

Decision Notice



Decision 091/2009 Mr Joseph Handy and the Scottish Ministers

Written record of telephone conversation

Reference No: 200900947
Decision Date: 30 July 2009

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Handy requested from the Scottish Ministers (the Ministers) the contents of the written record of a telephone conversation between officials of the Health Secretary's department and representatives of NHS Tayside which was referred to in a Parliamentary Question. The Ministers responded by withholding the information in terms of section 30(b) and (c) of FOISA. Following a review, Mr Handy remained dissatisfied and applied to the Commissioner for a decision.

During the investigation the Ministers released some of the information requested while withholding the remainder on the basis of section 30(c) of FOISA only.

The Commissioner did not accept that disclosure of the information would be substantially prejudicial to the effective conduct of public affairs and therefore found that the Ministers had not been entitled to withhold the information in terms of section 30(c) of FOISA. He required the Ministers to release the information to Mr Handy.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) 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 14 January 2009, Mr Handy wrote to the Ministers requesting the following information:

The contents of the written record of the telephone conversation between officials of the Health Secretary's department and representatives of NHS Tayside which is referred to in the Parliamentary Question below:



NHS Hospitals

S3W-18660 - Marlyn Glen (North East Scotland) (Lab) (Date Lodged Friday, December 05, 2008): To ask the Scottish Executive, further to the Cabinet Secretary for Health and Wellbeing's statements on 11 September 2008 that a buy-out of the PFI contract for car parking at Ninewells Hospital "would cost tens of millions of pounds" (Official Report c. 10734 and 10736) and subsequent notification in a letter dated 12 November 2008 to Marlyn Glen MSP that this estimated cost emerged in a telephone conversation between her officials and representatives of NHS Tayside, for what reason the cabinet secretary is unable to provide a copy of the written record of the telephone conversation, as stated in a letter to Marlyn Glen dated 18 November 2008.

Answered by Nicola Sturgeon (Tuesday, December 16, 2008): The written record of the conversation contained officials' initial assessment of the potential negotiating position of the PFI provider. It would undermine NHS Tayside's negotiating position if that figure was in the public domain and therefore it is not in the public interest to release it.

2. The Ministers responded on 10 February 2009, confirming that they held information falling within the scope of Mr Handy's request but withholding it under the exemptions in section 30(b) and (c) of FOISA. In considering the public interest test, the Ministers stated that releasing the requested information would undermine the negotiating position of NHS Tayside.
3. On 1 April 2009, Mr Handy wrote to the Ministers requesting a review of their decision. In particular, Mr Handy submitted that release could not undermine the negotiating position of NHS Tayside, given previous public statements on the matter and his understanding that renegotiation of the contract was not in prospect. He also argued that disclosure of the information was in the public interest.
4. The Ministers notified Mr Handy of the outcome of their review on 1 May 2009, upholding the original decision to withhold the information in terms of section 30(b) and (c) of FOISA.
5. On 19 May 2009 Mr Handy wrote to the Commissioner, stating that he 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.
6. The application was validated by establishing that Mr Handy 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.



Investigation

7. On 22 May 2009, the Ministers were notified in writing that an application had been received from Mr Handy and were asked to provide the Commissioner with any information withheld from him. 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 justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded, advising that the one email which fell within the scope of Mr Handy's request was being released to him subject to the redaction of two paragraphs. The Ministers confirmed that they were now relying upon section 30(c) of FOISA only in relation to the redactions.
10. Mr Handy acknowledged receipt of the redacted information and made submissions to the effect that he should be provided with an unredacted copy of the email.

Commissioner's analysis and findings

11. 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 Mr Handy and the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 30(c) – prejudice to effective conduct of public affairs

12. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.



13. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
14. The Commissioner's view is that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.
15. The Ministers stated in their submissions that release of the withheld information would prejudice substantially the effective conduct of public affairs in terms of the relationship between the Scottish Government and the NHS, and the ability of officials to be able to discuss issues of joint business interest, for example details involved in a possible termination of a PFI contract.
16. The Ministers further stated that the email central to this request was one sent from NHS Tayside to Scottish Government officials, demonstrating the close working relationship of the two organisations. They submitted that the content of the email clearly referred to the politically contentious issue of costs involved in terminating the PFI contract for car parking at Ninewells Hospital, Dundee, and that it would not have been written with any expectation of publication: they considered that its release would prejudice substantially the working relationship between the two organisations. The Ministers also contended that release would make officials far less inclined to write up such conversations, to the detriment of the public record.
17. The Ministers further argued that it was imperative that key stakeholders felt able to communicate and exchange essential information with each other through open channels of communication. The Ministers considered that release of such information would be likely to substantially prejudice such open communication, directly impacting upon the effective conduct of public affairs.
18. The Ministers also contended that release of part of the withheld information would prejudice any future negotiating position of NHS Tayside, as it would reveal financial assumptions and clearly compromise its ability to undertake any meaningful negotiation. The point relating to inhibition of future communication was reiterated, with the suggestion that disclosure would lead to communication being more cautiously phrased (with, in particular, figures identifying potential negotiating positions not being committed in writing in such fashion), resulting in the ability of stakeholders to advise and inform each other being compromised.



19. Mr Handy, on the other hand, pointed out that the Minister had informed Parliament that the cost of the buy out (of the parking contract) would be "tens of millions of pounds" and the released part of the e-mail indicated speculation on the part of NHS Tayside that the cost of the buy out might "come into the category of tens of millions of pounds". As the cost of buy out was agreed by the Ministers and NHS Tayside, he did not see how NHS Tayside's negotiating position could be prejudiced by release of its initial assessment of that position.
20. Mr Handy also drew the Commissioner's attention to the Ministers' response to his request for review, in which his point that the PFI contractor was not interested in an early termination of the contract had been met with the assertion that the contractor could not be guaranteed to hold that view through the rest of the contract (and therefore release of the information would undermine any future negotiating position of NHS Tayside). Mr Handy did not accept that making public information relative to an estimated cost of the termination in 2009 could undermine NHS Tayside's negotiating position with the contractor in, say, 2014, 2019, or 2024.
21. As mentioned above, the Commissioner has to be satisfied that the disclosure of the information would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs.
22. The Commissioner has carefully considered the redacted information which has been withheld under section 30(c) of FOISA, along with all relevant submissions made by the Ministers. He cannot accept that the information is of such sensitivity that disclosure would have the effects described by the Ministers. Consequently, he does not accept that disclosure of this information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
23. In particular, the Commissioner is not persuaded that release of the redacted information would have the damaging effect suggested by the Ministers on the relationship between the Scottish Government and the NHS. He has no basis for believing that relationship to be particularly finely balanced. He accepts that the email relates to a politically contentious issue, and indeed that the maintenance of effective working relations between central government and other Scottish public authorities is crucial to the effective governance of Scotland, but considering the level of detail and analysis in the withheld information together with the information on this matter released into the public domain already (including in response to Parliamentary questions), he cannot see how release of the information would be capable of causing such harm.
24. Equally, the Commissioner can see no basis for the argument that information at this level of detail would be capable of undermining a contractual negotiating position, noting that renegotiation does not appear to be in reasonably close prospect in any event. Finally, as he has indicated in more than one decision in the past, the Commissioner generally considers the maintenance of the public record to be a matter for effective management, and in this particular case he sees no basis for taking it into account as a relevant consideration in assessing potential prejudice to the effective conduct of public affairs.



25. As the Commissioner is satisfied that the section 30(c) exemption does not apply in this case, he is not required to go on to consider the public interest.

DECISION

The Commissioner finds that the Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Handy. He finds that the exemption in section 30(c) of FOISA did not apply to the information withheld from Mr Handy. Consequently, the Scottish Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Scottish Ministers to disclose the information withheld from Mr Handy by 13 September 2009.

Appeal

Should either Mr Handy 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.

Margaret Keyse
Head of Enforcement
30 July 2009



Appendix

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.

...

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.