



Scottish Information
Commissioner

Decision 019/2008 Mr Tom Gordon and the Scottish Court Service

Possible relocation of Parliament House's courts

Applicant: Mr Tom Gordon
Authority: Scottish Court Service
Case No: 200700783
Decision Date: 31 January 2008

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 019/2008 Mr Tom Gordon and the Scottish Court Service

All documents referring to the possible permanent relocation of Parliament House's courts as an alternative to the ongoing modernisation programme – Scottish Court Service relied on exemptions in sections 30 and 33 of the Freedom of Information (Scotland) Act 2002 for withholding certain information – Commissioner upheld reliance on section 30(c) (prejudice to effective conduct of public affairs)

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 30(c) (Prejudice to the effective conduct of public affairs).

The full text of each of these provisions is reproduced in the Appendix 1 to this decision. The Appendix forms part of this decision.

Facts

Mr Gordon requested information from the Scottish Court Service (SCS) referring to the possible permanent relocation of Parliament House's courts as an alternative to the ongoing modernisation programme. The SCS withheld information from Mr Gordon by relying on the exemptions in sections 30(b)(ii) and 33(1)(b) of FOISA. Mr Gordon applied to the Commissioner following a review and the SCS later added section 30(b)(i) and section 30(c) of FOISA to the exemptions claimed.

Following an investigation, the Commissioner found that the SCS had dealt with Mr Gordon's request for information in accordance with Part 1 of FOISA. He found in particular that the information had been properly withheld from Mr Gordon under section 30(c) of FOISA, as substantial prejudice to the effective conduct of public affairs (and in particular the process that was being undertaken and consequently the effective operation of the SCS) would have been likely to follow from release. .



Background

1. On 12 February 2007, Mr Gordon wrote to the SCS requesting a copy of all documents, emails, memos, correspondence, sections of reports etc referring to the possible permanent relocation of Parliament House's courts as an alternative to the ongoing modernisation programme.
2. The SCS responded to Mr Gordon on 5 March 2007. In its response to Mr Gordon, the SCS indicated that it was not willing to disclose the requested information to him and was relying on the exemptions in sections 29(1)(a), 30(b)(ii) and 33(1)(b) of FOISA to withhold it.
3. On 12 March 2007, Mr Gordon wrote to the SCS requesting a review of its decision. In particular, Mr Gordon drew to the SCS's attention the fact that a contract notice had appeared in the Official Journal of the European Communities on 6 February 2007 which indicated that tenders were sought for the redevelopment of Parliament House, and therefore Mr Gordon was of the view that a decision on whether Parliament House would be relocated had been taken. Mr Gordon also expressed his concern as to the "blanket" manner in which the SCS had applied the exemptions to the withheld information.
4. The SCS wrote to notify Mr Gordon of the outcome of its review on 19 April 2007,. It explained to Mr Gordon that it was no longer relying on the exemption in section 29(1)(a) of FOISA for withholding the information, but still upheld its decision to rely on the exemptions in sections 30(b)(ii) and 33(1)(b).
5. On 29 May 2007, Mr Gordon wrote to my Office, stating that he was dissatisfied with the outcome of the SCS'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 Gordon 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. The SCS is an executive agency of the Ministers. On 7 June 2007, the Freedom of Information Unit of the Scottish Government (the FOI Unit), which deals with applications to me on behalf of the SCS, was notified in writing that an application had been received from Mr Gordon and was asked to provide my Office with copies of the information withheld from Mr Gordon. A response was received from the FOI Unit and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the FOI Unit, asking it to provide comments and respond to specific questions on the application, on behalf of the SCS.
9. A full response was received on 20 September 2007. Within this response I was advised that the SCS, having considered the withheld information again, was of the view that certain of the documents could be released to Mr Gordon. The SCS released 24 of the 56 documents which it had previously withheld from Mr Gordon, although three of these documents were subject to redaction.
10. In its submissions to my Office on behalf of the SCS, the FOI Unit indicated that it was relying on the exemptions in sections 30(b)(i) and 30(c) of FOISA, in addition to those it had already cited to Mr Gordon under sections 30(b)(ii) and 33(1)(b), for withholding the remaining 32 documents.
11. The SCS's application of these exemptions will be considered further in the section on my analysis and findings below.

The Commissioner's Analysis and Findings

Background information

12. As noted above, Mr Gordon requested information relating to the possible permanent relocation of Parliament House's courts as an alternative to the ongoing modernisation programme.



13. Parliament House in Edinburgh is the home of the Supreme Courts in Scotland. In 1998 a major redevelopment of Parliament House was started by the Scottish Court Service, which was due to take between 10 to 12 years to complete. The project was divided into phases, each of which was capable of being stopped at the end without incurring any penalty. The Scottish Court Service took a decision in 2004 to carry out a review of the project as a result of a rise in overall costs, planning difficulties and delays in completion.
14. This review led to an “Options Appraisal” exercise being undertaken in order to determine whether it would be best to relocate the courts to an alternative site, or to renovate the current building in conjunction with the provision of supplementary accommodation.
15. This “Options Appraisal” exercise was carried out and various interim arrangements put in place. In parallel with this a tendering exercise was carried out to appoint contractors for refurbishment and upgrading work at Parliament House. The SCS explained in its submissions to me that this was still an ongoing matter and that various options relating to the courts at Parliament House had not been ruled out.
16. It is the documents, emails, memos, correspondence and sections of reports referring to the possible relocation of Parliament House’s courts that Mr Gordon is seeking in this case.

Information outwith the scope of the request

17. As mentioned already, of the twenty four documents which the SCS released to Mr Gordon it redacted certain information from three of these as it considered that this information was outwith the scope of Mr Gordon’s information request.
18. Having considered the information that the SCS has redacted from these documents, I agree with the assertion of the SCS that the redacted information does not fall within the scope of Mr Gordon’s information request. I will therefore not consider this information further in my decision.

Section 30(c) – Prejudice to the effective conduct of public affairs

19. As indicated above, the SCS has relied on the exemptions in sections 30(b)(i), 30(b)(ii) and 30(c) of FOISA for withholding the remaining 32 documents from Mr Gordon. I have considered the SCS’s reliance on the exemption in section 30(c) of FOISA first.



20. Section 30(c) of FOISA concerns information which, if disclosed, would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The exemption in section 30(c) is a qualified exemption, which means that it is subject to the public interest test laid down by section 2(1)(b) of FOISA.
21. As I have said in previous decisions (see for example *Decision 105/2007 Paul Hutcheon and the Scottish Executive*) I expect any public authority citing this exemption to show what specific harm would be caused to the conduct of public affairs by release of the information in question. The risk of damage being caused by release of this information would have to be real or very likely, not hypothetical. The harm caused would require to be significant and not marginal, and it would have to occur in the near (and certainly the foreseeable) future rather than in some distant time.
22. In providing justification for its reliance on the exemption in section 30(c), the SCS submitted that the various options outlined in the withheld information were still very much a live issue and subject to ongoing debate, and that no final decision had been taken on development or relocation. The SCS submitted that it was following its duties as a public authority in undertaking an assessment for the possible relocation of Parliament House, and that the withheld information had been gathered for the purpose of informing this process. In support of its reliance on section 30(c), it provided details of the kinds of damage (including damage to the public purse) it believed would be caused to the overall process (and consequently to the full and effective operation of the SCS) by premature release of the withheld information.
23. As I have said in previous decisions, even where the public authority considers that release of a number of documents in their entirety would engage the exemption in section 30(c), it is still necessary to consider the content of the individual documents.
24. Having considered the information which is contained in the 32 documents withheld from Mr Gordon, I am satisfied that this information does relate to the "Options Appraisal" process. I also accept that where, as in this case, the matter is one which is still subject to ongoing discussion and debate, release of the relevant information is more likely to prejudice that process substantially. I am aware that the documents which have been withheld from Mr Gordon are dated from 2004 onwards, and that Mr Gordon did not make his request for this information until February 2007. However, what is clear from the submissions provided to me by the SCS is that a final decision on this matter has not been reached (and certainly had not been at the time the Ministers dealt with Mr Gordon's request), and a further assessment of the options identified in 2004 and recorded in the withheld documents may well be necessary.



25. In the circumstances of this particular case, having considered all relevant submissions along with the information withheld, I accept the arguments which have been provided by the SCS regarding why, in its view, harm would be caused to the process of consideration of options concerning the possible relocation of Parliament House's courts, if this information were to be released at this stage (or were to have been released in response to Mr Gordon's request). I am satisfied that the likelihood of this harm being caused if the information were to be released is significant, and that it is likely that the harm itself would be substantial.
26. As I am satisfied that the information in the documents withheld from Mr Gordon would be exempt under section 30(c) of FOISA, I am now required to consider the application of the public interest test in section 2(1)(b) to these documents.

Public interest test

27. The SCS provided a submission as to its consideration of the public interest. The considerations it addressed are set out below;
- The SCS consider that there is an expectation of the public that public authorities will act in the general public interest in fulfilling their duties, and therefore that the public also has a legitimate expectation that authorities which act in their interests are held accountable for their actions.
 - The SCS also considers, however, that the public will understand that in conducting their affairs and in the process of arriving at decisions, public authorities will require a degree of freedom and an operating environment which allows them to carry out their business effectively.
 - The SCS argues that it is not in the public interest for its bargaining position in relation to this matter to be compromised by early release of options appraisals and risk assessments. The SCS states that such a release would result in potentially misleading information being placed in the public domain and its financial and other interests being prejudiced in consequence.
28. As I have said in previous decisions, when considering the application of the public interest test in section 2(1)(b) of FOISA, it is not correct simply to consider what is of interest to the applicant, in this case Mr Gordon. In applying this test it is necessary to consider what is in the interests of the public as a whole.
29. I recognise and accept that there is a general public interest in being reassured that public authorities are acting in the best interests of the public. There is also clearly a public interest in ensuring that where redevelopment or relocation projects relating to public buildings are being undertaken, best value for money is achieved while still ensuring that the project brief is met to an acceptable standard.



30. It is apparent from reading the documents which the SCS has voluntarily disclosed to Mr Gordon that it does recognise that there is a public interest in this matter, and that it has sought to address this by way of the information it has released. It is clear from the documents that have been released that full information as to the requirements and reasons for the renovation or relocation of Parliament House's courts has been made known to Mr Gordon.
31. However, in considering the 32 documents which the SCS did not release to Mr Gordon, the public interest identified in paragraph 29 above has to be balanced against the public interest in allowing the SCS to carry out a thorough investigation of what options are available to fulfil the requirement of bringing the Supreme Courts in Scotland up to a standard that is fit to cope with developing judicial needs. Obviously such an investigation will involve determining whether redevelopment of existing buildings will satisfy the requirements or whether additional or supplementary accommodation is needed, and consideration is likely to extend to the respective merits and disadvantages of alternative sites. There is a clear public interest in allowing the SCS to be able to consider this in private so that they are able to thoroughly examine all the relevant factors relating to each of the options that they have identified, and to carry out negotiations with land owners and contractors without fear that their negotiating position will be weakened by their intentions or proposals becoming public knowledge.
32. In the circumstances, having considered the respective public interests, I consider that the greater public interest lies in allowing the SCS to maintain its negotiating position and the factors informing that position, in the interests of obtaining best value for public money. It may well be the case that once a final decision on this phase of the project has been taken, the public interest in releasing this information, to allow the public to consider whether the SCS has made the correct decision (and more generally in the interests of accountability and transparency), would be greater.
33. On balance, therefore, I find that in this case the public interest in disclosing the information I have found to be exempt under section 30(c) of FOISA is outweighed by the public interest in maintaining the exemption in section 30(c). As a result, I am satisfied that all of the information remaining withheld from Mr Gordon has been properly withheld under section 30(c) of FOISA.
34. Given that I have found the information remaining withheld from Mr Gordon to have been properly withheld under section 30(c) of FOISA, I am not required to (and therefore will not) consider the other exemptions claimed by the Ministers in relation to this information.



Decision

I find that by relying on the exemption in section 30(c) of FOISA in relation to the information withheld, the Scottish Court Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Gordon.

Appeal

Should either Mr Gordon or the Scottish Court Service 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
31 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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.