



Scottish Information
Commissioner

**Decision 180/2007 Ms Laura Maddison and the
Scottish Ministers**

*Request for copy of letter passed between the Scottish Ministers
and Whitehall on the subject of oil and gas taxation*

**Applicant: Ms Laura Maddison
Authority: The Scottish Ministers
Case No: 200601943
Decision Date: 27 September 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 180/2007 Ms Laura Maddison and the Scottish Ministers

Request for a copy of a letter sent from the Depute Minister for Enterprise and Lifelong Learning (DETL) to his Whitehall counterpart on the subject of oil and gas taxation, along with any other related correspondence between DETL and Whitehall - information withheld under section 28(1) (Relations within the United Kingdom) of FOISA – decision upheld by the Commissioner.

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 28 (Relations within the United Kingdom).

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

Facts

Ms Laura Maddison (Ms Maddison) requested a copy of a specific letter and related correspondence between the Depute Minister for Enterprise and Lifelong Learning and his Whitehall counterpart from the Scottish Ministers (the Ministers). The Ministers identified two documents which fell within the scope of the request but withheld them citing the exemption in section 28(1) of FOISA. This decision was maintained without amendments following an internal review. Ms Maddison remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Ms Maddison's request for information in accordance with Part 1 of FOISA. He did not require the Ministers to take any action.



Background

1. On 27 September 2006, Ms Maddison wrote to the Ministers requesting the following information: a copy of the letter sent from Allan Wilson (the Depute Minister for Enterprise and Lifelong Learning at the time) to his Whitehall counterpart on the subject of oil and gas taxation as referred to in a parliamentary written answer (S2W-21461), along with any other related correspondence between the Department for Enterprise Transport and Lifelong Learning (DETL) and Whitehall.
2. On 24 October 2006, the Ministers wrote to Ms Maddison in response to her request for information. The Ministers withheld the information requested by Ms Maddison, citing the exemption in section 28(1) of FOISA.
3. On 25 October 2006, Ms Maddison wrote to the Ministers requesting a review of their decision. In particular, Ms Maddison drew the Ministers' attention to my previous decision 174/2006 (*Christine Grahame MSP and the Scottish Executive*) which required the release of certain communications between the Ministers and the Home Office concerning the detention of children at Dungavel Immigration Removal Centre.
4. On 21 November 2006, the Ministers wrote to notify Ms Maddison of the outcome of their review. In their response to Ms Maddison the Ministers upheld their original decision to withhold the information on the grounds that it was exempt from disclosure under section 28(1) of FOISA.
5. On 22 November 2006, Ms Maddison wrote to my Office, stating that she was dissatisfied with the outcome of the Ministers' review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Maddison 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.
7. On 8 January 2007, the Ministers were notified in writing that an application had been received from Ms Maddison and was asked to provide my Office with specified items of information required for the purposes of the investigation. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, asking them to provide comments on the application and to respond to specific questions.



The Investigation

9. The Ministers identified two documents (which will be referred to in this decision as document 1 and document 2, in line with the Ministers' numbering) which fell within the scope of Ms Maddison's request. In the Ministers' responses to Ms Maddison, both documents were withheld under section 28(1) of FOISA. Within their submissions to my Office the Ministers also claimed that the exemption in section 30(c) of FOISA applied to document 1.
10. Within their submissions, the Ministers advised my Office that they were awaiting advice from the HM Treasury as to the continued sensitivity of one of the documents withheld.
11. Subsequently, the Ministers confirmed to my Office that HM Treasury was content for document 2 to be released and that it was contacting the relevant policy team to ensure that this document was released and placed in the public domain. I have since received confirmation that this document has been disclosed to Ms Maddison.
12. The investigating officer subsequently contacted Ms Maddison to invite further comments following the disclosure of document 2. Her email explained that I now proposed to consider only the Ministers' decision to withhold document 1 within my decision, and invited further comments. As no further comments were received from Ms Maddison, I have not considered the Ministers' original decision to withhold document 2 any further in what follows below.

The Commissioner's Analysis and Findings

13. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Ms Maddison and the Ministers and I am satisfied that no matter of relevance has been overlooked.
14. Following my investigation, the Ministers continued to withhold only 1 of the two documents that Ms Maddison had requested. They maintained that document 1 had been withheld on the basis that the exemptions contained within sections 28(1) and 30(c) of FOISA applied.



Section 28 (1) - Relations within the United Kingdom

15. Section 28(1) provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The term “administration in the United Kingdom” is defined in section 28(2) of FOISA. In this case the Ministers consider that the disclosure of document 1 would be likely to prejudice substantially relations between the Scottish Administration and the UK Government.
16. As I have made clear in previous decisions, section 28(1) does not give a blanket exemption for all correspondence between the Ministers and the UK Government. I do not accept that the release of documents in one case should be seen as setting a precedent for the routine release of documents in all cases, which I accept might cause substantial prejudice to relations between the two administrations. In order for the exemption to apply to the information withheld in this case, the Ministers must be able to demonstrate that the release of this particular document would substantially prejudice relations between the two administrations.
17. The Ministers submitted that it is vital that a clear and uninhibited communications remain open between the Ministers and the UK Government on issues such as taxation, which can affect various reserved and devolved matters.
18. The Ministers submitted that this is particularly relevant to the content of document 1. The Ministers highlighted that where reserved policy areas have an impact on devolved matters, it is important that Scottish Ministers can put forward their views to their Westminster counterparts.
19. The Ministers suggested that if UK Ministers felt that one or other side of this correspondence might be released, that they would be less inclined to enter such exchanges with Scottish Ministers in future. The Ministers argued that this would cause real harm to its line of communication with Whitehall and would therefore substantially prejudice relations between the Ministers and the UK Government.
20. Document 1 is marked “Restricted-Policy” and reflects an exchange between Ministers of the UK and Scottish administrations. This exchange comments on the UK administration’s proposal of a windfall tax on the oil and gas industry. The outcome of deliberations by the UK administration on this subject was announced less than two weeks after this communication was sent. Although knowledge of this exchange is provided in the parliamentary written answers (SW-21461 and S2W-20095), the substance of this exchange was not disclosed.



21. I am satisfied that the content of this document engages the exemption contained within section 28(1) of FOISA. Given the relatively short period of time that has elapsed since this document was prepared and the sensitivity and recurring nature of the subject matter I accept that revealing the content of this communication would, or would be likely to prejudice substantially future engagement of matters of mutual interest and diminish the administrations' willingness to exchange information and views in such a manner.

Consideration of the public interest

22. The exemption in section 28(1) of FOISA is a qualified exemption, which means that when it is judged to apply, its application is subject to the public interest test required by section 2(1)(b) of FOISA. The public interest test requires an authority to consider whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in the disclosure of the information. Section 2(1)(b) provides that exempt information should only be withheld where the public interest in doing so outweighs the public interest in disclosure. Where the two are evenly balanced, the information should be disclosed.
23. The Ministers submitted that the release of this information would cause real harm to relations between the Scottish and UK administrations, to communications between them, and to the effective work of the Scottish government.
24. The Ministers also recognised the importance of transparency in the government's operations but determined that the complexities surrounding taxation policy and its affect on matters both reserved to Westminster and devolved to the Ministers, makes good communication especially important.
25. The Ministers argued that it is in the interest of the Scottish people that they have a trusting and amicable relationship with the UK administration. The Ministers submitted that it is essential for it to maintain the ability to keep fully informed on matters of reserved policy making and to ensure Scottish interests are taken account of.
26. I generally accept that it would not be in the public interest for relations between the Scottish and UK administrations to be prejudiced substantially and thus the counter public interest argument would have to be compelling to outweigh that in non-disclosure.
27. While I recognise that there is a general public interest in transparency by public authorities, having considered the content of this exchange in the wider context, I am not satisfied that the public interest in disclosure of this information is sufficient to outweigh the public interest in maintaining the exemption.



28. Consequently, I am satisfied that the Ministers acted correctly in withholding this document under section 28(1) of FOISA. As I have determined that the Ministers acted correctly in withholding document 1 under section 28(1) of FOISA, I am not required to consider the application of section 30(c) of FOISA.

Decision

I find that the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Maddison, and in particular that it applied the exemption in section 28(1) of FOISA correctly to the information withheld.

Appeal

Should either Ms Maddison 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
27 September 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.

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.

28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means-
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.