Decision 075/2006 Mr Paul Hutcheon and the Scottish Executive

Request for copies of the draft sexual health strategy

Applicant: Mr Paul Hutcheon
Authority: Scottish Executive
Case No: 200501428
Decision Date: 16 May 2006

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Scottish Information Commissioner

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Decision 075/2006 – Mr Paul Hutcheon and the Scottish Executive

Request for copies of the draft sexual health strategy – information withheld - section 29(1)(a) formulation of government policy - section 30(a) collective responsibility – section 30(b)(i) and (ii) free and frank exchange – public interest test considered – Commissioner partially upheld the decision

Facts

Mr Hutcheon requested all drafts of the sexual health strategy that were drawn up between January and December 2004. The Scottish Executive (the Executive) advised that the drafts produced in 2004 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 instance, it decided that the public interest in 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 the decision on review. Mr Hutcheon subsequently requested that the Commissioner investigate.

Outcome

The Commissioner found that the Executive failed to comply with Part 1 of FOISA by not disclosing any statistical information used to provide an informed background to the taking of a policy decision in accordance with section 29(2)(a) of FOISA and by failing to have regard to the public interest in the disclosure of any factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision in accordance with section 29(3) of FOISA.

However, the Commissioner found that the Scottish Executive had complied with Part 1 of FOISA in withholding the remainder of the information requested.

Appeal

Should either the Scottish 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

1. On 8 February 2005, Mr Hutcheon requested the following information from the Executive:

   - All drafts of the Sexual Health Strategy that were drawn up between January and December 2004

2. The Executive responded to Mr Hutcheon's request on 8 March 2005, refusing to provide the information requested. The Executive advised that the drafts of the sexual health strategy produced in 2004 were exempt under section 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 needed 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 publishing this information was in the public interest.

5. The Executive responded to the request for review on 8 April 2005. The Executive advised that it had concluded that its response to Mr Hutcheon's request should be upheld. It advised that it had also considered whether there was an outweighing public interest for disclosure and concluded that there was not.

6. On 9 April 2005 Mr Hutcheon applied to my Office for a decision.

7. The case was allocated to an investigating officer.

The Investigation

8. Mr Hutcheon's appeal was validated by establishing that he had made a 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 to this letter on 21 June 2005. The Executive advised that there were a significant number of drafts for this period (in the region of 80) and that their size varied between 20 and 80 pages long. As a result, the Investigating Officer went to inspect the documents on site. Subsequently, however, copies of all drafts were supplied to my Office.

12. The Executive submitted that the draft papers were exempt under section 29(1)(a) as they directly related to the formulation of government policy, together illustrating the development over the time of the sexual health strategy. It advised that this had been a significant policy initiative of the Executive, the development of which necessitated consideration of all issues involved, many of which were particularly sensitive and which stakeholders did not always agree on.

13. The Executive submitted that the release of such information would be to the detriment of future policy formulation, and thus damaging to the effectiveness of government itself.

14. The Executive submitted that there was a significant public interest in ensuring that policy formulation and development could take place in an arena which would enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations would be picked over out of context.

15. The Executive indicated that the draft papers show how various policy options were put forward and subsequently amended or discarded. It submitted that officials should feel able to put these forward for consideration without concern about wider dissemination. The Executive argued that if there was a perceived risk of internal ideas being made publicly available with little time having lapsed in the interim, their quality would be undermined. The Executive advised that it considered that the balance of the public interest lay against disclosing these documents.

16. The Executive also advised that an exemption under section 29(1)(b) was mistakenly referred to in the response issued to Mr Hutcheon. It was not therefore relying on this exemption. As a result, I have not considered the use of this exemption further.

17. The Executive submitted that in retrospect section 30(a) and section 30(b)(i) and (ii) might also have been applied to information where a particular Minister's views (for example regarding amendments) are made clear, or where officials' advice or views are annotated.

18. In correspondence with my Office the Executive was asked to provide detailed submissions why it would not be in the public interest for the information to be disclosed. The Executive was reminded of the presumption that disclosure would be in the public interest unless the authority could demonstrate otherwise. The Executive was also asked to identify the content of the drafts exempt by virtue of section 30(a) and section 30(b)(i) and (b)(ii) and provide detailed analysis on why these exemptions applied. The Executive's additional submissions are set out below.

Submissions in respect of the public interest

19. The Executive submitted that it was not the case that any one section merits disclosure any more than another. Rather it argued that the overriding public interest lies in protecting the process by which documents such as the sexual health strategy are developed over time. It submitted that this is particularly the case where very little time has lapsed since the work was carried out. The Executive pointed out that, in this instance, Mr Hutcheon submitted his request in February 2005, just weeks after the publication of the strategy.

20. The Executive submitted that the concept of possible protection of a process is consistent with the nature of section 29(1)(a) and 30(b) exemptions, which by definition are about processes rather than other exemptions which relate to discrete types of information (for example trade secrets (section 33(1)(a)) and court records (section 37). The intention of these exemptions, the Executive submitted, must therefore be to protect the information relating to these processes.

21. The release of the drafts of the sexual health strategy would, the Executive believed, damage the process of policy development by inhibiting the candour with which officials and Ministers consider options. The Executive referred to the view of the Federal Court in Canada (Canadian Council of Christian Charities v Canada (Minister of Finance)) in 1999 that:

"the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies. It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely."

22. The Executive submitted that whilst it recognised the importance of considering the public interest in policy-formulation taking place in an arena which is transparent and accountable, this was taken fully into account whilst developing the sexual health strategy. The Executive submitted that sexual health is a very sensitive issue and the production of the sexual health strategy included an extensive consultation on its drafting. It was one of the largest consultation exercises carried out by the Executive and resulted in 1,394 responses from a broad range of respondents. In addition a non-written consultation was carried out to address any 'gaps' in the consultation exercise; for example consultation events were organised for hard to reach groups by the Scottish Civic Forum and the Poverty Alliance; and research with young people was commissioned from Children in Scotland. The results from both strands of consultation were made public. In addition there were presentations by officials and members of the expert Reference Group to key stakeholders, e.g. the Catholic Education Service and the Scottish Churches Parliamentary Office. The Executive advised that a website had been set up which published information concerning the sexual health strategy.

23. The Executive advised that the strategy was launched in January 2005 with a statement by the Minister for Health to Parliament, a Press Conference and accompanying press release. In addition officials informed (where contact details were available) respondents to the consultation about the publication of the strategy and either supplied copies or pointed them in the direction of the published document. Subsequently the Minister for Health met with the Cross Party Group on Sexual Health, and on 15 June 2005 there was a debate in the Parliament on the sexual health strategy. The Executive submitted that the reaction to the strategy, from across the spectrum of stakeholders, had been generally favourable and as a result progress was being made in what is a difficult and sensitive subject.

24. The Executive submitted that, nevertheless, the controversies and sensitivities surrounding the subject matter of the strategy are such that speculation will remain about the process of its development. The Executive pointed out that what is of speculative interest to the public does not equate with 'the public interest' in respect of the release of information. Additionally, it submitted that the sexual health strategy remains very much a live issue, which Ministers and others continue to implement and full exposure of its preparation would risk reopening issues that Ministers had determined and which had now received general acceptance. The Executive argued that disclosure just a matter of weeks after publication would have allowed uncertainty about the viability of policy decisions, which must be damaging in general, and especially so in this case.

25. The Executive submitted further that the language used in the strategy is crucial, in that the strategy has to achieve Ministers' objectives to address Scotland's poor sexual health and at the same time try to avoid needless antagonism of differing stakeholders, who have widely varying and sincerely held views. It gave as an example the language used in relation to issues such as abstinence, on which particular stakeholders had strong views and required careful drafting and redrafting. It submitted that it would be damaging to the preparation of policy if Ministers could not consider alternative drafts in privacy.

26. The Executive submitted that publication of the strategy was a very open and time consuming exercise which required very careful handling. It submitted that the Executive was making good progress in a difficult and very sensitive area and there continued to be ongoing meetings with key stakeholders. Also the Executive had created a sexual health website, a purpose of which was to track progress of the implementation of the strategy. Finally, the Executive submitted that undermining implementation of the strategy would have real consequences for the drive to improve the poor sexual health in Scotland.

Application of sections 30(a) and 30(b)(i) and (ii)

27. The Executive submitted that on balance it considered that section 30(a) and section 30(b) applied to the drafts in their entirety. It argued that by definition the drafts of the strategy each represent the views of the Ministers involved, as its evolution reflects the decisions made by them on the policy options under consideration whilst developing the strategy. The principle of collective responsibility on which the Executive operated required the free expression of views by Ministers without inhibition and the preparation of the alternative versions of the draft which reflect these.

28. The Executive submitted that the drafts demonstrate the consideration of different options and different emphases – the rejection of some, the adoption or development of others. Similarly, they reveal the position and sometimes differing stances of the particular Ministers responsible (there were changes of Ministers at both Cabinet and Deputy Minister level whilst the strategy was being developed) regarding these particularly sensitive areas. The Executive submitted that for these to be made open to detailed public scrutiny would clearly undermine the convention of collective responsibility of the Scottish Ministers.

29. The Executive referred me to the terms of the Executive's guidance on section 30(a) which provides some specific examples of potential negative impacts which would indicate that this section is engaged. It submitted that most, if not all, seemed to be engaged here.

30. Additionally, the Executive submitted that the drafts comprise an exchange of advice and views by officials in respect that their drafting offers options for the strategy's presentation and reflect the decisions reached. The Executive considered that disclosure of the drafting process of policy documents such as the strategy would be a substantially inhibiting factor on the future deliberations by officials by restricting the frank exchange of views and the provision of advice. Release would, the Executive felt, also possibly cause damage to relations with stakeholders, whose input to the consultation process was vital. In that respect there would also be substantial prejudice to the exchange of views between them and the Executive.

31. The Executive submitted that its balanced consideration of the public interest in respect of the section 29(1)(a) above was equally applicable in relation to the section 30 exemptions.

Submissions from Mr Hutcheon

32. 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 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.

33. 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.

34. 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 or original copies of communications between Ministers, then this information should be withheld. However, he also considers that information showing the decisions reached and why, including the evidential basis, motive and the influence of third parties should be published.

35. 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.

The Commissioner's Analysis and findings

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36. It might be helpful to provide some background information on the Scottish Executive's sexual health strategy and its development to give some context to the information under discussion.

37. 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.

38. 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. As I understand it, he is interested in the decision making process that led to certain recommendations of the Reference Group being accepted and others being rejected. He is also interested in late inclusions in the sexual health strategy.

Application of section 29(1)(a)

39. The Executive submitted that all drafts of the sexual health strategy are exempt by virtue of section 29(1)(a) of FOISA. Section 29(1)(a) 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.

40. The section 29(1)(a) 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."

41. It is also worth noting that in order to fall under section 29(1)(a), the information need only "relate" to the formulation or development of government policy.

42. I take the view 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. "Development" is sometimes used interchangeably with "formulation," but "development" may go beyond this stage. It may refer to the processes involved in improving on, altering or recording the effects of existing policy.

43. Section 29(1)(a) includes no harm test; it is not necessary for the authority to show that disclosure of the information would prejudice substantially the formulation of policy or to consider the effect or harm that would result if the information were to be disclosed. Information, whether sensitive or innocuous, will be covered by this exemption if it relates to policy formulation or its development.

44. Mr Hutcheon requested the drafts of the sexual health strategy. All information contained within the drafts necessarily comprises the development of the sexual health strategy. I am therefore obliged to accept that all information within the drafts falls within the scope of section 29(1)(a).

Application of section 29(2)(a) and 29(3)

45. However, an authority relying on section 29(1)(a) must also take into account section 29(2)(a) and section 29(3). 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 a policy decision is not to be regarded as relating to the formulation or development of the policy in question. This information should therefore be released upon request unless an alternative exemption applies.

46. Further, section 29(3) states that where information has been exempted under section 29(1)(a), the Scottish Administration must have regard to the public interest in the disclosure of any factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.

47. "'Factual" information is generally to be distinguished from advice, opinions, recommendations and internal discussion.

48. Therefore, I contacted the Executive and advised that any statistical information contained in the drafts did not fall under this exemption and, as a result, should be released. I also reminded the Executive that it should have regard to the public interest in the disclosure of factual information which had been used to provide an informed background to the taking of a decision. I advised that I considered there would be strong public interest grounds in the release of the factual information appearing in the drafts.

49. The Executive in response recognised the requirements under section 29(2). It agreed to supply this information to Mr Hutcheon. It suggested that the statistical and factual information be extracted from the most complete version of the draft strategy on the grounds that this, together with the final published version, would represent all the statistical and factual information contained throughout the drafting process. This step would only be necessary, however, if I ultimately conclude that only the factual and statistical information should be released to Mr Hutcheon and not the remainder of the drafts.

Application of the public interest test

50. Section 29(1)(a) is subject to the public interest test and therefore I must go on to consider whether the public interest in disclosing the information is outweighed by the public interest in withholding the information.

51. The Executive has submitted that there is a significant public interest in ensuring that policy formulation can take place in an arena which would enable rigorous and frank debate about the merits and demerits of alternative courses of action. By contrast, Mr Hutcheon has argued that the public is entitled to know the factual, statistical and evidential basis of Ministerial decisions. Mr Hutcheon has stated that he accepts that the space within which ideas can be discussed and floated, such as civil servant advice and Ministerial discussions, are off limits. However, he considers that the decisions taken and the reasoning behind them are very much in the public interest.

52. I am taking this opportunity to set out my thinking in respect of the public interest test and its application to information relating to government policy formulation. In doing this, I have been assisted by the decisions reached by my counterparts in other jurisdictions, in particular, the case of *Roy Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* decided by the Information Commissioner in Queensland ("the Eccleston case") and the case of *Coastal Waters Alliance of Western Australia and the Department of Environmental Protection* decided by the Information Commissioner in Western Australia ("the Coastal Waters case"). While clearly neither decision is binding on me, they provide a useful analysis of the public interest arguments put forward by governments seeking to protect information relating to policy formulation and internal deliberations.

53. 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 formulation of policy and legislation if that process is hidden from view. As Justice LaForest stated in the Canadian court case Dagg v. Canada (Minister of Finance) [1997] 2 S.C.R.:

"The overarching purpose of access to information legislation … is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry."

54. In the Coastal Waters case the Commissioner stated that:

"In my view, it may legitimately be argued that all government information is collated, maintained, distributed and used by agencies on behalf of and for the benefit of, the public and that it should, therefore, be accessible by the public."

55. Some authorities appear to consider the application of the public interest test to be a mere formality in the decision-making process. Where information has been found to be exempt these authorities advance the same arguments in respect of the public interest test rather than recognising it as an independent step in the assessment of whether the information should be disclosed or withheld. Often in these cases, the authority will simply assume that the public interest must be in favour of withholding that information. To date in Scotland, few authorities have provided a detailed analysis of the public interest test in respect of exempt information as envisaged by FOISA.

56. In other cases, authorities appear to consider that in order for the public interest test to be satisfied there must be some overwhelming evidence to justify disclosure; for example, the information must be of real importance or must show evidence of wrong-doing or deviance from the normal processes. While these factors will be significant in the consideration process, limiting the public interest test in this way is to misunderstand the nature of this test as set out in FOISA and its pivotal role in freedom of information legislation.

57. It seems to me that the role of the public interest test becomes even more significant when applied to exemptions which do not contain a harm test or require any consideration of the likely impact of disclosure. Such is the case in respect of section 29(1)(a).

Relationship between section 29(1)(a) and the public interest test

58. As I stated above, 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.

59. That is not the case in respect 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. This was noted while the legislation proceeded through Parliament. During a discussion of section 29(1)(a) by the Justice 1 Committee an objection to the phrase "if it relates to" was raised, pointing out that almost anything, including a tea-break during the discussion, could relate to the formulation or development of policy.

60. In responding to this complaint, Jim Wallace, the then Justice Minister pointed to the significance of the public interest test, as well as my role in enforcing it:

"If the Commissioner asked us when a tea-break took place, who had coffee and who had tea, and we decided that to disclose that information was not in the public interest, I hope that any Commissioner worth his or her salt would give the administration pretty short shrift for doing so."

61. 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?

62. The assessment of the public interest must be made quite independently of whether the information falls within the description set out in section 29(1)(a). The fact that Parliament added this additional step means that there is no assumption that harm will automatically result from disclosure of this information or that disclosure of this kind of information would not be in the public interest.

63. A presumption that harm would occur if information within this class were to be released would alter the balance contained within the public interest test. This was clearly not envisaged by Parliament which has provided for a universal test under section 2(1)(b) (in that it applies to all qualified exemptions regardless of their content) that assumes that disclosure would be in the public interest unless it can be shown otherwise. This leads me to another key aspect of FOISA.

Balancing the public interest test

64. It is worth remembering that section 2(1)(b) 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 be to place the burden on the applicant, my Office or me to identify the reasons relating to the public interest that would justify disclosure. In some cases, where the subject matter has been extensively debated in the media and/or is in public domain this may be clearly evident. However, in other cases the applicant and/or my Office would be required to search out and identify matters of public interest which would justify disclosure. This is clearly not the intention of section 2(1)(b) or, for that matter, the legislation. 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.

65. The assumption that information held by government is secret unless there are reasons to the contrary has been replaced by the assumption that information held by government is available unless there are reasons to the contrary.

Clear and cogent evidence

66. Further, I expect authorities to put forward clear, cogent and credible evidence as to why the disclosure of the information requested would not be in the public interest. This should be in the form of submissions which relate directly to the information being withheld. In order to rebut the presumption contained within the public interest test, authorities will need to supply real examples as to why this particular information should not be released.

67. In this instance the Executive subsequently advanced a number of arguments in support of its view that it would not be in the public interest to disclose the content of the drafts. I will address these in turn.

Process v content

68. A key part of the Executive's submission concerns the need to protect the "process" of policy formulation. The Executive has argued that the overriding public interest lies in protecting the process by which documents, such as the sexual health strategy, are developed over time. It argued that section 29(1)(a) is, by its nature, about processes rather than discrete types of information and that the intention of this exemption must therefore be to protect the information relating to those processes. The Executive has submitted that there is a significant public interest in ensuring that policy formulation and development can take place in an arena which would enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations would be picked over out of context.

69. I can find no evidence to support the Executive's contention that section 29(1)(a) aims to protect a process. The exemption protects a class of information, that is, information relating to policy formulation and development but it does not automatically follow that the aim of the exemption is to protect that whole process.

70. In any event, even if I were to accept that contention, it does not follow that the overriding public interest must be to consolidate that protection. It would appear that the Executive wishes to ring fence all information relating to policy formulation 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.

71. 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.

72. 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.

73. Where information relating to negotiations does not in fact reveal the internal debate (because it was not recorded) then the information will not require protection. Likewise, information relating to policy formulation which simply reaffirms the public debate on the issue is rarely likely to have the requisite sensitivity. In other words, the process argument will only stand where the actual content of the information is sufficiently sensitive.

74. In its submissions to me the Executive referred to the Canadian case of Canadian Council of Christian Charities v Canada. For the sake of completeness, I think it relevant to insert the remainder this quote which went on to state that:

"On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed."

75. While the decision from the Canadian Federal Court is clearly not binding on me, it is worth noting that its comments were not made in the context of a discussion on the public interest test (the equivalent section in the Canadian legislation is not subject to the public interest) but rather, it seems to me, its comments reflect the terms of that legislation. By making section 29(1)(a) subject to a public interest test containing a presumption towards disclosure, the Scottish Parliament was clearly of the view that the internal deliberations of government should not automatically be protected from the public eye. Therefore I reaffirm my view that when considering the public interest test the authority should have regard to the actual content of the information being requested.

Sensitivity of the subject matter

76. Interestingly, although the Executive has argued that the process should be protected it has actually provided evidence relating to the specific information to show that disclosure would result in harm. For example, it identifies policy areas such as the issue of abstinence where the drafting required particular care. It has also focussed on this strategy and the sensitivities concerning its development. This, it seems me, is a tacit acceptance by the Executive that the content and not just the process is of significance.

77. However, the sensitivity of the subject matter of the policy alone will not automatically lead to a conclusion that the information should not be released.

Candour v accountability

78. The Executive indicated that the draft papers show how various policy options were put forward and subsequently amended or discarded. It submitted that officials should feel able to put these forward for consideration without concern about wider dissemination. The Executive argued that if there was a perceived risk of internal ideas being made publicly available with little time having lapsed in the interim, their quality would be undermined.

79. As a general point about the drafting process it is worth noting the comments of the Information Commissioner in Queensland in Eccleston:

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.

80. 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. Would the release of information that showed considered, temperate and constructive comments and amendments lead to the inhibition of quality debate and discussion?

81. 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.

82. Nonetheless, the realities of drafting complex policy are such that the individuals contributing to these documents 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. I am also aware that differentiating between amendments which are fundamental and those that are not may not always be a straightforward process. The inclusion or omission of a word or phrase which to an ordinary member of the public appears insignificant may, in fact, represent a fundamental policy change. This does not automatically exclude any internal deliberations, however; the content will still be the deciding factor.

Timing of the request

83. In support of its submission that disclosure would not be in the public interest the Executive has referred to the short period of time that had lapsed since the time of publication. Mr Hutcheon's application was made a matter of weeks after this date. The Executive argued that full exposure of its preparation would risk reopening issues that the Ministers had determined.

84. It could be argued that the timing of the policy development (during 2004) and subsequent publication would support disclosure of this information in that both Ministers and officials were on notice that any recorded information could be subject to disclosure once FOISA came into force.

85. I am not persuaded by the Executive's contention that release of the information might have an impact on the implementation of the strategy. I would need to see real evidence from the Executive that disclosure of the internal deliberations would have this effect or would, by extension, detrimentally impact on Scotland's poor sexual health. However, I agree that the timing of the request may well be relevant when considering the public interest test and that the sensitivity of information requested may decrease with time. I accept that at the time this request was made the sensitivity of the information would be high.

Extent of information already in the public domain

86. The Executive has also pointed to the transparency in the development of the sexual health strategy in support of its contention that it would not be in the public interest to disclose this information. The Executive has provided details about the processes of consultation, the discussions with stakeholders and the information subsequently published. 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.

87. 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 is 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. In this case, for example, the publication of a summary of consultation responses makes clear the kind of views and issues with which officials and ministers were required to grapple.

88. I am unable to take into account information that has been disclosed or published subsequent to Mr Hutcheon's request. As the Executive helpfully points out, the decision being assessed is the Executive's response to Mr Hutcheon's request made in February 2005.

Proximity to policy development

89. Although the Executive did not advance this argument I consider that the type of information and its proximity to policy formulation is also pertinent when considering the public interest in respect of section 29(1)(a). It seems to me that the broad, all encompassing nature of section 29(1)(a) and the fact that it can include peripheral information means that account can be taken of how closely the information is connected with actual policy formulation. In this case, the information is policy-making at its purest, that is, the actual drafts of the strategy.

Conclusion

90. The Executive has submitted that it has provided a balanced consideration of the public interest test. With respect, I do not consider that it has. Rather it has focussed on the need to protect the policy formulation process. It has not set out any submissions in favour of disclosure of the information requested by Mr Hutcheon but rather pointed to the information already in the public domain or that it has subsequently disclosed.

91. I have already stated that there is a presumption that the public interest would be served by disclosure of information. Therefore it is for the authority to demonstrate why this would not be the case. In considering the public interest test the authority may properly consider the process to which the information relates. For example, the fact that the information relates to negotiations or the process of drafting may raise an expectation of sensitivity. The timing of the request may also be pertinent. However, the existence of these factors alone will not determine that the information should be withheld. Ultimately, the determination must be made on the actual content of the information.

92. In this case, I accept that the subject matter of the strategy is of particular sensitivity and that the views expressed by stakeholders were diverse and strongly held. As a consequence, the drafting to reconcile these conflicting view points required particular care. I accept that amendments to the text even where these involve only the deletion or inclusion of a word or phrase may, on occasions, reflect a significant change in policy. Section 29(1)(a) protects information relating to policy formulation. In this particular case (unlike other applications before me relating to this strategy) the information sought is policy formulation at its purest; that is, the actual drafts of the strategy. I have also taken into account the fact that the request was made a matter of weeks following the publication of the policy and that, as a result, the sensitivity of the comments and the subject matter had not diminished.

93. I am satisfied that all drafts of the sexual health strategy involve amendments, alterations and comments the disclosure of which could significantly harm the candour with which such comments and amendments will be made in the future. Given that the final strategy has been published these alterations will either have been accepted and therefore known, or will have been subsequently discarded. I do not seek to protect intemperate or defamatory comments. Rather I am persuaded that if I were to order disclosure of disregarded amendments or comments the candour with which officials and ministers recorded their concerns, suggestions and objections during policy development in the future would be significantly inhibited. It is important that policy alternatives can be explored, and discarded, and that officials and ministers should not be inhibited from doing so, to the extent policy formulation and development is rigid or non-inclusive.

94. Of course, this needs to be balanced against the public benefit of transparency in decision-making. Release of the information in this case may increase understanding of how decisions relating to this strategy were reached and the timing and context in which these decisions were made. However, I also need to consider the impact release in this case might have on transparency in general. Disclosure of the information in this case may lead to comments of substance not being recorded in the future or result in drafts simply being deleted. Changes in practice of this kind would not enhance transparency.

95. This does not mean that I accept that any draft policy document held by the Executive will automatically deserve protection on public interest grounds. Close consideration will need to be paid to the relative sensitivity of the policy or strategy, the nature of the information (that is, how closely does it relate to the drafting process), the timing of the request and the nature of the amendments, comments and changes to the text.

96. Consideration of the public interest test requires a careful balancing act between competing interests. In this case I have accepted that the risk to the candour of discussion between officials and Ministers would be substantially harmed given the sensitivity of the information requested. However, the public interest also requires that even where the information is sensitive the information should still be released if I consider there to be some overriding reason for disclosure.

97. Where I find, after considering the content of the information, that the information is of sufficient sensitivity that disclosure would, for example, seriously harm the candour of such discussions in the future I am likely only to order release where I find some compelling public interest ground for doing so. Compelling reasons for disclosure would arise, for instance, where disclosure of the information requested may expose wrongdoing or the fact that wrongdoing has been dealt with, or dispel suspicions of wrongdoing. Where a policy decision involves an unexplained or unacknowledged departure from routine procedures or standard practices there may also be a strong public interest in disclosure.

98. It seems to me that the issue to be considered here is not whether there were any changes to the strategy but whether any such changes would demonstrate or be indicative of any wrongdoing such as the Executive having been influenced in an unacknowledged or improper manner or that the Executive had departed from the normal procedures which it employs when carrying out a consultative process.

99. It should come as no surprise to anyone that policy goes through a series of drafts in which options are considered, opinions are aired and comments made. If these were made available no doubt they would attract some public interest. There is a real distinction between what may be of interest to anyone or even to a wider public and what is in the interest of the public to release, even if it were to cause harm to the authority. Where, as here, I find that the information is of such sensitivity that release would be to the detriment of the formulation of Scottish Administration policy there would have to be a demonstrable benefit either from what is contained in the information or from what would be achieved by the release of information, such that the public interest in disclosing the information is not outweighed by that in maintaining the exemption. I have fully considered the factors set out in the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (the Section 60 Code), and in particular I have considered the extent to which disclosure would enhance scrutiny in the decision making process and the extent to which disclosure would contribute to a debate on sexual health strategy, as a matter of public interest.

100. There is a strong public interest in members of the public having access to information which explains why decisions were reached and the basis for those decisions. This has to be balanced against the public interest in the need for candour of debate among civil servants and Ministers when formulating policy. In this particular case, I have considered all factors relevant to the public interest test including the type of information being sought, the amount and nature of information already in the public domain, the sensitivity of the information requested, the timing of the request and the actual content of the amendments. On balance, I conclude that the public interest in disclosure of the information requested is outweighed by the public interest in withholding the information (subject to the provisions of the paragraph below).

101. However, I find that the public interest is in disclosing the factual information which has been used to provide an informed background to the taking of a decision and this should be provided to the applicant.

Application of additional exemptions

102. The Executive submitted that, in retrospect, section 30(a) and section 30(b)(i) and (ii) may also have been applied to information where a particular Minister's views (for example regarding amendments) are made clear, or where officials' advice or views are annotated. However, it did not direct me to the information to which these exemptions relate or set out the nature of the harm that would arise through disclosure of any specific document or piece of information.

103. I asked the Executive to clarify the information to which these exemptions related in subsequent correspondence. The Executive responded that, on balance, it considered that section 30(a) and section 30(b)(i) applied to the drafts in their entirety. Its further submissions are set out above.

104. While I accept that section 30(a) and section 30(b)(i) and (ii) might well apply to certain comments and views expressed within particular drafts, I do not accept that these exemptions can apply to a whole process. Where an authority wishes to rely on these exemptions it will need to identify the specific information to which the exemption applies and demonstrate why it would prejudice substantially (as in the case of section 30(a)) or inhibit substantially (as in the case of section 30(b)) the particular interest. Even where an authority is able to demonstrate that a particular comment or exchange is covered by an exemption, I would still require the remaining information to be released.

105. I do not accept the Executive's argument that section 30(a) and section 30(b) aim to protect a process. There is no justification for this approach in terms of FOISA. If I were to accept this argument, any internal deliberations or negotiations, regardless of the content of the views or exchanges, would fall to be protected.

106. As a result, I find that the Executive has failed to demonstrate why these exemptions apply to all information within all drafts. The exemptions contained in section 30(a) and section 30(b)(i) and (ii) are not upheld.

Decision

I find that the Scottish Executive (the Executive) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to provide any statistical information used to provide an informed background to the taking of a policy decision in accordance with section 29(2)(a) of FOISA and by failing to have regard to the public interest in the disclosure of any factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision in accordance with section 29(3) of FOISA. This information should be released to Mr Hutcheon in the terms described in paragraph 49 above.

I note that the Executive has already agreed to supply Mr Hutcheon with this information. Nevertheless, I am unable to order the release of information until the time for appealing to the Court of Session has passed. Accordingly, I require the Executive to provide Mr Hutcheon with a copy of the information within 6 weeks of receipt of this decision.

I find that the Scottish Executive complied with Part 1 of FOISA in withholding the remainder of the information requested by Mr Hutcheon.

Kevin Dunion
Scottish Information Commissioner
16 May 2006