



Scottish Information  
Commissioner

**Decision 221/2007 Mr Alistair Gemmell and the  
Scottish Ministers**

*Who recommended or proposed and seconded Mr Paddy Tomkin  
for the Queen's Police Medal*

**Applicant: Mr Alistair Gemmell  
Authority: Scottish Ministers  
Case No: 200700709  
Decision Date: 20 November 2007**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 221/2007 Mr Alistair Gemmell and the Scottish Ministers

***Who recommended or proposed and seconded Mr Paddy Tomkins for the Queen's Police Medal – information withheld – Commissioner upheld the Executive's reliance on sections 25(1) (information otherwise accessible) and 41(b) (honours)***

### Relevant Statutory Provisions and Other Sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2 (Effect of exemptions); 25 (Information otherwise accessible); 41(b) (Communications with Her Majesty etc. and Honours); 58(2)(a) (Falling away of exemptions with time).

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

### Facts

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Mr Gemmell requested information from the Scottish Ministers (the Ministers) as to who recommended or proposed and seconded Mr Paddy Tomkins for the Queen's Police Medal (QPM). The Ministers responded by advising Mr Gemmell that they were withholding this information from him, and they were relying on the exemption in section 41(b) of FOISA for doing so. Following a review which upheld the original decision to withhold, Mr Gemmell applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Gemmell's request for information in accordance with Part 1 of FOISA, by deciding that the majority of the information was exempt under section 41(b) of FOISA (being related to the exercise of the prerogative of honour and the public interest not favouring release), while the remainder was publicly available at the time of the request and therefore exempt under section 25(1) of FOISA.



## Background

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1. On 19 July 2006, Mr Gemmell wrote to the Ministers requesting information as to who recommended or proposed and seconded Mr Paddy Tomkins for the QPM. In particular, Mr Gemmell requested the individuals' names and copies of any minutes or paperwork relating to discussions and approval of this award.
2. On 25 October 2006, the Ministers wrote to Mr Gemmell in response to his request for information. The Ministers advised Mr Gemmell in their response that the information that he had requested was exempt from disclosure under section 41(b) of FOISA, as it related to the exercise of Her Majesty of Her prerogative of honour.
3. Mr Gemmell did not receive a copy of the 25 October letter until some time after it was sent. On 4 April 2007, he wrote to the Ministers requesting a review of their decision. Mr Gemmell drew the Ministers' attention to his contention that it was in the public interest for the requested information to be released, given current investigations and suspicion of the honours system.
4. On 3 May 2007, the Ministers wrote to notify Mr Gemmell of the outcome of their review. They advised Mr Gemmell that they upheld their original decision to rely on the exemption in section 41(b) of FOISA for withholding the requested information from him. The Ministers also set out their views as to why they concluded the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
5. On 16 May 2007, Mr Gemmell wrote to my Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Gemmell 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 that request.



## The Investigation

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7. On 24 May 2007, the Ministers were notified in writing that an application had been received from Mr Gemmell and were asked to provide my Office with copies of the information which had been withheld from Mr Gemmell. Following receipt of this information, the case was allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, asking them to provide comments on the application and to respond to specific questions about it, as required by section 49(3)(a) of FOISA. Comments and specific responses were duly provided.

### *Submissions from the Ministers*

9. In their submissions to my Office, the Ministers advised that having reviewed the information withheld from Mr Gemmell, they no longer considered one document (document 5) to come within the scope of his information request. The Ministers also considered that certain of the withheld information (the covering email to document 4) could be released to Mr Gemmell: this has now been done.
10. The Ministers also advised that they were relying on the exemption in section 25(1) of FOISA for information in the attachments to document 2, as this information was publicly available. In addition, they considered certain personal information to be exempt under section 38(1)(b) of FOISA
11. I will consider the Ministers' arguments further analysis and findings below.

### *Submissions from Mr Gemmell*

12. In his appeal to me, Mr Gemmell clearly indicated his dissatisfaction with the Ministers' decision to withhold information from him which would address his request. He asserted that the award of an honour to a senior police officer was a matter of public interest, particularly considering the then current criminal investigation into aspects of the honours system. He argued that the system should be transparent if it was to retain credibility.



## The Commissioner's Analysis and Findings

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13. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Gemmell and the Ministers and am satisfied that no matter of relevance has been overlooked.

### Information outwith the scope of the request

14. As indicated above, the Ministers have advanced the view that the information contained in document 5 is not within the scope of Mr Gemmell's request. I cannot accept this conclusion, however.
15. I am of this view as part of Mr Gemmell's request seeks "copies of any minutes or paperwork relating to discussions and approval of this award [to Mr Tomkins]". I am satisfied that the information in document 5 falls within this description. Therefore, I will consider the Ministers' application of section 49(1) to this information.

### Section 25 – Information otherwise accessible

16. The Ministers relied on the exemption in section 25(1) of FOISA for withholding the information contained in the attachments to document 2.
17. The Ministers asserted that as the information contained in the attachments to document 2 (which relate to background information on Mr Tomkins' professional life) was available via the Lothian and Borders Police and Association of Chief Police Officers in Scotland (ACPOS) websites, and was therefore in the public domain, it was reasonably obtainable by Mr Gemmell other than by requesting it under FOISA.
18. The Ministers provided links to the Lothian and Borders Police and ACPOS websites to facilitate accessing this information. These links are; <http://www.lbp.police.uk/about/forcemanagement/chiefconstable/cc-tomkins.asp>, and <http://www.scottish.police.uk/main/acpos/repmem2004.pdf>. Having considered the content of this information, along with the Ministers' submissions and the relevant links, I am satisfied that it is otherwise accessible and therefore that the Ministers were correct to rely on the exemption in section 25(1) of FOISA in respect of this.
19. As I am satisfied that the information in the attachments to document 2 is otherwise accessible, and was at the time of Mr Gemmell's request and request for a review, I will not consider this information further.



## **Section 41(b) – Communications with Her Majesty etc. and honours**

20. The Ministers relied on the exemption in section 41(b) of FOISA for withholding the information contained in documents 1 to 4 (not including the attachments to document 2, dealt with above in the context of section 25(1) of FOISA, and the covering email in document 4 which has been released to Mr Gemmell) and 6 to 8 inclusive. As I was not satisfied that the information contained in document 5 was, as the Ministers asserted, outwith the scope of Mr Gemmell's request, and the Ministers had originally relied on section 41(b) for withholding this information, it is my intention to consider this document under the section 41(b) exemption also.
21. The Ministers explained that the information in these documents was about the process of nominating Mr Tomkins for the QPM. They stated that in their view the information clearly related to the exercise by Her Majesty of Her prerogative of honour and was therefore exempt under section 41(b). Having considered the information in these documents, I accept this position.
22. The exemption in section 41(b) is subject to the public interest test contained in section 2(1)(b) of FOISA. Having accepted that the information detailed in paragraph 20 above is exempt under section 41(b), therefore, the main issue for me to consider is 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.
23. As the exemption in section 41(b) of FOISA is a class based exemption, it will be in considering the application of the public interest test that it is appropriate to consider the content and sensitivity of the information, along with any likely effects of disclosure.
24. The Ministers have accepted that there is a public interest in knowing why public figures are nominated for awards like the QPM. However, they also state that they believe the limited public interest in Mr Tomkins' award to be outweighed by the public interest in maintaining the integrity of the honours system.
25. The Ministers have provided comprehensive arguments as to why the integrity of the honours system would be prejudiced by release of the information withheld. They argue in particular that:
  - those invited to offer information about a candidate must be able to do so freely and honestly, on the understanding that their confidence will be respected;



- decisions about honours must continue to be taken on the basis of full and honest information about the persons concerned and their achievements; and
  - those sitting on honours assessment committees should be able to carry out their work free from pressure for, or on behalf of, potential or actual candidates.
26. It is the Ministers' contention that release of the information detailed in paragraph 20 above would be very likely to lead to those providing information about individual candidates in the future being less candid in their views on the merits and suitability of individuals under consideration for an honour. The resulting lack of detailed and accurate information would, they argue, make the process of selection far more difficult and drawn out, and might lead to either worthy candidates not being nominated or nominations being made for candidates who in the perception of the public might be seen to be less worthy. The Ministers conclude that this would lead to erosion of public confidence in, and respect for, the honours system and its recipients.
27. The Ministers consider that release of this information would have the effect that civil servants would be unwilling to give forthright opinions during the process of considering who should be a recipient of an award, if they knew that these opinions might be unpopular and lead to repercussions in both their personal and professional lives. The Ministers contend that in order for civil servants to come to a true, fair and balanced conclusion they need to be able to discuss candidates in a forthright manner and to express their own personal opinion, colleagues' impressions, etc.
28. As I said in my previous decision on the application of this exemption (*079/2007 Ms Kathleen Nutt and the Keeper of the Records of Scotland*) I believe there to be a general public interest in information being accessible, as this enhances scrutiny of the decision-making process and improves accountability. Much the same assertion was made by Mr Gemmell in his application to me, in which he stated that if the award of honours is to retain credibility then it should not be shrouded in secrecy and should be transparent.
29. In considering the public interest in relation to section 41(b), however, I must also bear in mind that section 58(2) of FOISA provides for the exemption remaining in force for the period of sixty years from the beginning of the calendar year after that in which the information under examination was created. Consequently, while in principle the general public interest in transparency should apply to the decision-making process in relation to honours as it does to any other decision making by public servants, I do consider that specific reasons need to be shown as to why the public interest in release of information covered by this exemption outweighs that in maintaining the exemption in this case.



30. As stated in decision 079/2007, I consider it necessary when deliberating on the application of this exemption to consider the content of the information in question on a case by case basis, taking account of all relevant factors including the status of the recipient or prospective recipient of the award, in this case Mr Tomkins, and the age of the information under consideration.
31. It is clear that Mr Tomkins did at the time of Mr Gemmell's request and still does occupy a prominent professional role as a public official. While there must be a degree of public interest in knowing why Mr Tomkins was awarded this honour, I accept this has to be balanced against the public interest in ensuring that the integrity of the honours system is maintained. In this case, it is clear from the information withheld and information already in the public domain that the matter of Mr Tomkins' honour was current only a matter of months before Mr Gemmell's request for the information in question.
32. There is information in the withheld documents which provides a degree of insight into who proposed and seconded Mr Tomkins for this award. While some of the withheld information relates to Mr Tomkins' professional history and includes information which is already in the public domain, even this forms part of the thinking process leading to a recommendation in respect of the award of an honour. Overall, the information withheld reflects the deliberative process in respect of that award. Considering the short period of time that has passed since this information was recorded, and the real likelihood that those civil servants who were involved in these discussions are still in post and are still likely to be involved in this type of discussion in future, I accept that in this case there would be a substantial public interest in not disclosing the information in the documents described in paragraph 20 above.
33. I am of this view as on this occasion I accept the submissions that have been made by the Ministers as to the effect that disclosure of this information would or would be likely to have on similar discussions in future. I accept that it is clearly in the public interest that the relevant departments of the Scottish Government, and the civil servants within those departments, should be able to express their views fully, taking into account all relevant information, whether sensitive or not, to allow them to reach an informed and balanced decision as to who should be nominated for an honour, and thereafter to make recommendations to Ministers accordingly. In this particular case, I accept that it is in the interest of maintaining the integrity of the honours system that the information withheld should not be disclosed after such a short time has passed following the relevant deliberations and recommendations.



34. On balance, therefore, having taken account of all relevant information available to me, I am satisfied in the circumstances that the Ministers were correct to apply the exemption in section 41(b) of FOISA to the information in documents 1 to 4 (not including the attachments to document 2, dealt with above in the context of section 25(1) of FOISA, and the covering email in document 4 which has been released to Mr Gemmell) and 5 to 8 inclusive, the public interest in disclosure of these documents being outweighed by the public interest in maintaining the exemption.
35. Finally, as I am satisfied that the personal information identified by the Ministers in their submissions to me is exempt under section 41(b), I am not required to consider the application of section 38(1)(b) of FOISA to this information.

## **Decision**

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I find that by applying the exemptions in sections 25(1) and 41(b) of FOISA to the information withheld, the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Gemmell.

## **Appeal**

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Should either Mr Gemmell or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**20 November 2007**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (...)
- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - (a) the provision does not confer absolute exemption; and
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (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.

## **25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-
  - (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if-
    - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,  
  
members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

## **41 Communications with Her Majesty etc. and honours**

Information is exempt information if it relates to-

(...)

- (b) the exercise by Her Majesty of Her prerogative of honour.



**58 Falling away of exemptions with time**

(...)

(2) Information cannot be exempt information by virtue of-

(a) section 41(b) after the end of a period of sixty years;

(...)

Which commences at the beginning of the calendar year following that in which the record containing the information is created.