



Scottish Information
Commissioner

Decision 221/2006 Michael Matheson MSP and the Scottish Executive
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<i>London 2012 Olympic Bid</i>

Applicant: Michael Matheson MSP
Authority: Scottish Executive
Case No: 200502678
Decision Date: 4 December 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 221/2006 Michael Matheson MSP and the Scottish Executive

Correspondence between the Scottish Executive and others in relation to the London 2012 Olympic bid – request refused in part and refusal upheld on review – application to the Commissioner for a decision – authority’s decision upheld in part

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 sections 1(1) (General entitlement); 2 (Effect of exemptions); 3(2)(a)(ii) (Scottish Public Authorities); 15 (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 28(1) (Relations within the United Kingdom); 30(b)(ii) (Prejudice to effective conduct of public affairs).

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

Facts

Mr Matheson requested the publication by the Scottish Executive (the Executive) of correspondence and other documentation in relation to the 2012 London Olympic bid. This was refused in part by the Executive, citing various exemptions under the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Matheson sought a review of this decision. The Executive, while agreeing to publish certain further documents on its website, maintained that a small number of documents remained exempt under sections 28(1) and 30(b) of FOISA. Mr Matheson applied to the Commissioner for a decision. Following an investigation, the Commissioner concluded that generally the Executive had dealt with the request in accordance with Part 1 of FOISA, subject to breaches of certain technical requirements.



Background

1. On 10 March 2005, Mr Matheson submitted the following request for information to the Executive:

“Under the Freedom of Information (Scotland) Act 2002 I request that all correspondence and documentation between the Scottish Executive, the UK Government, sportscotland and the London 2012 Olympic bid team, in relation to the London 2012 Olympic bid be published.”
2. On 31 March 2005, the Minister for Tourism, Culture and Sport wrote to Mr Matheson, advising that documentation falling within the scope of Mr Matheson’s request was being pulled together already, with a view to publication on the Executive’s website. Certain documents, however, were considered to be exempt from release under sections 25 (Information otherwise accessible), 28(1) (Relations within the United Kingdom), 29(1)(a) and (b) (Formulation of Scottish Administration policy etc.), 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs) and 33(1)(b) (Commercial interests and the economy) of FOISA. Mr Matheson was advised of his rights to seek a review of the Executive’s decision and (if he remained dissatisfied) to apply to the Commissioner for a decision.
3. Mr Matheson requested a review from the Executive on 28 April 2005 and the Minister responded to this request on 14 July 2005. The Minister apologised for the delay in responding and advised that certain additional documents had been identified for publication on the Executive’s website. She provided the url at which the published documents would be found but went on to advise that a small number of documents remained exempt under sections 28(1) and 30(b) of FOISA. The Minister argued that it would not be in the public interest to publish the withheld documents. Mr Matheson was advised that he had the right to apply to the Commissioner for a decision if he was unhappy with the outcome of the review.
4. Mr Matheson applied to the Commissioner for a decision in relation to the Executive’s refusal to release the documents withheld on 13 October 2005, requesting in addition that the Commissioner investigate why the information the Executive had agreed to publish had not yet appeared on its website. The case was allocated to an investigating officer and the application validated by establishing that Mr Matheson had made a valid request for information to a Scottish public authority and had appealed to the Commissioner only after asking the authority to review its response to his application.



Investigation

5. At the outset of the investigation, as required by section 49(3)(a) of FOISA, I notified the Executive of Mr Matheson's application and invited its comments, including reasons for applying the exemptions claimed to the information withheld. In addition, I requested a copy of that information.
6. In the course of the investigation I have considered fully the information withheld from release (contained in 5 documents), along with all relevant submissions from the parties. Basically, the arguments presented for the information withheld being exempt relate to the importance of maintaining relations between devolved and central governments and, in that context, the need for uninhibited communications between the two governments. In addition, it has been argued that certain documents are not held by the Executive for the purposes of FOISA, being subject to section 3(2)(a)(ii).

The Commissioner's Analysis and Findings

7. The issues for determination in this case would appear to be as follows:
 - (i) Whether certain information is covered by section 3(2)(a)(ii) of FOISA (and consequently should not be considered to be held by the Executive for the purposes of FOISA) by virtue of that information being held in confidence by the Executive having been supplied by the Government of the United Kingdom;
 - (ii) Whether the exemptions in sections 28(1) and/or 30(b)(ii) apply to certain of the information withheld;
 - (iii) If certain of the information withheld is exempt information under either of the above exemptions, whether in all the circumstances the public interest in maintaining the relevant exemption outweighs the public interest in disclosing that information; and
 - (iv) Whether the Executive dealt with the request for information in accordance with the technical requirements in Part 1 of FOISA, in particular the duty to provide advice and assistance (section 15) and the timescale for complying with a request for review (section 21(1)).



8. I will now consider each of these issues in turn. As indicated above, the full text of each of the relevant provisions of FOISA is set out in the Appendix to this decision. I will not repeat them at length here.

Section 3(2)(a)(ii)

9. Having examined the information claimed by the Executive to fall within the scope of this provision, together with supporting information and submissions provided by the Executive (including comments from the Department for Culture, Media and Sport, or DCMS, the department which supplied the letter), I am satisfied that the internal UK Government letter marked Document 1 by the Executive meets the relevant criteria of being held in confidence having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom. Therefore, I am satisfied that Document 1 is not held by the Executive for the purposes of FOISA.
10. The Executive has also argued that section 3(2)(a)(ii) applies to Document 4, which is a letter from the Secretary of State for Culture, Media and Sport to the First Minister. I can accept, therefore, that it was supplied to the Executive by a Minister of the Crown and accordingly fulfils part of the test laid down by section 3(2)(a)(ii). I accept too the assertion made by the Department of Constitutional Affairs on behalf of the DCMS, that Document 4 was supplied in confidence and remains confidential. Therefore, whilst I have some reservations about the Executive's interpretation of this exemption, in this particular case I accept the application of section 3(2)(a)(ii) to Document 4 (which, consequently, should not be regarded as held by the Executive for the purposes of FOISA).

Section 28(1)

11. The letters marked Documents 2 and 3 by the Executive are an exchange between the Permanent Secretaries at the Scottish Executive and a department of the Government of the United Kingdom (the DCMS). The Executive has highlighted the sensitivity of these documents and the prejudice to relations between the two administrations (and in particular the frank communications that require to go on between them) that it considers would follow from release. Having considered these arguments and the terms of the documents, I am satisfied that their disclosure would, or would be likely to, prejudice substantially relations between the Government of the United Kingdom and the Scottish Administration, and therefore that they comprise exempt information under section 28(1) of FOISA.



12. Section 28(1) has also been applied by the Executive to Document 5. This is a letter from the First Minister to the Secretary of State for Culture, Media and Sport, responding to Document 4. Similar arguments to those advanced in relation to Documents 2 and 3 have been presented to me in justification for this document being withheld, with particular reference to the effect on openness in communication on issues of cross-border concern (which is held to be vital to the efficient interaction of the two administrations). Once again, having considered the arguments and the content of this document, I am satisfied that its disclosure would, or would be likely to, prejudice substantially relations between the Government of the United Kingdom and the Scottish Administration, and therefore that it comprises exempt information under section 28(1) of FOISA.

Section 30(b)(ii)

13. The Executive has argued that section 30(b)(ii) applies to Documents 2, 3 and 5 in addition to section 28. It takes the view that frank communications between the devolved and central governments are essential and that it is particularly important in this context that the Executive can represent Scotland's interests clearly on issues of UK-wide concern such as the Olympics. Release of such communications, it is argued, would have a directly inhibiting effect which would be to the detriment of the successful operation of the devolution settlement.
14. I have considered the information in Documents 2, 3 and 5, along with the wider context and the submissions made to me in this connection. In all the circumstances, I am satisfied that disclosure of this information would, or would be likely to, inhibit substantially the freedom and frankness with which views are (and require to be) exchanged among the administrations within the United Kingdom and therefore accept that section 30(b)(ii) applies to the information.

The Public Interest

15. The exemptions under sections 28 and 30(b)(ii) are, of course, subject to the public interest test and therefore, before information can be exempt under either exemption, I must be satisfied that the public interest in maintaining it outweighs that in disclosing the relevant information. In this case, I accept that the public interest arguments in relation to both exemptions are interlinked and therefore will consider them together.
16. Section 2(1)(b) of FOISA, which contains the public interest test, is worded in such a way as to presume that disclosure, rather than withholding the information, will be in the public interest. The onus is on the public authority to persuade me in a given set of circumstances that the public interest would not be served by releasing the information.



17. There is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. I would also acknowledge a more specific public interest in disclosure in this particular case, as all of the documents withheld, to a greater or lesser extent, have something to say about the operation of the devolution settlement in practice.
18. I note that a substantial amount of information about the 2012 Olympic bid has been made available to the public already, including the information published by the Executive in the course of dealing with Mr Matheson's request (see paragraph 3 above). I accept, as I have in previous decisions, that the publication of related information may demonstrate due process and a desire to be transparent on the authority's part and may be taken into account when considering the public interest. It cannot, however, by itself justify the withholding of further information requested by the applicant.
19. Having considered the submissions I have received on the public interest, I accept the importance of the Olympic bid to the United Kingdom as a whole and the need to maintain effective working relationships among the various administrations in the United Kingdom in this and other key areas of national policy. It is important that the devolved administrations can represent their interests freely to the UK Government, and equally that Whitehall is not inhibited in informing these administrations of relevant developments as they occur. Of necessity, this will from time to time involve the exchange of information and views of some (sometimes considerable) sensitivity and I accept that the sensitivity is likely to be all the greater when the issues are ongoing.
20. Ultimately, however, whether information can be withheld or not will depend on the content of the information under consideration and I will not be able to accept arguments that information requires protection simply because it is of a sensitive general type or subject matter. Even where I am satisfied that the information has the requisite degree of sensitivity, it may require to be disclosed if there is a compelling overriding public interest reason for doing so.
21. Having considered the arguments presented to me and the content of the information withheld in Documents 2, 3 and 5, I accept the stronger public interest in maintaining the exemptions in sections 28 and 30(b)(ii) in relation to these documents and therefore uphold the Executive's decision to withhold the documents under these exemptions.



Technical Requirements of FOISA

22. In her letter of 14 July 2005, the Minister indicated to Mr Matheson that certain documents previously withheld would be published shortly on the Executive's website. This duly happened on 29 July 2005, but unfortunately the url given to Mr Matheson was inaccurate and clearly he was prevented from locating the information for some time (i.e. until the correct url was identified to me and passed on to him in October 2006). I have to note that a reasonable degree of care is required of public authorities when advising and assisting persons seeking information under FOISA if the duty to provide advice and assistance under section 15 is to be discharged meaningfully and I am not satisfied that the requisite care was taken by the Executive when advising Mr Matheson of the location of these documents. I note, however, the Executive's apology for any confusion caused by this oversight and am satisfied following my investigation that the inaccurate reference was nothing more than an oversight: therefore, I will not require the Executive to take any action as a consequence of this breach of section 15.

23. In connection with the Executive's assertion of section 3(2)(a)(ii) of FOISA in relation to 2 documents, I have to note that this was done in response to my request for comments on Mr Matheson's application and not at any earlier stage in dealing with his request for information. Being advised that the information in question was not held by the Executive but by a department of the UK Government (the DCMS) would have given Mr Matheson the opportunity of considering whether he should continue to pursue that information from the Executive or should take the matter up with the DCMS under the Freedom of Information Act 2000 (FOIA). I consider that the Executive was required to give Mr Matheson notice that the information was not held in terms of section 17(1) of FOISA if it considered that to be the case and that it should have advised him that the information was in fact held by the DCMS (with sufficient information to enable him to submit a request to that department) in pursuance of its duty under section 15 of FOISA. While there is no obvious purpose to be served by requiring the Executive to take steps now to rectify this omission in Mr Matheson's case (noting that the holding department is clear from this decision and the process of making a request to it is reasonably clear from its own website), I would remind authorities that they should identify at the earliest practicable opportunity where information requested of them is not information they hold but will (or is likely to) be found in the hands of another public authority (subject either to FOISA or FOIA) and to advise applicants accordingly.



24. The Minister's letter of 14 July 2005 was the Executive's response to Mr Matheson's request for review dated 28 April 2005. Therefore, the Executive failed to respond to that request within the period of 20 working days stipulated in section 21(1) of FOISA. Mr Matheson was not, however, prejudiced significantly in the exercise of his rights under FOISA by this failure and I note the Minister's apology for the delay in her letter of 14 July. Therefore, I will not require the Executive to take any action as a consequence of this breach of section 21(1).

Decision

I find that generally the Scottish Executive (the Executive) dealt with Mr Matheson's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA).

However, I find that the Executive failed to comply with the following technical requirements of FOISA:

- (i) Section 15 (Duty to provide advice and assistance), in that it did not direct Mr Matheson to the correct location of the additional documents identified for publication in the Minister's letter of 14 July 2005 or advise him that certain information falling within the scope of his request was in fact held by the Department for Culture, Media and Sport (with sufficient information to enable him to submit a request to that department);
- (ii) Section 17(1) (Notice that information is not held), in that it did not give Mr Matheson notice in terms of that section in respect of certain information which it did not hold by virtue of section 3(2)(a)(ii);
- (iii) Section 21(1) (Review by Scottish public authority), in that it did not carry out a review of its original decision on Mr Matheson's request within the required period of 20 working days.

For the reasons stated in my Analysis and Findings above, I do not require the Scottish Executive to take any action as a consequence of these technical breaches.



Appeal

Should either Mr Matheson or the Executive 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
4 December 2006



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.

(2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption-

- (a) section 25;
- (b) section 26;
- (c) section 36(2);
- (d) section 37; and
- (e) in subsection (1) of section 38-
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

3 Scottish public authorities

(2) For the purposes of this Act ... information is held by an authority if it is held-

- (a) by the authority otherwise than-
 - (i) ...



(ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom

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.

(2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).

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.

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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) ...
- (d) ...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

(b) would, or would be likely to, inhibit substantially-

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