

Decision Notice



Decision 010/2009 Mr Paul Martin MSP and the Scottish Ministers

Documents relating to the commitment to provide an additional 1000 police officers

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Summary

Mr Paul Martin MSP requested from the Scottish Ministers (the Ministers) documentation relating to the Scottish Government's commitment to providing an additional 1000 police officers. The Ministers responded by advising Mr Martin that the information was considered exempt from disclosure in terms of sections 29(1)(a) and (b) and 30(b)(i) of FOISA. Following a review in which the Ministers additionally applied section 30(b)(ii) of FOISA to the withheld information, Mr Martin remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers acted in accordance with Part 1 of FOISA by withholding some of the information under consideration. However, he found that they had partially failed to act in accordance with Part 1 of FOISA, by incorrectly applying the exemptions in sections 29(1)(a) and 30(b)(i) and (ii) of FOISA to some of the withheld information. He required the Ministers to disclose certain documents to Mr Martin.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2 (Effect of exemptions); 25(1) (Information otherwise accessible); 29(1)(a) and (4) (Formulation of Scottish Administration policy etc.); 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs) and 38(1)(b), (2)(a)(i) and (b) (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions – definition of personal data); Schedule 1 Part I (The data protection principles: the first principle)

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

Background

1. On 10 December 2007, Mr Martin emailed the Ministers requesting all papers that had been provided to the Cabinet Secretary for Justice or the Minister for Community Safety in connection with the Scottish Government's commitment to provide an additional 1000 police officers by redeployment, retention and recruitment, and also any emails and correspondence circulated within the Justice Department on this subject.



2. The Ministers responded on 9 January 2008. The Ministers informed Mr Martin that they considered the information to be exempt from disclosure in terms of sections 29(1)(a) and (b) and 30(b)(i) of FOISA.
3. On 7 February 2008, Mr Martin wrote to the Ministers requesting a review of their decision. In particular, Mr Martin expressed the view that it was imperative that Parliament be provided with the maximum information available to allow effective post budget scrutiny of the Scottish Government's commitment to an additional 1000 police officers being available in Scotland's communities.
4. The Ministers notified Mr Martin of the outcome of their review on 6 March 2008. They upheld their decision to withhold the information in terms of sections 29(1)(a) and (b) and 30(b)(i) of FOISA. Additionally, the Ministers informed Mr Martin that they considered the information withheld also to be exempt in terms of section 30(b)(ii) of FOISA.
5. On 31 March 2008, Mr Martin wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Martin had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 14 April 2008, the Ministers were notified in writing that an application had been received from Mr Martin and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded on 25 July 2008, providing detailed comments on the case including their reasons for relying on the exemptions in sections 29(1)(a) and (b) and 30(b)(i) and (ii) of FOISA. The Ministers also intimated at this stage that they were additionally relying upon the exemptions in sections 25(1) and 38(1)(b) of FOISA in relation to certain information within the withheld documents.
10. At this stage, the Government also indicated that it had reviewed the documents withheld and decided to release a number of documents or parts thereof. These were subsequently disclosed to Mr Martin.



11. Mr Martin was also invited to comment on the case, and particularly why he considered the public interest to favour the disclosure of the information he had requested. He provided his comments in a telephone conversation with the investigating officer.
12. The submissions from both parties are summarised where relevant in the analysis and findings section below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Martin and the Ministers and is satisfied that no matter of relevance has been overlooked.

Background

14. Mr Martin's request relates to the Scottish Government's commitment to provide an additional 1000 police officers in Scotland's communities by redeployment, retention and recruitment.
15. In its manifesto for the 2007 elections, the Scottish National Party set out its departmental priorities for justice. These included details of a commitment to recruit additional police officers. The manifesto included the statement:

"It is essential that we have sufficient police on local streets. That's why we will set out plans in our first Budget for Scotland for 1,000 more police and will encourage Chief Constables to focus these new resources on community policing. We want to see these new police officers becoming part of the fabric of communities and through local knowledge and by building strong relationships with families and businesses in the local area, they will be in a better position to deter crime, solve crime and make you and your family feel safer as you go about your daily business."
16. Mr Martin's request sought information from 7 May 2007 to the date of his request on 10 December 2007. This period covers the time immediately after the election, during which a project was initiated by the Ministers to consider how the additional capacity should be delivered.
17. The work of this project led to the announcement that the commitment would be delivered by increasing the capacity of Scotland's police forces to the equivalent of 1000 officers. This would be achieved via the recruitment of 500 centrally-funded police officers, with the remaining capacity identified through retention of existing officers and redeployment and other efficiencies.
18. This approach to fulfilling the policy of providing an additional 1000 police officers was the subject of considerable discussion within the media and Parliament. Some critics claimed that, by failing to commit to the recruitment of an additional 1000 officers, the Ministers had failed to honour their manifesto commitment.



19. Mr Martin first made his information request in December 2007, when the policy and political context was as described above. However, it is relevant to note subsequent developments by the time that the Ministers considered his request for review in February and March 2008. In January 2008, the Ministers announced amendments to the Budget Bill to allocate additional funding for the recruitment of 1000 police officers.

Information under consideration

20. The information under consideration in this case therefore relates to the early development of policy in relation to the Ministers' commitment to provide an additional 1000 police officers. The documents withheld include briefings, project planning documents, correspondence and discussions (both internal and with key stakeholders).
21. The documents identified in this case are listed in the schedule of documents at the end of this decision. This schedule forms part of this decision. Each entry shows the position held by the Ministers during the investigation regarding the application of exemptions and sets out the Commissioner's findings and any steps required in relation to that item.
22. As noted above, a number of documents were released to Mr Martin during the investigation, and these will not be considered any further in this decision. These are all identified in the schedule of documents. Where part of a document has been released, the remaining parts have been considered, but the released parts have not.
23. In their submissions, the Ministers indicated that, on reflection, document 7 actually fell outwith the scope of the request. Having reviewed document 7, the Commissioner is satisfied that it relates to an entirely separate policy issue and is therefore outwith the scope of the request. This item will not be considered any further in what follows.

Consideration of section 25(1)

24. Section 25(1) of FOISA provides that information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
25. During the investigation, the Ministers applied the exemption in section 25(1) to part of document 6 (speech extracts), document 20 (news release) and part of document 31 (answer to parliamentary question). The Ministers stated that this information can be accessed on the Scottish Parliament and Scottish Government websites.
26. The links to these items can be found at:
<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0621-02.htm#Col1013>;
<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0614-02.htm>; <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0606-02.htm>; <http://www.scotland.gov.uk/news/releases/2007/10/29081843> and <http://www.scottish.parliament.uk/business/pqa/wa-07/wa1112.htm>.



27. Having tested these links and examined the information found therein, the Commissioner is satisfied that the Ministers have correctly applied the exemption in section 25(1) to the information contained in the documents described at paragraph 25 above.

Consideration of section 29(1)(a)

28. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. This is a qualified exemption, which means that even if the exemption applies, it is subject to the public interest test required by section 2(1)(b) of FOISA.
29. For information to fall under the exemption in section 29(1)(a), it must *relate to* government policy. The Commissioner considers that this can be defined as the development of options and priorities for the Scottish Ministers, who will subsequently determine which options should be translated into political action and when. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. Development suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
30. In this case, the Ministers have applied section 29(1)(a) to most of the documents withheld on the basis that the information therein relates to the early development of the government's policy on additional police officers from the commitment contained in the SNP manifesto.
31. The Ministers noted that the information to which this exemption has been applied include the following types of documents:
- Advice to Ministers on how the commitment to provide 1000 additional police officers might be delivered, the options for taking the policy forward and their implications, costs and funding, announcements about progress of implementation and giving evidence to the Justice Committee.
 - Discussions between officials on these policy issues.
 - Estimated costings for police constables at various stages of their careers.
 - Discussions with external stakeholders e.g. the Association of Chief Police Officers in Scotland, and the Association of Scottish Police Superintendents on these policy issues.
 - Project planning documents which set out how the project was to operate.
32. The Ministers submitted that, as all of these documents relate to various aspects of the development of the government's policy on 1000 additional police officers, they considered that the exemption in section 29(1)(a) of FOISA clearly applied.



33. Having considered the content of the documents the Ministers have exempted under section 29(1)(a), together with the submissions from the Ministers, the Commissioner is satisfied in each case that the document concerned relates to the formulation and/or development of the government's policy with respect to the commitment to provide an additional 1000 police officers. He is satisfied that the exemption in section 29(1)(a) has been correctly applied in each case.
34. As the Commissioner is satisfied that these documents fall within the scope of the exemption in section 29(1)(a), he is required to go on to consider the public interest test in section 2(1)(b) of FOISA to the information contained in these documents.

Public interest test

35. As stated above, information is exempt by virtue of section 29(1)(a) if it falls into a particular class of documents; that is where the information relates to the formulation or development of government policy. In considering the application of this exemption, the authority is not required to consider the significance of the content of the information, nor the effect of disclosure. The information will be covered by this exemption simply if it relates to the formulation or development of government policy regardless of how routine or insignificant the information may be.
36. The effect of the public interest test in section 2(1)(b) of FOISA is to require the authority to consider the public interest arguments both in favour of disclosure of the information and in favour of maintaining the exemption (and thereby withholding the information). The authority must then weigh the two and, unless it is satisfied, in all the circumstances of the case, that the public interest in disclosing the information is outweighed by that in maintaining the exemption, it must disclose the information. This assessment must be made independently of whether the information falls within the description set out in section 29(1)(a).
37. The Ministers acknowledged that the policy concerning 1000 police officers was a key commitment of the Scottish Government and, as such, there was a significant public interest in seeing what was being done to fulfil that commitment. However, they also considered that there was a vital public interest in Ministers and officials having a private space in which to consider fully all options and debate all relevant issues.
38. The Ministers submitted that, if these documents were to be released, particularly early drafts, officials would exercise an increased degree of caution in preparing such papers in future. This would mean that there would be a qualitative change in the views expressed, the recommendations made and the substance of the information contained in those papers. The Ministers suggested that disclosure would make it far less likely that a full range of options would be put forward, particularly when not all options would necessarily be in line with stated policy or politically acceptable. Additionally, they suggested fears over release might incline officials to play down or even ignore any concerns they may have regarding (for example) practical operational issues and other potential problems. This could limit the range of options considered, rendering the policy-making process less robust.



39. The Ministers argued that, if it were generally understood that positions set out in policy papers and particularly drafts were to be released at an early stage of the debate, the way in which the issue would appear in the next day's newspapers would have a stronger influence on the way policy is developed than a more considered approach looking at a full range of options, including those less obviously acceptable. In addition, Ministerial decisions may ultimately be influenced by external factors not fully articulated in the recorded discussion. The Ministers suggested that early or premature release may satisfy short-term public curiosity, but would not meet the longer term public interest in mature policy making.
40. The Ministers stressed that the commitment concerning 1000 police officers was very much an ongoing area of policy which was still evolving and had not yet been fully implemented. They argued that, were this policy information to be released while it remained a "live" issue, there would be the inherent danger that certain arguments may be taken out of context, open to misrepresentation or perceived to be misleading.
41. In his submissions to the Commissioner, Mr Martin has argued that it is imperative that Parliament is provided with the maximum level of information available to allow effective post budget scrutiny of the Scottish Government's commitment to an additional 1000 police officers being available in Scotland's communities.
42. Mr Martin also submitted that this matter has been at the top of the Scottish Government's agenda and, as the public has heard about it on a regular basis, there was a strong public interest in knowing how the policy came about and where it was progressing. Mr Martin indicated that he was aware there have been ongoing discussions between Ministers and officials concerning this policy. However, he did not accept that all of the advice under discussion can be exclusive to Ministers and instead maintained that there was a genuine public interest in knowing the content.
43. In the Commissioner's view, it should be clear by now that this exemption does not allow a general conclusion that Ministers are to be given a private space in which to formulate or develop policy, free from the prospect of information relating to such activity being released. Rather, the requirement is to consider what would be the effect of the release of the specific information in question and whether, on balance, the public interest in disclosing all or part of the information would be outweighed by that in maintaining the exemption.
44. In considering the public interest in this case, the Commissioner has been mindful of the relevant point in time to which his decision must relate. When considering whether a public authority has complied with part 1 of FOISA, the Commissioner must address the case as at the time when that authority issued the notice stating the outcome of its review. This was confirmed by the Court of Session in *Scottish Ministers v Scottish Information Commissioner* [2007] CSIH 8:

"it is correct that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of [FOISA]".



45. In this case, therefore, the Commissioner must consider the public interest as it stood at 6 March 2008. By this date, the Ministers had indicated a significant development in their implementation of policy from that put forward in the period covered by Mr Martin's request, to provide central funding for the recruitment of 1000 (rather than 500) new police officers. The Commissioner is satisfied that the Ministers' announcement of this intent in January 2008 reveals that policy development was still ongoing during the period when Mr Martin's information request and subsequent review were ongoing.
46. The Commissioner has considered all of the information that has been withheld under the exemption in section 29(1)(a) and notes that it reveals the initial formulation and development of the policy by which the (then) new Scottish Government would take forward its commitment to provide 1000 additional police officers. After the election, options were considered as to how this commitment could best be delivered. It then fell to a group of individuals within Government to initiate and refine the process for carrying the intention into effect. This process involved initial drafts being circulated and responses from others (including external stakeholders) suggesting alternatives, pointing out weaknesses, providing advice or querying options.
47. Much of the information under consideration therefore involves draft documents and commentary on early options for delivery of the policy commitment, along with suggested amendments, alterations and alternative points of view. The Commissioner has concluded that the disclosure of such documents so soon after their creation would have been likely to significantly harm the candour with which such drafts, amendments or comments were made in future development of that policy.
48. The Commissioner accepts, particularly where a policy formulation process is ongoing, that there is a substantial public interest in allowing Ministers and officials to engage in wide ranging discussions and robustly test alternative options. Protecting this process via non disclosure can contribute to good government by ensuring that Ministers and officials are not inhibited from fully exploring policy options and alternatives outside those which will ultimately become the stated policy of the Ministers.
49. In this case, the fact that the Ministers' initial approach to delivering the commitment to provide 1000 police officers has since then been superseded reveals that policy formulation is not always a linear process, and, particularly for a minority government, that changes may need to be made to accommodate solutions which are acceptable to a majority of parliamentarians. The Commissioner has considered whether this change of approach (which happened after Mr Martin's request was made, but before the Ministers' review) significantly diminishes the public interest that can be identified against disclosure of the information under consideration. The Commissioner has concluded that it does not, since the disclosure would still have been made very soon after their creation, and at a point when the policy for taking forward the Ministers' commitment was still being developed.



50. The Commissioner considers that this was a live and sensitive policy issue at the time of Mr Martin's request and the subsequent review, and that disclosure of the information would be likely to have inhibited the observations and further development of options from those involved. Given the range of stakeholders involved, the Commissioner has concluded this would have created a negative impact on the quality and efficiency of policy making.
51. However, the public interest against disclosure needs to be balanced against the public benefit from disclosure. Inherently, FOISA acknowledges that there is a public interest in disclosure of information held by authorities. In this case, release of the information would give an insight into the issues and options being considered by Ministers and officials and could assist public understanding of the action taken by the Scottish Government to take forward a key election pledge.
52. There has been considerable public and political debate in this area, and the Commissioner recognises that disclosure of some of the information concerned would contribute to wider public understanding on this issue. He notes that there is real public interest in understanding the steps that a new government took to take forward this key policy, particularly given the questions raised as to whether the commitments made prior to January 2008 should be considered to fulfil the manifesto pledge.
53. The Commissioner has also noted Mr Martin's comments regarding the public interest in allowing post-budget scrutiny of the Ministers' commitment. The Commissioner accepts this point, but also notes that the documents under consideration would not necessarily allow scrutiny of steps taken to fulfil the commitment made in the amended Budget Bill, since the documents pre-date that announcement in January 2008.
54. Having balanced the public interest for and against disclosure, the Commissioner has concluded, in relation to the majority of the information withheld under section 29(1)(a), that the public interest in maintaining the exemption outweighs that in disclosure of the information. He has noted that Mr Martin's request and review came at a point when the policy formulation process was still ongoing, and that in those circumstances and for the reasons set out above, the public interest weighs in favour of allowing that process to proceed with a degree of privacy.
55. However, the Commissioner does not consider that this is the case with all of the documents withheld under section 29(1)(a). For example, the Commissioner considers that some of the information is substantially in the public domain as a result of evidence presented to the Justice Committee or otherwise publicly disseminated. In other cases, the documents provide largely factual information or information about the process by which policy would be developed. The Commissioner is of the view that the public interest will not be harmed by the disclosure of the nature or content of the information contained in the documents listed below. At the same time, he has concluded that disclosure of these documents will provide insight into the key steps taken to develop the Ministers' policy with respect to an additional 1000 police officers, thereby contributing to the public interest.



56. The Commissioner is accordingly of the view that the public interest in the disclosure of the withheld information in documents 10, 11, 14A, 28, 31 (email only), 39 and 46 outweighs the public interest in maintaining the exemption.
57. Since items 11 and 28, and the email in item 31 have been withheld only under section 29(1)(a), the Commissioner requires disclosure of these. Where additional exemptions have been applied to items listed in paragraph 56 above, these have been considered further below.
58. Where the Commissioner has found that the public interest in maintaining the exemption in section 29(1)(a) outweighs the public interest in disclosure of that information, he has not gone on to consider any other exemption in this decision. Where an exemption cited by the Ministers has not been considered by the Commissioner, this is indicated with "N/C" in the schedule of documents.

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

59. In order for the Ministers to be able to rely on the exemptions contained in section 30(b)(i) and (ii) of FOISA, they would have to show that the disclosure of the information under FOISA 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, respectively.
60. As the Commissioner has said in previous decisions, in his view the standard to be met in applying the tests contained in sections 30(b)(i) and (ii) 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 the provision of advice or the exchange of views. The Ministers' own guidance to their staff on the application of section 30(b) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely, more reticent or less inclusive.
61. The exemptions under section 30(b) of FOISA are qualified exemptions, which means that where a public authority finds that certain information falls within the scope of the exemption it is then required to go on to consider the application of the public interest test laid down in section 2(1)(b) of FOISA.
62. The Ministers have applied either or both of the exemptions in section 30(b)(i) and (ii) to withhold a number of documents. They stated that the information relates to free and frank discussion and provision of advice about the government's policy on additional police officers from the SNP's manifesto commitment. It also includes briefings and lines to take which were prepared for Ministers to use in First Minister's Questions (FMQs) and debates in Parliament.



63. The Ministers explained that their rationale for the application of these exemptions was that an organisation must have an ability, and continue to have an ability, to communicate freely and frankly. They submitted that an organisation's position on any issue does not typically emerge fully formed. Rather, it is usually the result of careful discussion and the exchange of views of various internal and external stakeholders. The Ministers considered that for the government, this process includes advice to Ministers, who must make the ultimate judgement, and that it is vital that Ministers and officials feel able to, and indeed do, express and deliberate their views frankly and confidentially.
64. The Ministers submitted that disclosure of specific communications containing advice and/or discussion would be likely to inhibit substantially the future free and frank provision of advice and exchange of views for the purpose of deliberation. They considered it very likely that exchanges of this nature would be jeopardised if these communications were considered suitable for release while the issues were still relevant to the development of current policy and thinking in what was still a sensitive area. The Ministers stated that officials and stakeholders could feel constrained from offering full and frank advice on future occasions if they were concerned that their comments would be made public in such circumstances. The Ministers believed this would be to the substantial detriment of the policy and decision-making process.
65. Alongside their case-specific correspondence with the Commissioner, the Ministers supplied a revised version of general arguments that had previously been submitted in relation to section 30(b) of FOISA which they wished the Commissioner to take into account.
66. The Commissioner addressed submissions on these exemptions that were put to him in paragraphs 23 to 31 of *Decision 089/2007 Mr James Cannell and Historic Scotland*. The revised general submissions that were advanced in this case raised a number of the issues addressed in *Decision 089/2007*, but also put forward additional arguments concerning the exemptions in section 30(b). These new arguments and the Commissioner's comments on these are set out in detail in *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*.
67. The Commissioner will not repeat the Ministers' general submissions or the discussions set out in these two decisions here, other than to say that they have been considered fully, together with the case-specific arguments submitted by the Ministers, in reaching his decision on the applicability of the exemptions in section 30(b)(i) and (ii) of FOISA to the information under consideration. In particular, it should be clear that the Commissioner cannot as a rule accept an automatic presumption that harm will be caused by the release of information simply because it falls into a particular category.
68. The Commissioner's consideration of this case has also been informed by *Decision 166/2006 Mr Martin Williams of The Herald and the Scottish Executive*. In this case, the Commissioner discussed in detail his views on the issues that should be considered in deciding whether the exemptions in section 30(b)(i) and (ii) can apply. These are not repeated in full in this decision notice, but they can be summarised as follows:
 - Information must be treated on a case-by-case basis: release of information in one case need not imply release in another case



- The nature and content of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information
- If the information withheld does not in itself constitute advice or an exchange of views, the argument for exemption under section 30(b) may be weaker.

69. The Commissioner has also again had regard to the decision in the Court of Session appeal: *Scottish Ministers v Scottish Information Commissioner* [2007] CSIH 8. The Court's conclusions made clear that the actual content of the information must be considered in determining whether disclosure would be likely to have a substantially inhibitive effect, rather than proceeding on an assumption that disclosure of certain types of information, such as advice to Ministers, would always lead to future substantial inhibition for the purposes of these exemptions.

Conclusion on section 30(b)(i) and (ii)

70. As noted above, the Commissioner has not considered the application of these exemptions to items that he has already found to be correctly withheld under the terms of section 29(1)(a). The schedule of documents identifies these items.
71. Having considered the remaining information to which these exemptions have been applied, along with the Ministers' submissions, the Commissioner notes that the information includes both the provision of advice and the free and frank exchange of views for the purposes of deliberation. However, as noted above, the primary consideration is not whether the information contains advice and views, but whether its disclosure would have, or would be likely to have, either or both of the substantially inhibiting effects specified in section 30(b) of FOISA.
72. The Commissioner has noted that several of the documents to which these exemptions have been applied include briefings to Ministers setting out lines to take on a range of questions and issues raised by the policy of providing an additional 1000 police officers. These documents provide background information and suggest responses that might be made to anticipated criticisms of the Ministers' approach to fulfilling their commitment. A number of the suggested responses lines can be identified in parliamentary or other public comments. However, the Commissioner acknowledges that not all of the questions anticipated in these documents would have been asked, nor have all of the lines set out in response been publicly stated.
73. Other documents to which the exemptions have been applied provide other types of briefings, correspondence or comments relating to the policy.
74. The Commissioner has considered carefully the Ministers' comments with regard to the likelihood of inhibition to the particular type of advice and views under consideration this case. The Commissioner accepts that awareness of the possibility of disclosure might lead officials to take care in recording their views or advice, and pay more attention to the manner of expression. He does not suggest that the implementation of FOISA should, or would, have no effect on the way in which officials record their advice and views.



75. In this case, however, the Commissioner is unable to conclude that the majority of the documents under consideration would engage the exemptions in section 30(b) of FOISA. The Commissioner notes that much of the information has substantially been placed in the public domain. In the case of briefings for Ministers participating in debates or FMQs, it was clearly anticipated that the information in question was suitable for release into the public domain. Others simply provide factual comment or uncontentious advice or are digests of current issues (referred to as SCANCE papers (Scottish Cabinet Analysis of News and Current Events)). In the case of the SCANCE papers, the Commissioner has considered the sensitivity of each document on a case by case basis and has concluded that the content and nature of the analysis provided is fair, and not particularly sensitive, comment and reflects the public position adopted by the Scottish Government at that time.
76. The Commissioner notes that a number of the documents under consideration are provided in standardised templates which reveal that their production is a routine part of the work of government, and a core part of officials' duties to their Ministers. Delivering briefings and advice in their field of expertise, and assisting Ministers in preparing for and responding to questioning is an expectation of many officials, and the Commissioner does not accept the Ministers' arguments that a civil servant will be inhibited in their offering of advice in future should information of this type be disclosed in this case.
77. Having considered the Ministers' arguments, therefore, the Commissioner is unable to accept that release of the majority of the information withheld under the exemptions in section 30(b)(i) and (ii) in this particular case 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.
78. The Commissioner has concluded, however, that the Ministers were correct to apply the exemption in section 30(b)(i) to the suggested closing speech lines contained within document 17. These lines were put to the Minister as draft proposals in advance of a Parliamentary debate on police numbers, but the Commissioner has noted that they were not used by the Minister during that debate. He has noted that the official preparing these lines would have done so without knowing the content of the debate itself, and that the closing comments that were made would have been formulated by the Minister in the light of the events on the day. The Commissioner accepts that disclosure of this document would be likely to have the effect of inhibiting the way in which such Ministers are assisted in preparing for such debates in future.
79. Given that the Commissioner has upheld the application of the exemption in relation to this specific document, he has gone on to consider the public interest test, as required by section 2(1)(b) of FOISA.



Public interest test

80. The Ministers argued that there was a strong public interest in high quality policy and decision making. For Government to succeed in upholding that public interest, officials need to be free to consider all available options however unpalatable. The Ministers argued that officials candour in considering and offering options and advice will be affected by their assessment of whether the content of any discussions will be disclosed in the near future, especially if it may undermine or constrain the Government's view on policy which is still under discussion or development.
81. The Ministers contended that it is in the public interest for Ministers to be able to rely on high quality advice, particularly in policy making where issues are of a highly contentious nature, and that there is a strong public interest in maintaining the integrity of the process of giving free and frank advice in this sort of case. The Ministers considered that the knowledge of possible disclosure may inhibit the provision of advice in the future and impair the candour and freedom with which papers are prepared, deliberated and revised in future.
82. In relation to the lines to take for FMQs and debates, the Ministers stated that these were just suggested lines prepared for Ministers by officials and many were not actually used. The Ministers stated that, in effect, these lines were advice only and did not necessarily represent settled government policy or the views of Ministers. As such, the Ministers did not consider that it was in the public interest for such material to be subsequently released, particularly when it had not been used, as this could give a misleading impression of what Ministers have said publicly on an issue and what their policy position actually is.
83. Mr Martin has not made any separate submissions on the public interest test under this exemption other than those general submissions noted at paragraphs 41 and 42 above.
84. In considering the public interest test in relation to this specific document, the Commissioner accepts that 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 any detriment to the public interest as a consequence of disclosure. In the case of information which is considered to be exempt under the exemptions in section 30, information can only be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding the information).



85. The Commissioner recognises that there is a substantial public interest in ensuring that officials are able to advise Ministers in candour. Having accepted that disclosure of the relevant part of item 17 would likely to inhibit the candour of such advice in future, he accepts that such disclosure would be contrary to the public interest. The Commissioner's view is that there is no particular public interest in the disclosure of the draft closing remarks (which were never used) and the Commissioner has not identified any substantial public interest in favour of disclosure of this particular document. For this document, the Commissioner finds that the public interest in favour of disclosure is outweighed by that in favour of maintaining the exemption contained in section 30(b)(i) of FOISA.
86. The Commissioner now requires disclosure of those items listed in paragraph 56 above, along with those documents that were withheld only under the terms of sections 30(b)(i) and/or (ii) (with the exception of the closing remarks in document 17). The items to be disclosed are identified in the schedule.

Consideration of section 38(1)(b)

87. The Ministers have applied the exemption under section 38(1)(b) to redactions from document 44. The original has been released to Mr Martin but with the name, address and email address of an individual who had made a request for information to the Ministers removed.
88. The exemption under section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), provides that information is exempt information if it constitutes personal data (as defined in section 1(1) of the DPA) and its disclosure to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in the DPA. This is an absolute exemption and therefore is not subject to the public interest test laid down by section 2(1)(b) of FOISA.
89. In order for a public authority to rely on this exemption, it must therefore show firstly that the information which has been requested is personal data for the purposes of the DPA, and secondly that disclosure of the information would contravene at least one of the data protection principles laid down in the DPA.
90. The Ministers submitted that the redacted information was personal information, the release of which would contravene the first data protection principle on fair processing of personal data because the individual concerned would have no expectation that their personal data would be made public. They considered that of the conditions for processing as set out at Schedule 2 of the DPA, only the sixth might be of relevance but in practice it was not met. In their view, processing of the data in this case was not necessary for the purposes of any legitimate interest, and even if it were the processing would be prejudicial to the rights and freedoms or legitimate interests of the individual concerned.

Is the information personal data?



91. When considering the exemption in section 38(1)(b) of FOISA, the Commissioner must first establish whether the information withheld is personal data. Personal data is defined in section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the definition is set out in full in the Appendix).
92. In this case, the redacted information is clearly information from which an individual can be identified and which contains personal information. It focuses on and is biographical of that individual and the Commissioner is satisfied that it relates to them. The Commissioner has therefore concluded that the information is personal data for the purposes of section 1(1) of the DPA.

Would disclosure of the information breach the first data protection principle?

93. As noted above, the Ministers have argued that release of the information in question in this case would breach the first data protection principle of the DPA.
94. The first data protection principle requires that the processing of personal data (here, the disclosure of data in response to a request made under FOISA) must be fair and lawful and, in particular, that personal data shall not be processed unless at least one of the conditions in Schedule 2 (to the DPA) is met. For sensitive personal data, one of the conditions in Schedule 3 to the DPA must also be met. However, the Commissioner is satisfied that the information concerned is not sensitive personal data, and so this test does not need to be considered in this case.
95. The Ministers have not made any submissions which suggest that disclosure of the information requested by Mr Martin would be unlawful, other than by contravening the first data protection principle. The Commissioner has therefore focussed on whether disclosure of the information in this case would be fair.
96. Having considered the nature of the information and the circumstances in which it was obtained by the Ministers, the Commissioner is satisfied that the individual concerned would not have had an expectation that their personal information would be made public in the context of Mr Martin's information request. The Commissioner notes that the substance of the email in document 44 can be fully understood without knowing the identity of the individual concerned and that disclosure would add nothing to public understanding of the development of policy concerning an additional 1000 police officers. In all the circumstances, the Commissioner is satisfied that disclosure of the information would be unfair.
97. The first principle requires the processing to be fair and lawful, and for a condition in Schedule 2 of the DPA to be met. Consequently, having found the disclosure of the information to be unfair, the Commissioner is not required to go on to consider whether it would otherwise be unlawful, or whether any of the conditions in Schedule 2 of the DPA could be met.
98. The Commissioner therefore finds that the Ministers were correct in their application of section 38(1)(b) of FOISA to the redacted information in document 44.



DECISION

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

The Commissioner finds that the Ministers acted in accordance with Part 1 of FOISA by withholding information in documents 6, 20 and 31 in terms of section 25(1) of FOISA, and in document 44 in terms of 38(1)(b) of FOISA .

The Commissioner finds that the Ministers correctly applied the exemption in section 29(1)(a) of FOISA in this case (relevant items are indicated in the schedule). In most instances, he found that the public interest in maintaining this exemption outweighed the public interest in disclosure. By withholding these items, the Ministers acted in accordance with Part 1 of FOISA. However, the Commissioner finds that the Ministers incorrectly applied the public interest test to the documents listed at paragraph 56 above.

The Commissioner also finds that the Ministers incorrectly applied the exemptions in section 30(b)(i) and (ii) of FOISA to the majority of the information to which they had been applied. However, the Commissioner finds that part of the information contained in item 17 was correctly withheld under section 30(b)(i).

By withholding the information listed in paragraph 56, and those items (other than the part of item 17 referred to above) withheld under section 30(b)(i) and/or (ii) and no other exemption, the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to provide Mr Martin with the information detailed in the schedule of documents at the end of this decision by (date).

Appeal

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

Kevin Dunion
Scottish Information Commissioner
06 February 2009



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

- (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;

...

- (e) in subsection (1) of section 38 –

...

- (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.



...

29 Formulation of Scottish Administration policy etc.

(1) Information held by the Scottish Administration is exempt information if it relates to-

(a) the formulation or development of government policy;

...

(4) In this section-

"government policy" means-

(a) the policy of the Scottish Administration; and

(b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

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-

(i) the free and frank provision of advice; or

(ii) the free and frank exchange of views for the purposes of deliberation; or

...

38 Personal information

(1) Information is exempt information if it constitutes-

...

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-



(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

Data Protection Act 1998

1 Basic interpretative provisions

In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

Schedule 1 – The data protection principles

Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.



Schedule of documents

Doc	Exemptions applied/ Ministers' position	Exemption(s) upheld (Y/N)	P.I. favours disclosure? Y/N	Decision and any steps required
1	Part released 30(b)(i)	30(b)(i) - N	n/a	Disclose
2	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
2A	Covering email released 29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
3	30(b)(i)	30(b)(i) - N	n/a	Disclose
4	Released	n/a	n/a	n/a
5	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
6	25(1) (part) 30(b)(i) (part)	25(1) – Y 30(b)(i) - N	n/a	Withhold extract from official report. Disclose briefing.
7	Outwith scope	n/a	n/a	Outwith scope
8	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
8A	Covering email released 29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
9	Released	n/a	n/a	n/a
10	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) - N	Y	Disclose
11	29(1)(a)	29(1)(a) – Y	Y	Disclose
11A	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
12	Released	n/a	n/a	n/a
13	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
13A	29(1)(a) 29(1)(b) 30(b)(i) 30(b)(ii)	29(1)(a) – Y 29(1)(b)– N/C 30(b)(i)– N/C 30(b)(ii)– N/C	N	Withhold
13B	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
14	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) - N	N	Withhold
14A	29(1)(a)	29(1)(a) – Y	Y	Disclose



	30(b)(i)	30(b)(i) - N		
15	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
16	29(1)(a) 30(b)(i) 30(b)(ii)	29(1)(a) – Y 30(b)(i) – N/C 30(b)(ii) – N/C	N	Withhold
17	Covering email and some notes released 30(b)(i)	30(b)(i) – Y (closing remarks only) otherwise N	N (closing remarks)	Disclose remaining parts other than closing remarks
18	30(b)(i)	30(b)(i) – N	n/a	Disclose
19	30(b)(i)	30(b)(i) - N	n/a	Disclose
20	25(1)	25(1) – Y	n/a	Withhold
21	Released	n/a	n/a	n/a
22	30(b)(i)	30(b)(i) - N	n/a	Disclose
23	Released	n/a	n/a	n/a
24	Released	n/a	n/a	n/a
25	30(b)(i)	30(b)(i) - N	n/a	Disclose
26	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
27	30(b)(i)	30(b)(i) - N	n/a	Disclose
28	29(1)(a)	29(1)(a) – Y	Y	Disclose
29	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
30	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
31	Podcast script released 25(1) (part) 29(1)(a) (part) 30(b)(i) (part)	25(1) - Y 29(1)(a) – Y 30(b)(i) - N	25(1) – n/a 29(1)(a) - partial	Disclose email only
31A	Released	n/a	n/a	n/a
32	Released	n/a	n/a	n/a
33	Released	n/a	n/a	n/a
34	30(b)(i)	30(b)(i) – N	n/a	Disclose
35	30(b)(i)	30(b)(i) - N	n/a	Disclose
36	Released	n/a	n/a	n/a
37	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
38	30(b)(i)	30(b)(i) - N	n/a	Disclose
39	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) - N	Y	Disclose
40	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
41	30(b)(i)	30(b)(i) - N	n/a	Disclose
42	29(1)(a)	29(1)(a) – Y	N	Withhold

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	30(b)(ii)	30(b)(ii) – N/C		
43	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
44	Emails released, excluding identity of requestor 38(1)(b)	38(1)(b) - Y	n/a	Withhold
45	Released	n/a	n/a	n/a
46	29(1)(a) 30(b)(i), 30(b)(ii)	29(1)(a) – Y 30(b)(i) - N 30(b)(ii) - N	Y	Disclose
47	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
48	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
49	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
50	Released	n/a	n/a	n/a
51	Released	n/a	n/a	n/a
52	30(b)(i)	30(b)(i) - N	n/a	Disclose
53	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
54	30(b)(ii)	30(b)(ii) - N	n/a	Disclose
55	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
56	30(b)(i)	30(b)(i) - N	n/a	Disclose
57	29(1)(a) 30(b)(i)	29(1)(a) – Y 30(b)(i) – N/C	N	Withhold
58	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) – N/C	N	Withhold
59	29(1)(a) 30(b)(ii)	29(1)(a) – Y 30(b)(ii) - N	N	Withhold