



Scottish Information
Commissioner

**Decision 042/2007 – Mr Mike Purvis and the
Scottish Executive**

Refusal to release documents relating to a Public Local Inquiry

**Applicant: Mr Mike Purvis
Authority: The Scottish Executive
Case No: 200601500
Decision Date: 8 March 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 042/2007: Mr Mike Purvis and the Scottish Executive

Refusal to release documents relating to a Public Local Inquiry – information withheld under sections 30(b)(i) & (ii) of FOISA – Commissioner ordered disclosure

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 30(l) 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 Purvis wrote to the Scottish Executive (the Executive) and requested a number of items of information relating to a Public Local Inquiry held in relation to a planning application submitted by Cala Homes. The Scottish Executive responded stating that it did not hold the majority of the information and that the remainder was exempt from disclosure under sections 30(b)(l) and (ii) of FOISA. Mr Purvis was dissatisfied with the Executive's response and requested a review. The Executive reviewed its decision and upheld its initial response. Mr Purvis remained dissatisfied and applied to the Scottish Information Commissioner for a decision.

Following an investigation, the Scottish Information Commissioner found that the Executive incorrectly applied section 30 (b)(i) of FOISA to the information withheld. No other exemption being relied upon by the Executive at that stage, the Commissioner ordered release of the information.

Background

1. On 30 May 2006 Mr Purvis wrote to the Executive requesting the following:



- a) Copies of any communications concerning a letter he had written to Scottish Ministers, relating to the designation of a site at Freeland Road, Ratho as part of the Rural West Edinburgh Local Plan.
 - b) Copies of any communications between the Local Plan Inquiry Reporter and the City of Edinburgh Council concerning the history or condition of the Freeland Road landfill site.
 - c) Copies of any communications between the developer (Cala Homes) and the Inquiry Reporter concerning the Freeland Road site.
 - d) Copies of any communications between British Waterways and the Inquiry Reporter regarding development of the site.
2. Mr Purvis also asked whether the full history of the Freeland Road site, including files held within the City of Edinburgh Council, had been made available to the Inquiry Reporter.
 3. The Executive responded to Mr Purvis on 4 July 2006, disclosing some information relating to request (a), but withholding the remainder on the basis that it was exempt from disclosure under section 30(b)(i) and (ii) of FOISA.
 4. The Executive went on to give Mr Purvis notice that it did not hold information relating to his remaining requests (b) –(d).
 5. Mr Purvis was dissatisfied with the Executive's decision to withhold information and wrote again to the Executive on 14 August 2006, requesting a review of its decision. He did not challenge the Executive's assertion that it did not hold the majority of the information requested. The Executive responded to Mr Purvis on 13 September 2006, upholding its initial decision to withhold the information.
 6. Mr Purvis remained dissatisfied with the Executive's response and on 16 September 2006 applied to me to decide whether the Executive had complied with the provisions of FOISA in withholding the information from him.
 7. The case was then allocated to an investigating officer and the application validated by establishing that Mr Purvis 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 his request.



The Investigation

8. A letter was sent to the Executive on 20 September 2006, giving notice that an appeal had been received and an investigation into the matter had begun. The Executive was invited to comment on matters raised by the applicant and on the application as a whole, in accordance with section 49(3)(a) of FOISA. In particular, it was asked to provide copies of the information withheld, along with detailed analysis of its application of the relevant exemptions.
9. The Executive replied on 20 October 2006 enclosing its statements on the case and supporting documentation.
10. The Executive argued that the documentation withheld from Mr Purvis was exempt from disclosure in this instance under section 30(b)(i) only. The Executive withdrew its reliance on section 30(b)(ii) of FOISA at this point.
11. The Executive claimed that disclosure of the information withheld would be likely to inhibit substantially the free and frank provision of advice for the purposes of deliberation. It went on to argue that the public interest in release of the information was outweighed by that in maintaining the exemption, given the importance of the candid communication to Ministers of all available options, their merits and demerits and their possible implications. It appeared to argue a public interest in protecting the provision of such advice as a process.
12. The investigating officer contacted the Executive again on 3 November 2006 and requested that it give more specific reasons for withholding this particular information from Mr Purvis under section 30(b)(i) of FOISA. The Executive responded on 10 November 2006, stating its belief that if officials had to provide advice and views in the knowledge that they were likely to be disclosed in response to an FOI request, particularly while the issues remained current, they would be substantially inhibited in providing free and frank advice in the future. This might lead to advice being given orally rather than in writing, or to written advice avoiding contentious issues. The Executive went on to argue that section 30(b)(i) of FOISA recognised the need to preserve the private space in which ministers and officials can be given free and frank advice and debate issues freely. In this particular case, it argued, the issue was still current and release would have immediate implications for the ongoing policy process and the impartiality of such advice.



13. I contacted the Executive again on 19 December 2006, requesting that it elucidate further on the immediate implications that disclosure of the document would have on the free and frank provision of advice within the Executive. I also asked that it provide me with further detail on why the Executive held that the document related to an ongoing matter, given that the Executive's role in the matter had concluded on 18 April 2006 and the Rural West Edinburgh Local Plan (RWELP) had been adopted on 1 June 2006.
14. In its response, the Executive stated that it had not argued (and was not arguing) that the implications of the release of the document would be, or would necessarily be, immediate. It clarified that it had stated that disclosure of the document in question would have serious implications for the public record and/or for the quality of future advice. It went on to state that the implications of disclosure of this information would not be limited to this particular plan but would affect the ongoing development of policy across all departments of the Scottish Executive. It did not comment on the currency of the issue.

The Commissioner's Analysis and Findings

15. Section 30(b)(i) of FOISA states that :

“Information is exempt information if its disclosure under this Act would, or would be likely to, inhibit substantially the free and frank provision of advice;”
16. The exemption is also subject to the public interest test as set out in section 2(1) of FOISA. As a result, even if I am satisfied that the information requested falls within the scope of the exemption, I 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. If it is, the information will be exempt from disclosure.
17. The information withheld in this instance is contained within 2 documents. Both set out an official's advice to a Minister on issues surrounding the adoption of the RWELP, in the context of submissions made by representatives of the local community.
18. In order to rely on section 30(b)(i) of FOISA, an authority must demonstrate that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice.



19. In my view, the standard to be met in applying the harm test in section 30(b)(i) of FOISA is high. Public authorities must be able to show that release of the information would, or would be likely to, inhibit the free and frank provision of advice, but also that that such inhibition would be of a substantial nature.
20. The Executive's guidance to its staff on the application of section 30(b)(i) points out that the word "inhibit" suggests a suppressive effect, so that communication would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive.
21. Here, the Executive has argued that disclosure of the information would mean that officials would feel inhibited from offering similar advice on future occasions. It has argued that release of the information would therefore have serious implications for the public record and/or the quality (and impartiality) of future advice, which would not be in the public interest. The ongoing development of policy across all departments of the Executive would be affected by release.
22. The Executive has offered no more specific comment on the reasons it believes the information withheld to be exempt from disclosure under section 30(b)(i). The extent to which the issues considered in the information remains current, and the extent to which that currency has a bearing on the application of the exemption, has not been made entirely clear.
23. I agree with the Executive's argument that where issues are still current, disclosure of advice given on those issues could well inhibit such advice being provided in the future. However, I do not agree that this would occur every time advice on a current issue is disclosed and have stated in the past that I must look at documents withheld on a case by case basis. When arguing that the release of information would have the inhibiting effects envisaged by section 30(b)(i), I will require authorities to provide me with specific details on why disclosure of the information in question, whether it relates to ongoing matters or to events in the past, would inhibit the provision of future advice.
24. Mr Purvis made his request for information on 30 May 2006. To all intents and purposes, the Executive's role in the RWELP Public Local Inquiry had concluded on 18 April 2006, and the Local Plan was adopted on 1 June 2006.
25. In considering the suppressive effect that release of the information may have, I have given consideration to:
 - a) Who provided the advice and
 - b) The context in which the advice has been given.



26. In this case, a member of staff in the Planning Division of the Executive appears to have given a briefing to Ministers on the status of the RWELP in the light of possible public interest in (and concerns about) aspects of its conclusions. The briefing outlines the position of the Executive and includes background information on the role played by the Executive in the adoption of the local plan. I should note here that the Executive have provided Mr Purvis with the background information but have withheld the advice contained within the documents.
27. Here, the author of the briefing appears to have been acting in a professional capacity and giving professional advice to the ministers on the Executive's role in this particular process. It appears to me that this individual was acting within their professional capacity and carrying out one of the functions of their role in providing advice to ministers on planning matters. To do otherwise (e.g. to cease providing advice to ministers on planning matters) would be contrary to their professional responsibilities.
28. In the context in which the advice was given, I find it very difficult to accept that disclosure of this document would prevent similar advice from being given in the future. To me, it appears that this document is a routine briefing to ministers on the outcome of a matter in which the Executive had been involved, in case of any enquiries from the public. Basically, the briefing is for information rather than further deliberation and/or decision. Had the matter been of a particularly sensitive nature, I may have been more inclined to accept the Executive's argument that disclosure would prevent officials from recording such advice and thus the quality of the public record being damaged. Having had sight of the documents in question, though, I am convinced that this is not the case here.
29. I am unable to identify any evidence to support the argument that disclosure of the information requested by Mr Purvis would inhibit substantially the free and frank provision of advice in the future. In the absence of any more substantial reasoning from the Executive as to why in this case the information should be withheld, I cannot accept that section 30(b)(i) of FOISA applies to the information. Therefore, I must conclude that the information is not exempt under section 30(b)(i). I am not required to go on to consider the application of the public interest test in relation to the exemption.

Decision

I find that the Scottish Executive (the Executive) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Purvis' request for information.



I find that the disclosure of the information withheld would not, and would not be likely to, inhibit substantially the free and frank provision of advice. Therefore, I find that the Executive misapplied section 30(b)(i) of FOISA in dealing with Mr Purvis' request and therefore did not deal with the request in accordance with section 1(1) of FOISA.

I require the Executive to disclose the information requested by Mr Purvis within 42 days of receipt of this notice.

Appeal

Should either party wish to appeal 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
8 March 2007



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1. General entitlement

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

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) ...;
- (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
- (c) ...