



Scottish Information  
Commissioner

**Decision 140/2006 Mr Calum Cashley and the  
Scottish Executive**

*Correspondence between the Scottish Executive and sportscotland  
regarding proposals for the formation of a Scottish Olympic Team  
or Scottish Olympic Committee*

**Applicant: Mr Calum Cashley  
Authority: The Scottish Executive  
Case No: 200601004  
Decision Date: 27 July 2006**

**Kevin Dunion  
Scottish Information Commissioner**

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## Decision 140/2006 Mr Calum Cashley and the Scottish Executive

***Correspondence relating to proposals for the formation of a Scottish Olympic team – location and identification of relevant information - section 30(b)(ii) – free and frank exchange of views for the purpose of deliberation – consideration of the public interest – section 2(1)(b)***

### Facts

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Mr Cashley asked the Scottish Executive (the Executive) to provide copies of correspondence with **sportscotland** concerning proposals for the formation of a Scottish Olympic team. The Executive replied that no such correspondence was held. Mr Cashley then sought a review, noting that he was aware of the existence of relevant correspondence. The Executive's response confirmed that correspondence was held and some information was supplied. The Executive indicated that further correspondence was withheld because it was exempt from disclosure under section 29(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). Mr Cashley then applied for a decision from the Commissioner on this matter. In the course of the investigation, the Executive no longer sought to rely upon section 29(1), but stated that relevant information was exempt under section 30(b)(ii) of FOISA.

### Outcome

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The Commissioner concluded that some of the information withheld from Mr Cashley was exempt from release under section 30(b)(ii) of FOISA, and that the public interest in maintaining this exemption outweighed the public interest in disclosure of this information. The Commissioner found that the Executive had acted in accordance with Part 1 of FOISA in withholding this information.

The Commissioner found that the Executive had wrongly applied section 30(b)(ii) to some of the information withheld and that the Executive had failed to act in accordance with section 1(1) of FOISA and had therefore breached Part 1 of FOISA by withholding this. The Commissioner required this information to be supplied to Mr Cashley.



## Appeal

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Should either Mr Cashley or the Executive 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 of receipt of this notice.

## Background

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1. On 3 April 2006, Mr Cashley made an information request by email to the Scottish Executive (the Executive). This sought:  
  
*Copies of any correspondence which has passed between sportscotland (including any member of staff or of the board) and the Scottish Executive regarding the formation or possible formation or proposals for the formation of a Scottish Olympic Team or Scottish Olympic Committee since the beginning of June 2005.*
2. **sportscotland** (the Scottish Sports Council) is a non-departmental public body, and the national body for sport development in Scotland.
3. The Executive responded to Mr Cashley's request on 3 May 2005, confirming that despite a thorough review of files no relevant correspondence between the Executive and **sportscotland** had been found. The Executive advised Mr Cashley that this information was therefore not held in terms of section 17 of FOISA.
4. The Executive's response went on to note that under section 25 of FOISA, it was not required to provide information in response to a request if it was already accessible to the requestor. However, it advised Mr Cashley that a number of Parliamentary Questions had been tabled on this matter, and the answers to these posted on the Scottish Parliament's website.
5. Mr Cashley asked the Executive to review this decision in an email dated 3 May 2006 in which he stated that he was already aware of relevant correspondence that had passed between the Executive and **sportscotland** between the 21 July and 5 August 2005. With this in mind, Mr Cashley asked the Executive to review again its files and disclose relevant correspondence.



6. The Executive notified Mr Cashley of the outcome of its review on 1 June 2006. The reviewer had concluded that the Executive's initial decision should be modified. The reviewer stated that the initial response should have explained that a number of documents relevant to the request had been judged to be covered by exemptions in FOISA, and therefore were not released. The reviewer apologised for this omission.
7. The reviewer noted that the initial response should have explained that information had been withheld under the following sections of FOISA:
  - a) Section 25(1): information otherwise accessible. This information had been withheld because it was already in the public domain.
  - b) Section 29(1): Information that relates to the formulation or development of government policy.
8. The Executive upheld the decision to withhold information under the terms of section 29(1). However, two emails (and two attachments to one of these emails) that were considered to be otherwise accessible were nonetheless supplied by the Executive at this point. In providing this information, I understand that the Executive chose not to apply any exemption (under section 25(1) or any other exemption in Part 2 of FOISA) to this information following its review.
9. The information supplied at this point was:
  - a) An email from an employee of **sportscotland** to an Executive official (dated 5 August 2005) providing comments in relation to Parliamentary Questions from Linda Fabiani MSP. Two attachments to this email were also supplied to Mr Cashley; one an internal briefing on the question of a the proposals for a Scottish Olympic team, and the other containing a statement sent to **sportscotland's** media partners in response to the Parliamentary Questions from Ms Fabiani.
  - b) An email (dated 26 July 2005) from a member of the Executive's communications team to individuals in both the Executive and **sportscotland** confirming a statement given to PA (I presume the Press Association) that morning on the proposals for a Scottish Olympic team. The Executive however did not supply previous emails that had been also contained within this message.
10. Mr Cashley contacted my Office on 1 June 2006 to seek advice about this case. An application for a decision by me was subsequently received on 5 June 2006. In his correspondence with my Office, Mr Cashley expressed dissatisfaction with a number of aspects of the Executive's handling of his information request:



- a) He noted that the original reply to his request appeared to deny the existence of documents that it later transpired had been considered before the reply. He suggested that this should not be the way that FOI requests are handled.
- b) He noted that the Executive's reply had not informed him of what documents were identified, or the reasons for withholding each.
- c) He questioned whether the exemption in 29(1) applies to correspondence between the Executive and **sportscotland** given his understanding that **sportscotland** has no right to invoke the exemption in section 29(1).
- d) He questioned whether information falling under the scope of his request was actually in the public domain at the time of his request (and so exempt from release under section 25(1)).

## Investigation

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11. Following its receipt on 5 June 2006, Mr Cashley's application was allocated to an investigating officer. The case was then validated by establishing that Mr Cashley had made a valid information request to a Scottish public authority (i.e. the Executive) and had appealed to me only after asking the Executive to review the response to the request.
12. The investigating officer wrote to the Executive on 13 June 2006 informing it that an appeal had been received and that an investigation into the matter had begun. The Executive was invited to comment on the case in terms of section 49(3)(a) of FOISA. The Executive was also asked to provide:
  - a) Copies of all documents identified as falling under the scope of Mr Cashley's request;
  - b) Details of the steps taken to identify relevant information;
  - c) Details of the exemptions judged to apply to each item identified, and the reasons for this application;
  - d) Details of the Executive's consideration of the public interest in relation to any information withheld under the terms of a qualified exemption;
  - e) For information judged to be exempt under section 25(1) of FOISA, details of where and how this information could be accessed by the applicant.
13. The Executive's response to this request was received on 13 July 2006. This provided copies of two emails that had been identified as falling under the scope of Mr Cashley's request. These were:



A. An email of 5 August 2005 from **sportscotland** to the Executive, attaching two **sportscotland** statements on Scotland and the Olympics. The email and the attachments were all supplied to Mr Cashley following the Executive's review.

B. A series of emails all dated 26 July 2006. The final email in this series was supplied to Mr Cashley following the Executive's review. The other emails were withheld by the Executive.

(I will refer these two sets of documents as item A and item B respectively in what follows.)

14. The Executive confirmed that, on reflection, it no longer believed that the application of section 29(1) to emails in item B was appropriate. Instead, the Executive submitted that the emails that had been withheld were exempt under section 30(b)(ii) of FOISA.
15. The investigating officer made a further request to the Executive for clarification on certain points on 20 July 2006, and a response to this request was received on 24 July 2006.
16. Mr Cashley was also invited to comment on this case in the light of the Executive's submissions on 18 July 2006. His comments were received on 19 July 2006.
17. Although this document does not summarise all submissions received in the course of my investigation from the Executive and Mr Cashley, I have taken all of the submissions into consideration when reaching my decision in this case.

## The Commissioner's analysis and findings

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18. This case raises two questions which I will address in turn below:
  - a) Has the Executive identified all correspondence passed between it and **sportscotland** that it holds and which is relevant to Mr Cashley's request?
  - b) In relation to item B, is the series of emails that was withheld exempt from release under section 30(b)(ii) of FOISA?



## Identifying the information

19. In its submissions to my Office, the Executive confirmed that following receipt of Mr Cashley's request, a search of its paper and electronic filing system was conducted to identify the correspondence requested. This search included reviewing those papers identified in response to a previous request for information on the same subject.
20. The Executive noted that, in its initial response, it had referred Mr Cashley to relevant Parliamentary Questions on the Scottish Parliament's website. However, these Questions did not actually fall under the scope of the request, since they were not correspondence between the Executive and **sportscotland**. In its initial search, the Executive failed to consider the emails and attachments in items A and B that were later identified as relevant to the request.
21. The Executive later supplied the documents in item A. In its submissions, the Executive stated that the covering email sending the two statements fell outwith the scope of the request, but was released as a courtesy to aid understanding of the attachments.
22. I have concluded that the email in item A does fall under the scope of the request made by Mr Cashley: it is an item of correspondence sent by **sportscotland** to the Executive, and it relates to the proposals for the formation of a Scottish Olympic Team or Scottish Olympic Committee. The email's subject heading is "RE: PQs from Linda Fabiani", and I understand the contents to relate to a series of written questions lodged by Ms Fabiani in July 2005 on subjects relating to proposals for a Scottish Olympic team. The answers to these questions were all provided by the Minister for Tourism, Culture and Sport on 11 August 2005. I also note that the text of this email, although brief, refers to the attached notes on Scotland and the Olympics. As the attached documents fall under the scope of the request, I also find that the covering email also falls under the scope of Mr Cashley's request.
23. The email from **sportscotland** to the Executive in item A appears to be a response to an earlier email, presumably sent by the Executive to **sportscotland**. However, no such email was identified in the Executive's searches of relevant files. Following the receipt of the Executive's initial submissions, the investigating officer sought confirmation of whether any email to which that in item B provided a response was still held. The Executive was also asked to confirm whether any individual's personal email folders (as opposed to departmental files) had been reviewed when searching for relevant information.
24. Having considered the steps taken by the Executive to identify relevant correspondence I am satisfied that it has identified all relevant information that it holds that would fulfil Mr Cashley's request for information.



25. Mr Cashley has expressed his dissatisfaction over the Executive changing its explanation as to why information was not being provided. The Executive initially informed him, in response to his request, that it held no relevant information. But then, after he indicated that he was aware of specific correspondence, it informed him that it did hold relevant information but that it had omitted to indicate that this was exempt. Further to this explanation I note in its submission to me that the Executive says that neither of the two papers (items A and B) were considered in providing the initial response.
26. The purpose of a review, in response to dissatisfaction expressed by an applicant in response to an initial reply, is to allow the authority to consider whether it has responded correctly. In that respect the Executive was entitled to check whether it had recovered relevant documents and properly considered them. Clearly, the initial response was deficient in not having identified relevant information. The review rectified this although I have to say it stretches matters to explain the failing by way of saying that the original reply should have contained additional information explaining that a number of documents relevant to Mr Cashley's request had been judged to be covered by exemptions under FOISA and therefore had not been released. This seems at odds with the Executive's submission to me. Nevertheless, what the review has done, it seems, is to recognise that the initial response was flawed, that there was indeed information relevant to the request and to apply exemptions to the information. As I have explained earlier, the Executive is entitled to do this

#### **Item B – consideration of the application of section 30(b)(ii)**

27. I turn now to consider the information that the Executive still considers exempt from release. This is a series of five emails that were contained within a final email sent on 26 July 2005 from a member of the Executive's communications team to individuals in both the Executive and **sportscotland**. This final email, which confirmed a statement given to PA that morning, was released by the Executive following its internal review of the case. However, the further emails contained within this were judged to be exempt under the terms of section 29(1)(a) of FOISA.
28. As mentioned above, in its submissions to my Office, the Executive advised me that it no longer considered the application of section 29(1)(a) to have been appropriate. Instead, it stated that it was now of the view that this information was exempt from release under section 30(b)(ii).
29. Section 30(b)(ii) states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.





30. "Inhibit" is not defined in FOISA. However, I take the view that in this context it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. "Deliberation" tends to refer to the evaluation of the competing arguments or considerations that may have an influence on a public authority's course of action.
31. In my view the standard to be met in applying the test in section 30(b)(ii) is high. When considering the application of section 30(b)(ii) 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. This would involve considering:
  - a) the subject matter of an exchange of views
  - b) the content of the advice or exchange of views
  - c) the manner in which the advice or exchange of view is expressed, and
  - d) whether the timing of release would have any bearing.
32. I should be clear, however, that the test for the application of the exemption in section 30(b)(ii) is not simply that of whether information to which it is being applied does or does not contain a free and/or frank exchange of views for the purposes of deliberation. When information does contain such an exchange, then this may well lend weight to the case for the application of this exemption. Where it does not contain such an exchange, it is less likely that this exemption will apply. However, in determining whether the exemption applies, the key test is that of whether the disclosure of any information (whether or not it contains a free and frank exchange of views for the purposes of deliberation) would, or would be likely to, have a substantially inhibitive effect on future exchanges.
33. In its submissions to my Office, the Executive described the contents of the emails of 26 July 2005 as relating to the process of drafting a statement, from an initial version in the first message, to the final version, which was included in the final email that was provided to Mr Cashley. Its submissions on the application of section 30(b)(ii) suggested that disclosure would have a substantially inhibitive effect on future such exchanges, and in particular would affect officials' ability to comment freely on the context of such a drafting process in future. The Executive has suggested that should this information be disclosed, this would encourage officials to labour painstakingly over the terms of a simple drafting request, in case it contained something that appeared embarrassing or that might be exploited politically in the event of release.



34. I do not accept the Executive's interpretation of the emails in question. I do not agree that they relate to the process of drafting the statement contained in the final email. Rather, I understand these to contain a series of comments upon an initial email sent by **sportscotland** to the Executive. This was not a draft statement and was being sent to the Executive for information. Nevertheless comments were made on it by Executive officials. The final e-mail, which has been released, was not a revised version of the **sportscotland** statement but an entirely different statement issued earlier in the day by the Executive – presumably also sent for information. So, notwithstanding what some of the participants in the e-mail chain may have believed, there was no drafting taking place and the two statements are from two different bodies each of which was complete (and at least one of which had been issued to the PA by the time the supposed drafting was going on).
35. Given the interpretation of these emails set out in paragraph 34, I can see no basis for the application of the exemption in section 30(b)(ii) to the first email in the chain (timed at 13:17 on 26 July). I find that the Executive wrongly applied this exemption to this email.
36. However, I do find the Executive's comments on section 30(b)(ii) to be relevant to my consideration of the four remaining emails that were timed at 13:33, 13:46, 13:51, and 13:57. Although these do not form a process of drafting the statement contained in the final email, these emails do contain a series of comments by officials, which I understand to form part of the Executive's wider consideration of how to respond to questions relating to proposals for a Scottish Olympic team. I consider these emails to contain an exchange of views for the purposes of deliberation.
37. I am of the view that any inhibitive effect that would follow from disclosure of these comments would be equal to the effect had they been part of the process as described by the Executive. I have therefore considered the Executive's comments on the application of section 30(b)(ii) in relation to these, but in the context of my different understanding of the process to which they relate.
38. I considered the contents of the emails of 13:33, 13:46, 13:51 and 13:57 in the light of the Executive's comments and in the light of my own views on section 30(b)(ii) as set out in paragraphs 30 -32 above. I concluded that the exemption had been wrongly applied in relation to the emails of 13:33 and 13:57 on 26 July 2006. However, I conclude that the exemption had been correctly applied to the main content of the emails timed at 13:46 and 13:51. However, I do not find that the exemption applies to the information within these two emails that details the sender, recipients and the timing and subject of the messages.



39. As I have found that section 30(b)(ii) had been wrongly applied to the emails of 13:17, 13:33, 13:57 on 26 July within item B, I require these emails to be released to Mr Cashley. I also require the “from”, “sent”, “to”, “CC”, and “subject” fields within the emails of 13:46 and 13:51 to be released.

### **Public interest**

40. The exemption in section 30(b)(ii) is a qualified exemption, which means that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to the information that has been requested, it must go on to consider whether, in all circumstances of the case, the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.
41. As I have found the main content of the emails of 13:46 and 13:51 in item B to be exempt under section 30(b)(ii), I must therefore go on to consider the public interest as it relates to this information.
42. The Executive has put to me that the public interest in allowing officials to provide comments and advice in an uninhibited and full way outweighs the public interest in the disclosure of the information.
43. Mr Cashley noted that FOISA contains a presumption of openness, that the public interest is served by open and transparent government, and that the government must make a strong case for refusing disclosure.
44. Mr Cashley did not have access to the information under consideration when making his comments on the case. However, he made certain observations on the public interest based on the possible content of the correspondence concerned.
45. For example, he suggested that, should the emails be concerned with news management between public bodies, it was in the public interest to know when the government is being less than open and transparent, as that will influence the direction of public affairs. He noted that if there were political themes to the correspondence, then there would be in the public interest to aware that the civil service is being politicised, since that will influence public debate and the direction of public affairs.
46. I have considered the points made by both parties on the public interest as it relates to this case alongside the actual content of the emails I have concluded are exempt under section 30(b)(ii).



47. I have accepted that disclosure of the main content of the emails of 13:46 and 13:51 on 26 July 2005 would, or would be likely to, inhibit substantially future similar exchanges, and I also conclude that disclosure would be harmful to the public interest. It is in the public interest that officials feel able to offer candid and full views in the course of their work. If they felt unable to do so, the quality of decision making and consequently the quality of government could in turn be harmed. Therefore, I do find that in relation to the exempt content of these emails, there is a public interest in maintaining the exemption and withholding the information.
48. As Mr Cashley has rightly pointed out, the public interest is also served by openness, and FOISA brings with it an assumption that disclosure of information by public authorities will be in the public interest. However, in the circumstances of this case, I have concluded that the public interest in disclosure is outweighed by the public interest in the maintenance of the exemption.
49. Therefore, in relation to the main content of the two emails in item B timed at 13:46 and 13:51, I conclude that the Executive acted in accordance with the requirements of FOISA by refusing to disclose the information to Mr Cashley in response to his request.



## Decision

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I find that the Scottish Executive (the Executive) failed to act fully in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in its responses to Mr Cashley's request for information.

In relation to item B (as identified in the Executive's schedule supplied to my Office), I find that the Executive acted in accordance with Part 1 of FOISA in withholding the content of the emails dated 26 July 2005 and timed at 13:46 and 13:51, excluding those parts set out in paragraph 39 above. This information is exempt from release under section 30(b)(ii) of FOISA, and, in all the circumstances of the case, the public interest in maintaining this exemption outweighs the public interest in disclosure of the information.

However, I find that none of the other emails contained in item B are exempt from release, and so the Executive failed to act in accordance with section 1(1) of FOISA by withholding those timed at 13:17, 13:33 and 13:57. I now require the Executive to provide a copy of item B to Mr Cashley, excluding the exempt content of those timed at 13:46 and 13:51.

I require the Executive to take the steps set out above within 45 days of the receipt of this notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**27 July 2006**