



Scottish Information  
Commissioner

**Decision 076/2006 Mr Paul Hutcheon and the Scottish  
Executive**

*Request for dates and minutes of meetings on the sexual health strategy*

**Applicant: Mr Paul Hutcheon  
Authority: Scottish Executive  
Case No: 2005001429  
Decision Date: 16 May 2006**

**Kevin Dunion  
Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews  
Fife  
KY16 9DS



## Decision 076/2006 – Mr Paul Hutcheon and the Scottish Executive

***Request for dates and minutes of meetings discussing the sexual health strategy – information withheld – section 29(1)(a) formulation of government policy – section 29(1)(b) ministerial communications – section 30(a) collective responsibility – public interest test – Commissioner found that the Executive had partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002***

### Facts

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Mr Hutcheon requested dates and minutes of all meetings within the Health and Education Departments from September 2004 to January 2005 on the sexual health strategy. The Scottish Executive (the Executive) indicated that the details of the meetings were exempt under section 29(1)(a) formulation of government policy and section 29(1)(b) ministerial communications of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive advised that in this case, it decided that the public interest in the maintaining the exemption as set out in section 29(1)(a) outweighed that in disclosure of information because Ministers and officials needed to be able to think through all the implications of particular options. Mr Hutcheon sought a review of this decision. The Executive upheld its decision on review. Mr Hutcheon then requested that the Commissioner investigate whether the exemptions had been correctly applied.

### Outcome

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The Commissioner found that the Executive partially complied with Part 1 of FOISA by withholding certain information requested by Mr Hutcheon. However, he also found that the Executive partially failed to comply with Part 1 of the FOISA in failing to provide Mr Hutcheon with:

- 1) A list of dates of the meetings
- 2) Document 2



The information should be supplied to Mr Hutcheon within 6 weeks of receipt of this decision notice.

The Commissioner found that the Executive partially failed to comply with Part 1 of FOISA in failing to respond to Mr Hutcheon's original request within 20 working days as required by section 10(1) of FOISA.

The Commissioner does not require the Executive to take any remedial steps in respect of this technical breach.

## Appeal

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Should either the Executive or Mr Hutcheon wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

## Background

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1. On 8 February 2005 Mr Hutcheon requested the following information from the Executive:
  - Dates and minutes of all meetings within the Health and Education departments from September 2004 to January 2005 on the sexual health strategy.
2. The Executive responded to Mr Hutcheon's request on 9 March 2005 and refused to provide the information requested. The Executive advised that the details of the meetings on the sexual health strategy were exempt under sections 29(1)(a) and section 29(1)(b) of FOISA, which relate to the formulation or development of government policy and ministerial communications, respectively.
3. The Executive indicated that it had applied the public interest test and had decided that in this instance the public interest in maintaining the exemption as set out in section 29(1)(a) outweighed that in disclosure of the information because Ministers and officials need to be able to think through all the implications of particular options.



4. Mr Hutcheon sought a review of this decision on 9 March 2005. He indicated that he believed that it was in the public interest for all of these documents to be out in the public domain.
5. The Executive responded to the request for review on 7 April 2005. It advised that it had carefully reviewed the papers. The Executive confirmed that the exemptions under section 29(1)(a) and section 29(1)(b) applied. It confirmed that it had also reapplied the public interest test and was of the view that withholding the information outweighed its release on the grounds stated in its previous response.
6. On 9 April 2005 Mr Hutcheon applied to my Office for a decision. He indicated that he believed disclosure of this information was in the public interest.
7. The case was allocated to an investigating officer.

## **The Investigation**

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8. Mr Hutcheon's appeal was validated by establishing that he had made a valid request to a Scottish public authority (i.e. the Executive), and had appealed to me only after asking the authority to review its response to his request.
9. The investigating officer contacted the Executive on 5 May 2005, giving notice that an appeal had been received and that an investigation into the matter had begun. The Executive was asked to comment on the issues raised by Mr Hutcheon's case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
10. In particular, the Executive was asked to provide my Office with copies of the information which had been withheld from Mr Hutcheon and to expand on its analysis of the exemptions applied and of the public interest test. The Executive was also asked to provide further information on its process of review and any guidance it had relied on in forming a decision.

## **Submissions from the Scottish Executive**

11. The Executive responded on 21 June 2005. It provided a Schedule that listed the dates of the meetings discussing the sexual health strategy within the Health and Education Departments within the time period specified by Mr Hutcheon.



12. The Executive also supplied copies of the minutes of some of those meetings. It advised that none of the documents comprised formal minutes and not all of the meetings were noted. The Executive advised that on review the relevant officer had considered the papers identified in relation to this request and ascertained that there were no papers relating to formally constituted meetings recorded by formal minuting. Email communications were the method used to both arrange meetings and to record their outcome. The reviewing officer confirmed that only those meetings involving the Minister were minuted (albeit by email); other contacts between officials on the issue were by way of general unminuted discussions. The Executive indicated that both the Health and Education departments had confirmed this.
13. The Executive had identified 8 documents that were relevant to Mr Hutcheon's request. The Executive subsequently advised that document 7 fell outwith the scope of Mr Hutcheon's request.
14. The Executive advised that documents 6 and 8 had been released to Mr Hutcheon in response to another request for information he had made to the Executive. Unfortunately, it had not been made clear to Mr Hutcheon that in fact some of the documents relevant to his request for minutes of meetings were being provided.
15. The Executive advised that all of the documents identified as being relevant to this request were all important parts of the records of the development of the sexual health strategy. It advised that this had been a significant policy initiative of the Executive, the development of which necessitated detailed and thorough discussions about all the issues involved, many of which were particularly sensitive.
16. Some of the documents included, the Executive indicated, advice to the relevant Minister and his communication of his views to officials. The Executive submitted that release of such information when so little time had elapsed would be to the detriment of future internal communications which were vital to the operation of effective government.
17. The Executive submitted that there was a significant public interest in ensuring that policy formulation and development could take place in an arena which will enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations will be picked over out of context. The Executive argued that if there was a perceived risk of internal discussions being made publicly available so soon, their quality would be undermined.
18. The Executive indicated that the exemption under section 29(1)(a) applied to all the information withheld, as it directly related to the formulation of government policy.



19. The Executive advised that an exemption under section 29(1)(b) also applied to documents 2, 3, 4 and 5 as they comprised records of ministerial discussions.
20. The Executive submitted that section 30(a) should, in retrospect, also have been applied. Section 30(a) states that information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.
21. The Executive argued that many of the documents comprise concerns and issues raised specifically by the Health Minister. It submitted that the Executive operates on the basis of collective responsibility, which requires that Ministers should be able to express their views frankly and a degree of privacy of opinions expressed therefore maintained. The Executive considered that due to the harm that would be caused to the future of such exchanges by the release of these documents, the balance of the public interest lay in withholding them.

#### **Submissions from Mr Hutcheon**

22. In response to my invitation, Mr Hutcheon put forward a number of submissions about why this information should be released. He is of the view that the public is entitled to know the factual, statistical and evidential basis of Ministerial decisions. Mr Hutcheon says he accepts that policy advice given by civil servants is exempt, but the reasoning behind a decision, including when and why it was taken is a matter of public interest.
23. Given that the publication of the sexual health strategy was delayed, Mr Hutcheon considers that information regarding items that were dropped and eventually included in the final draft should be disclosed.
24. He considers that the decisions taken and the reasoning behind them are very much in the public interest. He considers that if the minutes contain advice from civil servants or summaries/original copies of communications between Ministers then he considers this information should be withheld. However, information showing the decisions reached and why, including the evidential basis, motive and the influence of third parties should be published.
25. He is particularly interested in the issue of “abstinence” in relation to the sexual health strategy, which he submits was a late addition to the sexual health strategy. The motive and evidential basis of the inclusion of “abstinence” is, in his view, a matter of the public interest because it is now pivotal to Scotland’s sexual health strategy.



## Commissioner's analysis and findings

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26. It might be helpful to provide some background information on the Executive's sexual health strategy and its development to give some context to the information under discussion.
27. In August 2002, the Minister for Health and Community Care appointed an expert Reference Group to draw up a strategy for improving sexual health in Scotland. The Reference Group reported in September 2003 with a document entitled *Enhancing Sexual Wellbeing in Scotland: A Sexual Health and Relationships Strategy: Proposal to the Scottish Executive*. The proposals set out in the report were issued for consultation by the Executive on 12 November 2003. The Executive subsequently published an analysis of the responses it had received to the consultation document.
28. On 27 January 2005, the Executive published its own sexual health strategy entitled *Respect and Responsibility: Strategy and Action Plan for Improving Sexual Health*. Mr Hutcheon's request therefore relates to the development of a now finalised policy.
29. In response to my enquiries, the Executive subsequently indicated that it would provide Mr Hutcheon with a copy of the list of dates of meetings that are recorded as having taken place, with the description of the purpose of the meeting (Document 1).
30. The Executive emphasised that there might well have been other unscheduled and unrecorded meetings and so the list might not present an accurate account of discussions that took place on the sexual health strategy.
31. I am satisfied that Document 7 does not fall within the scope of Mr Hutcheon's information request.
32. The Executive is therefore withholding 4 documents in this case and has cited three exemptions in justification of this. It has advised that section 29(1)(a) and section 29(1)(b) applies to all of the documents withheld and that section 30(a) applies to certain of the documents withheld. I will consider the application of each exemption and the public interest test in respect of each document withheld.





### **Application of section 29(1)(a) formulation of government policy**

33. Section 29(1)(a) of FOISA states that information held by the Scottish Administration (defined as members of the Scottish Executive, junior Scottish Ministers and their staff, and non-ministerial office holders of the Scottish Administration and their staff) is exempt information if it relates to the formulation or development of government policy.
34. The section 29 exemption is sometimes referred to as a “class-based” exemption, a term which was adopted during the consultation process for the proposed Scottish freedom of information legislation to describe the scope of the exemption. This would suggest there is a presumption that this section of FOISA exempts any information from disclosure that falls into this class. However, as the Executive’s internal guidance on exemptions in FOISA states: “It is not the nature of the document itself that is determinative but the substance of the information contained within it.”
35. Section 29(2)(a) of FOISA states that once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded as relating to the formulation or development of the policy in question and should therefore be released upon request.
36. Having studied the content of each set of minutes, I am satisfied that no statistical information is included in these documents and therefore no statistical information falls to be disclosed in this instance.
37. I will consider the application of section 29(1)(a) to each of the documents withheld.

#### *Document 2*

38. In order to fall under section 29(1)(a) the information needs to “relate” to the formulation or development of government policy. Rather than discussing particular issues of substance, Document 2 sets out certain steps to be taken to progress the formulation of the policy. For example, who to consult. In other words, it seems to me to be discussing the “process” of formulation of policy rather than the “substance” of that policy. Therefore I have examined the meaning of the terms “formulation” and “development” of policy.
39. Given that the Freedom of Information Act 2000 contains a similar exemption, I have considered the guidance from the Information Commissioner’s Office (ICO) on that exemption (*Freedom of Information Act Awareness Guidance No. 24.*) This suggests that “formulation” means the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister.





40. The ICO's guidance goes on to state that "development" is sometimes used interchangeably with "formulation" but indicates that "development" may go beyond this stage. It may refer to the processes involved in improving on or altering or recording the effects of existing policy.
41. As a result, the formulation or development may not only involve the actual substance of the policy, but also the methodology or process to be followed in its development. This would include the requirements of the Minister on how the policy should evolve.
42. I have also taken into account that the wording of section 29(1)(a) is broad. The information must simply relate to the formulation of policy. I therefore accept that in many cases the methodology of the policy formulation process will be covered by this exemption.
43. I am satisfied that Document 2 falls under section 29(1)(a) in that it relates to the formulation or development of policy.

#### *Document 3*

44. This document sets out the Minister's views on a number of matters of substance relating to the policy formulation which were discussed at the meeting as well as matters agreed at the meeting. This includes the next steps to be taken.
45. I am satisfied that this document falls under section 29(1)(a) in that it relates to the formulation or development of government policy.

#### *Document 4*

46. This document sets out the issues addressed during two consecutive meetings. The note raises a number of points that needed to be clarified/checked in relation to the policy development and lists several items on which the Minister sought advice. Appended to the email is an amended Cabinet paper which reflects proposed changes.
47. I am satisfied that this document falls under section 29(1)(a) in that it relates to the formulation or development of policy.

#### *Document 5*

48. This document notes the discussion of the statement to be made by the Minister on publication of the sexual health strategy. It also lists the individuals/organisations that should be contacted as a lead up to the statement being made. In addition, further advice is sought on a number of points and action agreed. Given that the primary content of this information is discussing the presentation of the final policy, I queried with the Executive whether this information actually fell under section 29(1)(a).



49. The Executive acknowledged that this document relates to the presentation and publicity of the published strategy. However, it disagreed that this does not relate to the development or formulation of policy and considered that it could be considered an integral part of its formulation. The Executive argued that one cannot consider how policy will develop unless one considers how it will be communicated and what effect that communication will have on target audiences or how a nascent policy is likely to be received.
50. The Executive further argued that information is exempt under section 29(1)(a) if it relates to the formulation or development of government policy. The Executive argued that information in itself does not have to constitute the policy formulation or development providing it relates to such processes.
51. I consider that, in general, information which communicates or presents a finalised and/or published policy will not “relate” to its formulation or development. Therefore an article, press statement or other publication discussing an already established government policy could not be considered to relate to its development. However, I recognise that where the communication or presentation is directly linked to the publication of a new policy that discussion of this communication/presentation, the respective audience and how it should be worded can relate to the policy’s formulation.
52. I am therefore prepared to accept that given the proximity of these discussions to the publication of the finalised policy that the information in this document does “relate” to the strategy’s formulation. I should emphasise, however, that the information will need to be considered on a case by case basis.
53. I therefore accept that all documents are exempt by virtue of section 29(1)(a).

#### **Application of the public interest test**

54. Section 29(1)(a) is subject to the public interest test. Therefore, even though the information falls within the exemption set out in section 29(1)(a), I must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding it.
55. It is worth emphasising at the outset that there is a general public interest in making information held by public bodies accessible to enhance scrutiny of decision-making processes and thereby improve accountability and participation. This goes to the heart of freedom of information legislation. Without an adequate knowledge of the basis upon which decisions are made, the public will not have an opportunity to call public authorities to account; nor can they hope to participate in the decision-making process and contribute to the formation of policy and legislation if that process is hidden from view.



56. Information is exempt by virtue of section 29(1)(a) if it falls into a particular class of documents; that is, where the information relates to the formulation or development of government policy. In considering the application of this exemption, the authority is not required to consider the significance of the content of the information nor consider the effect of disclosure. This is in contrast to exemptions such as section 33(1)(b) or section 30(b)(ii) where the authority is obliged to consider not only whether the information is of a certain type or nature, that is, that it involves commercial interests or advice, but must also demonstrate that disclosure would “prejudice substantially” or “substantially inhibit” that interest. Therefore the authority must consider the significance and sensitivity of the information as well considering the harm resulting from or effect of disclosure.
57. In the case of section 29(1)(a) the information will be covered by this exemption simply if it relates to the development of government policy regardless of how routine or insignificant the information may be. The use of the term “relates” ensures that the application of section 29(1)(a) is so broad as to include even the most innocuous information.
58. As a result, there is clearly a two stage process that an authority relying on section 29(1)(a) must follow. That is:
- Does the information relate to the formulation or development of government policy?
  - If yes, in all the circumstances of the case, is the public interest in disclosure of the information outweighed by the public interest in withholding it?
59. Given the class nature of section 29(1)(a), the second stage must involve consideration of the actual content of the information withheld, including its relative sensitivity and the effect of disclosure.
60. Section 2(1)(b) of FOISA, which contains the public interest test, is worded in such a way as to assume that disclosure would be in the public interest rather than in withholding it. The test is that in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption. Therefore it is for the authority to show why, on public interest grounds, the information should not be released. To proceed otherwise would leave us in a position where innocuous and non-sensitive information relating to policy formulation would rarely be released because no resounding public interest argument could be found to justify disclosure.
61. The Executive made a number of further submissions as to why this information should not be released on public interest grounds and I will address these in turn.



62. The Executive has argued that it has demonstrated that there is a strong public interest in its operations with stakeholders being as transparent as possible by releasing information about meetings held with parties outwith the Executive. While this is to be commended I need to consider whether this argument is relevant to the consideration of the public interest in respect of the information withheld.
63. It seems to me that it does not follow that because information relating to the subject matter of a request is already in the public domain additional information cannot be requested or indeed disclosed to a member of the public. This in itself will not justify withholding additional information sought by the applicant. However, I accept that release of information relating to the subject matter may demonstrate due process and a desire to be transparent on the part of the authority and can be taken into account when considering the public interest test.
64. The Executive considered that there is an overriding public interest in withholding the internal minutes and therefore protecting such internal discussions which are necessary to examine the shape policy is taking and issues that arise.
65. The Executive advised that it did not accept that the sensitivities of discussions are automatically diminished once policy agreement has been reached, such as with the publication of a key document such as the sexual health strategy. It argued that there is a clear need for there to be private discussions of all options, however radical or unpopular, particularly when reaching decisions on such contentious issues. The Executive submitted that the publication of a key document does not signify the conclusion of the policy area; the sexual health strategy has itself now to be taken forward by the Executive and stakeholders, and so it is still very much a live issue. The Executive argued that the subject matter of the strategy was of particular sensitivity.
66. The Executive argued that if there is a perceived risk of these discussions, which take place in various forums, ranging from formal meetings to exchanges of email, being routinely made publicly available, their quality and the willingness of policymakers to continue working in such a manner would be significantly undermined.
67. The Executive argued that release of these documents would be to the detriment of future decision making, inhibiting the internal deliberations of sometimes contentious issues.
68. Finally, the Executive emphasised that whilst the information may be of speculative interest to the public this does not equate with “the public interest.”



69. As a general point, it is worth noting the comments of the Information Commissioner in Queensland in the case of *Roy Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* (“the Eccleston case”):

*I consider that the electorate in general... is aware that conflicting interests have to be reconciled in most difficult policy areas in which governments have to make decisions, and that there would be something severely deficient with the processes of government if alternative views and different policy options were not being put, and on occasions strongly, in advice received by the Government.*

70. In Eccleston, the Queensland Information Commissioner emphasised that even if it was conceded that there would be a decrease in the frankness and candour in discussions and comments, it would not follow that the efficiency and quality of the debate would suffer. While the comments from the Queensland Commissioner are clearly not binding on me, they provide a useful analysis of the arguments put forward by governments to protect information relating to internal deliberations. Would the release of information that showed considered, temperate and constructive comments and amendments lead to the inhibition of quality debate and discussion?
71. It might also be argued that where the content of the discussion, comment or proposal is substantive there is even more reason to see the context in which this amendment was made, by whom and the reason behind it.
72. Nonetheless, the realities of policy development are such that the individuals contributing to these discussions are less likely to record their strongly held opinions and objections or point to a fundamental misunderstanding by a Minister if they believe this information might subsequently become public. The benefits of open government need to be balanced against the risk that comments, proposals and advice that should be expressed are no longer recorded because of fear of disclosure.
73. However, it would appear that the Executive’s approach attempts to ring fence all internal deliberations on public interest grounds so that civil servants feel free, if they wish, to express strong views or potentially unwelcome advice. This approach aims to protect all information, regardless of the actual content, the context in which it was made or its proximity to actual policy formulation, on the basis that civil servants might feel inhibited in offering advice or exchanging views.
74. I have already emphasised that due to the class nature of section 29(1)(a) authorities must consider the actual content of the information when considering the public interest test. I am unable to accept an approach which casts a blanket protection, on public interest grounds, over a class of information.



75. In considering the public interest an authority may reasonably argue that the type and nature of the information or even process to which the information belongs raises an expectation of sensitivity; for example, where the information relates to ongoing negotiations. However, ultimately, that argument will only stand where the content of that information demands protection.
76. I have therefore considered the content of each document withheld to determine whether the public interest in disclosing the information is outweighed by the public interest in withholding it. In considering each document I have taken into account the desirability of providing access to information about the policy-making process and how and when decisions are reached and the general need for openness and transparency in government. These factors weigh strongly in favour of release.
77. On the other hand, I have also considered the sensitive nature of the subject matter of this strategy, the strongly held and often diverse opinions of stakeholders and the timing of this request for information. Mr Hutcheon's request was made a matter of weeks following the publication of the strategy. Therefore the sensitivity of any information would not have significantly diminished.
78. A key factor in determining whether the public interest would favour disclosure is the nature of the discussions and comments recorded. Where the exchanges or information is routine in nature this will normally point to disclosure. On the other hand, if I consider that disclosure of the information is likely to significantly harm the candour with which such exchanges or discussions are recorded in the future then this raises an expectation that the information will be withheld.
79. Even where the information has the requisite sensitivity I will still order disclosure where I consider there is some overriding reason for disclosure. This would arise, for example, where there is evidence of maladministration, wrongdoing or deviance from usual processes. However, there may be other compelling reasons in any given case for the disclosure of sensitive information.

#### *Document 2*

80. As described above, Document 2 sets out certain steps to be taken to progress the formulation of the policy. I have looked carefully at the content of this document and consider the information recorded to be routine in nature. The document does not record views or comments of such sensitivity that the disclosure of would harm the candour of discussions in the future. Therefore I do not consider that the Executive has demonstrated that the general public interest in having access to the information is outweighed by the public interest in withholding it.





### *Document 3*

81. As described above, this document sets out the Minister's views on a number of matters of substance relating to the policy formulation which were discussed at the meeting as well as matters agreed at the meeting. This includes the next steps to be taken. I consider there is a strong public interest in members of the public having access to information which potentially gives greater insight into the policy formulation process. However, this has to be balanced against the need for candour among officials and Ministers during this process. After considering all factors in this case and the actual content of the information I am satisfied that the Executive has demonstrated that the general public interest in having access to this information is outweighed by the public interest in withholding the information.

### *Document 4*

82. This document sets out the issues addressed during two consecutive meetings. The note raises a number of points that needed to be clarified/checked in relation to the policy development and lists several items on which the Minister sought advice. Appended to the email is an amended Cabinet paper which reflects proposed changes. The information actually discusses the content of the draft strategy and matters on which further discussion or information is required. I consider there is a strong public interest in members of the public having access to information which potentially gives greater insight into the policy formulation process. However, this has to be balanced against the need for candour among officials and Ministers during this process. After considering all factors in this case and the actual content of the information I am satisfied that the Executive has demonstrated that the general public interest in having access to this information is outweighed by the public interest in withholding the information.





### *Document 5*

83. This document notes the discussion of the statement to be made by the Minister on publication of the sexual health strategy. It also lists the individuals/organisations that should be contacted as a lead up to the statement being made. In addition, further advice is sought on a number of points and action agreed. Again, I have looked carefully at the content. I consider there is a strong public interest in members of the public having access to information which potentially gives greater insight into the policy formulation process. However, this has to be balanced against the need for candour among officials and Ministers during this process. After considering all factors in this case and the actual content of the information I am satisfied that the Executive has demonstrated that the general public interest in having access to this information is outweighed by the public interest in withholding the information.
84. In summary, therefore, I consider that Document 2 should be disclosed on the basis that the Executive has failed to demonstrate that the public interest in disclosing the information is outweighed by the public interest in withholding it.
85. The Executive also submitted that section 29(1)(b) Ministerial communications and section 30(a) collective responsibility apply to the information requested. I will, therefore, go on to consider the application of these exemptions to the information withheld.

### **Application of section 29(1)(b)**

86. The Executive submitted that section 29(1)(b) applies to documents 2, 3, 4 and 5 as they comprise records of ministerial discussions. In further correspondence, the Executive submitted that each of these documents make explicit the exchanges between the Minister for Health and Community Care and his Deputy or to Cabinet on the sexual health strategy at different stages in its development and publication.
87. Section 29(1)(b) of FOISA provides that information is exempt if it relates to Ministerial communications. Section 29(4) goes on to provide that “Ministerial communications” means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet).
88. Therefore for information to fall under this exemption there must be a communication between Ministers.
89. I accept that this exemption is not limited to written communications between Ministers, such as a letter or email from one Minister to another, but could also cover records of discussions between Ministers. I will consider the application of this exemption to each of the documents identified.



## Document 2

90. As described above, Document 2 sets out certain steps to be taken to progress the formulation of the policy. More importantly, for the purposes of the application of section 29(1)(b), the meeting is attended by the Minister for Health and Community Care and the Deputy Minister along with a number of officials. However, while the wishes of the Minister are recorded there is no mention of any explicit exchange between the Ministers. As I understand it, the Executive is applying section 29(1)(b) to this information because two Ministers attended the meeting.
91. It seems to me that the objective of section 29(1)(b) is to protect exchanges between Ministers where these are recorded. However, the Executive apparently chooses to apply it to information which makes no reference to any discussion between the Ministers but relates to a meeting at which both Minister and Deputy attended.
92. In consultation with the Executive on this point it contended that because it would not be known whether the record was confined to a discussion between Ministers or whether it was broader than this (that is, including officials), the Executive was erring on the side of caution. The Executive went on to submit that the information needs only to *relate* to Ministerial communications and disagreed that this limits the exemption to only explicit exchanges or correspondence. It pointed to its internal guidance on exemptions which specifies that the definition of Ministerial communications provided by section 29(4) shows that there are various types of such communications – among which are references to ministerial discussions, records of meetings or conversations.
93. While I accept that Ministerial communications may well include records of meetings and notes of discussions I am unable to accept the application of this exemption to any record or note simply because more than one Minister was present. To accept such an interpretation would mean that all unattributed records of discussions would fall under this exemption regardless of the size of the meeting, its purpose and regardless of whether the Ministers present actually had any contact.
94. Where the record of a meeting or discussion does not make explicit a communication between Ministers I would need to have further information about the meeting to be satisfied that section 29(1)(b) applies. I would need to know, for example, the purpose of the meeting; whether the meeting was set up as a discussion between Ministers or whether its purpose was for the Minister to give instructions to the officials present or whether it was a general discussion between Ministers and officials, with the latter playing an active role.



95. In this particular case, there is explicit reference to action to be taken by the Deputy Minister and therefore an inference that there was communication between the Ministers. In the circumstances, I am satisfied that section 29(1)(b) applies to the information within Document 2.

#### *Document 3*

96. In terms of the application of section 29(1)(b), similar considerations apply as discussed above in respect of Document 2. Again the meeting was attended by both the Minister and the Deputy Minister (and a number of officials). In this case, the Executive pointed to a statement which refers to both Ministers. In the body of the text, where views are attributed they are attributed to the Minister (rather than to both Ministers).
97. However, having looked at the information I consider that it is reasonable to infer from the statement at the beginning of this minute that the subsequent comments (other than those directly attributed to the Minister) are attributable to both Ministers and that they, therefore, reflect a communication between the Ministers.
98. In the circumstances, I accept that section 29(1)(b) applies to the information contained in Document 3.

#### *Document 4*

99. This document sets out the issues addressed during two consecutive meetings. The note raises a number of points that needed to be clarified/checked in relation to the policy development and lists several items on which the Minister sought advice. Appended to the email is an amended Cabinet paper which reflects proposed changes. While both Ministers were present at the first meeting, only the Minister was present at the second of the meetings.
100. As mentioned in paragraph 87 above, section 29(4) of FOISA provides that "Ministerial communications" includes communications relating to proceedings of the Scottish Cabinet (or any committee of that Cabinet).
101. I have looked at the content of this document and noted, in particular, the information which relates to the first meeting.
102. In the circumstances, and taking into account section 29(4), I accept that Document 4 falls within the scope of section 29(1)(b).



### *Document 5*

103. In terms of the application of section 29(1)(b), the same considerations apply as discussed above in respect of Document 2. While the meeting was attended by both the Minister and the Deputy Minister (and a number of officials) only the views and wishes of the Minister are made explicit.
104. The Executive has not provided me with sufficient information to determine that a discussion took place between Ministers and that the action points represent a communication between ministers.
105. As I indicated above, I am unable to accept an application of this exemption to any meeting where more than one Minister is present without further information. In the circumstances, I conclude that the Executive has not demonstrated that section 29(1)(b) applies to this information.
106. In summary, therefore, while I accept that section 29(1)(b) applies to Document 2, 3 and 4, I consider that the Executive has not demonstrated why section 29(1)(b) applies to Document 5.

### *Application of the public interest test*

107. The Executive's submissions on the public interest test did not differentiate between the exemptions applied. However, in further correspondence, it did provide additional submissions in respect of section 29(1)(b).
108. The Executive indicated that while it accepted that the presumption is that the public interest favours disclosure of information, there is also an important public interest in maintaining the principle of collective responsibility on which Scottish Ministers operate. The Executive indicated that there may be a fine balance between the two in relation to these documents, but particularly given that in all instances there are other exemptions which apply, indicating the sensitivities surrounding them, it considered that on balance the public interest lies in withholding.
109. The Executive went on to argue that the nature of collective responsibility is such that the Cabinet presents a united front on policy issues developed by the Minister with the relevant specialism. Paragraph 2.3 of the Ministerial Code states that "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 Executive should be maintained."
110. The Executive indicated that each of these documents sets out particular Ministers' views on the strategy and the direction it should take. The public interest arguments against the release of this type of information are made explicit in the Ministerial Code.



111. The Executive further submitted that the outcome of the discussions recorded in these documents are reflected in the final published version of the strategy, and submitted that there would be limited public benefit in their disclosure that would override the need to prevent the diminution of the quality of internal debate.
112. The Executive's additional arguments made in respect of the public interest in relation to section 29(1)(b) are confusing. The Executive appears to be arguing that the Ministerial Code and the requirements of collective responsibility make explicit the arguments supporting withholding this information on public interest grounds. However, concerns about the need to preserve the convention of collective responsibility are addressed in section 30(a). The Executive appears to be seeking to rely on another exemption when considering the public interest test.
113. Even if the Executive considers that disclosure of the information would prejudice substantially the convention of collective responsibility, the Executive is still required to consider whether the public interest in any given instance would point to disclosure. This requires consideration of the actual content of the material being withheld. I may accept that information is exempt because its disclosure would prejudice substantially collective responsibility. It does not follow, however, that as a result disclosure would never be in the public interest.
114. As I indicated above, the consideration of the public interest test must be an entirely independent process, independent that is from the considerations that apply when assessing the application of the original exemption.
115. I have addressed the Executive's additional submissions in respect of the public interest in paragraphs 61-75 above. I do not propose to re-visit these. I have accepted that Documents 2, 3 and 4 are exempt by virtue of section 29(1)(b) and therefore need to consider the public interest in respect of these documents. In respect of Documents 3 and 4, as described above, the information actually discusses the content of the draft strategy and matters on which further discussion or information is required. While I consider there is a strong public interest in members of the public having access to information which potentially gives greater insight into the policy formulation process I am satisfied that in this case that given the content of the information the candour with which future communications of this nature are recorded would be significantly harmed by disclosure. This factor, together with the timing of the request and the sensitivity of the subject matter, means that I am satisfied that the Executive has demonstrated that the general public interest in having access to this information is outweighed by the public interest in withholding it.



116. However, I do not consider that the Executive has demonstrated that the public interest in disclosing the information contained in Document 2 is outweighed by the public interest in withholding the information. As described in paragraph 80 above. The information does not record views or comments of such sensitivity that the disclosure of would harm the candour of such communications in the future.

*Application of section 30(a)*

117. The Executive also submitted that section 30(a) applies to the information withheld. Its submissions in respect of this point were succinct. The Executive indicated that many of the documents comprise concerns and issues raised specifically by the Health Minister. The Executive pointed to its internal guidance on this exemption which explains that Ministers should be able to express their views frankly and a degree of privacy of opinions expressed therefore maintained. The Executive advised that it considered that due to the harm that would be caused to the future quality of such exchanges by the release of these documents, the balance of the public interest lay in withholding them.
118. The Executive did not expand further on this submission.
119. Section 30(a) states that information is exempt if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. The concept of collective ministerial responsibility is a long-standing constitutional convention which is not regulated by statute but is formalised in the Ministerial Code, which provides guidance on the convention. Collective responsibility enables ministers to express their views in the expectation that they can argue freely and frankly in private, whilst maintaining a united front once decisions have been reached. Section 30(a) provides for the exemption of information if its disclosure would undermine the convention.
120. I understand that the Executive is applying section 30(a) to all documents on the basis that they all contain information about views expressed by the Minister. The Executive has not applied this exemption on a partial basis. That is, it has not suggested that the Minister's views are simply redacted and the remainder of the information released. Further, the Executive has taken no account of the nature and content of the views expressed. The view expressed may simply amount to a deadline when the revised version should be supplied, or relate to a matter of substance but at a mundane or routine level. It is difficult to see how disclosure of information in such cases would prejudice substantially the convention of collective responsibility.





121. The Executive has not distinguished between the views expressed. Once again, the Executive is seeking to apply a blanket exemption to any views expressed by the Minister regardless of content and context. In further consultation with the Executive on this point, the Executive indicated that it would not always be known whether the view expressed was contentious or diverged from the final policy and was therefore erring on the side of caution. It expanded on this submission and indicated that it considered that to undermine the principle of collective responsibility, information does not have to demonstrate explicit disagreement between Ministers. The Executive indicated that certain documents clearly show particular Ministers' views in relation to a number of issues, which may not necessarily be in line with the final approach adopted by the Ministers collectively.
122. In order to rely on section 30(a), the Executive is required to do more than assert that the documents contain views expressed by the Minister and therefore should be protected. In order for the maintenance of the convention of collective responsibility to be prejudiced substantially the views would need to be significant. Circumstances where the disclosure of information might prejudice the maintenance of the convention of collective responsibility could arise where the view expressed was at variance with the final policy or where the information revealed disagreement by another Minister or where the view expressed was outwith the scope of the Minister's responsibility.
123. I consider that the Executive has failed to demonstrate why section 30(a) applies to the information withheld in each case and how disclosure of this information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.

#### ***Application of Section 30(b)(ii)***

124. In subsequent correspondence the Executive submitted that if I did not accept that section 29(1)(a) applied to Document 5 that I should instead consider whether it should be withheld under section 30(b)(ii) as release would have a substantially inhibiting effect on future communications. As I have accepted that section 29(1)(a) does apply to Document 5 I have not gone on to consider the application of section 30(b)(ii) to this information.





## Decision

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I find that the Executive partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by withholding certain information requested by Mr Hutcheon. However, I also find that the Executive failed to comply with Part 1 of FOISA in failing to provide Mr Hutcheon with the following information:

- 1) The list of dates of meetings
- 2) Document 2

The information should be supplied to Mr Hutcheon within 6 weeks of receipt of this decision notice.

I find that the Executive partially failed to comply with Part 1 of FOISA in failing to respond to Mr Hutcheon's original request within 20 working days as required by section 10(1) of FOISA.

I do not require the Executive to take any remedial steps in respect of this technical breach.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**16 May 2006**