

Decision Notice



Decision 021/2011 Mr Peter Cherbi and the Scottish Legal Complaints Commission

Meeting with Fergus Ewing MSP

Reference No: 201001435
Decision Date: 3 February 2011

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr Cherbi requested from the Scottish Legal Complaints Commission (the SLCC) information contained in documents relating to a specified meeting with Fergus Ewing MSP and any discussions relating to that meeting. The SLCC provided some information to Mr Cherbi, but withheld other information under the exemptions in sections 30(b)(ii) and (c), and 38(1)(b), of FOISA. Following a review, Mr Cherbi remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner did not accept that the SLCC had been correct to withhold certain information under section 30(c) of FOISA, not being satisfied that disclosure would, or would be likely to, substantially prejudice the effective conduct of public affairs in the ways the SLCC had argued. However, the Commissioner also found that the SLCC had been entitled to withhold other information under section 30(c) and (on the basis that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation) under section 30(b)(ii) of FOISA. He required the SLCC to release certain information to Mr Cherbi.

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); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 13 May 2010, Mr Cherbi wrote to the SLCC requesting “the information contained in documents relating to the meeting with Fergus Ewing on 22 April 2010 and any discussions relating to that meeting”.
2. The SLCC responded on 10 June 2010 and provided certain information to Mr Cherbi, while withholding the remainder under the exemptions in sections 30(b)(ii), 30(c) and 38(1)(b) of FOISA. It set out its reasons for applying each exemption.
3. On 5 July 2010 Mr Cherbi wrote to the SLCC requesting a review of its decision.



4. The SLCC notified Mr Cherbi of the outcome of its review on 9 July 2010, which upheld its original decision without modification.
5. On 14 July 2010 Mr Cherbi wrote to the Commissioner, stating that he was dissatisfied with the SLCC'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 Cherbi had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 19 July 2010, the SLCC was notified in writing that an application had been received from Mr Cherbi and was asked to provide the Commissioner with any information withheld from him. The SLCC responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SLCC, 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. In particular the SLCC was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested, with particular reference to the requirements of the exemptions it had cited earlier.
9. During the investigation Mr Cherbi was asked to confirm whether he wished the Commissioner to consider the SLCC's withholding of personal data under section 38(1)(b) of FOISA. Mr Cherbi confirmed that he was not interested in the personal data withheld by the SLCC under section 38(1)(b). Accordingly, the Commissioner will only consider the information withheld by the SLCC under sections 30(b)(ii) and (c) of FOISA.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the submissions made to him by both Mr Cherbi and the SLCC and is satisfied that no matter of relevance has been overlooked.



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

11. For a public authority to rely on the exemption in section 30(b)(ii) of FOISA, it must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the test contained in section 30(b)(ii) is high.
12. In applying this exemption, the chief consideration is not whether the information constitutes opinion, but whether the disclosure of the information would, or would be likely to, inhibit substantially the exchange of views, and the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. The inhibition must be substantial, in other words of real and demonstrable significance.
13. Each request should be considered on a case by case basis, taking into account the effects anticipated from the release 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 whether the timing of disclosure would have any bearing: releasing advice or views whilst a decision is being considered and for which further views are still being sought, for example, may be more substantially inhibiting than once advice has been taken.
14. The SLCC applied section 30(b)(ii), wholly or partly, to the information in documents 15, 29 and 30, and explained that the withheld information included the views expressed by individuals in assessing the financial risks to the SLCC, and debating and formulating the SLCC's reserves policy in response to those risks. The SLCC referred to specific documents, but explained that the general principles behind its decision applied to all the withheld information.
15. The SLCC explained that its members were part-time, contracted to work 4 days per month and spread across Scotland. This arrangement necessitated email communication for urgent matters to be promulgated and discussed within reasonable timescales and cost-efficiently. These matters were often of the nature and substance that would normally be discussed verbally by colleagues who were co-located. The SLCC submitted that if its members believed that every opinion committed to email were to be released, this would substantially curtail free and frank discussion and exchange of views: substance would be inhibited in terms of full discussion of sensitive and business critical issues, as would freedom of expression. Additionally, the nature of the SLCC's organisation – that it had 6 members, located in different parts of the country with varied working patterns – meant that meetings or conference calls were not always practicable.



16. The SLCC commented that account had been taken of the impact of disclosure on the free and frank discussion within the SLCC, and with key stakeholders such as the Scottish Government and the Law Society of Scotland, particularly in relation to business-critical issues. It suggested that the prospect of disclosure would result in less open and effective discussion of such issues. For effective working relationships with key stakeholders, the SLCC submitted that some private space was needed for discussions to ensure decisions were taken on the basis of a full consideration of pertinent issues.
17. Before considering the information withheld under section 30(b)(ii), the Commissioner notes that the SLCC's submission could be read as arguing for a certain class of information (i.e. email communications between its members) to be exempted in terms of section 30(b)(ii). As the Commissioner has stated on many occasions, he does not, as a rule, accept the application of the exemptions in section 30(b) to the information in a certain class simply because they belong to that class. Assessment of the nature and content of the information will be necessary to determine whether section 30(b)(ii) applies, along with consideration of all other relevant circumstances, and it cannot necessarily follow from the Commissioner requiring release of one particular piece of information in particular circumstances that information of that general variety will require to be disclosed routinely in future.
18. The Commissioner will now consider the information withheld under section 30(b)(ii), in the light of the submissions from Mr Cherbi and the SLCC, in the individual documents.

Document 15

19. SLCC withheld part of this document (the complete note of the meeting and part of the covering email) under section 30(b)(ii). The SLCC stated that the withheld information comprised the personal views and impressions of the author of the email following the meeting, as expressed to SLCC members in the email and meeting note. It noted that the information was not accessible to anyone apart from Board members and submitted that there was an expectation that it would not be shared more widely.
20. The Commissioner has considered the withheld information in the email and meeting note, and is satisfied from the manner in which the views are expressed and the context within which they are made, that their disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore concludes that the SLCC was correct in its application of section 30(b)(ii) of FOISA to this information.



Documents 29 and 30

21. The SLCC withheld parts of documents 29 and 30 under section 30(b)(ii), and the remainder of these documents under section 30(c)(considered below). The SLCC explained that the contents related to an ongoing discussion with its sponsor department (of the Scottish Government) and it was important for the effective running of the SLCC that it had the space and facility to have a meaningful and frank dialogue with that department. There was a requirement in this case to discuss business-critical issues without concern that they would be put into the public domain, where they could have a negative impact on the SLCC's ability to carry out its functions. It took the view that disclosure was likely to result in less open and effective discussion.
22. It is clear from the content of the discussions that the matters under consideration were still ongoing and sensitive at the time, and in the circumstances the Commissioner concludes that the SLCC was correct in its application of section 30(b)(ii) to this information. He is satisfied from the manner in which the views are expressed and the context within which they were made that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore concludes that the SLCC was correct in its application of section 30(b)(ii) to this information.

Public interest test

23. The exemption in section 30(b)(ii) is subject to the public interest test in section 2(1)(b). Having found that the withheld information is exempt under section 30(b)(ii), the Commissioner is required to consider whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
24. The SLCC explained how it had balanced the public interest when it had dealt with Mr Cherbi's request. The SLCC accepted the general public interest in making information accessible to improve the accountability of the SLCC, and that disclosure might contribute to a matter of public debate (i.e. the level of reserves it should hold), but emphasised that there were strong competing factors favouring non-disclosure of the information.
25. On the other hand, the SLCC considered there to be very strong factors favouring non-disclosure in the circumstances. It submitted that where views had been expressed with an expectation that they would not be shared any further, it would be contrary to the public interest to release them into the public domain. It also argued that if individuals were to be substantially inhibited from freely discussing issues around setting the budget, levy or reserves policy of the SLCC, its Board's ability to make informed, objective and effective assessments of risk and best policy in this area, and its ability to make good decisions, would be compromised. This, the SLCC submitted, would clearly be contrary to the public interest.
26. Secondly, given the sensitivity attached to the information, the SLCC did not consider it to be in the public interest for the information to be disclosed.



27. In his application to the Commissioner, Mr Cherbi submitted that the meeting and events surrounding it were of overwhelming public interest, as it had been reported widely that a Scottish Government Minister, the Community Safety Minister Mr Fergus Ewing, “interfered with the independent SLCC, and even threatened the law complaints regulator with a review of its independence if it did not accede to the Law Society of Scotland’s demands for a reduction in the complaint levy”. Mr Cherbi referred to media reporting on the matter¹.
28. The Commissioner accepts that there is a public interest in the process of sound decision-making by the SLCC about its budget, reserves policy and approach to financial risk. He also accepts the more general public interest in accountability and transparency. On the other hand, he acknowledges the strong public interest arguments advanced by the SLCC against disclosure, in particular on the effect of the substantial inhibition he has recognised on the effectiveness of its decision-making.
29. Having considered the withheld and disclosed information and the submissions he has received, the Commissioner is of the view that a reasonable balance has been struck in this case in letting the public know that this issue has arisen with the Minister and the nature of the argument, without constraining the exchange of views within the SLCC. This has been done with the disclosure by the SLCC of documents 28 (a letter from the Chair of the SLCC to the Minister of 29 April 2010) and 32 (a letter from the Minister to the Chair of the SLCC of 22 February 2010). In the circumstances, he is not satisfied that the disclosure of the information he has accepted as being exempt under section 30(b)(ii) would add so materially to public understanding of the issues as to outweigh any resulting prejudice to the public interest.
30. Consequently, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information in this case, and therefore is satisfied that the SLCC was correct to withhold the information in documents 15, 29 and 30 under section 30(b)(ii) of FOISA .

Section 30(c)

31. The SLCC relied upon the exemption in section 30(c) of FOISA, wholly or partly, for the information in documents 3, 15, 22, 26, 29, 30, 33 and 35.
32. Having accepted that the information in document 15 (including the meeting note) was properly withheld under section 30(b)(ii) of FOISA, the Commissioner will not consider whether section 30(c) applies to this document.
33. Section 30(c) exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The word “otherwise” is used to differentiate this exemption from the other types of substantial prejudice covered in other parts of section 30. Section 30(c) is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.

¹ <http://business.scotsman.com/legalissues/Fergus-Ewing-tells-complaints-body.6235750.jp>



34. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The Commissioner's guidance² on this exemption makes clear that damage caused by disclosure must be real and significant, as opposed to hypothetical or marginal. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
35. In its submission to the Commissioner, the SLCC referred back to its reasoning in its initial response to Mr Cherbi. It stated that the withheld information, which it considered highly sensitive, related to the setting of its budget, its reserves policy and the complaint levy, and included detail of the key financial risks to the SLCC and the appropriate level of reserve fund to be held in response to those risks. Disclosure of this information, it argued, would adversely impact its decision-making and policy-setting in these areas, noting that much of the information was speculative, discursive and not formal policy or decisions.
36. The SLCC argued that discussions and decision-making about setting the budget, reserves policy and complaint levy, by necessity, required to be undertaken in a private forum to allow full and candid discussion and debate. Release of the information, it submitted, would cause the loss of that privacy, which would inhibit the candid and open participation of those involved in the process and their ability to exercise good decision-making in relation to those areas.
37. Consequently, in the SLCC's view, there was a real risk that disclosure of the information would have a significant impact on its ability to carry out its statutory functions and public affairs in relation to setting its budget, reserves policy, and complaint levy. This, the SLCC believed, could impact on every area of its business, in that if it were not appropriately resourced it would not be able to carry out its statutory functions of complaint-handling and oversight to an acceptable level of quality and within acceptable timescales.

Document 3

38. Document 3 is an email on the subject of budget, part of which was withheld under section 30(c) of FOISA. The Commissioner is not convinced by the SLCC's submissions that disclosure of the information would have a significant impact on its ability of the SLCC to carry out its statutory functions and public affairs as set out above.
39. Having considered the SLCC's arguments on substantial prejudice to the effective conduct of public affairs, along with the withheld information, the Commissioner is not persuaded that such prejudice would have occurred, or would have been likely to occur, as a consequence of disclosure of the withheld information in this document. There is nothing apparently sensitive about the information and the SLCC has provided no specific reasons as to why it should be considered sensitive in the circumstances. The Commissioner does not, therefore, accept that the SLCC was correct to consider the withheld information exempt under section 30(c) of FOISA.

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2582&SID=117>



Document 22

40. Document 22 is an internal email about a meeting date with the Minister and part of it was withheld under section 30(c) of FOISA. The information withheld from document 26 is identical, and so the Commissioner will only consider document 22.
41. As in the case of document 3, having read the information and considered the submissions presented to him, the Commissioner is not persuaded that disclosure of the information withheld from this document would have a significant impact on the SLCC's ability to carry out its statutory functions and public affairs as set out above. Once again, the information is not apparently sensitive in nature and the SLCC has provided no specific reasons as to why it should be considered sensitive in the circumstances.
42. The Commissioner does not, therefore, accept that the SLCC was correct to consider the withheld information exempt under section 30(c) of FOISA.

Documents 29 and 30

43. The SLCC withheld the remaining parts of these documents under section 30(c).
44. The Commissioner accepts the arguments put forward by the SLCC in relation to the degree of harm likely to be caused by disclosure of the information. He accepts that disclosure of the information would have the effect of undermining the functioning of the SLCC's board – and in particular the effectiveness of its decision-making and policy-setting – with specific reference in this case to the setting of the budget, the reserves policy and the complaint levy. In the circumstances, he is satisfied that disclosure of the information withheld under section 30(c) would have a significant impact on the ability of the SLCC to carry out its statutory functions and public affairs in relation to these matters. He therefore accepts that the SLCC was correct to consider the withheld information exempt under section 30(c) of FOISA.

Document 33

45. The SLCC withheld all of the information from this document, a paper on the setting of the general complaint levy for 2010/11 presented to its Board on 23 April 2010, under section 30(c).
46. The Commissioner has studied the information in this document. Whilst he accepts that the information in this document might have fallen within the exemption in section 30(c) at certain times, he notes that Mr Cherbi's request was made on 13 May 2010 and his request for review on 5 July 2010. The request and request for review were therefore considered by the SLCC some time after the SLCC budget was laid before the Scottish Parliament (on 29 April 2010, at which time the SLCC issued a full press release). From the terms of the report, the SLCC does not appear to have considered its disclosure to have been an issue after that point. As a result of the budget process and subsequent publicity, elements of the information have, in any event, entered the public domain.



47. In the circumstances, the Commissioner is not prepared to accept the SLCC's arguments in relation to the text of the report. However, he does accept, given its speculative nature, that disclosure of the information from the table of options would have been likely to result in the prejudicial effects on decision-making and policy-setting argued by the SLCC. In respect of that information only, therefore, the Commissioner considers the SLCC to have been correct in applying section 30(c) of FOISA.

Document 35

48. The SLCC withheld the full document under section 30(c). Document 35 contains estimates of the costs of key strategic risks identified by the SLCC for 2010/11, for the purposes of its Reserves Policy.
49. The Commissioner notes the date when this document was created and the timing of Mr Cherbi's request and request for review. In this instance, he is persuaded by the SLCC's submissions that disclosure of the information at the time the SLCC dealt with the request or request for review would have had a significant impact on the ability of the SLCC to carry out its statutory functions and public affairs in relation to setting the budget, reserves policy, and complaint levy. In particular, he accepts that disclosure would have been likely to inhibit the candid and open participation of those involved, and thereby to inhibit the identification and assessment of risks, with consequent substantial prejudice to its decision-making and policy-setting.
50. The Commissioner is therefore satisfied in this case that substantial prejudice would have occurred, or would have been likely to occur, as a consequence of disclosure of the information withheld from document 35. He therefore accepts that the SLCC was correct to consider the withheld information exempt under section 30(c) of FOISA.

The public interest test

51. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. Having found that certain of the withheld information is exempt under section 30(c), the Commissioner is required to consider whether the public interest in disclosing that information is outweighed by the public interest in maintaining the exemption.
52. The SLCC referred to the factors it had considered in balancing the public interest when it dealt with Mr Cherbi's request: the public interest arguments adduced for 30(c) were similar to those for 30(b)(ii) (above) and will not be repeated in full. To summarise, the SLCC stated that the information was sensitive, especially in relation to risk, and by its nature required to be considered in a private forum and only shared in confidence. If its Board members were to be substantially inhibited from freely discussing issues around setting the budget, levy or reserves policy of the SLCC, then the Board's ability to make informed, objective and effective assessments of risk and best policy in this area, and its ability to make good decisions, would be compromised. This, the SLCC submitted, would clearly be contrary to the public interest.



53. The SLCC acknowledged the general public interest in making information accessible to the public to improve the accountability of the SLCC, and that disclosure might contribute to debate on a matter of public interest, i.e. the level of reserves it should hold, but emphasised that there were strong factors favouring non-disclosure of the information. On balance, it did not consider the public interest in disclosure to outweigh that in maintaining the exemption.
54. Mr Cherbi's arguments on the public interest are set out at paragraph 27 above.
55. As noted previously, the Commissioner accepts that there is a public interest in the process of sound decision making by the SLCC about budget, reserves policy and approach to financial risk. He also accepts the more general public interest in accountability and transparency. Conversely, he acknowledges the strong public interest arguments advanced by the SLCC against disclosure, in particular in relation to maintaining the effectiveness of its decision-making.
56. Following the same general reasoning as has underpinned his conclusions on section 30(b)(ii), the Commissioner is of the view that a reasonable balance must be struck in this case in informing the public on the issues without disclosing information which would be likely to have a substantially prejudicial effect on the SLCC's decision-making. He believes this has been achieved by the other relevant information released by the SLCC, taking account also of the disclosure of the majority of document 33. In the circumstances, he is not satisfied that the disclosure of the information he has accepted as being exempt under section 30(c) would add so materially to public understanding of the issues as to outweigh any resulting prejudice to the public interest.
57. Consequently, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information in this case, and therefore is satisfied that the SLCC was correct to withhold the information in documents 29 and 30 under section 30(c) of FOISA, along with the table of options from document 33.

Summary of the Commissioner's findings in this decision

58. The Commissioner finds that the SLCC was correct to withhold information from documents 15 (under section 30(b)(ii) of FOISA), 29 and 30 (under sections 30(b)(ii) and 30(c)) and 35 (under section 30(c)), together with the table of options from document 33.
59. The Commissioner finds that the SLCC was not entitled to withhold, under section 30(c) of FOISA, information from documents 3 or 22, or (with the exception of the table of options) the information in document 33, all of which should therefore be disclosed to Mr Cherbi.



DECISION

The Commissioner finds that the Scottish Legal Complaints Commission (the SLCC) failed to comply completely 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 Cherbi. While the SLCC was correct to withhold certain information under the exemptions in section 30(b)(ii) and (c) of FOISA, other information was wrongly withheld under section 30(c) of FOISA.

The Commissioner therefore requires the SLCC to disclose to Mr Cherbi the information wrongly withheld under section 30(c) of FOISA, as specified in paragraph 59 above, by 24 March 2011.

Appeal

Should either Mr Cherbi or the Scottish Legal Complaints 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.

Kevin Dunion
Scottish Information Commissioner
03 February 2011



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.

...

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
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.