



Scottish Information
Commissioner

**Decision 225/2007 – Mr David Miller, The Park Proprietors' Association
and the Scottish Parliamentary Corporate Body**

*Disturbance caused by the construction of the Scottish Parliament building at
Holyrood*

Applicant: Mr David Miller, The Park Proprietors' Association

Authority: Scottish Parliamentary Corporate Body

Case No: 200600498

Decision Date: 5 December 2007

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 225/2007 – Mr David Miller, The Park Proprietors’ Association and the Scottish Parliamentary Corporate Body

Request for information relating to disturbance caused by the construction of the Scottish Parliament building at Holyrood – information withheld on the basis of section 30 – prejudice to the effective conduct of public affairs – failure to comply with the timescales set out in section 10 – Commissioner found that the SPCB had failed to comply fully with the requirements of Part 1 of FOISA when withholding information

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 10(1)(a) (Time for compliance) and 30(b)(ii), (Prejudice to the 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

On behalf of The Park Proprietors’ Association, Mr Miller submitted an information request relating to disturbance caused by the construction of the Scottish Parliament building at Holyrood.

The Scottish Parliamentary Corporate Body (the SPCB) disclosed some 75 documents to Mr Miller in response to his request for information, but withheld other information on the grounds that it was exempt from disclosure under various exemptions in FOISA. The SPCB’s reliance on the exemption in section 30(b)(ii) of FOISA was upheld on review. Mr Miller then applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPCB had dealt with Mr Miller’s request for information in accordance with Part 1 of FOISA, in that it had correctly relied on the exemption in section 30(b)(ii) of FOISA when withholding the information from Mr Miller on the basis that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.



However, the Commissioner found that the SPCB had failed to act in accordance with Part 1 of FOSIA in not responding to Mr Miller's request within 20 working days, as required by section 10(1) of FOISA.

Background

1. On 26 May 2005, Mr Miller submitted an information request to the SPCB on behalf of The Park Proprietors' Association, seeking access to SPCB documents which:
 - Referred to the disturbance suffered by local residents during the construction of the new parliament building at Holyrood
 - Discussed whether local people should be entitled to compensation payments
 - Sought to establish whether the SPCB or Bovis Lend Lease would be responsible for such payments
 - Referred to the use of the roadway to the north of The Park apartments, variously described as Hutton's Close or the North Access Road in local plans, by construction traffic.
2. The SPCB sent holding responses to Mr Miller on 7 and 16 June 2005, indicating that due to the nature of Mr Miller's request and the searches of relevant files and copying that were required, it would take the SPCB longer than 20 working days to provide a response. In the response of 7 June 2005, the SPCB indicated that it hoped to respond to Mr Miller by the end of July 2005 at the latest. These holding responses provided information to Mr Miller on his rights if he was dissatisfied with the response from the SPCB.
3. The SPCB responded to Mr Miller on 4 August 2005 and provided him with 75 documents which fell within the scope of his request for information. The SPCB also provided Mr Miller with a refusal notice under section 16 of FOISA, noting that it held further information falling within the scope of his request but that it was relying on exemptions in FOISA for withholding this information. This notice also stated that, where relevant, the SPCB had concluded that the public interest in maintaining the exemptions applied outweighed the public interest in disclosure of the information.
4. Mr Miller submitted a request for a review to the SPCB on 23 September 2005. This expressed dissatisfaction with the SPCB's delay in responding to him, and its decision to withhold internal email correspondence dated between 23 September 2004 and 19 May 2005.



5. The SPCB notified Mr Miller of the outcome of its review on 11 October 2005. This response included an apology for the delay in responding to Mr Miller's request for information. The SPCB upheld its earlier decision to exempt the email correspondence Mr Miller was seeking under section 30(b)(ii) of FOISA.
6. On 27 January 2006, Mr Miller applied to me for a decision as to whether the SPCB had breached Part 1 of FOISA in withholding the information contained in the email correspondence, and also in taking so long to respond to his request. The case was subsequently allocated to an investigating officer. Mr Miller's application was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had applied to me only after asking the SPCB to review its response to his request.

The Investigation

7. A letter was sent by the investigating officer on 23 March 2006, notifying the SPCB of Mr Miller's application and inviting it to comment on the application in terms of section 49(3)(a) of FOISA. The SPCB was asked to provide, amongst other items, a copy of the information which had been withheld from Mr Miller and an analysis of the exemptions relied on in withholding this information. The SPCB was also asked to provide an analysis of its consideration of the public interest test in relation to these exemptions.
8. A response was provided by the SPCB on 10 April 2006. This provided copies of the information released to Mr Miller in response to his request, alongside the items withheld.
9. Further communication was entered into between the investigating officer and the SPCB during the investigation, where the SPCB was asked to provide additional submissions regarding its reliance on the exemptions in section 30(b)(ii) and 30(c) of FOISA.
10. In its submissions to my Office, the SPCB indicated that it was relying on the following exemptions in FOISA in relation to the information withheld from Mr Miller:
 - Section 30(b)(ii) – prejudice to the effective conduct of public affairs (free and frank exchange of views for the purposes of deliberation)
 - Section 30(c) – prejudice to the effective conduct of public affairs (otherwise prejudice substantially the effective conduct of public affairs).



11. The SPCB withheld 10 documents from Mr Miller. One of these documents does not come within the scope of his application, and therefore will not be considered further in this decision notice. The remaining 9 documents consist of email communications and, in some cases, a draft letter attached to a covering email.
12. The SPCB has applied the exemption in section 30(b)(ii) to both the letters and the emails. The exemption in section 30(c) has also been applied to the emails, but not the draft letters.
13. The SPCB's submissions also recognised that Mr Miller had expressed his dissatisfaction with the delay in responding to his request. The SPCB advised my Office that when it realised the number of documents to be examined in order to respond to Mr Miller's request, it recognised that this would cause a delay in its response and notified Mr Miller of this. The SPCB stated that it considered that the approach it took led to the maximum amount of information being provided to Mr Miller.
14. Mr Miller believed the SPCB's decision to withhold the contents of all of the relevant email communications to be excessively restrictive, and also that the SPCB failed to deal with his request within a reasonable time frame. I will deal with the arguments presented by both parties in my analysis and findings below.

The Commissioner's Analysis and Findings

15. Mr Miller's application for a decision questioned the SPCB's decision to withhold information contained in email communications dated between 23 September 2004 and 19 May 2005.
16. As indicated above, the SPCB sought to rely on the exemption in section 30(b)(ii) when withholding both the emails and the draft letters. It also relied on the exemption in section 30(c) in relation to the content of the emails only.
17. As the SPCB has treated the information contained within the emails and draft letter as two distinct types of information, I will consider these two types of information in turn below.



Email communications

Section 30(b)(ii)

18. In order for the SPCB to be able to rely on this exemption, it would have to show that disclosure of the information requested would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
19. The exemption under section 30(b)(ii) is a qualified exemption, which means that its application is subject to the public interest test under section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to the information that has been requested it must release the information unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
20. My general views on the exemptions in section 30(b) of FOISA are set out in *Decision 089/2007 Mr James Cannell and Historic Scotland*. As I have said in a number of previous decisions, it is my view that the standard to be met in applying the tests in either part of section 30(b) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially, in the case of section 30(b)(ii), the free and frank exchange of views for the purposes of deliberation. In determining whether disclosure of information would have a substantially inhibiting effect, consideration should be given to the risk of damage being caused by disclosing the information, which must be real or very likely if the exemption is to apply, not simply hypothetical. The harm caused or likely to be caused must be significant, not marginal, and it would have to occur in the near (certainly the foreseeable) future and not in some distant time.
21. In its submissions to my Office, the SPCB argues that the information contained within the email communications relates to the iterative process undertaken by the SPCB in relation to the preparation of correspondence with individuals in these or similar circumstances. The SPCB states that it is this process that it is seeking to defend in withholding this information from Mr Miller.
22. The SPCB states that it considers that the disclosure of this information would inhibit substantially the free and frank exchange of views in relation to the preparation of such correspondence.
23. My first task is to determine whether the exemption in section 30(b)(ii) applies to the information contained in the emails which have been withheld. If I am satisfied that the information within the emails is exempt, then I am required to consider the public interest test.



24. Having taken the SPCB's submissions into consideration, and having considered the email communications, I am satisfied that the emails within documents NI1, NI2, NI3, NI4, NI5, NI6, NI7, NI8 and NI9 would come within the scope of section 30(b)(ii). I am satisfied that these emails contain frankly-expressed opinions which can be attributed to individuals, and that these opinions relate to the matter which was subject to debate. I am also satisfied that release of the information in these emails would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. I accept that it is unlikely that the individuals expressing their views within these emails would be so open in future were this information to be disclosed, and that, as a result, disclosure would be likely to have a substantially inhibiting affect on future discussions of this kind.
25. Having concluded that the emails in documents NI1, NI2, NI3, NI4, NI5, NI6, NI7, NI8 and NI9 are exempt from disclosure under the terms of section 30(b)(ii), I am now required to consider the public interest test.

Public interest test

26. With respect to the public interest, the SPCB has advanced the following arguments to justify its view that the public interest in disclosure is outweighed by the public interest in maintaining the exemption:
- The public interest against disclosure lies in the ability to protect and maintain the iterative process in preparing such correspondence
 - The public interest against disclosure also lies in allowing a public body to freely prepare, discuss and deliberate in developing an approach to dealing with individual matters where the approach adopted will have an impact on public funds.

The SPCB has concluded that to compromise its ability to do these things would be very likely to inhibit the way in which it operates.

27. In considering the application of the public interest test, I have considered what it is in the interest of the public to disclose, rather than what may be of interest to the public. It is important to note here that there is a general public interest in making information held by public bodies accessible to enhance scrutiny of decision-making processes. On the other hand, I also recognise that there is a public interest in allowing public bodies to be able to debate issues freely and frankly and share opinions without feeling that whatever is said may be disclosed in future, and on the whole I accept the public interest arguments advanced by the SPCB for withholding the information in this particular case. On balance, therefore, I am satisfied that the public interest in disclosing the information contained in the emails in documents NI1, NI2, NI3, NI4, NI5, NI6, NI7, NI8 and NI9 (the nine email communications under consideration in this case) is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).



28. As I am satisfied that the information in the email communications is exempt from disclosure under section 30(b)(ii) of FOISA, I will not go on to consider the application of the exemption in section 30(c) to the same information.

Draft letters

Section 30(b)(ii)

29. In its submissions to my Office, the SPCB indicated that the draft letters under consideration formed part of the iterative process followed by Parliamentary staff when developing its response to a particular matter such as that forming the subject of Mr Miller's information request. The SPCB asserted that this process was considered by it to form the free and frank exchange of views for the purposes of deliberation set out in section 30(b)(ii) of FOISA. It insisted, however, that it had considered each draft separately and was not arguing for a blanket exemption in relation to drafts: one draft letter had been released to Mr Miller (along with the final versions of all the letters), but it was not considered to form part of the deliberative process of preparing the relevant letter.
30. Having considered the information that has been withheld from Mr Miller, together with the information that has been released, and the submissions from the SPCB, I am satisfied that the information contained within the draft letters in documents NI2, NI3, NI5, NI8 and NI9 is exempt from disclosure under section 30(b)(ii) of FOISA.
31. The SPCB has already released 75 documents to Mr Miller in response to his request for information. Some of these documents include the same information that is contained within the draft letters under consideration here. I accept, however (as I have done in previous decisions), that public authorities, in this case the SPCB, should be afforded time and space to discuss what should be contained in letters and other documents, and that the process of drafting responses should generally be protected, particularly where, as in this case, the final copy of the letter has been disclosed. Here, I accept the argument that has been advanced by the SPCB that if this information were to be disclosed then it would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation, in that it would affect the relevant iterative process amongst parliament staff.
32. I am therefore satisfied that the information contained within the draft letters in documents NI2, NI3, NI5, NI8 and NI9 is exempt under section 30(b)(ii) of FOISA. As a consequence I must now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.



Public interest test

33. The SPCB has argued that the public interest against disclosure is in allowing a public body to freely prepare and deliberate over the final content of letters of this kind, bearing in mind that the final versions are disclosed.
34. Having considered the application of the public interest test, taking cognisance of what is in the interests of the public to disclose as I did previously, I accept that there is a general public interest in ensuring that public authorities are transparent in their decision making and that this can be scrutinised. However, I also accept, as I did in considering the email communications, that there is a public interest in allowing public bodies to be able to debate issues freely and frankly and share opinions without feeling that whatever is said may be disclosed in future. It is my view that the public interest which exists in relation to being able to scrutinise the decision making of the SPCB in this case can be met by the information that has already been disclosed. Therefore, on the whole, I accept the public interest arguments advanced by the SPCB for withholding the information in this particular case. On balance, therefore, I am satisfied that the public interest in disclosing the information in documents N12, N13, N15, N18 and N19 is outweighed by the public interest in maintaining the exemption in section 30(b)(ii).

Technical requirements of FOISA

35. The SPCB failed to respond to Mr Miller's information request within the 20 working days set down in section 10(1) of FOISA.
36. I note the submissions made by the SPCB, as set out in paragraph 13 above, in relation to this. I appreciate that the SPCB felt that it was appropriate in the circumstances to follow this course of action, but section 10(1) FOISA is quite clear in requiring that Scottish public authorities respond to an information request within 20 working days of receipt.

Decision

I find that the SPCB dealt with Mr Miller's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding information under section 30(b)(ii) of FOISA.



I find that the SPCB did not deal with Mr Miller's request for information in accordance with Part 1 of FOISA as it did not comply with section 10(1), by failing to respond to Mr Miller's request for information within 20 working days of receipt. However, in the circumstances, I do not require any remedial action to be taken in relation to this breach.

Appeal

Should either Mr Miller or the SPCB 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.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
5 December 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

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

(...)

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.



10 Time for compliance

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

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

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