

Decision Notice



Decision 127/2009 West Highland Free Press and the Scottish Ministers

Appointment of Chair to Gaelic Media Service

Reference No: 200801825

Decision Date: 9 November 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

The West Highland Free Press requested from the Scottish Ministers (the Ministers) all communications between Ministers and within the Scottish Government concerning the appointment of a chairman to the Gaelic Media Service.

The Ministers responded by withholding some of the information under various exemptions in the Freedom of Information (Scotland) Act 2002 (FOISA), arguing that disclosure would have a substantially inhibiting effect on the formulation of responses to public appointments in future. A review was requested by West Highland Free Press, but the Ministers failed to respond within the 20 working day time limit for doing so under FOISA. Following the Commissioner's intervention, a review was conducted and further information was supplied by the Ministers. The West Highland Free Press remained dissatisfied with the result of the review and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had partially failed to deal with West Highland Free Press's request for information in accordance with Part 1 of FOISA, by breaching the 20 working day time-limit for responding to the request for review. However, the Commissioner found that the Ministers were correct to have withheld the relatively small amount of information ultimately withheld by them. He did not require the Ministers to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 21(1) (Review by Scottish public authority) and 30(b)(i) and (ii) (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 July 2008, the West Highland Free Press wrote to the Ministers requesting the following information: “all communications between Ministers and within the Scottish Government, including written submissions, minutes, memos, records of telephone conversations and e-mails, concerning the appointment of a chairman to the Gaelic Media Service/MG ALBA” (GMS).
2. The Ministers responded on 8 August 2008 and released certain correspondence between the Scottish Government and the Scotland Office to West Highland Free Press. The Ministers withheld other information falling within the scope of the request on the basis that it was exempt from disclosure under the exemptions in sections 29(1)(b) and 30(b) of FOISA.
3. Within the documents released, the Ministers withheld officials’ names and those of the candidates who applied for the Chairman’s post. They explained (in error) that this information was removed because an exemption in section 40 of the Freedom of Information Act 2000 applied. It is clear that the Ministers’ intention was to apply the exemption in section 38(1)(b) of FOISA to this information.
4. On 23 September 2008, West Highland Free Press wrote to the Ministers requesting a review of their decision. In particular, West Highland Free Press argued that since the appointment of the individual to the Chairman’s post was no longer being disputed, there was, in its view, no reason, other than avoiding potential embarrassment to Ministers and possibly to officials, for withholding information.
5. An acknowledgement of the request for review was received by West Highland Free Press on 29 September 2008. This letter stated that a response would be provided within 20 working days.
6. Other than this acknowledgement, the Ministers did not respond to the request for review within the timescales required by FOISA. On 13 November 2008, West Highland Free Press made an application to the Commissioner.
7. As a result, an Information Notice was served by the Commissioner on the Ministers on 21 November 2008, asking the Ministers to explain why they had failed to respond to the request for review.
8. The Ministers subsequently notified West Highland Free Press of the outcome of their review by letter of 4 December 2008. Having reconsidered the information, the Ministers decided to disclose certain information which had previously been withheld. The Ministers upheld their original decision to withhold the remaining information, on the basis that the exemptions in sections 29(1)(b) and 30(b) of FOISA applied.
9. On 8 December 2008, West Highland Free Press wrote to the Commissioner, stating that it was dissatisfied with the outcome of the Ministers’ review and applying for a decision in terms of section 47(1) of FOISA.



10. The application was validated by establishing that West Highland Free Press 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

11. On 18 December 2008, the Ministers were notified in writing that an application had been received from West Highland Free Press and were asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
12. 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.
13. By letter of 25 February 2009, the Ministers intimated that, following further consideration, they intended to release additional information to West Highland Free Press.
14. The Ministers also indicated that they considered one item that had previously been judged to fall within the scope of West Highland Free Press's request (and which had been supplied to the Commissioner) actually fell outside its scope. They confirmed that they considered the remaining withheld information to be exempt from disclosure under sections 29(1)(b), 30(b)(i) and (ii) and 38(1)(b) of FOISA.
15. On 5 March 2009, the Ministers wrote to West Highland Free Press disclosing approximately half of the information that had been withheld following their review.
16. The investigating officer sought submissions from West Highland Free Press on 11 March 2009. West Highland Free Press responded on 19 March 2009, and also confirmed that it was not seeking access to any information involving the discussion of candidates' respective merits or referring to candidates who were unsuccessful in their applications for the position.
17. West Highland Free Press stated that it had information in its possession which suggested an email had been sent by a special adviser within the First Minister's Office of a politically partisan nature seeking to frustrate the appointment of the chairman of GMS.
18. On 8 June 2009, the investigating officer wrote again to the Ministers, requiring them to provide specific information on the searches undertaken in order to ascertain whether any relevant information was held and asking detailed questions relating to special advisers and communications within the Scottish Government concerning the appointment in question



19. The Ministers replied on 23 June 2009, providing additional information and submissions. The Ministers also stated that whilst certain of the withheld documents had names of special advisers included on the copy list, none originated from or were directed solely to any special adviser. The Ministers also expressed their confidence that all the documents previously provided to the Commissioner constituted the entirety of the documents held. The Ministers further explained that there were no separate systems for dealing with special advisers' correspondence; nor were such communications specially flagged up.
20. The Commissioner subsequently contacted West Highland Free Press to request any specific information it could provide which would corroborate its assertion that a special adviser within the First Minister's Office had sent an email of the nature alleged by West Highland Free Press. However, West Highland Free Press was not in a position to provide further information.
21. The Commissioner nevertheless issued an Information Notice (in terms of section 50 of FOISA) to the Ministers on 15 September 2009 which required the Ministers to conduct a search of all paper and electronic records from and to a named special adviser which related to the appointment of the chair of GMS and for all information falling within the scope of West Highland Free Press's information request. The Ministers were also required to conduct further searches for any communications within the whole of the Scottish Government relating to the information request. .
22. The Ministers responded on 29 September 2009. They stated that there was no further additional information to submit to the Commissioner. They reiterated the searches that had been undertaken and specified the search terms used, which included those of specific individuals, including the appointee and the name of a special adviser.
23. The Ministers further advised that additional searches had also been carried out according to the Commissioner's instructions. These included electronic and paper searches. However, no new information had been discovered as a result. The Ministers stated that their searches had included personal computers, laptops and blackberries, including those of the special advisers. The Ministers confirmed that full searches had been undertaken on a number of occasions and all held information had been identified and recorded.
24. The parties' submissions are summarised, where relevant, in the analysis and findings section below.

Commissioner's analysis and findings

25. 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 the West Highland Free Press and the Ministers, and he is satisfied that no matter of relevance has been overlooked.



Adequacy of searches

26. As noted above, during the investigation, West Highland Free Press indicated that their request had been prompted by their understanding that one or more Special Advisers had been involved in communications within the Scottish Government about the recruitment of the Chair of GMS.
27. West Highland Free Press indicated that it had expected that the information requested would include such recorded information, and explained why it expected such communications to be identified. Since the correspondence identified by the Ministers did not include communications of the type described by the West Highland Free Press, questions were addressed during the investigation to the Ministers to establish whether their searches had been adequate to identify all relevant information.
28. In response, the Ministers provided the names of four Special Advisers working directly for the First Minister and noted that certain of these Special Advisers had been copied in to some of the email exchanges identified (some of which have been released, while some are being withheld). However, the Ministers also confirmed that the withheld documents did not include any in which Special Advisers had been the originating party, nor were any directed to a Special Adviser.
29. The Ministers stated that they were unaware of any direct communication between Special Advisers and the Minister relevant to this case. The Ministers confirmed that there were no separate systems kept for records relating to Special Advisers, and that material was filed according to subject, so that the Ministers were accordingly confident that the searches already undertaken would have found all relevant records.
30. The Ministers explained further what searches had been undertaken and the way in which information was recorded and filed, and they confirmed that they were confident that no other sources of information which might be relevant to be searched.
31. The final round of searches was conducted in response to an Information Notice issued by the Commissioner. Failure to comply with an Information Notice can be referred to the Court of Session by the Commissioner.
32. In all the circumstances, the Commissioner is satisfied that the Ministers undertook comprehensive searches to locate information falling within the scope of West Highland Free Press's request. He is satisfied that the specific issue of information from or to Special Advisers has been directly addressed by the response to the Information Notice. The Commissioner concludes that Ministers have identified all information relevant to the West Highland Free Press's request.



Information under consideration

33. The Ministers disclosed some information to West Highland Free Press when responding to their initial request, and then disclosed additional information following their reconsideration of the withheld information during their review of the case.
34. At the start of the investigation, the Ministers provided 21 numbered documents to the Commissioner, in which information had been partially or wholly withheld. However, they indicated that document 2 fell outside the scope of the request under consideration.
35. Document 2 is an email from an official at Ofcom to an official at the Scottish Government. As the information request was restricted to communications between Ministers and within the Scottish Government, the Commissioner agrees that this falls outside its scope, and so the information in document 2 has not been considered further in this Decision.
36. During the investigation, the Ministers disclosed any remaining withheld information within documents 1, 5, 6, 7, 8, 9, 10, 11, 12, 17, 18, 19 and 21.
37. The Commissioner has not considered in his decision information that was disclosed during the course of the investigation. The information that the Ministers continued to wish to withhold is contained in documents 3, 4, 13, 14, 15, 16 and 20.
38. Document 20 comprises an email enclosing background information about the post of Chairman of GMS, details of the recruitment process, and biographies of applicants for the post. Most of this document was released to West Highland Free Press by the Ministers. The remaining information was withheld by the Ministers on the basis that it contained biographies of unsuccessful candidates to which they applied the exemption in section 38(1)(b) of FOISA, which applies to personal data, disclosure of which would contravene any of the data protection principles.
39. West Highland Free Press indicated during the investigation that it did not seek information discussing candidates' relative merits or relating to unsuccessful candidates. Since all of the withheld information within document 20 falls within these categories, document 20 has been excluded from further consideration in this Decision.

Section 30(b)(i) and (ii) of FOISA – Prejudice to the effective conduct of public affairs

40. The Ministers have applied the exemption in section 30(b)(i) to document 3, the withheld sections of which contain advice to Ministers from an official, relating to GMS and to the appointment of its Chair. The Ministers applied the exemption in section 30(b)(ii) to documents 4, 13, 14, 15 and 16, which contain a series of emails discussing the formulation of "lines to take".
41. The exemptions in section 30 are qualified exemptions and as such are subject to the public interest test contained in section 2(1)(b) of FOISA.



42. In order for the Ministers to be able to rely on the exemptions laid down in section 30(b)(i) and 30(b)(ii) of FOISA, they would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially (i) the free and frank provision of advice and (ii) the free and frank exchange of views for the purposes of deliberation, respectively.
43. The term "inhibit" is not defined in FOISA. However, the Commissioner has taken the view in his previous Decisions that in the context of these exemptions it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. The inhibition must also be substantial, in other words of real and demonstrable significance.
44. As the Commissioner has commented in previous decisions, it is his view that the standard to be met in applying the tests contained in sections 30(b)(i) and 30(b)(ii) is high. In applying these exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would, or would be likely to, inhibit substantially the provision of advice and in this case also the exchange of views for the purposes of deliberation, respectively.
45. The Ministers argued in relation to section 30(b)(i) that publication of the remaining parts of document 3 would substantially inhibit officials from providing written advice freely and frankly on sensitive issues in future, for fear of it being made public. They further argued that the Ministers require access to all the available information on a subject, and that if officials are substantially inhibited from providing advice on sensitive issues, this would be significantly hampered.
46. The Ministers put forward broadly similar arguments in the same letter in respect of the other withheld documents to which they applied the exemption in section 30(b)(ii). They argued that these documents contain free and frank exchanges on formulating the lines to take, and that releasing these documents would be likely to inhibit substantially officials and Ministers from offering their views on such issues in future, or even from recording their views on paper. They also pointed out that the draft lines differed from the final public position which was taken.
47. The Ministers also pointed out that appointments to public positions are undertaken regularly, and that routine release of information such as that requested would be likely to inhibit officials substantially from providing full and frank advice to Ministers if they thought their advice would be routinely released. An adverse impact on future appointment processes could thus be anticipated.
48. West Highland Free Press expressed the view that the Ministers had dealt with the information request in accordance with political considerations, and without regard to the public interest. They argued that the picture which they had received of the Scottish Government's actions was incomplete because of the withheld information.
49. West Highland Free Press also maintained that the Ministers' arguments were general and did not justify withholding information in the circumstances of this case. West Highland Free Press also expressed criticism, in various respects, of the way in which the Scottish Government had involved itself with the appointment process.



50. When assessing substantial inhibition, the Commissioner will take into account a variety of factors, some of which are highlighted in his briefing on the application of section 30¹. Relevant factors may include the identity/status of the author and/or the recipient; the circumstances in which the advice or views were given; the sensitivity of the advice or views expressed, and the timing of the request.
51. The Commissioner's view is that the remaining withheld emails, as noted above, principally form part of the process of drafting a response to the Scotland Office. The withheld parts of document 3 contain advice and options presented to Ministers by officials with respect to their response to consultation on the proposed appointment by the UK Government. This information forms part of the same process by which the Scottish Ministers considered and reached their view on this matter.
52. The Commissioner considers that the drafting process, particularly early on in the process, would be inhibited if officials' attempts to anticipate and synthesise Ministers' views were disclosed on a matter of some sensitivity, on which a range of options and wording might be offered to represent the settled view of Ministers. In assessing the scale of this inhibition, the Commissioner is satisfied in this case that it would be substantial and is of real and demonstrable significance.
53. The Commissioner is satisfied that this is also the case in relation to the advice withheld within document 3, given that disclosure would have revealed the detail of options considered by the Ministers only a short time after the matter was settled. Disclosing this type of information on a sensitive subject so soon after the Ministers' decision had been taken has the potential to make officials and Ministers substantially more inhibited in future processes of seeking and imparting advice. The Commissioner has concluded that this applies to both section 30(b)(i) and (ii) respectively in relation to the withheld documents.

Public Interest test

54. As the Commissioner has found that the Ministers were correct in their application of section 30(b)(i) and (ii) of FOISA to the withheld information, he is required (in respect of this information) to consider the public interest test required by section 2(1)(b) of FOISA. This means that, even if the information is exempt, he must still require disclosure unless, in all the circumstances of the case, the public interest in disclosure is outweighed by that in maintaining the relevant exemption.
55. The Ministers accepted that there is a public interest in releasing the information to understand the relationship between the Scottish Government, the Scotland Office and Ofcom in relation to this appointment. They argued, however, that this public interest was served by information in the documents which had already been released.

¹ (<http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp>)



56. The Ministers argued that there is also, in their view, a strong public interest in ensuring that Ministers and officials have a private space within which free and frank debate of sensitive issues, such as relations with the UK Government on public appointments, can be undertaken without fear that those discussions will be subsequently made public.
57. The Ministers further argued that disclosure in this case could substantially prejudice similar discussions on such appointments in the future and that this would not be in the public interest. The Ministers concluded that, in their view, the balance of the public interest favoured maintaining the exemptions.
58. In its submissions to the Commissioner, West Highland Free Press noted that it is difficult to formulate public interest arguments without access to the withheld documents. However, they argued that the Ministers' approach was a catch-all, and the same arguments could be used to withhold any type of communications. West Highland Free Press argued that the Ministers could therefore deploy such arguments widely, and implied that this could substantially defeat the purpose of freedom of information legislation by so doing, wherever Ministers wished to conceal communications between Ministers, special advisers and civil servants.
59. West Highland Free Press raised the possibility of political arguments being relied upon by Special Advisers and/or Ministers in arriving at what it regarded as the highly unusual public position adopted by the Scottish Government in relation to the appointment of the Chair of GMS. West Highland Free Press's view was that there might be a breach of the guidelines on public appointments which would be a legitimate matter of public interest.
60. Having viewed the information, the Commissioner found nothing in the withheld information which matches the types of exchange the West Highland Free Press expected to find as evidence of impropriety, or indicating a failure to adhere to any guidelines. The Commissioner notes that the appointment process was not the responsibility of the Scottish Government. Rather, the Scottish Government was consulted on an appointment that was made by Ofcom.
61. The Commissioner accepts that there is a general public interest in making information available to the public, and a general need for transparency and accountability in the conduct of public affairs and decision-making, but this must be balanced against any detriment to the public interest as a consequence of such disclosure.
62. In this case, the Commissioner acknowledges that there is also some public interest in publicising the relationship between the Scottish Government, Ofcom and the UK Government in the matter of a public appointment of considerable significance to Scotland.
63. The Commissioner considers that, in addition to the general public interest noted above and argued by West Highland Free Press, there is also a public interest in ensuring that Ministers are fully informed about the various factors involved when determining how best to respond to public appointment processes and to interact with the UK Government, and being able to discuss the formulation of these responses without publicly debating them.



64. The submissions on the public interest test presented by West Highland Free Press suggest that to withhold this information would in effect allow the Scottish Government to withhold any document it wished in future. The Commissioner is unable to accept this proposition, since decisions under FOISA are taken on a case-by-case basis. Each case must be determined (by the public authority concerned, and subsequently by him) following consideration of the particular information requested and in all the circumstances of the case. There have been many instances where the Commissioner has required authorities to disclose more information; just as there have been instances where the Commissioner has accepted that the authorities were entitled to withhold information.
65. In considering the balance of the public interest, the Commissioner has noted that a considerable amount of the information falling within the scope of West Highland Free Press's request has now been released by the Ministers (although the decision to release a number of the documents disclosed was not taken until after the Commissioner's investigation began). Disclosed documents include information provided by officials to Ministers; email exchanges between the Scottish Government and UK Government and information about the structure, culture and details of GMS and the post in question. It also included views robustly expressed by the Scottish Government to the UK Government over the appointment process and over the role of the Scottish Government.
66. The Commissioner takes the view that the public interest in understanding the involvement of the Scottish Ministers in the appointment of the Chair of GMS has been substantially served by the disclosure of the correspondence and other information which the Ministers have already disclosed to West Highland Free Press. The Commissioner does not consider that significant additional insights into that process would be provided through the disclosure of the remaining information the Ministers have withheld. As noted above, the Commissioner has found that there is nothing in the withheld information which matches the types of exchange the West Highland Free Press expected to find.
67. The Commissioner considers that the public interest in favour of releasing the remaining withheld information is outweighed in this case by the public interest in withholding the information. The Commissioner has therefore decided that the Ministers were justified in maintaining the exemptions in sections 30(b)(i) and (ii).
68. The Ministers also cited the exemption in section 29(1)(b) of FOISA in respect of one of the documents under consideration above. However, as the Commissioner has determined that the information in the remaining six documents was correctly withheld by the Ministers under the exemptions in section 30(b) of FOISA, it is not necessary to go on to consider section 29(1)(b) in this Decision.

Technical breaches - timescales

69. West Highland Free Press also expressed dissatisfaction with the time taken by the Scottish Government to respond to their requirement for review.



70. Section 21(1) of FOISA gives public authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review, subject to exemptions which are not relevant in this case.
71. The Commissioner finds that the Ministers failed to respond to West Highland Free Press's requirement for review of 23 September 2008 within the 20 working days allowed under section 21(1) of FOISA. The response was made by the Ministers on 4 December 2008.
72. Given that the Ministers did respond to the requirement for review, the Commissioner does not require them to take any action in relation to this technical breach in response to this decision.

Recent Court of Session Opinion

73. The Commissioner notes that the information request by West Highland Free Press was for "all communications" as specified in paragraph 1 above. In the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
74. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between West Highland Free Press and the Ministers that the latter questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the Ministers have subsequently had with the Commissioner that the Ministers were unclear as to what the information requested sought.
75. The Commissioner is satisfied that the request is reasonably clear and that the information request is therefore valid.



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by West Highland Free Press.

The Commissioner finds that by withholding the information in the six remaining communications under the exemptions in section 30(b)(i) and 30(b)(ii), the Ministers complied with Part 1 of FOISA.

However, the Commissioner finds that the Ministers failed to comply with Part 1 of FOISA by failing to respond to West Highland Free Press's requirement for review within 20 working days as required by section 21(1) of FOISA.

As a substantive response was subsequently provided to West Highland Free Press, the Commissioner does not require the Ministers to take any action in relation to this breach in response to this decision.

Appeal

Should either West Highland Free Press or the 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
9 November 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 –

- (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.

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.

...



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;

...