

Decision Notice



Decision 145/2008 Paul Martin MSP and the Scottish Prison Service

Papers relating to the comparative costs of the procurement of a Public Private Partnership prison as opposed to one procured in the public sector

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Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Paul Martin MSP (Mr Martin) requested copies of any papers provided to named Cabinet members relating to the procurement costs of public private partnership prisons compared with those procured in the public sector from the Scottish Ministers (the Ministers). The Scottish Prison Service (SPS) (an agency of the Ministers) responded by advising Mr Martin that it considered the information to be exempt under sections 29(1)(a) and 30(b)(i) and (ii) of FOISA. Following a review, Mr Martin remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the SPS disclosed part of one of the documents to Mr Martin. The Commissioner found that the SPS had been entitled to refuse to disclose the remainder of the documents to Mr Martin. The papers in question were Cabinet Papers and in this instance the Commissioner found that the public interest in favour of withholding the papers outweighed the public interest in favour of disclosing them under FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1) (Effect of exemptions) and 29(1)(a) (Formulation of Scottish Administration policy etc)

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 10 December 2007, Mr Martin wrote to the Ministers and requested copies of all papers provided to the Cabinet Secretary for Justice (Kenny MacAskill) or the Minister for Community Safety (Fergus Ewing) in connection with costs relating to the procurement for a Public Private Partnership (PPP) prison compared to one that is procured in the public sector between 7 May 2007 and 10 December 2007.
2. The Ministers passed this request on to the SPS, given that it concerned operational issues for the SPS. The SPS responded on 17 January 2008 and advised Mr Martin that it had identified some documents falling within the scope of his request, but that it was refusing to disclose them under the exemptions contained in section 29(1)(a) and 30(b)(i) and (ii) of FOISA.



3. On 7 February 2008, Mr Martin wrote to the SPS requesting a review of its decision. Mr Martin argued that it was imperative that Parliament is provided with the maximum level of available information to allow the effective interrogation of pre and post budget proposals, and that it is in the public interest for such information to be in the public domain to enable an effective comparison of public and private procurement processes.
4. The SPS notified Mr Martin of the outcome of its review on 11 March 2008. The SPS upheld its original decision.
5. On 1 April 2008, Mr Martin wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPS'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 Martin 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. As noted above, the SPS is an Executive Agency of the Scottish Ministers and a letter was sent to the Ministers' Freedom of Information Unit on 16 April 2008, in line with agreed procedures, giving notice that an application had been received from Mr Martin and that an investigation into the matter had commenced. The Ministers were asked to provide the Commissioner with any information withheld from Mr Martin. (Subsequent references to submissions etc. being received from the SPS are therefore references to submissions etc. made by the Ministers' Freedom of Information Unit on behalf of the SPS.)
8. The SPS responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the SPS, providing it with 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 SPS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
10. The SPS's submissions confirmed that it had withheld two cabinet papers numbered SCN(07)38 and SCN(07)48 from Mr Martin, along with their covering emails, and that it considered the withheld information to be exempt from disclosure under the exemptions contained in sections 29(1)(a), 30(b)(i) and (ii) of FOISA.



11. The SPS also submitted that the scope of the documents focused on proposals for the prison estate and range far wider than comparative costs of procurement. However, given the fact that the matters in the documents were so interconnected, the SPS considered that it was not possible to separate out the various policy issues and advised that it was content for the Commissioner to apply its arguments to the entirety of all of the withheld documents.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr Martin and the SPS and he is satisfied that no matter of relevance has been overlooked.

Scope of the request

13. Mr Martin requested copies of any papers that had been provided to either the Cabinet Secretary for Justice (Kenny MacAskill) or the Minister for Community Safety (Fergus Ewing) between 7 May 2007 and 10 December 2007, which focused on the comparative costs of private versus public sector prison procurement.
14. The SPS identified two cabinet papers (SCN(07)38 and SCN(07)48) falling under the scope of Mr Martin's request, along with the covering emails which were used to distribute each paper.
15. The Commissioner has reviewed the covering emails and he is of the view that neither of the emails fall within the scope of Mr Martin's request. The covering emails have little or no content and contain no references to the issues of prison procurement. The Commissioner notes that Mr Martin has specified that he is interested in copies of papers that were provided to either Kenny MacAskill or Fergus Ewing and which focused on the comparative costs of private versus public sector prison procurement. As the emails functioned simply as covering notes and contain no references to the subject matter of interest to Mr Martin, the Commissioner has found that they do not fall within the scope of his request, and he will not consider them further in this Decision.
16. The Commissioner notes the comments made by the SPS, and outlined above in paragraph 10, and he agrees that the issues discussed in the papers are interconnected and that it is difficult to separate out what information falls within the scope of Mr Martin's request and what information does not. Consequently, the Commissioner accepts that the most practical approach is to consider the papers as a whole and apply the arguments submitted by the SPS to all of the content.



17. During the investigation, the Commissioner asked the SPS whether they would be willing to disclose three paragraphs (paragraphs 10, 11 and 12) on page 10 of Annex B of document SCN(07)48 to Mr Martin. These paragraphs in question contain factual background information, with references to past research and historic fact in the area of public versus private procurement options for prisons, together with some comments from the SPS how the costs differ. The Commissioner considered that the information in these paragraphs substantially addressed the central element of Mr. Martin's request regarding the comparative basis of private versus public prison provision. The Commissioner also indicated that the public interest in this information favoured disclosure.
18. The SPS agreed to this and subsequently disclosed the information in the three paragraphs to Mr Martin. All further references to the withheld information in this case therefore excludes these three paragraphs and the two covering emails referred to in paragraph 15 above.

Section 29(1)(a) – Formulation of Scottish Administration Policy etc.

19. Section 29(1)(a) states that information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy.
20. For information to fall under the exemption in section 29(1)(a), it must relate to government policy, i.e. the development of options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when. The exemption contained in section 29(1)(a) of FOISA is a class-based exemption, which means that any information held by the Scottish Administration is exempt information if it relates to the formulation or development of policy, regardless of whether it is sensitive or innocuous (see *Decision 075/2006 Mr Paul Hutcheon and the Scottish Executive*). In considering the application of this exemption the SPS is not required to consider the significance of the content of the information, nor consider the effect of disclosure.
21. However, it should also be noted that this is a qualified exemption, which means that the application of the exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
22. The SPS has submitted that each of the withheld cabinet papers constitutes the formulation of government policy as they consist of the opinions, views and recommendations of Ministers seeking agreement on a policy.
23. The SPS has indicated that the purpose of cabinet paper SCN(07)38 is to provide an update on the prison estate and invite Cabinet to agree proposals for the running of prisons. The SPS has also submitted that cabinet paper SCN(07)48 responds to issues arising from the earlier paper (i.e. SCN(07)38) and invites Cabinet to agree further proposals. The SPS has argued that, given the information contained within both papers, the positions which they set out and the requirement to discuss and reach agreement on a policy, it would seem clear that the information relates to policy formulation in terms of section 29(1)(a) of FOISA.



24. The SPS further submit that the papers set out a range of policy options for Ministers' consideration in respect of HMP Kilmarnock, HMP Addiewell and HMP Bishopbriggs. Additionally, policy positions are set out regarding prisons in the north-east. The SPS has argued that, throughout the documents, consideration is given to the stated policy of the Government (the commitment to a publicly owned and run prison service) and the realities of being able to move towards this legally, practically and financially.
25. The SPS has indicated that, on several occasions, the documents refer to the Scottish Futures Trust and the role it might be able to play in the provision of prison services. As the Scottish Futures Trust policy itself remains to be settled at this time, the SPS has suggested that by association this also indicates policy on funding arrangements for projects such as prison funding remains to be settled.
26. The Commissioner has reviewed the two cabinet papers and is satisfied that the content of both documents relate to the formulation and development of government policy. Paper SCN(07)38 provides background information on the existing prison estate and sets out options for future policy decisions in relation to prison procurement. Paper SCN(07)48 includes advice and recommendations to Ministers in relation to the policy options outlined in paper SCN(07)38.
27. Consequently, the Commissioner has found that both of the cabinet papers fall under the exemption contained in section 29(1)(a) of FOISA.
28. The Commissioner must now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test

29. The effect of the public interest test in section 2(1)(b) of FOISA is to require the Commissioner to consider the public interest arguments both in favour of disclosing the information and in favour of maintaining the exemption (and thereby withholding the information). The Commissioner must then weigh the two and, unless he is satisfied, in all the circumstances of the case, that the public interest in disclosing the information is outweighed by that in maintaining the exemption, he must order the information to be disclosed.
30. In coming to his decision, the Commissioner has taken into account the SPS's views on the public interest as well of those of Mr Martin. These are discussed below along with the Commissioner's deliberations about the public interest in disclosing or withholding the information.
31. In his submissions on the public interest, Mr Martin advised the Commissioner that in Parliament in 2007, the Government set out its views for the prison estate and the issue of the cost of PPP prison verses prisons funded solely from the public purse was raised.
32. Mr Martin commented that he had obtained figures from a source that suggested that the running costs of a PPP prison costs the public £25,000 per prisoner per year, but for a public funded prison, it costs the public some £45,000 per prisoner per year.



33. Mr Martin submitted that he wanted to obtain background information that would indicate whether the figures he had been provided with were correct and to see how they were arrived at. He argued that this will enable him (and the wider public) to be satisfied that the right decision has been taken regarding the funding of prisons in Scotland.
34. The SPS has argued that while there is a public interest in the release of any cabinet paper considered by Ministers as part of the decision-making process regarding prison funding policy, it is outweighed by the public interest in withholding the information.
35. The SPS has submitted that Cabinet Government requires Ministers' full participation within an effective and robust collective decision making process. In order for this to happen, the SPS has argued that cabinet papers must be able to clearly set out policy options with accompanying facts and analysis as well as recommending a course of action. The SPS has argued that if it were understood that cabinet papers such as these were likely to be placed in the public domain, whether in full or in part, this would significantly alter the nature of such documents.
36. The SPS has referred to the marking of the cabinet papers as 'restricted' and has argued that the existence of such a marking (while not conferring any automatic exemption under FOISA) would suggest that the contents are not written with an intention of public disclosure. The SPS has argued that if these papers were to be released, officials and Ministers would exercise an increased degree of caution in respect of the contents, the views expressed and the recommendations made and that there would be a qualitative change in substance in the information contained.
37. The SPS has submitted that if it were generally understood that positions set out in policy papers were to be released at an early stage of the debate, officials and Ministers would be far more likely to develop policy with a view to how it will appear in the next day's newspapers rather than take a more considered approach where a full range of options, including those less acceptable, could be contemplated. The SPS has suggested that early or premature release of the cabinet papers may satisfy short-term public curiosity, but would not be in the longer term public interest in mature policy making. In addition, the SPS has submitted that Cabinet decisions may ultimately be influenced by external factors not fully articulated in the cabinet papers.
38. The SPS has also argued that if policy information were to be released while the debate remains a 'live' issue (and the comparative merits of private/public funding of infrastructure projects is a subject under much current debate) there is the inherent danger that certain arguments may be taken out of context, open to misrepresentation or perceived to be misleading.



39. In relation to the withheld information, the SPS notes that both Cabinet Papers discuss policy in respect of HMP Bishopbriggs and prisons in Grampian. The SPS has submitted that, as it is currently in the process of procuring new prisons at Bishopbriggs and in the Grampian area, it would be highly disadvantageous in discussing value for money figures associated with these projects if the alternative costs were to be made public at this stage of the procurement process. The SPS concluded that the potential release of information setting out often contentious issues for discussion and policy options for agreement would significantly curtail the opportunity for officials and Ministers to fully consider all available options and be fully apprised of all relevant details. The SPS submitted that this clearly has the potential to jeopardise the overall effectiveness of the collective decision-making process and could not be considered to be in the public interest.
40. The Commissioner accepts that the public interest may be served by allowing the process of policy formulation and development to proceed without disclosure of documents revealing details of the matters under active consideration, especially in the early stages, before any decision or settled policy been reached. The Commissioner also accepts that even where a decision has been publicly announced in relation to policy development, it is still possible that the specifics of that policy (and the discussion surrounding its uptake) may retain a level of sensitivity for some time after the initial decision has been announced. This is particularly likely to be the case in situations where the policies relate to procurement and tendering processes, and where these processes have not yet been finalised.
41. The Commissioner accepts that it is in the public interest that (for instance) officials or Ministers are not inhibited from considering the merits of a wide range of policy options, expressing their views upon them, and rigorously challenging the arguments for and against any proposed approach. Near contemporaneous disclosure may well subsequently inhibit the putting forward of politically controversial policy options, or limit the recording of these, and the Commissioner accepts (as he has previously, for example in *Decision 077/2006 Mr Paul Hutcheon and the Scottish Executive*) that the benefits of open government need to be balanced against this risk in the interests of sound policy development.
42. On the other hand, the Commissioner has also made it clear (see again *Decision 077/2006*) that it is inappropriate to "ring-fence" all internal deliberations on public interest grounds. Although the exemption in section 29(1)(a) applies widely to a class of information, this should not be taken to suggest that the public interest will automatically favour the maintenance of that exemption once it has been found to apply. The Commissioner's view is that information cannot as a matter of course be given protection simply because it is of a general type or subject matter. Consideration must be given to the content of the information in deciding whether the public interest demands its protection, and the balance of public interest may well change over time.



43. The Commissioner accepts that there is a strong case for releasing as much information as possible to help the public understand how and why the Government decided upon its policies in relation to prison procurement. The issue of procuring prisons (or other public facilities) using solely public money or part public funding is a contentious one, and one which has been the subject of much public debate. That is why he sought to identify highly relevant information within these documents which could and should be disclosed in response to Mr. Martin's specific interest.
44. The Commissioner also notes that while information relating to policy development may retain a high level of sensitivity at the time that policy is being formulated, the sensitivity of that information will decline over time, but that in this case the request was made at a time of high sensitivity whilst internal deliberation was still taking place.
45. Having considered the competing arguments for and against disclosure of the remaining information, the Commissioner finds that the public interest in maintaining the exemption in section 29(1)(a) outweighs the public interest in the disclosure of the information withheld by the SPS in this case. The Commissioner is satisfied that the content of both papers remained sensitive at the time of Mr Martin's request for review, particularly given that the policies outlined in the papers had not been implemented at that stage, and that disclosure of the papers in their entirety would have had a negative impact on the policy formulation and development. He considers that the public interest has been served by the disclosure of the three paragraphs in paper SCN(07)48.
46. Having reached this conclusion, the Commissioner has not gone on to consider the remaining exemptions applied to this information by the SPS.

DECISION

The Commissioner finds that the Scottish Prison Service acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Martin MSP.



Appeal

Should either Mr Martin or the Scottish Prison Service 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
24 November 2008

Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

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

...

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

2 Effect of exemptions

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

- (a) the provision does not confer absolute exemption; and



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

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;