

Decision Notice



Decision 129/2010 Mr Tom Gordon of the Sunday Herald and the Scottish Ministers

Staging and catering of meetings of the Council of Economic Advisers

Reference No: 200901594, 200901595, 200901596, 200901597, 200901598
Decision Date: 21 July 2010

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Summary

Mr Tom Gordon made five information requests to the Scottish Ministers (the Ministers) for staging and catering information for the first five meetings of the Council of Economic Advisors (CEA). The Ministers advised Mr Gordon that the information he had requested was available on the Scottish Government website, and therefore exempt from disclosure under section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Gordon was not satisfied with this response. Following a review, Mr Gordon was advised that the information falling within the scope of each request was exempt from disclosure under section 30(c) of FOISA (prejudice to effective conduct of public affairs). Mr Gordon remained dissatisfied and applied to the Commissioner for decisions on each of his five requests.

The Ministers were found to have correctly applied the exemption in section 25(1) to some of the information covered by Mr Gordon's requests, but to have wrongly withheld other information under section 30(c) of FOISA. The Commissioner also found that the Ministers had failed to demonstrate that all relevant information had been located and considered, and required the Ministers to conduct a further search for information covered by the terms of Mr Gordon's requests.

The Ministers were also found to have failed to comply with sections 10(1) and 21(1) of FOISA, by failing to respond to Mr Gordon's requests and requirements for review within the statutory timescales.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 25(1) (Information otherwise accessible) and 30(c) (Prejudice to effective conduct of public affairs)

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



Background

1. On 29 April 2009 Mr Gordon sent five emails to the Ministers, each requesting information about the staging and catering arrangements of a specified meeting of the CEA, as detailed below. As the subject matter of each request is so similar, the way in which the Ministers dealt with all five requests is considered in this single decision notice.
2. In each of his requests, Mr Gordon asked to be supplied with all records relating to the staging and catering of the relevant meeting of the CEA, and explained that this should include, but not be limited to, all invoices and payments for venue hire, menus, bills for flowers, refreshments, catering, social activities and associated correspondence. He also explained that he was not asking for information about the expenses claimed by members of the Council (the subject of another FOI request). The meetings in question were:
 - i) First meeting of the CEA at the Museum of Scotland, September 2007
 - ii) Second meeting of the CEA at Stirling Castle, February 2008
 - iii) Third meeting of the CEA at the University of Glasgow, June 2008
 - iv) Fourth meeting of the CEA at Dumfries House, October 2008
 - v) Fifth meeting of the CEA at Duff House, January 2009.
3. On 22 June 2009, the Ministers issued a response to each request. In each case, they advised that the information he had requested was available on the Scottish Government website¹, and accordingly, under section 25 of FOISA, the Ministers were not required to provide the information requested.
4. On 23 June 2009, Mr Gordon asked the Ministers for a review of their decision. He disagreed that the information requested was available at the web address provided in the response, or on any other part of the Scottish Government website. He described the information available online as “a minimalist breakdown of costs into broad headings” and complained that no copy of the original material was provided. He asked the Ministers to release the information, in the form requested, in full.
5. The Ministers provided their review responses on 8 September 2009. Mr Gordon was advised that the records he had requested were invoices from small local suppliers of goods and services, which were exempt from disclosure under section 30(c) of FOISA on the grounds that disclosure would affect the willingness of businesses to engage in contractual arrangements with the Scottish Government. The Ministers therefore did not consider it would be in the public interest to release the withheld records.

¹ <http://www.scotland.gov.uk/Topics/Economy/Council-Economic-Advisers/disclosures>

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6. On 8 September 2009, Mr Gordon wrote to the Commissioner stating that, in relation to each of his five requests, he was dissatisfied with the outcome of the review and applying for a decision in terms of section 47(1) of FOISA. He disputed the application of the exemption in section 30(c) to the information withheld, pointing out that on numerous previous occasions, full receipts for events hosted at Bute House had been released under FOISA without any reported damage to suppliers or the conduct of public affairs.
7. The five applications were each validated by establishing that Mr Gordon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The cases were then allocated to an investigating officer.
8. During the investigation, the Ministers submitted that Mr Gordon's requests were, in fact, partially invalid (see paragraphs 12 – 14 below).

Investigation

9. On 23 September 2009, the Ministers were notified in writing that the five applications had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested on 7 October 2009 and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the Ministers on 12 November 2009, providing them with an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to explain in detail why disclosure would cause substantial prejudice to the effective conduct of public affairs, and why, on balance, there was a greater public interest in withholding the information under section 30(c) than in disclosing it.
11. Additionally, the Ministers were asked about how they had satisfied themselves that they had located all the information they held which fell within the scope of Mr Gordon's requests. In particular, it was noted that information relating to social activities had only been identified in relation to one of the CEA meetings. The lack of "associated correspondence" (as requested by Mr Gordon) was also queried, and the Ministers were asked whether Scottish Government officials had been involved in making the arrangements for the meetings.
12. On 14 December 2009, the Ministers indicated that they considered Mr Gordon's requests should be treated as largely invalid, in asking for copies of documents and failing to clearly identify any specific information. They accepted, however, that it was reasonably clear that Mr Gordon was looking for information relating to the costs of the venue hire, flowers, refreshments, catering, menus and social activities for the first five CEA meetings, and accordingly considered that this element of the requests could be interpreted as valid. They advised that this information was already publicly available on the Scottish Government website, and that the exemption in section 25(1) therefore applied.

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13. As the Ministers considered section 25(1) to apply to all relevant information relating to the parts of Mr Gordon's requests they considered to be valid, they advised that they no longer wished to apply any other exemption in terms of FOISA.
14. The Ministers subsequently withdrew their claim that Mr Gordon's requests were invalid, along with similar claims affecting other applications to the Commissioner. To date, however, no further submissions have been received from the Ministers in response to the investigating officer's letter of 12 November 2009. In the circumstances, the Commissioner has taken the view that he must proceed to make a decision, as he is required to do in terms of section 49(1) of FOISA, on the basis of such arguments as the Ministers provided prior to 14 December 2009. Basically, these are the arguments in support of the application of section 30(c) of FOISA put forward in the Ministers' responses to Mr Gordon's requests for review. Section 30(c) was identified as the only applicable exemption when the Ministers supplied the withheld information to the Commissioner on 7 October 2009 and it must be presumed that they continue to rely on this exemption following the withdrawal of their arguments on the validity of those parts of the requests in respect of which the exemption was claimed.
15. For the sake of completeness, however, the Commissioner will also consider the application to these information requests of sections 25(1) of FOISA, referred to in the Minister's initial response to Mr Gordon and in their submission to the Commissioner of 14 November 2009. He will also consider whether the Ministers took adequate steps to locate the information Mr Gordon had requested.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Gordon and the Ministers and is satisfied that no matter of relevance has been overlooked.

Information otherwise accessible (section 25)

17. The Ministers advised Mr Gordon (22 June 2009) that under section 25 of FOISA, they were not required to provide information in response to a request if it was already reasonably accessible to the applicant. The Ministers stated that the information Mr Gordon had requested was already available on the Scottish Government website, and provided the relevant web address.² They reiterated this argument, in relation to the information they accepted was the subject of a valid request in each case, in their letter to the investigating officer of 14 December 2009.
18. Mr Gordon did not accept that the information available online comprised all the information covered by his requests. However, in his application to the Commissioner, he acknowledged that some of the information requested was available on the website in broad categories.

² <http://www.scotland.gov.uk/Topics/Economy/Council-Economic-Advisers/disclosures>

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19. The Commissioner has examined the information about the costs of the CEA meetings which is available on the Scottish Government website. The website provides the following information in relation to each of the first five CEA meetings:
- total cost
 - total travel costs
 - start/destination and mode of transport for individual Council members, where this was paid for by the Scottish Government
 - travel and accommodation costs for each Council member, where this breakdown is available
 - cost of venue hire
 - cost of food and beverages, usually presented as separate totals for “food” and “beverages”, but sometimes combined.

20. At the time Mr Gordon made his requests, some additional information was available for the fifth CEA meeting only:
- breakdown of “other costs” into three categories: “hired staff”, “guidebooks”, “small items for the dinner”
 - details of the menu for each meal and the wines and liqueurs offered at dinner.

On 21 May 2010, the Commissioner was advised that information about the menus for the first, second and fourth meetings had also been published on the website.

21. The Commissioner accepts that some of the information provided on the Scottish Government website falls within the scope of Mr Gordon’s requests. He accepts that the Ministers were justified in applying the exemption in section 25(1) to the information listed in bullet points in paragraphs 19 and 20, on the grounds that this is information which Mr Gordon can (and could at the time of his request) reasonably obtain other than by requesting it under section 1(1) of FOISA.
22. However, the Commissioner does not accept that the information provided on the Scottish Government website represents all the information which is held by the Ministers and which falls within the scope of Mr Gordon’s requests.
23. During their review of their responses to Mr Gordon’s requests, the Ministers identified certain documents (invoices) containing information which they considered would fall within the scope of those requests. This information was withheld under section 30(c) of FOISA. The Commissioner finds that some of this information falls within the scope of Mr Gordon’s requests, and notes that it is not available on the Scottish Government website.



24. The Commissioner finds that some of the information withheld relates to the costs of travel and accommodation for the individuals attending the first five CEA meetings. He does not consider this information to fall within the scope of the requests, which were for information relating to the staging and catering of the meetings. Accordingly, the Commissioner has not considered this information further in this decision notice.
25. The remainder of this decision notice, therefore, relates to information which falls within the scope of the requests and which has been withheld. He considers this to be the information in the following documents (not including signatures):
- 200901594 (1st meeting): documents 3 – 13 inclusive
 - 200901595 (2nd meeting): document 1
 - 200901596 (3rd meeting): documents 1 – 3 inclusive
 - 200901597 (4th meeting): documents 1 and 2
 - 200901598 (5th meeting): documents 1 and 2.

Information withheld under section 30(c) of FOISA

26. The exemption in section 30(c) applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" signifies that this exemption is to be used in situations other than those envisaged by the exemptions in section 30(a) and (b). However, section 30(c) remains a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm (which must be substantial) would, or would be likely to, be caused to the conduct of public affairs by release of the information. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA.
27. On 12 November 2009, the Ministers were asked to explain in detail why disclosure would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, and why, on balance, there was a greater public interest in withholding the information under section 30(c) than in disclosing it. The Ministers did not provide any submissions on this point. However, in the Ministers' letter to Mr Gordon of 8 September 2009, they explained that disclosure of the information in the invoices would affect the willingness of businesses to engage in contractual arrangements with the Scottish Government.
28. In his application to the Commissioner, Mr Gordon argued that after almost five years of FOISA, it was unsustainable for the Government to argue that it was inhibiting businesses from trading with the public purse: FOISA, he submitted, was by now an established part of the business environment. Mr Gordon also pointed out that on numerous previous occasions, full receipts for events hosted at Bute House had been released in response to information requests without any reported damage to suppliers or prejudice to the effective conduct of public affairs.

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29. After examining the information withheld, the Commissioner takes the view that disclosure is unlikely to cause substantial prejudice to the effective conduct of public affairs. He does not accept that disclosure of the information would, or would be likely to, discourage businesses from providing similar products and services to the Scottish Government in future, noting that the Ministers have provided no evidence which would support this assertion. He therefore does not accept that the exemption in section 30(c) applies, in relation to the information withheld.
30. Because the exemption in section 30(c) does not apply to the information withheld, the Commissioner is not required to consider whether the public interest in disclosure outweighs the public interest in maintaining the exemption. However, the Commissioner would note that in his view there is a strong public interest in transparency as to how public money has been spent.
31. The Commissioner therefore does not accept that the information identified by the Ministers which he considers to fall within the scope of Mr Gordon's requests (see paragraph 25 above) should be withheld under section 30(c) of FOISA, and requires the Ministers to provide it to Mr Gordon.

Extent of the searches carried out

32. The Commissioner noted that there was considerable variation in the amount and range of information identified in relation to each of Mr Gordon's five requests. This was raised with the Ministers on 12 November 2009, when they were asked about the lack of any "associated correspondence" (as requested by Mr Gordon) and records relating to social activities during the CEA meetings. The Ministers were asked to explain why they were satisfied that the information provided to the Commissioner represented all the information covered by the terms of Mr Gordon's requests.
33. The Ministers did not provide any comments or submissions on this issue. Given the variations referred to in the previous paragraph, the Commissioner is not satisfied that the Ministers have demonstrated that reasonable steps were taken to ensure that all information covered by the terms of Mr Gordon's requests was located, as required in order to demonstrate compliance with section 1(1) of FOISA. The Commissioner therefore requires the Ministers to carry out a further search for information about the staging and catering of the first five meetings of the CEA, taking into account the full terms of Mr Gordon's requests, the comments in the previous paragraph and the letter sent to the Ministers on 12 November 2009.
34. Having carried out further searches, the Ministers are required to provide Mr Gordon with any additional information retrieved, or to advise him why they are not required to provide the information under FOISA. If no additional information is found, the Ministers must give Mr Gordon notice of this fact. The Ministers should be prepared to demonstrate the extent of their searches to the Commissioner, if required.

Compliance with statutory timescale for response

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35. Section 10(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
36. The Ministers responded to Mr Gordon's requests of 29 April 2009 on 22 June 2009.
37. Section 21(1) of FOISA allows Scottish public authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
38. The Ministers responded to Mr Gordon's requirements for review of 23 June 2009 on 8 September 2009
39. Mr Gordon raised these matters in his applications for decision from the Commissioner. The Commissioner finds that the Ministers failed to respond to Mr Gordon's requests and requirements for review within the specified timescales and thereby breached sections 10(1) and 21(1) of FOISA respectively.

DECISION

The Commissioner finds that the Scottish Ministers failed to comply in full with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr Gordon. While the Ministers were correct to withhold some information under the exemption in section 25(1), other information was wrongly withheld under section 30(c) of FOISA.

The Commissioner requires the Ministers to provide Mr Gordon with the information wrongly withheld, as described in paragraph 26 above, by 6 September 2010.

The Commissioner finds that the Ministers also failed to demonstrate compliance with section 1(1) of FOISA by taking reasonable steps to locate all the information they held which fell within the scope of Mr Gordon's requests. He requires the Ministers to carry out additional searches in relation to Mr Gordon's requests and to communicate the results to him, as described in paragraphs 33 and 34 above.

The Commissioner finds that the Ministers also failed to comply with section 10(1) and 21(1) of FOISA, by failing to provide their responses to the requests and requirements for review within 20 working days. He does not require the Ministers to take any action in respect of these failures in response to Mr Gordon's application.

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Appeal

Should either Mr Gordon or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
21 July 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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;

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request;

...

...



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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.