

# Decision Notice



Decision 021/2013 Mr Ian Sutherland and the Scottish Criminal Cases Review  
Commissioner

Views and opinions on Cadder Judgement

Reference No: 201201416  
Decision Date: 19 February 2013

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## Summary

Mr Sutherland asked the Scottish Criminal Cases Review Commission (the SCCRC) for the views or opinions it canvassed on the Cadder judgement. The SCCRC withheld the information covered by Mr Sutherland's request, but released one document during the investigation.

The Commissioner found that the SCCRC had been entitled to withhold the remaining information under section 30(b) of FOISA (prejudice to effective conduct of public affairs).

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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

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1. In *Cadder v HMA*<sup>1</sup> ("the Cadder judgement"), the Supreme Court found the police practice (at that time supported by the relevant provisions of the Criminal Procedure (Scotland) Act 1995) of detaining a suspect at a police station for questioning without access to a solicitor to be incompatible with the European Convention on Human Rights.
2. On 14 March 2012, Mr Sutherland wrote to the SCCRC to ask for information which he had initially requested in a letter of 13 February 2012: namely, any written response canvassed from any SCCRC Board Member, legal officer or other employee on the implications of the statutory amendments enacted following the decision of the Supreme Court in the Cadder case, insofar as the amendments may have had implications for determination of the question of "finality" and the public interest in the administration of justice.
3. The SCCRC responded on 2 May 2012. It confirmed that (as previously indicated to Mr Sutherland) it considered the information to be exempt from disclosure under sections 30(b)(i) and (ii) of FOISA.

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<sup>1</sup> [http://www.supremecourt.gov.uk/docs/UKSC\\_2010\\_0022\\_Judgment.pdf](http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf)



4. On 11 June 2012, Mr Sutherland wrote to the SCCRC requesting a review of its decision. In particular, Mr Sutherland queried whether the public interest in disclosure had been properly assessed.
5. The SCCRC notified Mr Sutherland of the outcome of its review on 6 July 2012. It upheld its previous decision to withhold the requested information under section 30(b) of FOISA, but provided a copy of the SCCRC's formal response to the Carloway Review, which was already publicly available. (The Carloway Review<sup>2</sup> of criminal law and practice was carried out as a result of the Supreme Court's decision in the Cadder judgement and the passing of emergency legislation.)
6. On 23 July 2012, Mr Sutherland wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SCCRC's 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 Sutherland 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

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8. On 29 August 2012, the SCCRC was notified in writing that an application had been received from Mr Sutherland and was asked to provide the Commissioner with any information withheld from him. The SCCRC responded with the information requested and the case was then allocated to an investigating officer.
9. On 4 October 2012, the investigating officer contacted the SCCRC, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The SCCRC was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with specific reference to the provisions cited in its responses to Mr Sutherland.
10. The SCCRC responded on 26 October 2012, providing submissions to support its reliance on section 30(b) to withhold the requested information. The SCCRC advised that it also wished to rely on the exemption in section 36(1) of FOISA.
11. The SCCRC provided Mr Sutherland with one of the documents it had previously withheld, as it considered that it was no longer exempt from disclosure under FOISA. Mr Sutherland was advised that the information in this document would be excluded from the Commissioner's consideration below.
12. The relevant submissions received from both the SCCRC and Mr Sutherland are considered fully in the Commissioner's analysis and findings below.

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<sup>2</sup> <http://www.scotland.gov.uk/About/Review/CarlowayReview>



## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Sutherland and the SCCRC and is satisfied that no matter of relevance has been overlooked.

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

14. The SCCRC withheld the information covered by Mr Sutherland's request under section 30(b)(i) and (ii) of FOISA. In order for the SCCRC to rely on these exemptions, it must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). These exemptions are subject to the public interest test in section 2(1)(b) of FOISA.
15. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. In both cases, the inhibition must be substantial and therefore of real and demonstrable significance.
16. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, and is not simply a remote or hypothetical possibility. For inhibition to be likely, there must be at least a significant probability of it occurring.
17. Each request should be considered on a case by case basis, taking into account the effects on the future provision of advice or exchange of views anticipated from disclosure of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.

### *SCCRC's submissions*

18. The SCCRC explained that it is an independent public body whose role is to review possible miscarriages of justice in Scotland and decide whether to refer a case to the High Court of Justiciary for determination. The decision to refer cases is taken by the Board and not individual Board Members or employees.
19. The SCCRC advised that the withheld information in this case consisted of advice and views, provided by senior SCCRC staff and external legal consultants, to assist the Board in its consideration of complex legal issues and potential policy matters.



20. The SCCRC provided comments on each of the withheld documents, explaining, with respect to each document, whether the author was setting out their own views, providing views on the other documents, or offering advice in relation to the Cadder judgement's effect on the SCCRC. The advice and views were discussed at a number of Board meetings and Policy meetings.
21. The SCCRC argued that, as the Board alone may decide on policy matters or take the decision to refer a case to the High Court, it is reasonable to infer that any advice, views or responses by members of staff or individual Board Members about matters of policy would be intended for internal use only. The advice or views in question were provided simply to facilitate discussion among Board Members and staff, in the knowledge that where points relating to Cadder were raised as review grounds, it would be left to the Board to take a decision about whether to refer those cases to the High Court for determination. The SCCRC confirmed that the individuals who had provided the advice or views had objected to their opinions being disclosed.
22. The SCCRC explained that because the Supreme Court and the High Court were still deciding points of law relating to the Cadder case, it was likely that the SCCRC would have to consider new issues relating to this case and similar legal issues in future. The SCCRC considered that if the information covered by Mr Sutherland's request was disclosed, it would cause significant harm to the manner in which the SCCRC determines potential policy decisions in relation to the Cadder case, or similar legal issues. The views offered in such circumstances would become more restricted, or not offered at all, perhaps because the Board Member or the member of staff was unsure about their position, or perhaps because they had not had sufficient time to consider their position fully.
23. The SCCRC expanded further on this argument by commenting that there is a world of difference between putting forward for discussion at a meeting one's views or advice on a sensitive and complex legal issue, and putting them forward in the knowledge that one might have to defend them publicly; accordingly, the views offered or the advice given in those different circumstances might not be the same.
24. The SCCRC summed up its submissions by commenting that the inhibition resulting from disclosure in this case would cause significant harm to the manner in which the SCCRC carries out its statutory functions, as it requires a free or frank provision of advice or exchange of views for the purposes of any further deliberation on this subject, in order to take informed decisions about whether it ought to refer Cadder cases to the High Court for determination, while the law is constantly evolving in this case.

#### *Mr Sutherland's submissions*

25. Mr Sutherland queried whether information in a document described as a "paper" can constitute "advice", and did not accept that such information could represent an "exchange of views", considering that this would imply a dialogue and the involvement of more than one party. Mr Sutherland was unhappy that the SCCRC had not explained which information constituted "advice" and which information amounted to an "exchange of views".



26. Mr Sutherland also rejected the SCCRC's assertion that the individuals concerned would feel constrained in their future expression of views, arguing that these particular individuals were accustomed to having their views published.

*Commissioner's conclusion*

27. The Commissioner has considered both parties' submissions carefully. The investigating officer raised many of Mr Sutherland's queries with the SCCRC during the investigation, to which the SCCRC provided a detailed response.
28. With respect to Mr Sutherland's query as to whether the withheld information was either "advice" or "the exchange of views", the Commissioner is satisfied that the documents covered by Mr Sutherland's request either contain advice or represent part of an exchange of views for the purpose of deliberation by Board members. In any case (as stated previously), in applying the exemptions in section 30(b), the chief consideration is not whether the information itself constitutes advice or opinion, but whether the *disclosure* of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views.
29. Mr Sutherland also queried why individuals who are used to their views being published would feel constrained in providing such advice in the future. The Commissioner has considered the arguments put forward by the SCCRC (outlined earlier in this decision), and is satisfied that the information was not prepared or presented with any view to publication. The argument that the authors of the information were accustomed to having their views published is not relevant, in the circumstances of this case.
30. The Commissioner notes that, at the time of the request, discussion of the implications of the Cadder case was still going on, and that the SSCRC's policy position on this matter was developing and not yet finalised. She accepts that disclosure could have resulted in the SCCRC having to defend or debate the merits of the views and opinions contained in the withheld information, even where they may not have represented the SCCRC's final considered view.
31. In these circumstances, the Commissioner accepts that disclosure of the information withheld from Mr Sutherland would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, in any similar situation arising in future. Accordingly, the Commissioner accepts that the exemptions in section 30(b) of FOISA apply, subject to the requirements of the public interest test.

**Public interest test**

32. The exemptions conferred by section 30(b)(i) and (ii) are qualified exemptions (see section 2 of FOISA). Accordingly, in taking the view that both these exemptions apply, the Commissioner is required to consider whether the public interest in withholding the information under these exemptions outweighs the public interest in disclosure.





*SCCRC's submissions*

33. The SCCRC considered the following factors in relation to the public interest test: the general public interest in making information accessible; whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation; and whether disclosure would contribute to the administration of justice and enforcement of the law, including the prevention or detection of crime or the apprehension or prosecution of offenders.
34. The SCCRC acknowledged that disclosure would enable people to see the advice or views from the individual Board Members and employees. However, the SCCRC did not consider that disclosure would enhance scrutiny of its decision-making processes and thereby improve accountability and participation. It explained that an applicant asking for a review of his/her case (on the point of law raised by Cadder or on any other grounds) receives a response which sets out in detail the reasoning behind the decision in the statement of reasons and the supplementary statement of reasons issued in relation to their case. The SCCRC stated that, in each of those cases, where it was relevant to do so, it had applied the emergency legislation and provided its reasoning for reaching its conclusion for the case in question. The reasoning which underpins a decision to refer a case to the High Court is scrutinised by the High Court. Where a case is not referred to the High Court, the applicant is entitled to seek a judicial review of the Commission's decision not to refer the matter on.
35. In these circumstances, the SCCRC concluded that disclosure of the information would not contribute to the administration of justice.
36. The SCCRC also pointed to its published response to the Carloway Review (previously mentioned), in which it had set out its views on the implications of the Cadder decision and the emergency legislation, and its reasoning underpinning those views. The SCCRC considered that this published information went some way towards fulfilling the public interest it had identified in disclosure of the advice and views withheld from Mr Sutherland.
37. In conclusion, after considering both the public interest in disclosure and the public interest in withholding the information, the SCCRC concluded that the balance lay in favour of withholding the information in question.

*Mr Sutherland's comments*

38. Mr Sutherland commented that only one of the withheld papers was prepared by an employee, while the others were prepared by Board members who are public appointees subject to a code of conduct. He argued that this was relevant in terms of the public interest in disclosure.
39. Mr Sutherland believed that the SCCRC had failed to give adequate weight to the public interest in disclosure of views (both individual and collective) and serious comment about controversial legislative changes, arguing that criminal justice is not the preserve of an elite establishment but is public property.
40. Finally, Mr Sutherland argued that ensuring clarity for applicants (that is, people applying to the SCCRC to have their case reviewed) must be in the public interest.



*The Commissioner's findings*

41. The Commissioner has considered all of the comments made by Mr Sutherland and the SCCRC. She recognises that there is a genuine public interest in assisting the public (including people applying to have their case reviewed) to better understand the issues raised by the Cadder case. She accepts that the withheld information would offer insights into the matters considered by the SCCRC in relation to the Cadder judgement.
42. The Commissioner was not persuaded by Mr Sutherland's argument that the public interest in disclosure was strengthened because the Board members are public appointees subject to a code of conduct. She considers that this only has limited relevance when deciding whether the public interest is better served by disclosing or withholding information about the advice or views those individuals provided in relation to the Cadder judgement.
43. The Commissioner notes that one of the SCCRC's reasons for withholding the information is that points of law relating to Cadder are still being raised and decided, and that the Board may yet need to decide policy questions in future. Given its role and responsibilities, the Commissioner considers that it is in the public interest for the SCCRC to be able to have such internal discussions, to enable it to explore and test its thinking on the issues raised by judgements such as Cadder, before finalising its view. She accepts that internal discussions of this nature will help to ensure a rigorous decision-making process by the Board of the SCCRC, and that this is clearly in the public interest. As noted previously, the Commissioner has accepted that disclosure of the withheld information in this case would be likely to have an adverse effect on this process, by inhibiting participants from providing advice and views freely and frankly, and the Commissioner accepts that this outcome would not be in the public interest.
44. The Commissioner notes that the SCCRC published a response to the Carloway Review in 2011, which provided some insight into the SCCRC's view on issues raised by Cadder. The Commissioner accepts that publication of this response went some way towards meeting the public interest identified in disclosure of the information withheld in this case, in providing insight into the SCCRC's position on some of the issues associated with the Cadder judgement. (While not relevant to her decision on Mr Sutherland's case, the Commissioner is aware that the SCCRC has since published an additional response to the Carloway Review, offering further insight into its thinking.<sup>3</sup>)
45. The Commissioner is also aware that the SCCRC has published minutes of a Policy Meeting in which a discussion of the implications of Cadder and the proposed response to the Carloway Review is recorded<sup>4</sup>. Again, the Commissioner finds that this goes some way towards satisfying the public interest in disclosure of the information withheld from Mr Sutherland, as identified above.

<sup>3</sup> <http://www.scotland.gov.uk/Resource/0041/00411095.pdf>

<sup>4</sup> <http://www.sccrc.org.uk/viewfile.aspx?id=513>



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46. On balance, the Commissioner has concluded that, in this instance, the public interest in maintaining the exemptions in section 30(b) of FOISA outweighed that in the disclosure of the information. She therefore concludes that SCCRC was entitled to withhold this information.
47. Having found that the information requested by Mr Sutherland was correctly withheld under section 30(b) of FOISA, the Commissioner is not required to consider whether the exemption in section 36(1) of FOISA should be upheld.

## DECISION

The Commissioner finds that the SCCRC complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Sutherland by withholding the requested information under sections 30(b)(i) and (ii) of FOISA.

## Appeal

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Should either Mr Sutherland or the Scottish Criminal Cases Review Commission 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**  
**19 February 2013**



## Appendix

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### 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.

...

##### 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;

...