

# Decision Notice



Decision 063/2009 Mr David Rule and Historic Scotland

Flags flown over Edinburgh Castle

Reference No: 200900170  
Decision Date: 29 May 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Rule requested from Historic Scotland information relating to flags flown over Edinburgh Castle. Historic Scotland responded by providing some of the information requested, and by withholding the remainder under section 30(b) of FOISA. Following a review, where Historic Scotland upheld its decision to withhold certain of the information requested, Mr Rule remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, Historic Scotland released the remainder of the information which had been withheld. Mr Rule, however, remained dissatisfied with the handling of his request and asked the Commissioner to issue a decision.

The Commissioner accepted that Historic Scotland had provided Mr Rule with all the relevant information. However, he concluded that it had breached Part 1 of FOISA by wrongly withholding the requested information until the investigation commenced. Historic Scotland did not provide any arguments in support of its decision, and so the Commissioner could only conclude that the exemption had been incorrectly applied. Since the information had been disclosed, he did not require Historic Scotland to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions) and 30(b)(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. On 4 November 2008, Mr Rule wrote to Historic Scotland requesting the following information:

*“... all documents in your possession relating to flags flown over Edinburgh Castle and flag poles within Edinburgh Castle grounds as of 1<sup>st</sup> July 2008. This should include all documents related to meetings held after 1<sup>st</sup> July 2008 regarding the same subject”*



2. Historic Scotland responded on 10 December 2008. In its response, it provided Mr Rule with certain of the information requested. In withholding the remainder of the information, Historic Scotland cited the exemption under section 30(b)(ii) of FOISA, stating that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
3. On 15 December 2008, Mr Rule requested a review of this decision. In particular, Mr Rule stated that he strongly disagreed with Historic Scotland's use of section 30(b)(ii) of FOISA in the context of his request, going on to say that there was a public interest in the disclosure of the information in question.
4. Historic Scotland notified Mr Rule of the outcome of its review on 14 January 2009. In its response, Historic Scotland upheld its stance without amendment.
5. On 22 January 2009, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of Historic Scotland's 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 Rule 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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7. Historic Scotland is an Executive Agency of the Scottish Ministers and a letter was sent to the Scottish Ministers (the Ministers) on 11 February 2009 in line with agreed procedures, giving notice that an application had been received from Mr Rule and asking the Ministers 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. On 2 April 2009, the Ministers wrote to the Commissioner to inform him that on further consideration of Mr Rule's request they were now prepared to release all the information previously withheld from him. The Ministers included with this response a copy of a letter from Historic Scotland to Mr Rule dated 2 April 2009. Historic Scotland's response stated that although it considered that exemptions could still be applied to the information, it concluded that given the passage of time and in the interests of openness and transparency, the public interest now lay in release of the information in question. The Ministers did not provide any comments or respond to the questions posed by the investigating officer.



10. The investigating officer contacted Mr Rule to confirm that he had received the information sent by Historic Scotland. Mr Rule sought clarification regarding the completeness of Historic Scotland's response. After the investigating officer had clarified a number of specific points regarding the information Mr Rule was concerned about and the searches undertaken for it, Mr Rule confirmed that he was satisfied that he had received all the information falling within the scope of his request and held by Historic Scotland.
11. In light of the above developments, Mr Rule was asked whether he wished to continue with his application to the Commissioner. He confirmed that he wished to proceed to a formal decision, on the grounds that he did not agree that the information should have been withheld under the exemption cited in response to his request for information and request for review.
12. Following this, the investigating officer wrote again to the Ministers on 6 May 2009, reiterating the invitation to justify their reliance on any provisions of FOISA they considered applicable to the withheld information. On 27 May 2009, the Ministers responded by stating that because Mr Rule had received all the information he was looking for they saw no point in making a formal submission. They suggested that the application served no useful purpose and might be considered frivolous. Consequently, the Ministers provided no comment to the points raised in the investigating officer's letter of 6 May 2009.

### **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 him by both Mr Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.
14. This decision is unusual, but not unique, in that the information previously withheld by the Ministers had been disclosed to Mr Rule by the time of its writing. However, the Commissioner is obliged to issue a decision in response to an application to him, except in very limited circumstances. The Commissioner is satisfied that none of these circumstances apply in this case. He must consider (as he is required to do in any decision) the application of exemption/s to the information under consideration and (where this test is relevant) the balance of the public interest, in the circumstances that existed at the time when Historic Scotland notified Mr Rule of the outcome of its review. The Commissioner must disregard any developments since that time, including the subsequent disclosure of the withheld information to Mr Rule.
15. During the course of the investigation, the Ministers were asked by the investigating officer to explain the search methodology used to identify the information falling within the scope of Mr Rule's request. The Commissioner is satisfied that sufficient searches were carried out to locate any information falling within the scope of Mr Rule's information request which might be held by the Ministers.



## Consideration of exemptions

16. The Commissioner must consider whether Historic Scotland was correct (at the time of its review) to withhold the information that was previously withheld from Mr Rule in terms of the exemption set out in section 30(b)(ii) of FOISA.
17. In terms of section 30(b)(ii) of FOISA, in order for a public authority to be able to rely on this exemption, they would have to show that the disclosure of the information under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
18. The exemption in 30(b)(ii) of FOISA is a qualified exemption and as such is subject to the public interest test in section 2(1)(b) of FOISA.
19. The Ministers were invited to provide submissions on the reasons for their application of this exemption at the time of the review. They declined to do so, seeing no point in this as all the information had been released. In earlier correspondence, they had provided only a general comment to the effect that the issue of the Saltire flying above Edinburgh Castle had appeared more sensitive at the time of Mr Rule's request than when the information was released.
20. The Commissioner notes Historic Scotland's views on the "passage of time" as outlined in its letter to Mr Rule dated 2 April 2009 and recognises that a consequence of this may be that the sensitivity of information diminishes in the period between a review and the commencement of his investigation. Where this happens, it is an option for an authority to choose to disclose information while maintaining its view that it was exempt at the time of the review. However, such a decision does not remove the applicant's right to seek a decision.
21. In the absence of any submissions of substance to support the application of the exemption under 30(b)(ii) of FOISA, the Commissioner can only conclude that the exemption was incorrectly applied at the time of Historic Scotland's consideration of its review of Mr Rule's information request. As a result, he concludes that Historic Scotland acted in breach of Part 1 (and particularly section 1(1)) of FOISA by refusing to supply the information that was subsequently disclosed to Mr Rule during the course of the investigation.



## DECISION

The Commissioner finds that Historic Scotland failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr David Rule. By withholding the information under consideration on the grounds that it was exempt in terms of section 30(b)(ii) of FOISA, the Commissioner finds that Historic Scotland did not comply with section 1(1) of FOISA.

Given that Historic Scotland disclosed the information under consideration during the course of the investigation, the Commissioner does not require it to take any action in response to this particular application in relation to this failure.

## Appeal

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Should either Mr Rule or Historic Scotland 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**  
**29 May 2009**



## 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 –

- (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.

...

##### 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-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...