



Scottish Information
Commissioner

Decision 017/2008 Mr Mark Irvine and the Scottish Ministers

Correspondence relating to an article written by Mr Irvine

Applicant: Mr Mark Irvine
Authority: The Scottish Ministers
Case No: 200700763
Decision Date: 30 January 2008

Kevin Dunion
Scottish Information Commissioner

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Decision 017/2008 Mr Mark Irvine and the Scottish Ministers

Request for correspondence relating to an article written by Mr Irvine – information withheld by virtue of sections 30(b)(i) and (ii) (prejudice to effective conduct of public affairs) – Commissioner ordered partial release of the information

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) and 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs)

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

Facts

Mr Irvine requested correspondence held by the Scottish Ministers (the Ministers) relating to an article which Action 4 Equality had published on the NHS Agenda for Change. The Ministers responded by withholding the information requested under sections 29, 30 and 38 of FOISA. Following a review, Mr Irvine remained dissatisfied and applied to the Commissioner for a decision.

During the Commissioner's investigation, the Ministers withdrew their application of section 29 of FOISA to the information and Mr Irvine withdrew his request for information that fell under section 38. Following that investigation the Commissioner found that the Ministers had partially failed to deal with Mr Irvine's request for information in accordance with Part 1 of FOISA and required that certain information which had been withheld should be released. He was not satisfied that release of the information would substantially prejudice either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, and therefore could not accept that it was exempt under either of the exemptions claimed. However, the Commissioner found that the Ministers had correctly applied the exemptions contained within FOISA to the remainder of the information requested.



Background

1. On 13 March 2007, Mr Irvine wrote to the Ministers requesting copies of all documents and communications held by the (then) Scottish Executive Health Department which mentioned himself, another individual, or Action for Equality.
2. The Ministers wrote to Mr Irvine in response to his request for information on 12 April 2007. They released a copy of an article which Mr Irvine had written, but withheld the remainder of the information they held on the basis that it was exempt by virtue of sections 29, 30 and 38 of FOISA.
3. On 26 April 2007, Mr Irvine wrote to the Ministers requesting a review of their decision. In particular, Mr Irvine challenged the Ministers' blanket application of sections 29, 30 and 38 of FOISA to all of the information withheld.
4. The Ministers wrote to notify Mr Irvine of the outcome of their review on 18 May 2007. They gave some further reasoning for their decision to withhold the information, but generally upheld their initial response to Mr Irvine.
5. On 29 May 2007, Mr Irvine wrote to my Office, stating that he was dissatisfied with the outcome of the Minister's 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 Irvine 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

7. On 30 May 2007, the Ministers were notified in writing that an application had been received from Mr Irvine and were asked to provide my Office with copies of the information withheld. 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, asking them to provide comments on the application and to respond to specific questions relating to it.



9. The Ministers' submissions contained their reasoning for applying sections 30(b)(i) and (ii) to information in general, and to the particular information withheld in this case. They included a submission as to the Ministers' current general approach to the exemptions in section 30(b), originally set out in a letter of 2 May 2007, which they reiterated.
10. During the investigation the Ministers agreed to release four documents (document number 1, and appendices to document numbers 2, 3 and 4 as set out in the Schedule of Documents provided by the Ministers to me with their submissions) which they had previously withheld from Mr Irvine. They also withdrew their application of section 29(1)(a) of FOISA to the information withheld.
11. Additionally, my Office corresponded with Mr Irvine during the course of the investigation. Mr Irvine confirmed that he wished to withdraw his application as far as it related to information which fell under section 38 of FOISA (that is, personal information), as he was also in the process of making a request under section 7 of the Data Protection Act 1998 for information relating to himself and accepted that any information relating to the other individual referred to in his request was likely to be exempt under FOISA. I have not, in any event, been able to locate any personal information relating to that individual in the information remaining withheld.
12. Mr Irvine also provided my Office with useful background information relating to the type of information which he had requested.

The Commissioner's Analysis and Findings

13. In coming to a decision on this matter, I have considered all of the information and the submissions which have been presented to me by both Mr Irvine and the Ministers, and I am satisfied that no matter of relevance has been overlooked.
14. Mr Irvine represents an organisation named Action 4 Equality. Action 4 Equality campaigns on issues relating to the Agenda for Change taking place within the NHS. Agenda for Change is an ongoing initiative which is restructuring the pay and job grading of NHS staff in order to ensure gender parity.



15. In February of 2007, Action 4 Equality published an article online (which can be found at <http://action4equalityscotland.blogspot.com/2007/02/nhs-agenda-for-change.html>) outlining concerns about the Agenda for Change initiative. Following the publication of the article, Mr Irvine received an email from the Ministers, requesting a copy. He supplied a copy of the article, but did not receive any further communications from the Ministers. Mr Irvine then requested any recorded information which the Ministers held relating to internal discussions about his organisation.
16. The Ministers concluded that a total of 11 documents fell within the remit of Mr Irvine's request. The information can be divided into three categories of documents. The first category consists of copies of draft minutes circulated internally for comment. The second category comprises a series of series of internal emails relating to the article. The third category comprises a copy of the final version of the minute discussing Mr Irvine's article which was submitted to the Minister.

Document number 11

17. The Ministers submitted that document number 11 (as identified by the Schedule of Documents provided to me by the Ministers with their submissions) fell within the scope of Mr Irvine's request for information. While I agree that the document relates to Mr Irvine's request, it postdates the date on which his request was made and so, as it was not recorded information which the Ministers held at that time, it cannot fall within the scope of that request. As a result, I shall not consider any further whether document number 11 should be disclosed .

Sections 30(b)(i) and (ii) – Prejudice to effective conduct to public affairs

18. Sections 30(b)(i) and (ii) of FOISA allow information to be withheld if its disclosure would, or would be likely to, inhibit (respectively) the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
19. The Ministers strongly argued, both in their submissions to me on this case, and in their more general arguments on the application of section 30(b) of FOISA first set out in their letter to me of 2 May 2007, that, by release of the type of information withheld, the candour of advice and views provided and recorded in the future would be jeopardised.



20. I have already considered the arguments put forward by the Ministers in their letter of 2 May 2007 and subsequently, and my views on their current position in relation to section 30(b) (and my expectations if the exemptions are to apply) are set out fully in *Decision 089/2007 Mr James Cannell and the Scottish Executive*. I do not consider it necessary to add anything in relation to those arguments here. However, I am compelled to examine in detail the information in this case in order to determine whether there are any particular reasons why the information withheld would, or would be likely to, substantially inhibit future advice or discussions.

The information withheld

21. As I have set out in paragraph 16 above, the documents withheld by the Ministers can be divided in to three categories of information. I have looked at each of those categories separately in considering whether the Ministers have correctly applied the exemptions contained within sections 30(b)(i) and (ii) of FOISA to the relevant information.
22. In the first category are copies of a draft minute about the article written by Mr Irvine. The documents contained within this category (excluding attachments to the drafts which have already been released to Mr Irvine during the course of my investigation) are documents numbers 2 and 3 as identified in the Schedule of Documents provided to me by the Ministers with their submissions. I have examined the drafts and am satisfied that they fall under the exemptions contained within sections 30(b)(i) and (ii) of FOISA. This is because I accept that in preparing such draft documents, officials should generally have the freedom to alter and discuss their terms before a final submission to the Minister is made. I accept that disclosure of the advice and other information in these particular drafts would have the substantially inhibiting effects envisaged by the exemptions in section 30(b).
23. The second category of documents (documents numbers 5-10 in the Schedule of Documents provided to me by the Ministers) comprises a series of internal emails relating to Mr Irvine's article. The emails contain a record of the exchange of views about advice which should be given to a Minister. Such advice had not been settled upon or proffered at the time of Mr Irvine's request.. On examination of the documents which fall under this category I have come to the conclusion that they also fall under the exemptions contained within sections 30(b)(i) and (ii) of FOISA.



24. In coming to my conclusion on the application of the exemptions to this second category of information, I have paid particular attention to the timing of Mr Irvine's request for information. As noted above the discussion recorded within the emails requested by Mr Irvine did not conclude until after he had made his request. In my view, sections 30(b)(i) and (ii) provide, where appropriate, a certain "thinking space" in order to properly resolve a matter which is still current at the time a request for information is made. I am therefore satisfied that emails recording this "thinking space" should be protected from disclosure under sections 30(b)(i) and (ii) of FOISA.
25. The final category of information withheld by the Ministers is the final version of the minute discussing Agenda for Change and Mr Irvine's article submitted to the Minister. It is identified as document number 4 in the Schedule of Documents provided to me by the Ministers with their submissions. Attachments to the final version which were originally also withheld were provided by the Ministers to Mr Irvine during the course of my investigation, and so only the minute itself remains to be considered by me.
26. I have examined document number 4 and am satisfied that the majority of its content is factual, or re-emphasises the government's position on Agenda for Change at the relevant time, and that such information was widely available in the public domain at the time of Mr Irvine's request. The advice and views recorded in the information withheld relate to the article published by Action 4 Equality and not to the broader related policy issues. I am also aware that the document was the final version of the minute submitted to the Minister and not subject to further discussion and amendments. Having examined the advice and views it contains, along with the relevant submissions made by the Ministers, I am not persuaded that disclosure would inhibit substantially similar information being produced and recorded in the future. Where the information is not simply factual, there is nothing in it which I would have regarded as particularly surprising if it were to have been disclosed at the time.
27. I have reached the above view having taken full account of the content of the information withheld and noting that a key function of employees within the Scottish Government is to advise and provide information to Ministers on such matters. I think it is extremely unlikely that such formal advice would not be proffered by officials in future, nor do I conclude that they would be inhibited substantially in terms of the content or nature of such advice. I would suggest that rigorous management and records management procedures should be used were there to be a risk that employees would cease recording or retaining such information in future, rather than simply accepting that information will not be recorded for fear of adverse reaction following disclosure. In any event, I am not persuaded from the Ministers' submissions or my understanding of Civil Service practice in the light of FOISA that such a risk exists.



28. I have examined the information withheld and considered the Minister's reasons for withholding it and have come to the conclusion that I can find no satisfactory evidence to establish that to release document 4 into the public domain would, or would be likely to, inhibit substantially the provision of advice or exchange of views in the future. Therefore I am not persuaded that the information falls under either of the exemptions contained in section 30(b) of FOISA in this instance.
29. The exemptions in sections 30(b)(i) and (ii) are qualified exemptions and are subject to the public interest test contained in section 2(1) of FOISA. Even when a public authority considers that these exemptions apply to the information requested, it must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. Having decided that the information in the first and second categories described above is exempt under the two exemptions in section 30(b), I must now go on to consider the public interest.

The public interest

30. In their submissions to me, the Ministers argued that while there was a public interest in releasing the information in order to inform public debate and increase public understanding of NHS Scotland equal pay policy, the public interest was balanced in favour of withholding the information.
31. The Ministers went on to state that discussions on Agenda for Change were at an early and sensitive stage, and subject to the outcome of several legal processes in which Ministers were either actually or potentially involved. They continued that it would be in the public interest for Ministers to be able to rely on high quality advice, particularly where the information related to a contentious issue.
32. The Ministers also considered that there was a strong public interest in maintaining the integrity of the process of giving free and frank advice relating to such issues. Disclosure would be likely to have an inhibiting effect on the candour with which information relating to Agenda for Change are recorded and discussed, which would in turn have a detrimental effect on the efficiency and quality of decision making relating to the matter in future.
33. The Ministers argued that there was a strong public interest in protecting the impartiality of the Civil Service, and that this applied where a particular release of official advice might create the risk those officials may come under political or public pressure not to challenge ideas. The Ministers implied that such a risk was evident in this case.



34. The Ministers also submitted that in this case the information related to advice on possible responses to a critical article on an important and sensitive ongoing process. They went on to argue that there was a strong public interest in protecting internal communications in such cases where the likely effect of releasing information would be the suppression of effective communication in future, for example because robust advice given would likely to be given orally rather than recorded. They qualified this argument by accepting that information should not be withheld just because strong views were recorded, but remained of the view that disclosure the information at issue would in the circumstances impact detrimentally on the civil service's ability to record advice or the exchange of views relating to matters of this kind, which would not be in the public interest.
35. I accept substantial elements of the Ministers' arguments in principle: in particular, I agree that there is considerable public interest in ensuring that Ministers are fully informed about the various factors involved when decisions are taken, and that if officials were substantially inhibited from providing full and considered advice in a free and frank manner, this could ultimately impinge upon the quality of the decision. There is clearly a strong public interest in avoiding such an outcome.
36. I do not, however, accept that the public interest is likely to favour the protection of an entire process, such as the giving of advice to Ministers (either generally or in the context of a particular process such as the one under consideration here). The focus of the public interest test in any given case should be the information under consideration in that case and the consequences for disclosure in the circumstances of the time.
37. Having considered fully the Ministers' arguments in relation to the information that has been withheld in this instance, along with the information itself and the context within which it was given, I have decided that there are no countervailing arguments which indicate an equally strong, or stronger, public interest in support of disclosure. In this case the information consisted of a draft which was superseded by a final document (which I have otherwise required to be disclosed). I see no particular public interest in disclosure which is not outweighed by the public interest in withholding the information so as to avoid the harm which would otherwise ensue.
38. The public interest in of the second category of information is limited. Disclosure might give an insight into a decision making process but this is not sufficient to outweigh the benefit of not disclosing the information, again so as to avoid the harm which would otherwise ensue. I have therefore concluded that in this case, the balance of public interest lies in favour of withholding the documents contained within the first and second categories of information.



39. In this case I have considered it helpful to go on to consider whether, in all the circumstances of the case, the public interest in disclosure of document number 4 is outweighed by the public interest in maintaining the exemption, as if, contrary to my findings, the exemption in section 30(b)(i) of FOISA did apply to the information.
40. The Ministers presented my Office with a detailed submission in relation to its consideration of the public interest test. I have outlined the thrust of their arguments for withholding the information in the paragraphs which address the public interest in relation to document numbers 2, 3, and 5-10. The reasons the Ministers have set out for the balance of the public interest to lie in favour of withholding document 4 do not vary from the reasoning set out above.
41. Again, I accept the importance of ensuring that Ministers are fully informed about the various factors involved when decisions are taken, and that if officials were substantially inhibited from providing full and considered advice in a free and frank manner, this could ultimately impinge upon the quality of the decision. There is clearly a strong public interest in avoiding such an outcome.
42. However, consideration of the public interest must be in the context of disclosure of particular information and the likely consequences of that disclosure. I do not accept that there is an inherent public interest in protecting the process of advice given to and received by ministers.
43. Even if I had found that disclosure would have had a substantially inhibiting effect, I would have concluded that the balance of the public interest lay in release of the information. The Minister had been briefed on an article written by Mr Irvine (which was in the public domain) and had come to a conclusion about points raised in that article. The article dealt with issues which clearly were of great public interest.
44. In my view, in this case, the public interest in disclosing information which showed that the Ministers had considered the points raised within that article, outweighed the public interest in withholding the information so as to avoid harm to the advisory process as envisaged by the Ministers.
45. In all the circumstances of the case I would have concluded that the public interest in disclosing the information is not outweighed by that in maintaining the exemption, if the exemption had applied.



Conclusion

46. In summary, of the 11 documents withheld from Mr Irvine and identified within the Ministers' Schedule of Documents, document number 1 [and the annexes to documents 2, 3 and 4] was released to him during the course of my investigation. I have concluded that documents numbers 2, 3, and 5-10 were correctly withheld from Mr Irvine on the basis that they were exempt from disclosure under sections 30(b)(i) and (ii) of FOISA, and that the balance of the public interest lay against disclosure. I also found that the exemptions in sections 30(b) (i) and (ii) of FOISA did not apply to document number 4, and therefore that it should be released to Mr Irvine. Finally, I found that document number 11 did not fall within the scope of Mr Irvine's request for information.

Decision

I find 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 from Mr Irvine. In withholding from Mr Irvine document number 4 of the documents identified by the Ministers in their Schedule of Documents, the Ministers incorrectly applied the exemptions in sections 30(b)(i) and (ii) of FOISA and thereby failed to comply with section 1(1) of FOISA.

I therefore require the Ministers to release document number 4 to Mr Irvine within 45 days after the date of intimation of this decision notice (that is, by 15 March 2008).

I find that in withholding document numbers 2, 3, and 5-10 (as identified by the Schedule of Documents provided to me by the Ministers), I find that the Ministers correctly applied the exemptions in sections 30(b)(i) and (ii) of FOISA and thereby complied with section 1(1) of FOISA in relation to those documents.

Appeal

Should either party 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
30 January 2008



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.

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;

...