

Decision Notice



Decision 090/2008 Mr Tom Gordon and the Scottish Ministers

Ministerial consultation with Law Officers on civil proceedings

Reference No: 200701357

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Summary

Mr Gordon asked the Scottish Ministers to provide information relating to the occasions on which Scottish Ministers or Deputy Ministers had consulted the Law Officers in relation to civil legal proceedings, as described in paragraph 2.24 of the Scottish Ministerial Code.

The Scottish Ministers withheld the information under sections 29(1)(c), 30(b)(i) and (c), 36(1) and 38(1)(b) of Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, the Ministers released some information, but upheld their decision to withhold the remaining information under the previously cited exemptions. Mr Gordon remained dissatisfied with the Scottish Ministers' response and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Scottish Ministers had dealt with Mr Gordon's request for in accordance with Part 1 of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement), 2(1) (Effect of exemptions) and 29(1)(c) (Formulation of Scottish Administration policy etc.)

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.

The Scottish Ministerial Code: www.scotland.gov.uk/Publications/2003/08/17996/25270

Background

1. On 6 February 2007, Mr Gordon emailed the Scottish Ministers (the Ministers) requesting a breakdown of occasions on which the Ministers or Deputy Ministers had consulted the Law Officers in relation to civil legal proceedings, as described at section 2.24 of the Ministerial Code. Mr Gordon indicated that this should include the relevant dates, names of Ministers and Law Officers, the nature of the legal proceedings involved and outcomes.



2. Section 2.24 of the Scottish Ministerial Code states:

“Ministers occasionally become engaged in civil legal proceedings in their personal capacities but in circumstances that may have implications for them in their official positions. In all cases where Ministers become engaged in civil legal proceedings in their personal capacities they should consult the Law Officers before consulting their own solicitors, in order to allow the Law Officers to express a view on the handling of the case so far as the public interest is concerned or, if necessary, to take charge of the proceedings from the outset.”
3. On 6 March 2007, the Ministers responded to Mr Gordon advising him that they were withholding the requested information under sections 29(1)(c), 30(b), 30(c), 36(1) and 38(1)(b) of FOISA. The Ministers supplied Mr Gordon with details of their reasons for applying the exemptions and their consideration of the public interest test.
4. On 13 March 2007, Mr Gordon wrote to the Ministers requesting a review of their decision. He argued that the application of the exemptions relied upon by the Ministers had been disproportionate. Mr Gordon stressed that his request did not ask for the content of any legal advice and he simply wanted a breakdown of the occasions on which advice was sought.
5. The Ministers notified Mr Gordon of the outcome of their review on 3 July 2007. The review led to the modification of the original decision, and the Ministers disclosed that there had been one occasion on which the Law Officers had been consulted in terms of section 2.24 of the Ministerial Code. The Ministers confirmed the name of the Law Officer concerned and that the outcome of that consultation was that advice was provided. The Ministers maintained their decision to withhold the remaining information requested under the previously cited exemptions.
6. On 15 October 2007, Mr Gordon 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.
7. The application was validated by establishing that Mr Gordon 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

8. On 6 November 2007, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with documents which contained the information withheld from Mr Gordon along with background information about the one occasion when a Law Officer had been consulted in terms of paragraph 2.24 of the Scottish Ministerial Code. The case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted the Ministers on 5 December 2007, requesting details of the searches undertaken to locate the requested information. The Ministers responded on 19 December 2007 and also provided detailed submissions on their reliance upon the exemptions.
10. The investigating officer emailed the Ministers on 10 April 2008, clarifying the scope of the investigation and providing the Ministers with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The Ministers responded on 10 April 2008, stating that they had nothing further to add to their previous submission.
11. Mr Gordon was also invited to comment on the case. His response provided detailed arguments to support his reasoning that the information should be released.

Commissioner's analysis and findings

12. In coming to a decision on this matter, all the information and submissions that have been presented to the Commissioner by Mr Gordon and the Ministers have been considered and the Commissioner is satisfied that no matter of relevance has been overlooked.

Scope of application

13. As noted above, Mr Gordon's request for information sought a breakdown of occasions on which Ministers or Deputy Ministers have consulted the Law Officers in relation to civil legal proceedings, as described at Section 2.24 of the Ministerial Code. The particular information sought can be broken down into the following parts:
 1. Breakdown of occasions
 2. Relevant dates,
 3. Names of ministers,
 4. Names of law officers,
 5. Nature of the legal proceedings involved, and
 6. Outcomes.
14. The Ministers' review response dated 3 July 2007 provided information in respect of parts 1, 4 and 6 of Mr Gordon's request; and so this decision will consider whether the remaining parts should be disclosed. These are 2. the date(s) of the single consultation concerned, 3. the name of the Minister involved and 5. the nature of the legal proceedings involved.
15. Since the Ministers provided only limited information on the outcome of the occasion where a Law Officer had been consulted, the Commissioner has also considered whether additional information with respect to part 6 of the request (for example, providing a summary of the the advice offered, or the progress of any civil proceedings) should have been disclosed by the Ministers.



Section 29(1)(c) the provision of advice by Law Officers

16. The Ministers have applied the exemption in section 29(1)(c) of FOISA to all of the information withheld.
17. The exemption in section 29(1)(c) provides that information held by the Scottish Administration is exempt from disclosure if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The phrase "Law Officers" is defined in section 29(4) as the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland.
18. Section 29(1)(c) is a qualified exemption, which means that even if the exemption applies, the application of this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
19. In this case, the Ministers have confirmed to Mr Gordon that a Law Officer was consulted in terms of section 2.24 of the Ministerial Code on one occasion. It has also confirmed that the Law Officer concerned was Colin Boyd QC (who served as Solicitor General from 1997 -2000 and as Lord Advocate from 2000 - 2006) and that the outcome of this consultation was that advice was provided.
20. The Commissioner accepts that the information withheld from Mr Gordon relates to the provision of advice by one of the Law Officers, as it would confirm who had sought this advice, when they had done so and the nature of the proceedings to which the advice related. He also accepts that any further information relating to the outcome on the occasion where a Law Officer had been consulted would be information that relates to the provision of advice by the Law Officers.
21. Mr Gordon has questioned whether the exemption in section 29(1)(c) would apply to this information on the basis that that section 29 of FOISA is headed "Formulation of Scottish Administration Policy etc". Mr Gordon argued that the information he has requested does not relate to the formulation of Scottish Administration policy, but relates to advice given to Ministers in a personal capacity. He suggested that it was therefore unreasonable to cite this exemption.
22. The Commissioner notes that there is a degree of conflict in the authorities on statutory interpretation on the use of headings etc. in construing words in a statutory provision. The Commissioner has considered the discussion of this matter in *Cross on Statutory Interpretation* (third edition, page 124-5). Here, the authors explain that if a judge has doubt as to the meaning of a provision in a statute and the sole cause of the doubt is a disparity between clear unambiguous words in the provision and a heading or title, the judge must disregard his doubts and apply the otherwise clear words. The authors go on to state:



“If, however, the judge has doubts about the meaning of a statutory provision he is considering for some other reason, such as its lack of clarity or apparent pointlessness, he may take the title, preamble, heading or side-note into consideration in determining how those doubts should be resolved.”

23. The Commissioner has also noted the discussion in *Bennion, Statutory Interpretation* (fourth edition, 2002), in section 256, that most modern judges consider it not only their right but also their duty to take account of headings in Acts. Indeed, as *Bennion* points out, there is authority for the proposition that where general words are preceded by a heading indicating a narrower scope, it is legitimate to treat the general words as cut down by the heading (*Inglis v Robertson and Baxter* 25 R (HL) 70, [1898] AC 616).
24. Having considered the exemption in section 29(4), the Commissioner is satisfied that its meaning is clear and unambiguous. There can be no suggestion that the exemption is unclear or pointless.
25. He has also taken account of the actual wording of the heading to section 29, which is “Formulation of Scottish Administration policy *etc.*” (emphasis added).
26. Section 29(1) of FOISA contains four distinct exemptions relating to the operation of the Scottish Administration. One of these (section 29(1)(a)) applies specifically to information relating to the formulation or development of government policy. The other exemptions apply to information relating to other matters, i.e. the seeking and provision of advice by the Law Officers, communications between Ministers and the operation of their private offices.
27. The word “etc” in the title of section 29 clearly suggests to the Commissioner that the exemptions contained within it relate to matters other than policy formulation. Therefore, the Commissioner does not consider the exemptions in sections 29(1)(b), (c) or (d) to be limited to include only information that falls into the relevant categories and which also relates to policy formulation.
28. The Commissioner is therefore satisfied in this case that the information withheld by the Ministers relates to the provision of advice by one of the Law Officers and it is therefore exempt under section 29(1)(c) of FOISA.

The public interest in relation to sections 29(1)(c)

29. Having concluded that the information withheld is exempt under section 29(1)(c), the Commissioner is required to consider the application of the public interest test in section 2(1)(b) of FOISA. This test requires consideration of whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.



30. Mr Gordon has submitted that it is extremely rare in Scotland for a Law Officer to give advice to a Minister in civil legal proceedings and that this is a benefit which is only ever available to a handful of people in the country. He suggested that the mechanics of such an unusual operation of government are naturally of public interest and ought to be released.
31. He also submitted that the Minister concerned had a choice as to whether or not to consult the Law Officers. He suggested that by doing so, he brought a personal matter into the realm of government and this was a matter of public interest.
32. However, the Ministers have argued that in this case advice was given to the Minister in a private capacity and that there is a public interest in Ministers being able to obtain confidential advice in such circumstances [i.e. in contemplation of civil proceedings] in order that they can make an informed decision about how to proceed, in the full knowledge of the potential implications for discharge of Ministerial functions and for the conduct of Government business by Ministers collectively. The Ministers also submitted that there is a public interest in the Government having confidence that an individual Minister will obtain such advice before embarking on litigation.
33. The Commissioner has considered all the submissions put to him with respect to the public interest in this case. Having reviewed the terms of section 2.24 of the Scottish Ministerial Code, he is of the view that this is intended to ensure that Ministers considering civil legal proceedings in an individual capacity seek the advice of the Law Officers before doing so in order that they make any decisions on such action with a proper understanding of the implications of these for the Government as a whole.
34. The Commissioner does not consider this form of consultation to simply be a benefit offered to Ministers. He considers it to be in the public interest that Ministers are able to seek and be provided with such advice.
35. More generally, the Commissioner has pointed out in many decisions that the Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client on administration of justice grounds. Where information relates to the seeking and providing of advice by Law Officers, FOISA provides specific protection from disclosure under the terms of section 29(1)(c) of FOISA.
36. Having considered the competing arguments for and against disclosure, the Commissioner is not persuaded that there is any significant public interest in the disclosure of the information withheld in response to Mr Gordon's request.
37. He considers that disclosure of the name of the Minister, along with the nature of the proceedings concerned and the date of the consultation, would be an intrusion into the private affairs of the individual concerned. He is persuaded that disclosure would make it less likely that Ministers in similar situations in future would also consult the Law Officers. He accepts that a disclosure that would be likely to prompt this outcome would be contrary to the public interest.



38. For these reasons, the Commissioner finds that the public interest in maintaining the exemption in section 29(1)(c) outweighs the public interest in the disclosure of the information withheld by the Ministers in this case. The Commissioner therefore finds that the Ministers acted in accordance with Part 1 of FOISA by withholding this information in response to Mr Gordon's request.
39. Having reached this conclusion, the Commissioner has not gone on to consider the remaining exemptions applied to this information by the Ministers.

DECISION

The Commissioner finds that the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Tom Gordon.

Appeal

Should either Mr Gordon or the Scottish 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.

Kevin Dunion
Scottish Information Commissioner
5 August 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.

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
 - (...)
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or ...