

Decision Notice



Decision 039/2014 Mr Billy Briggs and the Scottish Ministers

SQA project in Bahrain

Reference No: 201301877

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Summary

On 28 March 2013, Mr Briggs asked the Scottish Ministers (the Ministers) for communications about a Scottish Qualifications Authority (SQA) project in Bahrain. The Ministers provided some information, but withheld other information on the basis that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views (section 30(b) of FOISA).

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold most of the information, but that some information should be disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) (Prejudice to effective conduct of public affairs)

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 28 March 2013, Mr Briggs wrote to the Ministers requesting communications about an SQA project in Bahrain. Only part 4 of his request is relevant to this decision. In part 4, Mr Briggs requested communications involving Dr Alasdair Allan [Minister for Learning, Science and Scotland's Languages] after 24 February 2013.
2. On 29 May 2013, the Ministers responded by disclosing some information, but withholding the remainder under the exemptions in sections 30(b) (Prejudice to effective conduct of public affairs) and 38(1)(b) (Personal information) of FOISA.
3. On 12 June 2013, Mr Briggs wrote to the Ministers requesting a review of their decision to withhold information under these exemptions. With regard to the personal data withheld under section 38(1)(b) of FOISA, Mr Briggs indicated he was not seeking information about the officials involved in any advice given to Ministers, just the advice itself.



4. The Ministers notified Mr Briggs of the outcome of their review on 9 July 2013. They noted Mr Briggs was not interested in obtaining “personal details relating to officials” and did not consider further the decision to withhold such information under section 38(1)(b) of FOISA. The Ministers released more information, but continued to withhold three documents from Mr Briggs under section 30(b) of FOISA.
5. On 13 August 2013, Mr Briggs 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 Briggs made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 19 August 2013, the Ministers were notified in writing that an application had been received from Mr Briggs and were asked to provide the Commissioner with the information withheld from him. The Ministers did so, 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.
9. The submissions from the Ministers highlighted points regarding each of the three documents being withheld.

Commissioner’s analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Briggs and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. The Ministers asked the Commissioner not to include or summarise certain parts of their submissions in this decision where these would divulge or allude to the contents of the withheld information.



Section 30(b)(i) and (ii) – free and frank provision of advice/exchange of views

12. Under section 30(b) of FOISA, information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). Public authorities must assess whether officials or other parties would be deterred from providing advice or views in future, if the information is disclosed, and consider whether this would cause significant harm to the way in which they carry out their business. Although it may be difficult to judge how likely it is that disclosure would cause officials to be inhibited from providing advice or views, the exemptions cannot be applied unless there are reasonable grounds for anticipating that disclosure would, or would be likely to cause, substantial inhibition.

Documents 1 and 2

13. The exemption in section 30(b)(ii) was applied to part of document 1 (the remaining part was disclosed) and to all of document 2.
14. Documents 1 and 2 are emails discussing possible supplementary questions relating to a parliamentary question. The question (S4T-00264), posed by Liz Smith MSP, asked the Government what recent discussions it had had with the SQA regarding contracts that it had signed with foreign governments.
15. Some emails from document 1 were disclosed, but the Ministers argued that disclosure of the remainder of the information in documents 1 and 2 would be likely to substantially inhibit the free and frank provision of advice on this and on other topics in future.
16. The Ministers argued that all of the emails – either on their own or when viewed in context with the others in the document – provide free and frank views which were not intended for wider dissemination. They considered that officials would be likely to be much more wary of providing Ministers with detailed question and answer (“Q and A”) briefings, or other similar “lines to take”, if they felt their advice to Ministers was likely to be released into the public domain, even where the advice related to questions which were not asked.
17. The Ministers took the view that the withheld information formed part of the process of clearance and discussion that was going on at a particular point in time. They argued that Ministers should be able to determine privately how they approach responding to parliamentary questions and other similar matters without undue scrutiny of who was consulted. They stated that documents 1 and 2 were clearly intended only to be considered by the limited number of people on the email copy lists, and were not comments which the authors would have made publicly. Releasing this information would be likely to have the effect of substantially inhibiting the free and frank exchange of views as Ministers, special advisers and others would not wish to put any sensitive comments in emails if they expected they would be released.



18. The Ministers noted that while Ministers and special advisers would be expected to comment on the proposed answer to oral parliamentary questions, in this case the views put forward were particularly frank in nature; these particular comments could not be said to be expected as part of their duties.
19. The Ministers argued that if disclosure was required in this case, in future it would be more likely for views of this type to be discussed orally rather than to be provided in writing, which could lead to difficulties in ensuring that all those who needed to be aware and might have views or advice to contribute were “in the loop”. The Ministers believed this would lead to a significant risk of misunderstandings or issues not being picked up, which would affect their ability to respond appropriately to oral Parliamentary Questions (or similar questions) in future.

Document 3

20. With regard to document 3, the Ministers contended that some of the withheld information did not fall within the scope of Mr Briggs’ request, and explained why this was their view.
21. The Commissioner does not accept the Ministers’ view; she considers that the information in question was compiled because the Ministers were concerned that they might be asked specific questions about the issues considered in document 3, when dealing with other questions relating to the SQA’s project with Bahrain.
22. The Ministers indicated that, if the information in document 3 was found to be within the scope of Mr Briggs’ request, they would seek to apply the exemption in section 30(b)(i) of FOISA to withhold it.
23. The Ministers considered that disclosing the information in document 3 would be likely to have the effect of substantially inhibiting the free and frank provision of advice on the same topic, and on other topics, in future. They explained that this type of briefing is often drafted by relatively junior members of staff (while acknowledging that this was not the case here), who try to ensure that Ministers are prepared to answer almost any possible question which could be asked, including questions on sensitive issues.
24. The Ministers believed there was a risk that officials would either avoid providing “Q and A” on questions which they think might not be asked, or would seek to provide such advice orally. In either case, this would be substantially prejudicial to the effective conduct of public affairs by leaving Ministers potentially unaware of significant information or unable to answer questions which might be asked. The Ministers feared that, if advice was provided orally, there was a greater risk that the advice would be incorrect as it would not go through the same checking process as would normally be the case with advice on this type of “Q and A”. There was also a greater possibility that oral advice would be misunderstood by Ministers, if received second or third hand and not directly from the official providing it.



25. The Ministers acknowledged that their private offices would still continue to commission or expect briefings to be provided for Ministers in cases like this, but considered it likely that advice on sensitive topics would be more focussed on the factual background, and would not include information which could be useful but which was considered sensitive unless this was absolutely essential.

Mr Briggs' submissions

26. In his application to the Commissioner, Mr Briggs contended that the Ministers had failed to show that substantial inhibition would occur if the information he sought were to be disclosed, and argued that the level of harm suggested by the Ministers would not be likely to occur.
27. Mr Briggs argued that all government officials are fully aware that their communications may be subject to FOISA, and did not accept that officials would object to the disclosure of any advice they gave Ministers. Further to this argument, Mr Briggs suggested that there was precedent for such advice and information to be published under FOISA. He cited the Commissioner's *Decision 099/2008 R Hill & Co and the Scottish Ministers*¹ as an example of officials' advice being placed in the public domain.
28. Mr Briggs also believed that disclosure of the withheld information would inform public debate by showing what was actually known by Ministers when questions about the SQA project in Bahrain were answered in the Scottish Parliament. Mr Briggs suggested that, far from harming Ministers and officials, this could have the effect of dispelling any unfounded concerns.

Commissioner's conclusion on sections 30(b)(i) and (ii)

29. In assessing whether the disclosure of information would, or would be likely to, inhibit substantially the free and frank provision of advice or exchange of views, the Commissioner will take account of matters such as the subject matter, the content of the information, the manner in which advice or an opinion is expressed and the circumstances existing at the time of the request. In this case, that includes both the timing of the parliamentary debate for which the information was prepared and the contract itself.
30. As set out in her briefing on the exemptions in section 30 of FOISA², the Commissioner takes the view that, in order for either of the exemptions in section 30(b) to apply, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal, and that the damage would have to occur in the near future, and not at some distant time.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200701018.aspx>

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>



31. The Commissioner, when considering the level and likelihood of prejudice which would occur, must consider the position as at July 2013, when the Ministers notified Mr Briggs of the outcome of their review of his request (four months after the Parliamentary debate in March 2013, to which the withheld information relates). Although some time had elapsed between the debate and Mr Briggs' request, the SQA's Bahrain project was current (and scheduled to run until January 2014). Mr Briggs' request captures information which was not fully aired during the Parliamentary debate of 5 March 2013, as it provides views and advice on points which did not actually arise during the Parliamentary debate.
32. The Commissioner considers that most of the withheld information retained its currency after the parliamentary debate, given that its purpose had ongoing relevancy during the lifetime of the project. It is clear to the Commissioner that exchanges between officials and Ministers for the purposes of briefing Ministers (for questions in parliament or in the media) would necessarily be expected to highlight any ongoing issues, including issues which could be considered sensitive to any of the parties involved, whether they be internal or external, local or international. The fact that some of the advice and views related to questions which were not actually raised in Parliament does not (in the Commissioner's view) reduce the sensitivity of the information. She is satisfied that disclosure of this information would reveal something of the thought processes and strategies involved in preparing briefings of this kind for debate by Ministers in a parliamentary setting, and that, in this case, the subject matter included issues which were potentially sensitive.
33. That said, the Commissioner does not share the Ministers' concern here about such information being misinterpreted, in the event of disclosure; the Ministers would be in a position to provide further explanations capable of preventing misinterpretation. However, for the most part, due to the nature and purpose of the withheld information, the Commissioner agrees with the Ministers' view that disclosure would, or would be likely, to inhibit substantially the provision of such advice or views in future.
34. The withheld information in document 1 consists of four emails which were exchanged in seeking clearance for the document designed to brief the Minister about questions which might arise during the Parliamentary "Q and A" session on the SQA contract. The Commissioner is mindful that, whilst the session was over by the time Mr Briggs submitted his request, any part of the "Q and A" briefing which was not required during the debate could well be required for any future questions; the contract was continuing. The Commissioner also notes that the second and fourth emails in this string are not in themselves briefings, and contain so little information in their own right that it cannot be said that disclosure would cause substantial prejudice or harm. (The attachment to these emails is considered separately, as document 3.)
35. Consequently, the Commissioner concludes that the exemption under section 30(b)(ii) of FOISA is only engaged for two of the four withheld emails in document 1, and she requires the Ministers to release the emails sent at 9:51 and 11:05 on 5 March 2013, which were wrongly withheld under this exemption. As noted previously in this decision, Mr Briggs has indicated he does not wish to be given any personal data belonging to the officials themselves, he only wishes to be given the advice itself. Therefore, the personal data in the two emails which are to be disclosed can be redacted. The Commissioner accepts that the exemption applies to the other two emails (sent at 11:00 and 14:12 on the same day).



36. In relation to the information withheld in document 2, the Commissioner finds that the exemption in section 30(b)(ii) is engaged, given the content of the emails and the timing of the request relative to the ongoing contract. In this context, she accepts that the information retained its sensitivity and, if disclosed, was likely to cause substantial inhibition in the future provision of similarly sensitive views for discussion.
37. Document 3 is a background note designed to assist the Minister in preparing for a Parliamentary Question about the SQA's Bahrain project. Part of the document was disclosed following the review of the way in which Mr Briggs' request was handled. The Commissioner is satisfied that the remaining withheld information is potentially sensitive, and accepts that if it was disclosed, it would be likely to substantially inhibit officials from providing such free and frank advice in future, if the topic was similarly sensitive. The Commissioner is satisfied that the information in document 3 was correctly withheld under section 30(b)(i) of FOISA, given the timing of Mr Briggs request and requirement for review in relation to the Parliamentary debate and the lifespan of the contract.
38. Where the Commissioner has accepted that the exemption cited by the Ministers applies to the withheld information, she is required to go on to consider the public interest test in section 2(1)(b) and whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemptions.

The public interest: the Ministers' views

39. The Ministers recognised the public interest in openness and transparency, but they considered that information provided by the Minister to Parliament about the SQA project in Bahrain during the Q and A session on 5 March 2013 was sufficiently detailed to achieve this without requiring disclosure of the withheld information.
40. The Ministers argued that there is a strong public interest in ensuring that officials have private space in which to have frank, unfettered discussions about how best to respond to an issue before responding publicly (in this case, in Parliament), or in rebutting criticism effectively and avoid undermining public confidence. Disclosure of frank discussions would be likely to discourage people from providing views (certainly in writing) and this would undermine the Government's consideration and presentation of issues such as the SQA's work in Bahrain. The Ministers contended that "Q and A" briefing is written in such a way as to allow the Minister to draw on it if needed - if made public, such information could be also be used to disadvantage Ministers.
41. On balance, therefore, the Ministers believed that the public interest lay in withholding the information by maintaining the exemptions.

The public interest: Mr Briggs' views

42. Mr Briggs gave his reasons why disclosure of the withheld information would be in the public interest. He believed that disclosure of the withheld information would inform public debate and increase transparency about who, at Government level, knew what about the SQA contract with Bahrain.



43. Mr Briggs believed disclosure was necessary so that the public was not deceived about the way in which the Government, its Ministers, or the bodies which they regulate, operate. It would help to dispel any unfounded concerns about the position of the Minister and the Government, in relation to what they knew or did not know about the contract; Mr Briggs raised the possibility that Parliament had been misled.

The public interest: the Commissioner's view

44. The Commissioner has considered the public interest arguments put forward by both the Ministers and by Mr Briggs.
45. The Commissioner notes that the Ministers have cited the sensitivity of the information as the basis for maintaining the exemptions here. It is clear from Mr Briggs' application that he is aware that his request might cover sensitive information, particularly from the nature of his comments on what the Ministers knew and said at the time of the Parliamentary "Q and A" session.
46. The Commissioner considers that there is a strong public interest in protecting high quality decision-making by ensuring that Ministers receive high quality advice, particularly in contentious areas. Substantial inhibition to these processes, brought about by the prospect of disclosure in the near future would, in the Commissioner's view, be to the detriment of efficient, high quality decision-making; this would not be in the public interest.
47. The Commissioner accepts that Mr Briggs has put forward some strong reasons for disclosure of the withheld information, in the public interest. However, after reading the withheld information, she is not satisfied that disclosure would meet his expectations, as expressed in his application. While disclosure would increase transparency and give a wider understanding of the issues considered by Ministers and their officials, she is not persuaded that disclosure would address some of Mr Briggs' concerns in the way he anticipates.
48. The Commissioner accepts the Ministers' argument that the public interest in information about the SQA project in Bahrain has been met, to some extent, by information already made available either in Parliament or by disclosure under FOISA.
49. Taking into account the existing and continuing sensitivity of the information withheld under sections 30(b)(i) and (ii) together with the timing of the request, the Commissioner is satisfied that, in the circumstances of this case, the public interest in maintaining the exemptions in sections 30(b)(i) and (ii) outweighs the public interest in the disclosure of the information.



DECISION

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

The Commissioner finds that the Ministers were correct to rely on the exemptions in section 30(b)(i) and (ii) of FOISA for the majority of the withheld information.

However, the Commissioner finds that the Ministers were not entitled to withhold certain information from Mr Briggs under section 30(b)(ii).

The Commissioner therefore requires the Ministers to disclose the information described in paragraph 35, by 7 April 2014.

Appeal

Should either Mr Briggs or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement
20 February 2014



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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

...