

Decision Notice



Decision 051/2009 Advocates for Animals and the Scottish Ministers

Introduction of Giant Pandas to Edinburgh Zoo

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Advocates for Animals requested from the Scottish Ministers (the Ministers) correspondence relating to the proposed introduction of Giant Pandas to Edinburgh Zoo. The Ministers responded by providing some information to Advocates for Animals, but relied on the exemptions in sections 29(1)(a), 30(b)(i), 30(b)(ii), 32(1)(a)(i) and 32(1)(a)(iii) of the Freedom of Information (Scotland) Act 2002 (FOISA) for withholding other information. Following a review, Advocates for Animals remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner came to the view that the information which had been withheld from Advocates for Animals was environmental information as defined by the Environmental Information (Scotland) Regulations 2002 (the EIRs). He therefore considered whether the Ministers should have made the information available to Advocates for Animals under the EIRs.

The Commissioner found that the Ministers had been entitled, under both FOISA and the EIRs, to withhold the information in the four emails from Advocates for Animals, in that it was information the disclosure of which would, or would be likely to, prejudice substantially relations between the United Kingdom and China (and therefore was exempt under section 32(1)(a)(i) of FOISA and regulation 10(5)(a) of the EIRs), the public interest in this case favouring the withholding of the information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 32(1)(a)(i) and (3) (International relations); 39(2) (Health, safety and the environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(a) (Exceptions from duty to make environmental information available).

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 6 August 2008 and 8 August 2008, Advocates for Animals wrote to the Ministers to request the following information:

Request of 6 August 2008

Any correspondence since January 2007 between the Scottish Government and any other UK, Scottish or foreign Government offices on the topic of Giant Pandas.

Request of 8 August 2008

Copies of all correspondence, whether draft or final, with the Scottish Government relating to Giant Pandas since 14 May 2008.

2. A response was provided by the Ministers on 10 September 2008. With this response the Ministers provided some information to Advocates for Animals, but relied on the exemptions in sections 32(1)(a)(i) and (iii) of FOISA for withholding information in four emails.
3. Advocates for Animals wrote to the Ministers on 10 September 2008 requesting a review of their decision.
4. The Ministers notified Advocates for Animals of the outcome of their review on 10 October 2008. The Ministers upheld their original decision to withhold the information in the four emails and to rely on the exemptions in sections 32(1)(a)(i) and (iii) of FOISA for doing so. In addition, the Ministers advised that they were also relying on the exemptions in sections 29(1)(a), 30(b)(i) and 30(b)(ii) for withholding this information.
5. On 19 November 2008, Advocates for Animals wrote to the Commissioner's Office, stating that it was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Advocates for Animals had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.



Investigation

7. On 27 November 2008, the Ministers were notified in writing that an application had been received from Advocates for Animals and asked to provide the Commissioner with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments 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 comment on the Commissioner's view that the information that had been withheld could be deemed to be "environmental information" for the purposes of the EIRs. The Ministers were also asked to justify their reliance on any provisions of FOISA and/or the EIRs they considered applicable to the information requested, including arguments as to the application of the public interest test.
9. A full response was received from the Ministers. In their response, the Ministers maintained that the withheld information was very substantially non-environmental, and so they were still seeking to rely on the exemptions in sections 30(b)(i), 30(b)(ii), 32(1)(a)(i) and 32(1)(a)(iii) of FOISA for withholding the information (they explained that they were no longer relying on section 29(1)(a)). However, the Ministers also advised that if the Commissioner remained of the view that the withheld information was environmental then they would wish to rely on the exception in regulation 10(5)(a) of the EIRs, applying the arguments they had advanced in relation to the FOISA exemptions.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Advocates for Animals and the Ministers and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

11. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length. Broadly, the Commissioner's position on the interaction between the two regimes is as follows:
 - a. The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in the EIRs.
 - b. There are two separate statutory frameworks for access to environmental information and a Scottish public authority is required to consider any request for environmental information under both FOISA and EIRs.
 - c. Any request for environmental information therefore must be dealt with under the EIRs.



- d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - e. If the authority does not choose to claim the section 39(2) exemption, it must, as well as dealing with the request under the EIRs, deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 of FOISA (or a combination of these).
 - f. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
12. Firstly, therefore, the Commissioner must determine whether all or part of the information withheld from Advocates for Animals is environmental information. If the Commissioner finds that all or part of the information is environmental information, he must go on to consider the Ministers' handling of that environmental information in terms of the EIRs.
 13. "Environmental information" is defined in regulation 2 of the EIRs (the definition is reproduced in full in the Appendix). Where information falls within the scope of this definition, a Scottish public authority holding that information has a duty to make it available to the applicant on request, subject to various restrictions and exceptions contained in the EIRs.
 14. In this case, Advocates for Animals made their information requests under FOISA, at least to the extent that they referred to "Freedom of Information" and "Fol" rather than making any explicit reference to the EIRs. This is hardly unusual, however, and does not absolve the public authority of responsibility for considering whether the information requested is in fact environmental. During the investigation, the investigating officer drew the Ministers' attention to the Commissioner's view that the withheld information could be deemed to be "environmental information" for the purposes of the EIRs and asked for their comments on the potential application of the EIRs to the information, including whether they wished to apply section 39(2) of FOISA to it. The Ministers responded to advise that having considered the withheld information in context they were of the view that the issues to which the information related were primarily political and (to a lesser extent) commercial rather than environmental. Consequently, the Ministers submitted that they did not regard the withheld information as environmental and were continuing to rely on the exemptions in FOISA for withholding it.
 15. The Commissioner has considered carefully the information withheld from Advocates for Animals and concluded that all of it falls within the definition of environmental information set out in the EIRs. While the political context is undoubtedly important, the underlying issue to which the withheld information relates is the potential transfer of endangered wild species from one part of the world to another, which must count as a measure likely to affect biological diversity and its components.



16. Given that the Commissioner is satisfied that all of the information withheld from Advocates for Animals is environmental information and given that the Ministers did not cite the exemption in section 39(2) of FOISA in relation to this information, the Commissioner will go on to consider whether the Ministers were entitled to withhold the environmental information under both FOISA and the EIRs. The Commissioner considers that he is able to do this without seeking further submissions from the Ministers on the EIRs, as the Ministers have advised that they would seek to apply the arguments advanced for their reliance on the exemptions in FOISA in support of their reliance on regulation 10(5)(a) of the EIRs.

Application of FOISA

17. The Commissioner will first of all decide whether the Ministers dealt with Advocates for Animals request for information in line with Part 1 of FOISA. In all, four emails were withheld from Advocates for Animals. These emails form two related email exchanges.

Section 32(1)(a)(i) – International relations

18. The Ministers have relied on the exemption in section 32(1)(a)(i) of FOISA for withholding all of the information in the four emails from Advocates for Animals.
19. Section 32(1)(a)(i) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between the United Kingdom and any other State.
20. For the purposes of this exemption, the Commissioner accepts that China falls within the meaning of another State in line with the definition in section 32(3) (reproduced in the Appendix below).
21. In order to claim this exemption, the Commissioner takes the view (see his briefing at <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2659&SID=119>) that the damage caused (or likely to be caused) by disclosing information would have to be both real and significant, as opposed to hypothetical or marginal. It would have to occur in the near future, not in some distant time. For harm to be “likely”, the Commissioner takes the view that there must be a significant probability that the required degree of harm would occur.
22. In his briefing, the Commissioner emphasises that in considering the application of these exemptions, authorities should be aware that it is the international relations and interests of the United Kingdom as a whole which should be at risk of substantial prejudice from the release of information, not simply those of a component region, part, or sector of the UK, or indeed those of the public authority itself. Authorities should therefore only consider the application of this exemption if it can be clearly demonstrated that substantial prejudice to the international relations or interests of the entire UK would, or would be likely to, result from the release of information.



23. The Commissioner also states that the exemption requires the public authority to concentrate on the potential impact that release may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information. There may be circumstances where potentially controversial information concerning one state or international organisation may have little or no impact on their relations, whilst seemingly innocuous information relating to a second may have a substantial impact. This may depend on the political relations and diplomatic sensitivities that exist at the time, or may depend on cultural, religious or legislative differences. Authorities should therefore consider the content of the information only in terms of the impact that it may have on particular relations or interests were it to be released.
24. Even if a negative reaction is anticipated from the release of information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice substantially international relations. There may be circumstances where the release of information may cause diplomatic annoyance or irritation, but would not result in significant, long term harm to the relations between countries. The timing of release may also be an issue, and the risk of substantial prejudice may well diminish as time passes.
25. In their submissions, the Ministers contend that the exemption in section 32(1)(a)(i) applies to the withheld information, which requires to be assessed in the context of the political/diplomatic situation between the UK and China and clearly deals with the possible transfer of Giant Pandas in a political (as well as commercial) environment.
26. The Ministers also submit that the issue of transferring Pandas should be seen in relation to other events in terms of UK-Sino relations, such as the timing and substance of official visits, and reciprocal cultural exchanges. It is the Ministers' view that while it is a matter of public record that discussions have taken place concerning the possibility of Giant Pandas transferring from China to Edinburgh Zoo, details remain subject to ongoing discussion.
27. It is the Ministers contention that if these emails were to be released relations between the UK and China would be substantially prejudiced. They have provided specific arguments to the Commissioner as to why they consider release of these emails would cause substantial prejudice, including questions of timing and the relationship between this particular issue and wider political questions.
28. The Commissioner has considered the information in the four emails which have been withheld. He accepts that this information relates to a matter (the transfer of Giant Pandas) which would have an impact on international relations for the whole of the UK. Even although the physical transfer of the Giant Pandas would be between China and Edinburgh Zoo, it is apparent that the relevant negotiation and discussion has taken place at a high political level, involving not only Ministers from the Scottish Parliament, but also Ministers and the Prime Minister at Westminster seeking to enter into an agreement with the Chinese Government.



29. The Commissioner is satisfied that if the withheld information were to be disclosed it would, or would be likely to, prejudice substantially relations between the UK and China. He has taken account of the Ministers' submissions on the nature of relations with China and the relations between the matter under discussion and wider political questions. It is apparent from reading the withheld information, together with information which is available in the public domain (for example in newspaper articles and on the Edinburgh Zoo website) that the matter of the introduction of Giant Pandas into Edinburgh Zoo is not yet resolved. Clearly at the time of Advocates for Animals' request and request for a review the matter was at an early stage of discussion. Even although a letter of intent had been signed by both the Chinese and UK governments, there was still much discussion to be had before agreement might be reached on the matter. The Commissioner is also satisfied that the content of the information, which includes the views of both the UK Government and Chinese officials, is expressed in a frank and candid manner and is of some sensitivity.

The public interest test

30. The exemption in section 32(1)(a)(i) of FOISA is subject to the public interest test contained in section 2(10(b)). Therefore, having found that the withheld information is exempt under section 32(1)(a)(i), the Commissioner is required to go on to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
31. The Ministers have explained that they consider any public interest in release of the withheld information to be strongly outweighed by that in withholding the information. In the Ministers' view it is critical that good relations are maintained with the Chinese Government, and to release emails discussing issues of sensitivity and the diplomatic and commercial matters arising would not be in the public interest.
32. The Ministers argue that the withheld information should be seen in context of the ongoing process, both in respect of the transfer of the Giant Pandas and the strategic relationship with China. Premature release of the information in the emails would, in the Ministers view, reveal the diplomatic process at work and this would not be in the public interest, particularly when the issue of the Giant Panda transfer is unresolved. It is the Ministers' contention that the public interest lies in successful outcomes rather than the disclosure of private internal communication which could easily be taken out of context.
33. In their application to the Commissioner, Advocates for Animals set out what they considered to be the public interest in disclosure of the withheld information. They did not believe there to be any conservation value in breeding captive Pandas in Scotland, given that there had been no successful re-introduction to the wild of captive bred animals. They also considered it to be inappropriate for live animals to be used as "political gifts". Advocates for Animals believed that there was considerable public support for their views that Giant Pandas should not be introduced into Edinburgh Zoo, and for that reason submitted that it was in the public interest for the negotiations surrounding the transaction to be made known.



34. The matter of the transfer of Giant Pandas to Edinburgh Zoo has ignited a great deal of debate and interest from various individuals and organisations. The Commissioner accepts that there are two main issues which have to be taken into account in assessing whether (and to what extent) the public interest favours disclosure of this information. Firstly, there is the obvious public interest in whether transfer of the Giant Pandas from China to Edinburgh Zoo is in the interests of the welfare of the animals, and what (if any) benefits there would be to the Giant Pandas from such a move. There is also the public interest in understanding whether the transfer is being considered in order to improve the conservation of a species whose numbers are dwindling in the wild, or whether it is being discussed as part of a more political exercise. On the other hand, there is the public interest in fostering and maintaining international relations between the UK and China.
35. The Commissioner accepts that there is a public interest in understanding the nature and content of the discussions which have taken place between and among officials and Ministers from the Scottish, UK and Chinese Governments, at least to the extent that it might inform the public interest in the welfare of the Giant Pandas and the underlying reasons for their proposed transfer to Edinburgh Zoo. Having read the withheld information, the Commissioner accepts that some it would perhaps go some way towards fulfilling this interest.
36. However, this public interest has to be balanced against the public interest in fostering and maintaining international relations between the UK and China. The Commissioner understands that the UK Government is involved in ongoing discussions with China, which include official visits and reciprocal exchanges in an effort to establish co-operation on political, economic, and commercial issues. The Commissioner accepts the Ministers' assertion that there is a public interest in fostering and maintaining good relations with China, not just in the short term but also for long term stability and co-operation. The Commissioner also accepts that the release of information which might harm or prejudice these discussions in future would not be in the public interest.
37. In considering the public interest in release of this information and the fact that certain of the withheld information would perhaps fulfil this interest, the Commissioner is also mindful of the fact that at the time of Advocates for Animals' request and request for a review, the discussions recorded in the emails had only recently taken place and were very much still subject to debate. The matter remained (and remains) unresolved.
38. In balancing the relevant public interests, taking into account the timing of the discussions recorded in the withheld information in relation to Advocates for Animals' request and request for a review, the Commissioner is of the view that there is a greater public interest in maintaining the exemption in section 32(1)(a)(i) of FOISA. While acknowledging that there is some information which would inform (and therefore support) the public interest in disclosure, the Commissioner considers the greater public interest to be in allowing Ministers and officials from both governments to discuss in private sensitive issues relating to matters which are still subject to some debate and which would be likely, if aired in public, to substantially prejudice international relations.



39. On balance therefore, the Commissioner finds that the public interest in disclosure of the withheld information is outweighed by that in maintaining the exemption in section 32(1)(a)(i) of FOISA.
40. As the Commissioner is satisfied that the Ministers were correct to rely on section 32(1)(a)(i) of FOISA for withholding this information from Advocates for Animals, he is not required to consider the application to the information of the exemptions in sections 32(1)(a)(iii), 30(b)(i) or 30(b)(ii).

Application of the EIRs

41. As noted above, the Commissioner considers all of the withheld information to be environmental information in terms of regulation 2(1) of the EIRs. Given that the Ministers have not cited section 39(2) of FOISA for this information, but did advise that they would rely on regulation 10(5)(a) of the EIRs if the Commissioner maintained his view that the information was environmental, the Commissioner will now go on to consider whether the exception in regulation 10(5)(a) would be applicable to this information.
42. In terms of regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. In terms of regulation 10(2) of the EIRs, this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)).
43. *The Aarhus Convention: An Implementation Guide*, produced by the United Nations Economic Commission for Europe to assist in interpretation of the international convention from which the EIRs ultimately derive, states (at page 59) that the convention does not define the terms “international relations”, “national defence” or “public scrutiny”, but suggests that the definition of such terms will be determined by the Parties consistent with international law.
44. In his briefing on the application of the exception in regulation 10(5)(a) (that same briefing as applies to section 32 of FOISA – see above), the Commissioner has noted that unlike section 32 the EIRs do not explain what is intended by the phrase “international relations”, but he considers it likely that he would include in the definition all factors covered by 32(1) and (2). In the circumstances of this particular case, the arguments put forward by the Ministers in relation to section 32(1)(a)(i) all appear to be relevant to the application of regulation 10(5)(a).
45. Having considered the information in the emails withheld from Advocates for Animals and the arguments put forward by the Ministers, the Commissioner is satisfied (for the reasons already set out in paragraphs 28 and 29 above) that release of this information would, or would be likely to, prejudice substantially international relations. As a result, he is satisfied that they are excepted under regulation 10(5)(a).



46. However, the exception in regulation 10(5)(a) is subject to the public interest test contained in regulation 10(1) of the EIRs. Regulation 10(1) states that a Scottish public authority may refuse a request to make environmental information available if there is an exception to disclosure under paragraph 10(4) or (5) and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception.
47. In coming to a decision on where the public interest lies, the Commissioner has again considered the comments and submissions made by both the Ministers and Advocates for Animals.
48. For the reasons set out when considering the public interest test in relation to FOISA above, the Commissioner is satisfied that the public interest in making the information in the four emails available is outweighed by that in maintaining the exception in regulation 10(5)(a) of the EIRs.

DECISION

Freedom of Information (Scotland) Act 2002

The Commissioner finds that the Scottish Ministers (the Ministers) dealt with Advocates for Animals' request for information in accordance with Part 1 of FOISA, by withholding information under section 32(1)(a)(i) of FOISA.

Environmental Information (Scotland) Regulations 2004

The Commissioner finds that the Ministers failed to deal with Advocates for Animals' request for information in accordance with the EIRs, by failing to identify and consider the withheld information as environmental information as defined in regulation 2(1) of the EIRs.

The Commissioner also finds, however, that the Ministers were entitled to withhold the information under regulation 10(5)(a) of the EIRs.

Outcome

The Commissioner does not require the Ministers to take any action.



Appeal

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

Kevin Dunion
Scottish Information Commissioner
27 April 2009



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 –

...

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

32 International relations

- (1) Information is exempt information if-

- (a) its disclosure under this Act would, or would be likely to, prejudice substantially-
- (i) relations between the United Kingdom and any other State;

...

- (3) In subsection (1)-

...

"State" includes-

- (a) the government of any State; and
- (b) any organ of such a government,



and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.
- (3) Subsection (2)(a) is without prejudice to the generality of section 25(1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;



- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-

...

- (b) is subject to regulations 6 to 12.

10 Exceptions from duty to make environmental information available—

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - (a) international relations, defence, national security or public safety;

...

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Advocates for Animals
and the Scottish Ministers

