

Decision Notice



Decision 217/2010 Mr Michael Veitch and the Scottish Ministers

Summer 2010 Cabinet tour

Reference No: 201001678
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Summary

Mr Veitch requested from the Scottish Ministers (the Ministers) information relative to the Summer 2010 Cabinet Tour. The Ministers responded to the effect that certain information was available on the Government website while the remainder was being withheld under exemptions in sections 29 and 30 of FOISA. Following a review, Mr Veitch remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Veitch's request for information in accordance with Part 1 of FOISA, by incorrectly withholding information under the exemptions in sections 29(1)(a) (formulation or development of government policy), 30(a) (substantial prejudice to maintenance of convention of collective responsibility) and 30(b)(i) (substantial inhibition to free and frank provision of advice) of FOISA. The Commissioner also found that the Ministers were not entitled to withhold certain information in terms of section 33(1)(b). He required the Ministers to provide Mr Veitch with the information withheld, including information in respect of which it was no longer relying on any exemptions but which had not yet been released to Mr Veitch.

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); 29(1)(a), (3) and (4) (definition of "government policy") (Formulation of Scottish Administration policy etc.); 30(a) and (b)(i) (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 8 June 2010, Mr Veitch wrote to the Ministers requesting the following information:
All (i) correspondence and (ii) notes or minutes of meetings and telephone calls, relating to the preparation of the summer 2010 Cabinet tour.



2. On 25 June 2010, the Ministers advised Mr Veitch that they anticipated a proportion of the information he sought being the subject of exemptions, as arrangements for the summer Cabinets remained in development. On the assumption that he continued to seek the information at that time, they asked if he could be more specific about the type of information he was seeking. On the same day, he confirmed that the “main area” of information he was looking for related to “how decisions were taken on the choice of venue for each of the tour dates”.
3. The Ministers responded to Mr Veitch’s request on 6 July 2010. Mr Veitch was informed that certain information was available on the Government website and was provided with a link to that information. He was also informed that the remainder of the information he sought was being withheld under exemptions in sections 29(1), 30(a) and 30(b) of FOISA.
4. On 21 July 2010, Mr Veitch wrote to the Ministers requesting a review of their decision. He considered his request to relate purely to how decisions had been made on the locations for the Cabinet summer tour dates, arguing that this was in no way a sensitive issue requiring confidentiality.
5. The Ministers notified Mr Veitch of the outcome of their review on 18 August 2010, upholding the original decision to withhold the information without amendment.
6. On 19 August 2010 Mr Veitch 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.
7. The application was validated by establishing that Mr Veitch 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

8. On 25 August 2010, the Ministers were notified in writing that an application had been received from Mr Veitch and asked to provide the Commissioner with any information withheld from him. The Ministers responded and provided the Commissioner with a schedule and 25 documents which had been withheld from Mr Veitch. The case was then allocated to an investigating officer.
9. 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.



10. The Ministers responded and withdrew reliance on FOISA to withhold the information in documents 1, 11, 12 and 25, stating that there was no continuing public interest in withholding the information in these documents and that it had therefore been supplied to Mr Veitch, subject to the redaction of information falling outwith the scope of the request. Following further correspondence with the investigating officer the Ministers re-released this information to Mr Veitch, including pages omitted from the original release. Following this further release, the Commissioner is satisfied that Mr Veitch has been provided with all the information from these documents which falls within the scope of his request, with the exception of the information redacted from Annex C of document 11 (which he therefore still requires to consider in this decision).
11. The Ministers continued to withhold the remaining information under various exemptions.
12. During the investigation, the Ministers reconsidered the withheld information again and indicated that they intended to release documents 3, 4, 6, 10, 13, 16, 17, 18, 19 and 22 as a consequence, following final Ministerial approval). They also indicated that they intended to release document 8, subject to the redaction of information in terms of section 33(1)(b) of FOISA. However, although the Ministers ceased to claim any exemptions in respect of the information they intended to release, it had not been released to the applicant by the date of this decision.
13. The Ministers continued to withhold the information in documents 2, 5, 7, 9, 14, 15, 20, 21, 23 and 24, and confirmed during the investigation that they wished to rely upon the exemptions in sections 29(1)(a), 30(a) and 30(b)(i) of FOISA in respect of this information. They later added that the redaction made to Annex C of document 11 should be considered to have been withheld under these exemptions. In addition, they continued to argue that the information they proposed to redact from document 8 should be withheld under section 33(1)(b) of FOISA.
14. The Commissioner accepts that only the information contained on pages 5 and 6 of document 24, as identified by the Ministers in correspondence with the investigating officer, falls within the scope of Mr Veitch's request and requires to be considered in this decision.
15. The relevant submissions obtained from Mr Veitch and the Ministers will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

16. 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 Veitch and the Ministers and is satisfied that no matter of relevance has been overlooked.



17. On 7 July 2010, the First Minister announced that the Scottish Cabinet would, in line with practice in previous years, hold four meetings outside Edinburgh during the Scottish Parliament's 2010 summer recess. The locations for the 2010 meetings were Dornoch, Stirling, the Isle of Bute and Kilmarnock, each visit including a public meeting on the Ministers' "Vision for Scotland" and a reception to mark Scotland's Year of Food and Drink, in addition to the formal Cabinet meeting and individual Ministerial engagements.

Section 29(1)(a) of FOISA – formulation or development of government policy

18. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
19. For information to fall under the exemption in section 29(1)(a), it must relate to the formulation or development of government policy. The Commissioner considers that this can be defined as the development of options and priorities for the Ministers, who will subsequently determine which options should be translated into political action and when this should be done. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. "Development" suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
20. In relation to documents 2, 5, 7, 8 and 9, the Ministers considered it more important to maintain the opportunity for Ministers to make suggestions and for these to be considered as part of the policy development process in a private space outside public view. They therefore considered that the public interest was in not releasing these documents to enable that private space to be maintained.
21. In relation to documents 14, 15, 20, 21, 23 and 24, the Ministers submitted that the information contributed to the formulation of a minute to the First Minister, which was essentially an early draft of the Cabinet paper on the Summer Cabinet locations, and also included the Cabinet paper itself and minutes of the relevant Cabinet meeting. The Ministers further claimed that these documents all reflected the development and formation of policy, and rehearsed the pros and cons of various suggestions, expressing personal opinions and the development of thinking at a time when policy was not finalised. As with the information referred to in the previous paragraph, the Ministers took the view that Ministers required the space to undertake this thinking outwith the public sphere, and therefore that the public interest was in withholding the information.
22. Having considered the information in question, the Commissioner finds that it relates to the formulation and development of the Scottish Government's policy on the arrangements for Cabinet meetings outside Edinburgh during the 2010 recess. Consequently, he must consider the public interest test in relation to the withheld information.



23. On the public interest, the Ministers have provided generic arguments on the need for the policy development process to take place in private. This may well be a relevant consideration for information on the formulation or development of government policy, particularly where the policy development process remains ongoing. In this connection, though, the Commissioner would note that the announcement of the chosen locations for 2010 was made on 7 July 2010 (as indicated above), well before the Ministers reached a decision on Mr Veitch's requirement for review. In any event, having considered the content of the withheld information, the Commissioner can identify nothing of any substance which would appear to support the Ministers' arguments on the public interest in withholding the information in this particular case. On the other hand, there is a clear public interest in transparency in relation to decisions which involved the expenditure of fairly substantial sums of public money.
24. In all the circumstances of this case, therefore, the Commissioner finds that the public interest in disclosing the withheld information is not outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA. Consequently, he finds that the Ministers were not entitled to withhold the information under that exemption.

Section 30(a) – collective responsibility of the Scottish Ministers

25. The Ministers also applied section 30(a) of FOISA to the information withheld. Section 30(a) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. As with the other exemptions in section 30, the exemption is subject to the public interest test in section 2(1)(b) of FOISA.
26. The concept of collective ministerial responsibility is a long-standing constitutional convention, which is not regulated by statute, but is formalised in the Scottish Ministerial Code¹, which provides guidance on the convention. Paragraphs 2.2 and 2.3 are of particular relevance:

2.2 *The Scottish Government operates on the basis of collective responsibility. Decisions reached by the Government are binding on all its members. Ministers are required to abide by them and defend them as necessary. The internal processes through which a decision has been made should not be disclosed. Such decisions are, however, normally announced and explained as the decision of the Minister concerned. On occasion it may be desirable to emphasise the importance of a decision by stating explicitly that it is the decision of the Scottish Government; but this is very much the exception rather than the rule.*

2.3 *Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed and advice offered within the Government should be maintained. It is important that Ministers and their staff preserve the privacy of Government business and protect the security of Government documents, subject to the provisions of the Freedom of Information (Scotland) Act 2002. (See also paragraphs 2.23-2.25 below.)*

¹ <http://www.scotland.gov.uk/Resource/Doc/158641/0043036.pdf>



27. In a number of earlier decisions, for example, *Decision 056/2007 Mr Paul Hutcheon and the Scottish Executive*, the Commissioner has noted that in order to rely on the exemption in section 30(a), the Ministers are required to do more than assert that the documents contain views expressed by a Minister and therefore should be protected. They are required to show that disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Ministers.
28. As he has also said in previous decisions, to determine whether substantial prejudice would (or would be likely to) occur, the Commissioner must consider the nature and content of the withheld information. He must consider what it reveals about any views expressed by the Ministers and the context in which they were expressed. Although it may be relevant that the views expressed were at variance with the final policy or revealed disagreement among Ministers, those views would need to be significant: the Commissioner finds it difficult to see how the disclosure of merely procedural information, or information relating to a matter of substance but at a mundane or routine level, or simply affirming a proposal from officials, could cause the level of substantial prejudice required.
29. The Ministers considered that section 30(a) applied to the information in that it all reflected consideration prior to the announcement of a final decision which had been agreed by Cabinet. They considered it important that individual Ministers could express their own views prior to a collective decision being reached, and that to reveal any thoughts they had expressed on the matter would not support collective responsibility.
30. Having examined the withheld information and considered the submissions by the Ministers, the Commissioner cannot accept that disclosure of this particular information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Ministers. To the extent that it is revealing of individual Ministers' views at all, it simply records thoughts or comments (expressed in a manner which is not remotely frank or candid) on points the Ministers appear to have no concerns about requiring secrecy. Nothing of any substance is revealed about debate among Ministers or their internal decision making processes. In the circumstances, therefore, the Commissioner cannot uphold the Ministers' reliance on this exemption in relation to the withheld information.
31. As the Commissioner has not found that the exemption in section 30(a) applies to the information withheld, he is not required to go on to consider the application of the public interest test as it relates to this exemption.

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

32. In order to rely on the exemption laid down in section 30(b)(i) of FOISA, the Ministers must show that disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice.



33. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in section 30(b)(i) is high. In applying the exemption, the chief consideration is not whether the information constitutes advice (although this may also be relevant) but whether the release of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. The inhibition must be substantial, in other words of real and demonstrable significance.
34. The Ministers submitted that the information withheld was not intended for debate in the public sphere but for internal consideration as policy was developed and refined. They took the view that release would cause substantial inhibition as it would open up the discussion into the public sphere and would deny the opportunity of private space to have the free and frank consideration that policy development required.
35. In this case, the Commissioner can identify nothing in the withheld information which would make it particularly sensitive, or which might be expected to have any significant inhibiting effect on the nature of similar future correspondence or discussion: none of the advice or comment in the information is expressed with any notable degree of frankness or candour. The arguments advanced may be of relevance in other circumstances, but they are generic in nature and have little apparent relevance to the information under consideration in this case. In the circumstances, the Commissioner is not satisfied that any inhibiting effect the release of the information might have has been clearly articulated and reasoned in the Minister's submissions, and consequently he cannot accept that the Ministers were correct to apply section 30(b)(i) of FOISA in withholding the information requested.
36. As the Commissioner has not found that the exemption in section 30(b)(i) applies to the information in documents withheld, he is not required to go on to consider the application of the public interest test as it relates to this exemption.

Section 33(1)(b) – commercial interests of any person

37. The Ministers submitted that prior to being provided to Mr Veitch, information would be redacted from document 8 under the terms of section 33(1)(b) of FOISA, which provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
38. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate whose commercial interests would, or would be likely to be, harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.



39. In this case, the Ministers submitted that the release of the information redacted from document 8 might harm the commercial interests of third parties, specifically the hotels which had provided the quotes in question on the basis that others might expect similar rates if these were revealed. The Ministers made no submissions to demonstrate that the prejudice would (or would be likely to) be substantial, or regarding the public interest test. On the basis of such broad and unspecific submissions, and without it being immediately obvious why the disclosure of this information would enhance the bargaining power of any potential customer of the hotels in question significantly, the Commissioner is not satisfied that section 33(1)(b) of FOISA could be applied to any information contained within document 8.

Conclusion

40. The Commissioner finds that the Ministers wrongly withheld the information contained in documents 2, 5, 7, 9, 11 (redactions form Annex C only), 14, 15, 20, 21, 23 and 24 under the various terms of sections 29(1)(a), 30(a) and 30(b)(i) of FOISA, as considered more fully above. The Commissioner also finds that the exemption under section 33(1)(b) of FOISA could not be applied to any information contained within document 8.
41. As noted above, the Ministers also indicated during the investigation that they intended to provide Mr Veitch with the information in document 8 (subject to redaction as detailed above) and that in documents 3, 4, 6, 10, 13, 16, 17, 18, 19 and 22 following final Ministerial clearance. Although this had not been done by the date of this decision, the Ministers ceased to apply any arguments to justify the withholding of this information and, in the circumstances, the Commissioner is satisfied that there is no justification for withholding this information under FOISA. In any event, he can identify no reason why the arguments advanced by the Ministers for withholding information should be considered any more applicable to this information than he has found they were to the information detailed in paragraph 40 above.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Veitch. He finds that the Ministers wrongly applied the exemptions in sections 29(1)(a), 30(a) and 30(b)(i) of FOISA to withhold information from Mr Veitch, and in addition that they were not entitled to rely upon the exemption contained in section 33(1)(b) of FOISA. He also notes that no arguments were maintained by the Ministers to justify the withholding of the information detailed in paragraph 42 above, although that information had not been released by the date of this decision.

The Commissioner therefore requires the Ministers to provide Mr Veitch with the withheld information, as detailed in paragraphs 41 and 42 above, by 8 February 2011.



Appeal

Should either Mr Veitch 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
20 December 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

...

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

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-

- (a) the formulation or development of government policy;

...

- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.

- (4) In this section-

"government policy" means-



- (a) the policy of the Scottish Administration; and
- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers
- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or

...

33 Commercial interests and the economy

(1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...