

Decision Notice

Decision 216/2016: Mr Paul Hutcheon and Scottish Enterprise

Donald Trump's GlobalScot status

Reference No: 201600682

Decision Date: 07 October 2016



Scottish Information
Commissioner

Summary

On 9 January 2016, Mr Hutcheon asked Scottish Enterprise (SE) for communications relating to Donald Trump's GlobalScot status.

SE initially withheld the information, disclosing some of it following a review. Mr Hutcheon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, SE disclosed two names (senior staff) to Mr Hutcheon. Mr Hutcheon did not require the names of any junior staff but he still wished to be given the remaining withheld information. The Commissioner investigated and found that SE was not entitled to withhold the remaining information, and ordered its disclosure to Mr Hutcheon.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) General entitlement); 2(1)(b) (Effect of exemptions); 30(b) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 9 January 2016, Mr Hutcheon made the following request for information to SE:
"Please provide me with all communications between SE/SDS and the Scottish Government (both ways) in December 2015 on the issue of Donald Trump's GlobalScot status."
2. SE responded on 8 February 2016, confirming that it held some information. It withheld most of it under section 30(b) (Prejudice to effective conduct of affairs.)
3. On 15 February 2016, Mr Hutcheon wrote to SE requesting a review of its decision. He contended SE had exaggerated the harm in disclosing this information. He also believed there was a clear public interest favouring disclosure.
4. SE notified Mr Hutcheon of the outcome of its review on 14 March 2016. It decided the harm was not as substantial as it had first suggested for some of the information, which it disclosed to Mr Hutcheon. It continued to withhold some information under section 30(b), and also some under 38(1)(b) (Personal information) of FOISA.
5. On 18 April 2016, Mr Hutcheon wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Hutcheon stated he was dissatisfied with the outcome of SE's review, disagreeing with SE's decision to withhold some of the information. He confirmed that he did not require the contact details of junior staff.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Hutcheon made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 13 May 2016, SE was notified in writing that Mr Hutcheon had made a valid application. SE was asked to send the Commissioner the information withheld from Mr Hutcheon. SE provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SE was invited to comment on this application and answer specific questions, focusing on the exemptions applied by SE in correspondence with Mr Hutcheon.
9. During the investigation, SE offered to disclose the (previously redacted) names of two senior staff to Mr Hutcheon, and did so on 5 August 2016. Mr Hutcheon confirmed receipt of this information and commented that he was content with the personal data which had been disclosed. He re-iterated that he still wished to obtain the non-personal withheld information.
10. The Commissioner need not consider the withheld personal data any further in this decision notice.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Hutcheon and SE. She is satisfied that no matter of relevance has been overlooked.

Scope of Mr Hutcheon's request

12. Mr Hutcheon's request was for communications on the issue of Donald Trump's GlobalScot status, for a specified period of time. One of the emails captured by this request (Document 10) contained information (two bullet points) which SE contended were not within scope.
13. Having considered these two bullet points carefully, the Commissioner is satisfied that the information in the first of them is not within scope. It relates to a third party and not to Donald Trump. The Commissioner is also satisfied that a small amount of information in the second bullet point (i.e. text which appears within two round brackets) also relates to a separate third party and not to Donald Trump.
14. However, the Commissioner is of the view that remaining piece of text in the second bullet point is within scope. Its focus is Donald Trump.

Withheld information to which no exemption has been applied

15. As there is further information she has found to be within scope, the Commissioner must consider it in this decision. SE was given the opportunity to apply exemptions to this information but did not do so. In the absence of any exemptions being applied by SE, there is no reason for that information being withheld.
16. Consequently, the Commissioner requires this further information to be disclosed. A marked copy will accompany this decision notice, to provide clarity on which information this is.

Section 30(b) - Prejudice to effective conduct of public affairs

17. Under section 30(b) of FOISA, information is exempt 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)).

18. SE applied the exemptions in section 30(b)(i) and (ii) to most of the withheld information, with the exception of personal data of staff. In support of its position, it presented arguments which covered both exemptions in section 30(b). As it did not make a distinction between the two, the Commissioner will now consider both together.
19. In applying the exemptions in section 30(b)(i) and (ii), the chief consideration is not whether the information constitutes advice or opinion, but whether its disclosure would, or would be likely to, inhibit substantially (as the case may be) the free and frank provision of advice or the exchange of views for the purpose of deliberation. The inhibition must be substantial and therefore of real and demonstrable significance.
20. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, and is not simply a remote or hypothetical possibility. For inhibition to be likely, there must be at least a significant probability of it occurring.
21. Each request should be considered on a case-by-case basis, taking into account the effects on the future provision of advice or exchange of views from disclosure of the particular information involved. The content of the withheld information must be considered, taking into account factors such as its nature, subject matter and manner of expression. The timing of disclosure may also have a bearing. For example, disclosing advice or views while a decision was being considered, and for which further views were still being sought, could be more likely to cause future inhibition than disclosure of advice or views which had already been acted upon.
22. SE submitted that the context of the correspondence in this case was to develop media lines in relation to the matter of Mr Trump's GlobalScot membership being withdrawn. It explained that the final comment and some text of one of the withheld items (document 10) were placed in the public domain at the time.
23. SE commented on Mr Hutcheon's stated interest in this information, which was to know more about the decision to publicly strip Mr Trump of his GlobalScot status, as well as who was involved in this decision. It submitted that none of the withheld information provided an insight into the "decision" process, or who was involved in that decision. It contended that disclosure would not provide Mr Hutcheon with what he wanted to know.
24. In order for SE to carry out its duties as a public body, SE contended it was crucial for it to be able to converse privately and in an honest and unguarded manner with the Scottish Government on particular issues. If this information were to be disclosed, it considered there was a real danger of communication of this type being stifled, decreased and suppressed, to the extent that SE would be unable to converse in this way with the Scottish Government in future. It also commented on the spirit of privacy it believed to apply when sharing information to formulate appropriate media lines.

Commissioner's conclusion on sections 30(b)

25. The Commissioner accepts that when formulating media lines there will undoubtedly be an element of exchange of views and opinions. She does not doubt the importance of sharing thoughts and ideas with Scottish Government colleagues. However it is incumbent on SE to demonstrate that any harm likely to result from the disclosure of such sharing is both real and substantial.

26. In the Commissioner's view, having considered the withheld information under consideration in this case, the Commissioner is not persuaded by SE's submissions that there was a risk of real, significant harm. Looking at the content of the information, it is straightforward and routine in nature. As SE has said, it sheds no light of any significance on the decision process.
27. The Commissioner is not persuaded that substantial inhibition to the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, would be a likely consequence of disclosing the withheld information in response to Mr Hutcheon's request. In reaching this conclusion, the Commissioner has also taken account of the timing. Mr Hutcheon's request came well after it was public knowledge that the decision to withdraw Donald Trump's GlobalScot status had been taken. The media line was already formulated and a public statement had been made. Any potential harm had diminished by the time of the request, to the point that disclosure would not carry with it the risk of substantial inhibition.
28. Therefore, the Commissioner is not satisfied that disclosure of the withheld information would (or would be likely to) substantially inhibit officials from providing such advice in the future. The Commissioner is not satisfied that the exemptions in sections 30(b)(i) and (ii) are engaged, and so is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
29. The Commissioner finds that SE incorrectly withheld information under section 30(b)(i) and (ii) of FOISA and requires SE to disclose that information to Mr Hutcheon (subject to the redaction of personal data of junior staff, which Mr Hutcheon does not require).

Decision

The Commissioner finds that Scottish Enterprise (SE) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Hutcheon.

The Commissioner finds that SE disclosed some information within the scope of Mr Hutcheon's request at review. In so doing, it complied with Part 1 of FOISA.

The Commissioner also finds that SE:

- (i) should have identified further information in document 10 as being within the scope of the request and disclosed it;
- (ii) was not entitled to withhold the information to which it applied the exemptions in section 30(b)(i) and (ii) of FOISA.

In these respects, SE failed to comply with section 1(1) of FOISA. The Commissioner therefore requires SE to disclose the further information in document 10 and the information withheld under section 30(b)(i) and (ii), by **21 November 2016**.

Appeal

Should either Mr Hutcheon or Scottish Enterprise wish to appeal against this decision, they have the right to 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.

Enforcement

If Scottish Enterprise (SE) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that SE has failed to comply. The Court has the right to inquire into the matter and may deal with SE as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

07 October 2016

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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

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; or

...

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