



Scottish Information
Commissioner

**Decision 183/2007 Mr John Ross of The Scotsman and the
Scottish Ministers**

Information about the PFI project for Inverness Airport Terminal

**Applicant: Mr John Ross of The Scotsman
Authority: The Scottish Ministers
Case No: 200600573
Decision Date: 4 October 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 183/2007 –Mr John Ross of The Scotsman and the Scottish Ministers

Advice and information relating to Inverness Airport terminal PFI contract

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 28(1) and (2)(a) (Relations within the United Kingdom); 29(1)(a) (Formulation of policy); 30(b)(i) & (ii) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality) and 38(1)(b) and (2) (Personal information)

The full text of each of these provisions is reproduced in Appendix 1, which forms part of this decision notice.

Facts

In January 2006 Mr John Ross of the Scotsman Newspaper asked for the advice given to the Scottish Ministers (the Ministers) on the public finance initiative (PFI) funding arrangements for the passenger terminal at Inverness airport, and the public sector comparator for the PFI. Some of the information covered by the request was withheld by the Ministers under various exemptions within FOISA, and Mr Ross applied to me for a decision.

During the investigation the Ministers re-examined their decision to withhold some information, and decided that a significant number of documents could now be released to Mr Ross. In reaching this decision the Ministers took into account the passage of time, during which the PFI buy-out had been completed.

After investigating the case, the Commissioner upheld the decision to withhold much of the information (and particularly legal advice) from Mr Ross, but found that some information had been wrongly withheld by the Ministers and should be released.



Background

1. During the 1990s it became apparent that the terminal at Inverness Airport was no longer fit for purpose. Highlands and Island Airports Ltd (HIAL) and its shareholder (the Secretary of State for Scotland) explored the range of options available for upgrading or replacing the facility. In 1995 it was decided that a new terminal should be constructed and that this should be financed through the Private Finance Initiative (PFI) mechanism.
2. The contract was signed in February 1998 with the original PFI owners, Noble Bank. The cost was around £9.5 million, with £3 million provided through European Regional Development Funding. Inverness Airport Terminal Limited (IATL) became the terminal owner and provided and maintained terminal facilities for use by HIAL. In return, HIAL paid the investors a set charge per passenger and IATL also received income from concessions operating within the terminal.
3. At the time the contract was agreed, the PFI option was considered to be the best value for money, but after 1998 changes in the aviation market and an increase in the number of passengers using the airport meant that the costs of the contract increased significantly, while HIAL's ability to generate income from landing charges diminished. HIAL therefore sought to buy-out the contract, having secured a deal with the PFI owners at a price less than the expected net cost of the PFI contract, which was estimated to reach £73 million by the time the contract expired in 2024.
4. The Ministers funded HIAL to buy-out the contract at a price of £27.5 million, with an additional sum of up to £8.4 million being paid to indemnify the investors against potential tax exposure. The deal was concluded in January 2006, attracting considerable interest and public comment.

Mr Ross's request

5. On 20 January 2006, Mr John Ross asked the Ministers for the advice given to them by civil servants and others on the arrangements which led to the Inverness Airport Terminal PFI deal. In particular, he asked whose idea had it been to set up a deal whereby HIAL had to pay a set amount for every passenger using Inverness Airport, and on what basis was this advice given. He also asked to see "the public sector comparator, i.e. what it would have cost to build the Inverness Airport terminal from public funds as opposed to funding it from the public sector."



6. On 10 February 2006 the Ministers provided Mr Ross with a copy of the public sector comparator and a revised summary table giving a marginal change to the Net Present Value (NPV) values. The Ministers advised that it was aware that descriptions of the cost headings on page 1 of the public sector comparator were illegible, and explained that the copy provided was an exact facsimile of the document it held.
7. The Ministers withheld information relating to advice given to Ministers in relation to legal, financial and policy aspects of the Inverness Airport Terminal PFI. It cited the exemptions in sections 29(1)(a), 29(1)(b), 30(b)(i) & (ii), 36(1), and 36(2) of FOISA.
8. Mr Ross asked for a review of the Ministers' decision on 13 February 2006. He complained that the information provided on the public sector comparator was insufficient and unhelpful, consisting of a list of figures without explanation, and also complained that the headings were illegible. Regarding the illegible headings, he pointed out that someone must know what these headings were and sought a proper explanation. He challenged the decision to withhold the advice to Ministers, and in particular the view that all this information was confidential in nature.
9. The Ministers replied on 14 March 2006. The Ministers noted that in the period since Mr Ross made his initial request, an electronic version of the public sector comparator had come to light and had been supplied to him: this resolved the problem of the legibility of the original copy and it was suggested that the formulae built into the spreadsheet should help explain how the model worked.
10. The Ministers upheld the decision to withhold information relating to advice to Ministers, and additionally cited the exemption in section 30(a) of FOISA in relation to exchanges between officials and Ministers. The Ministers decided that the exemption in section 29(1)(b) of FOISA did not apply to any of the information withheld from Mr Ross. The Ministers gave their reasons for considering that the public interest in withholding the information outweighed that in disclosure (these reasons are discussed fully later in this decision notice).
11. Mr Ross applied to me for a decision on 15 March 2006. He summarised the details of the PFI buy-out, and commented that the government had ended up paying four times the value of the terminal building; HIAL had been restricted in developing the airport; and passengers in the Highlands had been denied new routes. At the same time, the investors received £46 million for their initial £5.5 million investment. Mr Ross felt that as the deal had involved huge sums of public money and had effectively hindered HIAL, a state-owned company, it was in the public interest for details of the contract and the advice on which it was based to be revealed.



12. An investigating officer was allocated to the case, and Mr Ross's application was validated by establishing that he had requested information from a Scottish public authority, and had appealed to me only after requesting the authority to review its response to his requests.

The Investigation

13. A letter was sent to the Ministers on 21 March 2006, informing them that an application had been received from Mr Ross and that an investigation into the matter had begun. The Ministers' comments were sought in terms of section 49(3)(a) of FOISA.
14. For clarity, it should be explained that a similar request for information relating to the Inverness Airport Terminal PFI project was already the subject of an investigation by my Office (this application was subsequently withdrawn). The Ministers had already provided my Office with copies of the information withheld and their submission on the use of the exemptions they had applied. The Ministers were invited to provide any further explanation of their position.
15. On 31 March 2006 the Ministers advised that their case for the exemption of the advice behind the PFI deal remained as stated in relation to the earlier application.

Further release of information

16. During the course of the investigation, the Ministers were asked for further comment and explanation in relation to several points in their submission to my Office. The Ministers took the opportunity to review the decision to withhold information from Mr Ross, and went on to release a significant proportion of the information withheld. The Ministers also revised their application of exemptions to the remaining information and provided my Office with a revised schedule of documents.
17. The Ministers explained that in making the decision to release these documents they had taken into account that the PFI contract buy-out had now been completed, and had also considered the length of time which had passed since the buy-out and since the Ministers first responded to me in relation to the application received from Mr Ross and the earlier application.



18. While the Ministers considered that the exemptions in section 29(1) and section 30(b)(i) and (ii) still applied to the information, they had concluded that the public interest in releasing the information was no longer outweighed by that in maintaining the exemption. The Ministers stressed that this conclusion was based on a consideration of the public interest test as it now stood, and was not a reconsideration of the public interest test at the time that the request was made.
19. The Ministers withdrew some exemptions from the information which was still withheld. The Ministers provided reasons why certain information should continue to be withheld under various exemptions: these are discussed in the next section of this decision notice. The Ministers also found that two documents should be withheld under section 28(1) of FOISA, which had not previously been cited.
20. Following the release of some information, referred to above, the investigating officer contacted Mr Ross to ask whether he had found the information sufficient to satisfy his requests. Mr Ross advised that he still required a decision from me.

The Commissioner's Analysis and Findings

21. 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 Mr Ross and the Ministers and I am satisfied that no matter of relevance has been overlooked.
22. As noted previously, the Ministers have revised the exemptions applied to some of the information which continues to be withheld. Where the Ministers have indicated that they no longer wish to rely upon certain exemptions in relation to particular documents, I have accepted this and have considered only the exemptions indicated in the revised schedule of documents provided to me in March 2007 (see Appendix 2).



23. Mr Ross has expressed concerns that, by releasing some of the information to him during my investigation, the Ministers will not be accountable for their original decision. I should make it clear at this point that I do not intend to consider whether, in all cases where information has now been released, the Ministers were justified in withholding information at the time of the original request. However, when considering the Ministers' arguments as they relate to the information currently withheld, I will give some indication of the principles which would have informed my decision on the information now disclosed. I have found that, on the whole, the Ministers' arguments supporting the use of exemptions are essentially unchanged from their original submission.
24. I must also make it clear that my decision examines the Ministers' response to Mr Ross as issued at the time his request was received. Although the passage of time has been a factor in the Ministers' recent decision to release some information, I can only take into account circumstances as they existed at the time when Mr Ross made his request and the Ministers issued their response. For this reason, it is possible that I would not have ordered disclosure of some of the information which the Ministers have now decided to release.

Information requested

25. As noted in paragraph 5 above, Mr Ross requested "the advice given to Ministers by civil servants and others on the arrangements which led to the PFI deal" and the public sector comparator.

The public sector comparator

26. Mr Ross was initially provided with a copy of the public sector comparator in which the spreadsheet headings were illegible (as the Ministers acknowledged when providing the information). Eventually Mr Ross received another copy of the information in which the headings were legible. However, in his application to me he complained that he had not been given any explanatory notes.
27. While Mr Ross did not initially ask for explanatory notes to be provided with the public sector comparator, his request for review makes it clear that he was looking for some additional explanation of the information, which consists of a list of figures.
28. The problem of interpreting the public sector comparator data was partially solved when the Ministers produced another version of the information in which the headings were legible. However, in his application to me, Mr Ross complained that he had not received any explanatory notes.



29. The Ministers have advised me that no generic explanatory notes are held about the comparator. However, I am not satisfied that the Ministers fully met the requirements of section 15 of FOISA (Duty to provide advice and assistance) in initially providing Mr Ross with information which was clearly incomplete (in being partially illegible) and with no accompanying explanation which would assist him in the face of this difficulty.

The advice provided to Ministers

30. Parliamentary Answer S1W-19401 indicates that advice was received from Dundas & Wilson, Ernst & Young, Scottish Airports Limited, Thomas & Adamson, The Scottish Office, HM Treasury and its PFI Unit. However, the Ministers have explained to me that Scottish Airports Ltd and Thomas & Adamson provided advice not to the Ministers but to HIAL: the advice related to technical estates matters and quantity surveyor services and as such had no direct bearing on the PFI business case and was of no direct interest to the Ministers.

Application of the exemption in section 36(1) - Confidentiality

31. The Ministers withheld the advice it had received from other bodies under various exemptions in FOISA. I shall first consider the application of the exemption in section 36(1) (Appendix 2 lists the documents in respect of which this – and the other exemptions considered in this decision notice – were cited. Appendix 2 forms part of this decision.)
32. Additional exemptions have been applied to a small number of these documents; however, where I find that the exemption in section 36(1) should be maintained, I will not go on to consider any further exemptions applied to the information by the Ministers.
33. Section 36(1) of FOISA exempts information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. It covers legally privileged advice from a solicitor to a client and privileged information passed by a client to their solicitor. The public authority, as client, has the right to waive this privilege. The exemption is subject to the public interest required by section 2(1)(b) of FOISA.



34. During the investigation I considered whether in some cases the privilege attached to the legal advice received by the Scottish Office and HIAL from their respective solicitors may have been waived because the advice had been shared with each other. Having considered the position here, I am satisfied, given that the parties had a common interest in the information, that the information was disclosed to each other without the parties waiving privilege more generally. On that basis, I accept that the privilege in the legal advice provided by the Scottish Office solicitors and Dundas and Wilson has not been waived by the sharing of that advice between HIAL and the Scottish Office, who were parties with a common interest, and so this information is exempt from disclosure under section 36(1) of FOISA.
35. I found that document 2, withheld under section 36(1), did not constitute legal advice and did not attract legal professional privilege. I therefore found that the exemption in section 36(1) had been wrongly applied to the information in document 2. Given that no other exemptions were applied in respect of this document, I require the Ministers to release document 2 to Mr Ross.
36. In relation to the other information withheld under section 36(1), I found that the exemption had been correctly applied.
37. Section 36(1) is subject to the public interest test contained in section 2(1)(b) of FOISA and I must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information withheld is outweighed by the public interest in maintaining the exemption.
38. 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. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and Others v Governor and Company of the Bank of England* (2004) UK HL 48 (<http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>).
39. In Decision 023/2005 (*Mr David Emslie and Communities Scotland*) I concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, while I will consider each case on an individual basis, I am likely only to order the release of such communications in highly compelling cases.
40. The public interest issues in favour of releasing the information might include enhanced scrutiny of the legal advice on which the decision to use PFI funding for the Inverness Airport Terminal was taken; by extension, this might assist effective oversight of expenditure of public funds and obtaining value for money.



41. It might also be in the public interest to order disclosure where the information would make a significant contribution to a matter which has been the subject of much public debate.
42. In favour of maintaining the exemption, I must consider the public interest in allowing an authority to communicate its position to its advisers fully and frankly in confidence, in order to obtain the most comprehensive legal advice to defend its position adequately should that become necessary. I must also consider the public interest in allowing a public authority to receive comprehensive legal advice about its proposed actions.
43. I must also consider the argument submitted by the Ministers, that disclosure of some of the information withheld under section 36(1) would have significant implications for HIAL's business dealings in future. I have examined the Ministers' arguments in respect of this issue and have accepted that this is a likely outcome of disclosure, and one which would not be in the public interest.
44. On balance, I have found that where the exemption in section 36(1) has been correctly applied to the information withheld, there is greater public interest in maintaining the exemption than in disclosure of the information.

Information withheld under section 29(1)(a)

45. For information to fall under the section 29(1)(a) exemption, it must relate to the formulation or development of government policy, i.e. to the development of options and priorities for the Ministers, who will subsequently determine which options should be translated into political action, and when. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. Development suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
46. The reasoning behind the section 29(1)(a) exemption in FOISA is to ensure that, where appropriate, Scottish Administration policy can be formulated and developed effectively by allowing the Administration to discuss matters in a candid and frank manner.
47. The documents withheld under section 29(1)(a) are set out in Appendix 2. As I have already found that two of these (documents 27 and 45) should be withheld under section 36(1), I will not consider whether any other exemptions should also apply. Otherwise, I am satisfied that the information in the documents listed above relates to the formulation of government policy on the awarding of the PFI contract for Inverness Airport terminal and that the exemption in section 29(1)(a) therefore applies.



48. Section 29(1)(a) is subject to the public interest test contained in section 2(1)(b) of FOISA and I must therefore consider whether, in all the circumstances of the case, the public interest in disclosing the information withheld is outweighed by the public interest in maintaining the exemption.

Section 29(1)(a) - the public interest test

Of interest to the public?

49. The Ministers have acknowledged that following their decision to buy out the PFI deal, there was considerable interest in the initial policy decision to use this method of funding the airport terminal development. This point was also made by Mr Ross in his application to me. The Ministers have submitted that the issue to consider is not what is of interest to the public but what is in the public interest.

50. In my guidance on the public interest test, available on my website at <http://www.itspublicknowledge.info/legislation/briefings/publicinterest.htm>, I note:

“The term [public interest] is not defined within [FOISA] but it has been variously described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has also been held that public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. it serves the interests of the public.”

51. I accept that, for disclosure of information to be seen to be in the public interest, there must be other considerations besides assessing the level of general interest in the subject matter. However, I do not exclude the possibility that the public may find a subject interesting because it raises questions about how the general public interest has been or may be served by a certain decision or course of action. In my guidance on the public interest test I also note:

“...it has been recognised that where the information requested relates to a high profile issue that has featured heavily in the media and which involves the accountability for public funds, there will be a strong public interest in releasing that information.”¹

¹ Case A.26/01, Refusal to provide copies of correspondence between FCO and DTI relating to human rights issues and the Ilisu Dam. <http://www.ombudsman.org.uk/pdfs/par01.pdf>.



52. In this case it seems to me that the focus of the public's interest in the Inverness Airport Terminal PFI has been largely centred on the extent to which the PFI contract offered value for money. I accept that there is a genuine public interest in disclosure of information which would ensure effective oversight of such public expenditure, and that this should be taken into account in determining whether the public interest in this case lies in disclosure of information or in maintaining the exemptions applied by the Ministers.

Public interest in high quality decision making

53. The Ministers have argued that there is a strong public interest in ensuring that, where necessary, policy formulation and development in sensitive areas can take place in a non-public arena: this will enable rigorous and frank debate about the merits and demerits of alternative courses of actions, without fear that such considerations will be picked over out of context.
54. The Ministers stated that while the public interest test must be considered on a case by case basis, in such instances as these where the information requested related to an important process (e.g. the provision of advice in order to reach policy decisions) it can be the process itself which it sought to protect by withholding the information requested.
55. My views on the public interest test in relation to the formulation and development of government policy have been set out in decision 075/2006 (Paul Hutcheon and the Scottish Executive [Ministers]). I will not repeat my views in full in this Decision notice but refer to paragraphs 52 – 57 of decision 075/2006, summarised below.
56. In decision 075/2006 I found that an assessment of the public interest must be made independently of whether the information falls within the class covered by the exemption in section 29(1)(a). A presumption that harm would occur if information within this class were to be released would alter the balance contained within the public interest test. Section 2(1)(b) is worded in such a way as to assume that disclosure would be in the public interest rather than in withholding it. The assumption that information held by government is secret unless there are reasons to the contrary has been replaced by the assumption that information held by government is available unless there are reasons to the contrary.



57. In decision 075/2006 I also considered the Ministers' argument that it would be in the public interest to protect a process necessary for policy development or formulation. Again, I will not repeat my views in full in this Decision notice but will instead refer to paragraphs 68 – 71 of decision 075/2006. In summary, I found no evidence to support the Ministers' view that section 29(1)(a) can be cited in order to protect a process and, even if I were to accept that contention, it does not follow that the overriding public interest must be to consolidate that protection. I found that due to the class nature of section 29(1)(a) authorities must consider the actual content of the information when considering the public interest test. I am unable to accept an approach which casts a blanket protection, on public interest grounds, over a class of information without any consideration of the content or context of the information.
58. During the investigation the Ministers provided further explanation why they considered that the public interest in withholding certain information outweighed any public interest in its disclosure. The Ministers found that the public interest considerations for sections 29(1)(a) and 30(b)(i) and (ii) were closely interlinked, and dealt with them both together. At this point, I will consider the arguments only as they relate to information withheld under section 29(1)(a).

Public interest in preserving good relationships with third parties (docs 6 and 16)

59. The Ministers noted that some of the information withheld relates to third parties, and advised that its disclosure would have serious implications both for future policy making and for HIAL's dealings with other organisations. The Ministers referred specifically to certain information within documents 6 and 16.
60. Two sentences from document 6, and two sentences from document 16 were withheld on the grounds that the information consists of subjective assessments of potential tenderers which were based on negotiations and conversation, not on any objective data in the public record, and that these views could reflect adversely on the parties concerned if made public. The Ministers argued that disclosure of such information would have serious implications for future policy making for the Ministers and for HIAL's dealings with other organisations. In particular, the Ministers believed that the information withheld from document 6 could seriously impact on relations with the party concerned and limit options available to the Ministers and to HIAL. The Ministers took the view that this would be to the detriment of future development and formulation of policy and would not be in the public interest.



61. The Ministers were asked whether the passage of time and the completion of the PFI buyout during this period would have lessened the detriment caused by disclosure by the time Mr Ross made his request. The Ministers explained that although the buy out was complete, this did not mean that the relationships with the potential tenderers were completely ended; for example, they may tender for other contracts in the future. The Ministers continue to view disclosure of the information as likely to impact on future relations with the bodies involved in the tender negotiations.
62. I note that a substantial amount of factual information about the preferred tenderer has already been disclosed by the Ministers. The argument for withholding the information in document 6, and two sentences from document 16, is that the information consists of subjective views on the potential tenderers, expressed before agreement was reached with the Treasury on funding policy.
63. I have studied the information withheld in documents 6 and 16. Although it may be the case that the views communicated there were not based on any objective data in the public record, I do not agree that the information is essentially subjective in nature. It summarises part of the history of the PFI project and is a description of verifiable actions rather than a record of subjective views.
64. I do not accept that the information in document 6 would, if disclosed, be likely to seriously limit the future development and formulation of policy. I do not consider the factual summary of part of the tendering process to be sufficiently sensitive to deter or dissuade any third party from dealing with either the Ministers or HIAL in future. On balance, therefore, I do not accept the Ministers' view that the public interest (in relation to section 29(1)(a)) lies in maintaining the exemption in relation to the information about potential tenderers in either documents 6 or 16.
65. The Ministers also withheld several sentences from document 16 on the grounds that the information explores potential problems and solutions in dealings with a particular body, which, if disclosed, could have significant implications for HIAL in their dealings with this body in future. During the investigation the Ministers provided additional background information to explain their reasoning on this point.
66. I have accepted that disclosure of this information would be likely to limit options for HIAL in dealing with this body in future, and that this would not be in the public interest.



67. Before reaching my final decision on the balance of the public interest in relation to the information withheld from documents 6 and 16 I have also taken into account the other public interest arguments offered by the Ministers in relation to all information withheld under section 29(1)(a), as discussed in paragraphs 49 – 77 of this Decision Notice. My conclusion is as set out in paragraphs 78 and 79 below.
68. The information withheld from documents 6 and 16 under section 29(1)(a) has also been withheld under section 30(b)(i), which is considered later in this Decision Notice.

Public interest in ensuring effective internal communication

69. The Ministers argued that there is a public interest in protecting internal communications in cases where the likely effect of releasing information would be the suppression of effective communication in the future, such as advice or discussion being oral rather than written down. The Ministers commented that they would not suggest that the public interest lay in withholding internal communications where officials had used strong or trenchant language, which would focus the exemption on rigorous, outlandish or unusual statements. Rather, the public interest test should focus on the real impact of releasing the information.
70. I accept much of the Ministers' argument in principle: I agree that there is considerable public interest in ensuring that Ministers are fully informed about the various factors involved when decisions are taken, and that if officials were substantially inhibited from providing advice or views in a free and frank manner, this could ultimately impinge upon the quality of the decision. There is clearly a strong public interest in avoiding such an outcome.
71. Where the information withheld gives details of the negotiating position and possibilities explored by the Ministers, I accept it is possible that disclosure may, at the time of the information request, have had a detrimental effect on any future negotiations between the Ministers or HIAL and the third parties named. Although the results of the negotiation are now public knowledge, the strategy of the negotiators is not, and I accept that to reveal details of the strategy adopted might affect future negotiations in relation to this matter, and might inhibit officials from committing such information to record in the future.
72. Against the arguments submitted by the Ministers I have considered two general principles relating to the concept of the public interest.
73. The first principle is that there is a general public interest in information which contributes to the effective oversight of public expenditure and the obtaining of value for money.



74. In this case it is clear that, for whatever reasons, the actual cost of financing the Inverness Airport Terminal was far greater than anticipated when the decision was taken to use PFI rather than public sector funding. The impact on HIAL was such that after seven years a decision was taken to buy back the PFI contract from the private investors. The cost of doing so, while far less than the projected cost of letting the PFI contract run its course, was around four times greater than the actual building costs incurred in developing the terminal. I am in no doubt that there is considerable public interest in Ministers and officials being accountable for public expenditure in circumstances where spending has deviated significantly from the initial expectations and plans. It seems likely that this public interest would be served by disclosure of information which would confirm the basis for the decision to opt for PFI funding for this project.
75. The second principle I considered is the general public interest in making information accessible where disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation. In his application to me, Mr Ross wrote:
- “Politicians of all colours, as well as local business people and the general public are wondering how such a deal came about. As this involves huge sums of public money...I felt it right that details of this contract, and on what advice it was drawn up, should be revealed in the public interest.”
76. As I stated in decision 077/2006 (Paul Hutcheon and the Scottish Executive), there is a general public interest in making information held by public bodies accessible to enhance scrutiny of decision-making processes and thereby improve accountability and participation. This goes to the heart of freedom of information legislation. Without an adequate knowledge of the basis upon which decisions are made, the public will not have an opportunity to call public authorities to account; nor can they hope to participate in the decision-making process and contribute to the formation of policy and legislation if that process is hidden from view.
77. On this basis it seems likely that the public interest would be served by disclosure of information which would further explain the decision to proceed with PFI funding for the airport terminal, and would allow some scrutiny of the process by which that decision came to be finalised.
78. After balancing the competing public interests in this matter, I have concluded that the over-riding public interest lies in the disclosure of information which relates closely to the choice of PFI funding rather than public sector funding, either by showing how the two options compared or by showing the process followed in making the decision to opt for PFI funding. This decision had huge financial implications for the public purse. I have found that the public interest in disclosure of such information outweighs any other consideration in relation to most of the information withheld under section 29(1)(a).



79. However, for the reasons outlined above in paragraph 71 I have found that the balance of the public interest lies in withholding certain information from document 8. Similarly, for the reasons set out in paragraphs 65 and 66 I have found that the balance of the public interest lies in withholding certain information from document 16.

Information withheld under section 30(b)(i) and (ii)

80. The exemptions in sections 30(b) of FOISA allow public authorities to withhold 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)). Both of these exemptions are subject to the public interest test required by section 2(1)(b) of FOISA.
81. I have previously expressed the view that in section 30(b) of FOISA, the chief consideration is not whether the information itself constitutes advice or the exchange of views for the purposes of deliberation (although that will be relevant in most cases), but whether the release of the information that has been withheld would or would be likely to inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
82. Again, the documents withheld (either in part or in full) on the basis of the exemptions in section 30(b)(i) and (ii) are listed in Appendix 2. I have already found that documents 27 and 45 contain information which should be withheld under section 36(1), and I will not consider whether the exemptions in section 30(b) should also be upheld in relation to these.
83. The Ministers have argued that these documents relate to free and frank debate, or to free and frank provision of advice, about the merits of different courses of actions and exploration of potential loopholes or weaknesses in the contract. It is felt that release of such information would be likely to prejudice substantially future communications and the quality of advice and discussion. If officials felt this type of information was likely to be released they would be less inclined (it is argued) to explore all possibilities and options in future, particularly if issues are of a politically sensitive nature.
84. In a letter dated 2 May 2007, the Ministers also provided me with a further submission regarding their views on the exemptions in section 30(b)(i) and (ii), and advised me that they wish these views to be taken into consideration in relation to any case in which these exemptions have been cited.



85. While I have considered the arguments put forward by the Ministers in their letter of 2 May 2007, my views on the Ministers' revised position on section 30(b) are set out fully in Decision 089/2007 (Mr James Cannell and the Scottish Executive) and I do not consider it necessary to add anything in relation to these arguments in this decision notice.
86. In summary, I take the view that the main consideration in determining whether this group of exemptions is triggered is not so much whether the information constitutes advice or (as the case may be) an exchange of views – although obviously that will be relevant in many cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the relevant exemption to apply. In this connection, I look for authorities demonstrating a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves should be of some real and demonstrable significance.
87. In relation to document 16, the Ministers have described the specific harm which they believe would result from disclosure of the information. Although they have not expressly argued that this in turn would be likely to cause substantial inhibition among officials providing advice or views in future, I am willing to accept that this might well be the consequence, if the anticipated outcome were to occur.
88. I have found that information already disclosed in relation to this case shows that the issues discussed in document 16 caused some difficulties during the negotiations, while the solution that was eventually discovered has also been revealed. It seems to me that the information withheld in document 16 does not add much more to what has already been made public, and I do not accept that disclosure would have the harmful consequences anticipated by the Ministers. I make an exception for one sentence dealing with legal advice received by the Ministers.
89. The Ministers have not provided any other specific examples of the harm which they believe would result from disclosure of the information withheld under section 30(b)(i) and (ii). After considering the content and context of the information I have not found any reason to uphold the use of these exemptions. With the exception of certain information within document 16, I have found that the exemptions in section 30(b)(i) and (ii) were wrongly applied.



90. In relation to the information in document 16 to which the exemption in section 30(b)(i) has been correctly applied, section 2(1)(b) of FOISA requires me to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
91. As noted previously, the Ministers found that the public interest considerations for sections 29(1)(a) and 30(b)(i) and (ii) were closely related and, indeed, the Ministers dealt with them together. The Ministers' arguments have been summarised in the section of this Decision Notice dealing with the exemption in 29(1)(a), above.
92. In paragraph 65, I noted that the Ministers had withheld several sentences from document 16 on the grounds that the information explores potential problems and solutions in dealings with a particular body, which could limit the options available to HIAL in their dealings with this body in future. In relation to the information withheld from document 16, paragraphs 27 and 30 and Annex C, I accept that this would be a likely outcome of disclosure, and one which would be likely to inhibit officials from providing similar sensitive advice in future.
93. I also accept that disclosure of the information withheld from paragraph 7 of document 16 would be likely to inhibit officials from providing similarly free and frank advice to Ministers in future, because of the sensitive nature of that advice.
94. I have considered and accepted the Ministers' arguments that such inhibition would be to the detriment of the decision-making process in formulating policy, and as such, would be against the public interest. I have weighed this against the public interest in disclosing the information, which would allow a full understanding of the way in which certain issues were presented to Ministers. On balance, I have found that the public interest lies in maintaining the exemption in section 30(b)(i) in relation to the information in question, and that it should be withheld.
95. For details of my decision on whether particular information should be released or withheld, see Appendix 2 below.

Information withheld under section 28(1)

96. Information from documents 77 and 88 was withheld from Mr Ross on the ground that it was exempt from disclosure under section 28(1) of FOISA, which allows information to be withheld if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.



97. 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 certain information from documents 77 and 88 would cause substantial prejudice to relations between the Scottish Administration and the UK Government.
98. The Ministers have explained that the Treasury was consulted on the question of whether or not the information in documents 77 and 88 should be disclosed.
99. The Ministers provided a copy of the email received from the Treasury, in support of their arguments. The email makes it clear that the Treasury considered that the information in question was not covered by the terms of the Mr Ross’s requests. No other reason was given by the Treasury for seeking to withhold the information, with the exception of one paragraph in document 77 which contains some personal contact details.
100. The Ministers have confirmed that although it agrees with the Treasury’s view that the information in question falls outside the scope of the request, it wishes to rely upon the exemption in section 28(1) to withhold the information.
101. I find this to be an odd approach. If the information falls outside the scope of Mr Ross’s request, there is no need to consider whether it should be provided under section 1(1) of FOISA or whether any exemptions apply.
102. I have examined the information withheld. I found that it related mainly, though not completely, to other projects funded by PFI. However, it is clear that these projects were discussed in order to provide points of comparison with the circumstances affecting the Inverness Airport Terminal PFI. Contrary to the Treasury and the Ministers, I believe that the information about the other PFI projects is covered by the scope of Mr Ross’s request because it forms part of the wide range of advice provided to the Ministers about the Inverness Airport Terminal PFI project. I also note that case studies on other projects were disclosed to Mr Ross in response to his request, presumably on the basis that they fell within the scope of his request.
103. As I have found the information to be within the scope of Mr Ross’s request, I have gone on to consider whether the information is exempt from disclosure under section 28(1).
104. As noted previously, with the exception of one sentence containing personal contact details, the only reason given by the Treasury for seeking to withhold the information was that it fell outside the scope of the requests. The Treasury did not offer any predictions of harm likely to occur from disclosure of the information.



105. The Ministers have argued that to disclose information which the Treasury has asked them not to release would undoubtedly cause real harm to communications between the Ministers and Whitehall and could prejudice substantially relations between the Ministers and the UK Government.
106. The Ministers referred to the Memorandum of Understanding between the UK Government and the devolved administrations² and to the concordat between the Scottish Ministers and the DETR which established an agreed framework for co-operation, joint working and exchange of information between the two administrations. It argued that the complexities surrounding the PFI contract for Inverness Airport terminal included matters both reserved to Westminster and devolved to the Scottish Ministers, which made good communication especially important.
107. It seems clear to me that the reason why the Treasury considered that certain information should not be provided was not that disclosure would be likely to have particular harmful consequences, but that the information fell outside the scope of Mr Ross's request. I have shown why I have taken a different view. As there is no indication that the Treasury anticipated any harmful consequences from disclosure I find it hard to accept that Treasury officials would be so concerned by the disclosure of the information in question as to substantially prejudice relations between the two administrations.
108. I will not comment further on the Ministers' arguments in relation to section 28(1) except to point out that the Memorandum of Understanding referred to by the Ministers includes the following acknowledgement in paragraph 9:
- “These exchanges between administrations may be subject to restrictions or requirements, such as those relating to confidentiality or freedom of information.”
109. I find that the Ministers have misapplied the exemption in section 28(1) to the information withheld in documents 77 and 88. As the exemption does not apply, I am not required to go on to apply the public interest test in section 2(1)(b).
110. I require the Ministers to release documents 77 and 88. I make an exception for the last paragraph of the letter in document 77: this constitutes personal data which, if disclosed, would breach the first data protection principle (as laid down in the Data Protection Act 1998) and, accordingly, I find it to be exempt in terms of section 38(1)(b) of FOISA.

² <http://www.scotland.gov.uk/library2/memorandum/default.htm>



Decision

I find that the Scottish Ministers (the Ministers) partially complied with Part 1 of FOISA in responding to the request made by Mr Ross. However, I also find that the Ministers failed to comply with Part 1 of FOISA by wrongly withholding some of the information requested under the exemptions it cited and, in doing so, failed to deal with the request made by Mr Ross in accordance with section 1(1) of FOISA.

I also find that the Ministers failed to provide Mr Ross with reasonable advice and assistance in relation to part of his information request, and thereby failed to comply with section 15 of FOISA. I do not require the Ministers to take any action in respect of this failing.

However, I require the Ministers to provide Mr Ross with the information indicated in Appendix 2 within 45 days of the date of intimation of this decision notice.

Appeal

Should either Mr Ross or the Ministers wish to appeal the 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 the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
4 October 2007



Appendix 1 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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



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

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;

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

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.



38 Personal information

- (1) Information is exempt information if it constitutes –
 - (...)
 - (b) personal data and either the condition mentioned in subsection (2) (the “first condition”) or that mentioned in subsection (3) (the “second condition”) is satisfied;
 - (...)
- (2) The first condition is –
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of information to a member of the public otherwise than under this Act would contravene -
 - (i) any of the data protection principles; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.



Appendix 2

Schedule of documents: (as revised March 2007 following the Scottish Ministers' decision to release some information)

Key:

Y = exemption applies

N = exemption wrongly applied

NC = exemption not considered

PI – N = public interest lies in maintaining exemption and withholding information

PI – Y = public interest lies in disclosure of information

Brief description /date /	Content to which exemption(s) applied	Exemptions applied	Exemptions upheld	Public interest	OSIC decision
2. Letter (6/1/1998) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) - N		Release
6. Submission (23/12/1997) Bill McQueen to PS/Minister of State	Part (paragraph 3, 6 th & 7 th sentences)	Section 29(1)(a) Section 30(b)(i)	29(1)(a) – Y 30(b)(i) - N	PI - Y	Release
8. Minute (23/12/1997) Bill McQueen to Secretary Development Department	Part (paragraph 12, 5 th , 6 th & 7 th sentences)	Section 29(1)(a), 30(b)(i)	29(1)(a) – Y 30(b)(i) - N	PI – N	Withhold
9. Minute (23/12/1997) Bill McQueen to PFI unit, covering 'fax from Dundas & Wilson	All	Section 29(1)(a) and 36(i), 30(b) (ii)	29(1)(a) – Y 30(b)(ii) - N 36(1) – Y (fax)	PI – Y (minute) PI - N (fax)	Release minute, withhold fax
10. Fax (23/12/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
15. Minute (21/12/1997) PFI Unit to Bill McQueen	All	Section 29(1)(a), 30(b)(i) & (ii)	29(1)(a) – Y 30(b)(i) & (ii) - N	PI – Y	Release
16. Minute (19/12/1997) Bill McQueen to Secretary Development Department	Part (paragraph 7, 2 nd & 3 rd sentences; paragraph 27, 4th sentence first clause;	Section 29(1)(a), 30(b)(i)	29(1)(a) – Y 30(b)(i) – Y (part)	PI – Y for paragraph 29, 2 nd and 3 rd sentences.	Release paragraph 29, 2 nd and 3 rd sentences in full.



	paragraph 29, 2nd sentence apart from 1st clause, and 3rd sentence; paragraph 30; & Annex C, 2nd paragraph 4th sentence 2nd clause)			PI – N for paragraph 7, 2nd and 3rd sentences (in relation to s.30(b)(i)); paragraph 27, 4th sentence first clause; paragraph 30; Annex C, 2nd paragraph 4th sentence 2nd clause.	Withhold paragraph 7, 2nd and 3rd sentences; paragraph 27, 4th sentence first clause; paragraph 30 in full; Annex C, 2nd paragraph 4th sentence 2nd clause.
17. Minute (19/12/1997) Scottish Office Solicitors to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
18. Letter (19/12/1997) Bill McQueen to Dundas & Wilson (with 17 attached)	All	Section 36(1)	36(1) - Y	PI - N	Withhold
19. Minute (18/12/1997) Scottish Office Solicitors to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
20. Minute (18/12/1997) PFI Unit to Bill McQueen	All	Section 29(1)(a), 30(b)(i) & (ii)			Not considered separately as duplicate of doc 15 (but without manuscript notes).
21. Fax (18/12/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) – Y	PI - N	Withhold
22. E-mail covering draft minute (17/12/1997) Peter Conlong to Ernst & Young (doc 16)	All	Section 29(1)(a), 30(b)(i) & (ii)	29(1)(a) – Y 30(b)(i) & (ii) - N	PI – N	Withhold
25. Fax (11/12/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) – Y	PI - N	Withhold



27. Letter (9/12/1997) Bill McQueen to HIAL Includes copy of doc 31, already released	All	Section 29(1)(a) and 36(1), 30(b)(i) & (ii)	29(1)(a) – NC 30(b)(i) & (ii) - NC 36(1) – Y	PI – N	Withhold
32. Fax (5/12/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
33. Letter (5/12/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) – Y	PI - N	Withhold
36. Letter covering contract synopsis (26/11/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
38. Fax (24/11/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
39. Fax (21/11/1997) HIAL (covering Dundas & Wilson letter) to Bill McQueen	Part (Dundas & Wilson correspondence)	Section 36(1)	36(1) - Y	PI - N	Withhold
45. Letter (13/11/1997) Dundas & Wilson to Bill McQueen Includes draft of doc 16, part released.	All	Section 36(1), 30(b)(i)&(ii), 29(1)(a)	29(1)(a) – NC 30(b)(i) & (ii) – NC 36(1) - Y	PI - N	Withhold
51. Minute (22/9/1997) SO Solicitors to Bill McQueen	All	Section 36(1)	36(1) - Y	PI – N	Withhold
52. Fax (12/9/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) - Y	PI - N	Withhold
62. Minute (16/7/1997) SO Solicitors to Bill McQueen	All	Section 36(1)	36(1) - Y	PI – N	Withhold
74. Letter (10/3/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) – Y	PI - N	Withhold



75. Draft minute (11/3/1997) Bill McQueen to Secretary Development Department (Draft of doc 16, mostly already released.)	All	Section 29(1)(a), 30(b)(i)&(ii)	29(1)(a) – Y 30(b)(i) & (ii) - N	PI - N	Withhold
76. Minute (24/2/1997) SO PFI Unit to Bill McQueen	All	Section 29(1)(a), 30(b)(ii)	29(1)(a) – Y 30(b)(ii) - Y	PI - N	Withhold
77. Letter (20/2/1997) HM Treasury to Bill McQueen	Part (paragraphs 6, 7, 10 & 11 of letter of 20/2/1997 and attached minute and briefing note)	Section 28(1)	28(1) - N		Release, with exception of last paragraph in letter which is personal data exempt under 38(1)(b).
79. Letter (17/2/1997) from HIAL to Scottish Office	Part (Dundas & Wilson correspondence)	Section 36(1)	36(1) – Y	PI - N	Withhold
80. Fax (12/2/1997) from Dundas & Wilson to Scottish Office	All	Section 36(1)	36(1) – Y	PI - N	Withhold
85. Fax (10/2/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) – Y	PI - N	Withhold
88. Fax (10/2/1997) HM Treasury to Bill McQueen	Part (manuscript comments)	Section 28(1)	28(1) - N		Release all, including ms comments
90. Fax (3/2/1997) Dundas & Wilson to Bill McQueen	All	Section 36(1)	36(1) – Y	PI - N	Withhold
93. Fax (5/12/1996) Dundas & Wilson to the Scottish Office	All	Section 36(1)	36(1) – Y	PI - N	Withhold