

Decision Notice



Decision 057/2009 Mr Andrew Black and the Scottish Ministers

Correspondence on the rejection of the Creative Scotland Bill

Reference No: 200900144
Decision Date: 21 May 2009

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Scottish Information Commissioner

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Summary

Mr Andrew Black (Mr Black) requested from the Scottish Ministers (the Ministers) copies of correspondence relating to the rejection by Parliament of the Creative Scotland Bill (the Bill). The Ministers considered this information exempt from disclosure under several provisions within the Freedom of Information (Scotland) Act (FOISA). Following a review, the Ministers released two documents, but Mr Black remained dissatisfied with the decision to withhold the remaining information.

During the investigation the Ministers released the remainder of the information which had been withheld, but Mr Black remained dissatisfied with the handling of his request and asked the Commissioner to issue a decision.

The Commissioner accepted that the Ministers had provided Mr Black with all relevant information. However, he concluded that they had breached Part 1 of FOISA by wrongly withholding the requested information until the investigation commenced. The Ministers did not provide any arguments in support of their decision, and so the Commissioner could only conclude that the exemptions had been wrongly applied. Since the information had been disclosed, he did not require the Ministers to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1) (Effect of exemptions); 29(1)(a) and (b) (Formulation of Scottish Administration policy) and 30(b)(ii) (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 9 September 2008, Mr Black wrote to the Ministers requesting the following: “all correspondence between the Scottish Government and the Creative Scotland Transition Project, Scottish Arts Council and Scottish Screen, in relation to the rejection by Parliament of the Creative Scotland Bill in June.”



2. The Ministers responded on 2 October 2008 and informed Mr Black that they considered the information to be exempt from disclosure in terms of sections 29(1)(a) and 30(b)(ii) of FOISA.
3. On 7 October 2008, Mr Black wrote to the Ministers requesting a review of their decision. He explained that he disagreed with the finding that the information was exempt.
4. The Ministers notified Mr Black of the outcome of their review on 8 December 2008. They revised their previous decision and released two documents to Mr Black, but continued to withhold the remaining information in terms of sections 29(1)(a) and 30(b) of FOISA.
5. On 21 January 2009, Mr Black 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 Black 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. The Ministers were notified in writing on 26 January 2009 that an application had been received from Mr Black. On 2 February 2009, they were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested, confirming that they wished to rely on the exemptions contained in sections 29(1)(a) and (b) and section 30(b)(ii) of FOISA, 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. On 27 March 2009, the Ministers wrote to the Commissioner to inform him that they had released to Mr Black the majority of the documents which had been withheld. The Ministers did not provide any comments or respond to the questions posed by the investigating officer. They stated that two of the documents initially identified had not been released, on the grounds that, on reconsideration, the Ministers did not believe that these fell within the scope of Mr Black's information request. On examining these two documents the Commissioner noted that one of them was wholly duplicated within the other and so, in effect, only one document had not been supplied to Mr Black.



10. The investigating officer wrote to Mr Black to check that he had received the information sent by the Ministers, and confirmed that this included all documents that had previously been withheld, with the exemption of the one document mentioned above. The investigating officer indicated to Mr Black that it was likely that the Commissioner would accept that this document fell out with the scope of his request.
11. In the light of the above developments, Mr Black was asked whether he wished to continue with his application to the Commissioner. He confirmed that he wished to proceed to a formal decision on the grounds that he did not agree that the information should have initially been withheld under the cited exemptions.
12. Following this, the investigating officer wrote again to the Ministers reiterating the invitation to justify their reliance on any provisions of FOISA they considered applicable. On 27 March 2009, the Ministers responded by stating that they had nothing further to add.

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 contents of the correspondence his office has had with both Mr Black and the Ministers and is satisfied that no matter of relevance has been overlooked.
14. This decision is unusual, in that the information previously withheld by the Ministers had been disclosed to Mr Black by the time of its writing (with the exception of one document, which the Ministers judged to fall outside the scope of the request).
15. The Commissioner is obliged to issue a decision in response to an application to him, except in very limited circumstances. The Commissioner is satisfied that none of these circumstances apply in this case. He must therefore consider (as he is required to do in any decision) the application of exemptions to the information under consideration and (where this test is relevant) the balance of public interest in the circumstances that existed at the time when the Ministers notified Mr Black of the outcome of their review, and disregarding any developments since that time (including the subsequent disclosure of the withheld information to Mr Black).

Scope of the request

16. The Ministers were asked by the investigating officer to explain the search methodology they had employed and submitted that in order to identify the information relating to Mr Black's request their policy team carried out an electronic search of eRDM (their electronic filing system) for the dates between 18 June 2008 (when the Bill fell) and 9 September 2008 (the date of Mr Black's request) using keywords "rejection of Bill", "Creative Scotland Bill", "Creative Scotland Transition Project Team", "Scottish Arts Council" and "Scottish Screen".



17. The Commissioner is satisfied that sufficient searches have been carried out to locate any information which may be held by the Ministers in relation to Mr Black's information request.
18. As noted above, the Ministers now believe that the document which was not disclosed to Mr Black does not fall within the scope of his information request.
19. The Commissioner notes that the document in question relates to work which was being done to garner support for the continuation of a project in anticipation of the Bill coming back to the Parliament.
20. Having considered the terms of Mr Black's request, the Commissioner is satisfied that the information contained in this document is not related to the rejection of the Bill, and so falls outwith the scope of Mr Black's request. The Commissioner will not consider this document any further.

Consideration of exemptions

21. The Commissioner must consider whether the Government was correct (at the time of its review of Mr Black's request) to withhold the information that was previously withheld from Mr Black in terms of exemptions set out in sections 29(1)(a) and (b) and 30(b)(ii) of FOISA.
22. 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.
23. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt information if it relates to Ministerial communications.
24. In order for the Ministers to be able to rely on the exemption contained in section 30(b)(ii) of FOISA, they would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
25. Each of these exemptions is a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.
26. The Ministers were invited to provide submissions on the reasons for their application of these exemptions at the time of the review. However, the Ministers declined to do so, taking the view that having disclosed the information to Mr Black, it was no longer possible to provide any such reasoning.
27. The Commissioner recognises that, while he is obliged to invite a public authority to comment on a case, there is no requirement for an authority to provide any submissions in support of its decision to withhold information. The Commissioner has some sympathy with the Ministers' wish not to provide submissions in this case after they had chosen to disclose the information under consideration.



28. The Commissioner recognises that the passage of time may mean that the sensitivity of information diminishes in the period between a review and the commencement of his investigations. Where this happens, it is an option for an authority to choose to disclose information while maintaining its view that it was exempt at the time of the review. However, such a decision does not remove the applicant's right to seek a decision.
29. In the absence of any submissions to support the application of these exemptions, the Commissioner can only conclude that they were wrongly applied at the time of the Ministers' consideration of their review of Mr Black's information request. As a result, he concludes that the Ministers acted in breach of Part 1 and section 1(1) of FOISA by refusing to supply the information that was subsequently disclosed to Mr Black during the investigation.

DECISION

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Andrew Black. By withholding the information under consideration on the grounds that it was exempt in terms of sections 29(1)(a) and (b) and 30(b) (ii) of FOISA, the Commissioner finds that the Ministers did not comply with section 1(1) of FOISA.

Given that the Ministers disclosed the information under consideration during the investigation, the Commissioner does not require them to take any action in response to these failures.

Appeal

Should either Mr Black 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.

Margaret Keyse
Head of Enforcement
21 May 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.

...

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;

(b) Ministerial communications;

...



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-

...

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

...