69. Taking into account the content of the information I have accepted as being exempt and the context within which they were generated, the sensitivity of the negotiations which were underway at that time and the fact that the information requested concerned the formative stages of proceedings, I am of the view that disclosure of this information would be likely to have a detrimental effect on the efficiency and quality of the deliberative process of SEG in respect of the use of public money and the employment within a local area. It is in the public interest for the SEG to be able to undertake discussions and deliberations on sensitive issues as freely and frankly as possible, without fear that the exploration of potential solutions would be subdued or inhibited and I am of the view, in this instance, that the future provision of free and frank views would be likely to suffer or be inhibited to an extent that would be contrary to the public interest.

70. I am therefore of the view that, in all the circumstances of the case, the public interest in disclosing the above documents and parts of documents which I have found to fall within section 30(b)(i) and/or 30(b)(ii) is outweighed by the public interest in maintaining the relevant exemption or exemptions under FOISA. Accordingly, I am satisfied that SEG was justified in withholding the following information from item 32 under section 30(b)(ii) of FOISA:

32/9 (fourth and seventh sentences only);

32/11 (the redacted figures);

32/13 (email of 23 July 2002 [08:54];

32/15 (email of 23 July 2002 [08:17];

32/16 (email of 24 July 2002 [07:45];

32/20 (email of 26 July 2002 [21:32], point 3 only;

32/26 (with the exception of the first three paragraphs, under the heading "BACKGROUND");

32/27 (paragraph 3.12 only).

In addition, I am satisfied that SEG was justified in withholding item 32/26 (with the exception of the first three paragraphs) and paragraph 3.12 in item 32/27 under section 30(b)(i) of FOISA.



Application of section 30(c)

71. Section 30(c) of FOISA states that information is exempt if its disclosure under FOISA would otherwise [i.e. other than in the ways contemplated by the exemptions in section 30(a) and (b)] prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. Section 30(c) is also subject to the public interest test.
72. SEG withheld Document 2 of item 32 (i.e. item 32/2) under section 30(c) of FOISA. SEG initially withheld this document under section 30(b) of FOISA, but in its submissions to my Office stated that it thought this document fell within the terms of section 30(c) rather than 30(b). Item 32/2 is a letter to Aberdeenshire Council from Company B. SEG's arguments in relation to this exemption are set out at paragraph 8 above. Basically, it has argued that release of item 32/2 would result in businesses being inhibited from supplying such information and that consequently there would be significant harm to its ongoing relationship with business and therefore its ability to function effectively in the field of business development. This would affect detrimentally the public function of SEG, which is to improve economic development.
73. Item 32/2 makes a proposal in respect of the purchase and redevelopment of the Fraserburgh factory and their funding. It was part of an ongoing discussion between Company B, Aberdeenshire Council and SEG. Some of what is contained in this letter is contained within other released documents and item 32/1 (a released briefing note) indicates that Company B has been asked to present options for the purchase of the business of Company A.
74. I accept that the functions of SEG, in improving economic development, can be seen as an aspect of public affairs. I also accept that these will require that businesses and persons be assured of a degree of confidentiality in respect of correspondence with SEG, especially at initial or formative stages.
75. As I have said, I must look at the content of the information withheld and not the category or class within which that information falls. I have considered carefully the information SEG regards as falling within the scope of section 30(c). In my view it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that such communications will be "routinely" released in future. The circumstances of each case must be taken into consideration and the public interest in each case assessed on its own merits. While I accept that there might be letters which if released might cause reluctance within companies to approach SEG in respect of funding and other support, I do not consider that item 32/2 is such a letter.



76. Burnett and Reid, on behalf of Coupers, argued that since SE had not submitted that section 33(1)(b) of FOISA applied to item 32/2 it followed that the concern in respect of section 30(c) did not relate to information affecting the commercial interests of the company in question.
77. While I accept that there may be some validity in that submission, my view is that SEG were correct to recognise that there may be information which might be supplied by a company at the early stages of a project which, whilst not meeting the test in section 33(1)(b), is information which the company may be inhibited from providing were it likely to be disclosed under FOISA. However, as I have said, I do not think that item 32/2 contains such information.
78. I think that it is recognised that the business environment within which SEG operates involves proposals and suggestions relating to the development of businesses and that changes and modifications to such proposals will be inevitable as a project develops. In this way, initial proposals - in general terms (for example the business structure of a project) and in particular (for examples amounts involved or legal transactions required) – will change over time and those changes do not reflect on the quality of the initial proposal.
79. In this case, as far as I am aware, the project has been completed, subject to the completion of certain legal arrangements, and SE has disclosed information about the project – in particular communications (to Coupers Ltd) and the legal instruments which require to be registered. If the project had not come to fruition the argument for withholding such formative information under section 30(c) might be stronger. However, this is not the case in this instance.
80. As I have said in previous cases, for example, *Decision 131/2007, Mr Anthony Cannon and the Scottish Public Pensions Agency* - the harm test in section 30(c) is high and an authority must demonstrate that the harm contemplated is real, significant and substantial. It would need to occur in the near (certainly the foreseeable) future and not in some distant time.
81. Even where I consider the information is of some sensitivity, it seems to me that the timing of the request will be a crucial factor in determining whether the harm test as set out in section 30(c) will be met. In this instance item 32/2 is dated 5 July 2002 and the request from Coupers was dated 31 August 2005. As far as I am aware, the majority of the project was completed at that date. Therefore, in this instance, the content of item 32/2 relates to an initial written proposal, which had already been discussed, in respect of a project which had been completed by the time of the request. It seems to me where the process is concluded the authority's reliance on the application of section 30(c) will depend on the effect that disclosure of the information would have on future practice.



82. I can see nothing within the letter which I consider would not have been stated had there been knowledge that the letter would be disclosed, or the disclosure of which at the time of request would have had the effect on SEG's function which it is contending. In particular, I can identify nothing in its content or in SEG's submissions which persuades me that its disclosure could reasonably be expected to have any effect on future practice in this area.
83. I do not think that I can accept the submissions by SE in respect that it would, or would be likely to, prejudice substantially its public function.
84. In the schedule which SEG submitted to me it included item 32/2 within the documents which it considered fell within section 30(b). Whilst I do not understand that SEG was in fact submitting that item 32/2 fell within the terms of section 30(b), I would comment that were it to make a submission on that basis I would not accept that this item fell within the terms of either section 30(b)(i) or 30(b)(ii). It contains no particular freedom or frankness of expression and I can identify nothing in its content or in any of SEG's submissions to persuade me that its disclosure could be expected to have a remotely inhibiting effect on similar future exchanges, or on the accurate recording and transmission of similar records in the future.
85. In all the circumstances, therefore, I do not accept that disclosure of item 32/2 would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. Having decided that section 30(c) does not apply to item 32/2 I do not need to consider the public interest.

Decision

I find that **Scottish Enterprise** Grampian (SEG) partially dealt with the information request from Burnett and Reid, on behalf of Coupers Seafoods Ltd (Coupers), in accordance with Part 1 of FOISA, in withholding from the applicant under section 30(b)(i) and/or 30(b)(ii) of FOISA the information in item 32 listed in paragraph 70 of this decision notice.

However, I also find that SEG misapplied section 30 (b)(i) and section 30(b)(ii) of FOISA in withholding from the applicant the remaining information in item 32 and therefore to that extent failed to deal with the request in accordance with section 1(1) of FOISA.

I also find that SEG misapplied section 30(c) (and insofar as relevant, section 30(b)(i) and 30(b)(ii)) of FOISA to item 32/2 and therefore to that extent failed to deal with the request in accordance with section 1(1) of FOISA.



I therefore require Scottish Enterprise Grampian to release to Coupers all of the information in item 32 except that listed in paragraph 70 of this decision notice, within 45 calendar days after the date of intimation of this decision notice.

Appeal

Should either Scottish Enterprise Grampian or Coupers 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
5 November 2007



APPENDIX 1

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.

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.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

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) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.