



Scottish Information
Commissioner

**Decision 089/2005 David Hutchison and the
Scottish Executive**

*Refusal to provide communications about the use of powers under
section 5 of the Freedom of Information (Scotland) Act 2002*

**Applicant: David Hutchison
Authority: The Scottish Executive
Case No: 200501774
Decision Date: 22 December 2005**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 089/2005 David Hutchison and the Scottish Executive

Request for communications relating to the use of powers under section 5 of the Freedom of Information (Scotland) Act 2002 – whether information relates to the formulation or development of government policy (section 29(1)(a)) – whether information relates to ministerial communications (section 29(1)(b)) – whether release would or would be likely to prejudice substantially the convention of collective responsibility of Scottish Ministers (section 30(a)) – whether release would or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)) – consideration of the public interest

Facts

Mr Hutchison made eleven distinct requests for communications relating to the use of powers under sections 4 and 5 of the Freedom of Information (Scotland) Act 2002 (FOISA). These requests were all refused because the information related to the formulation or development of government policy, and so was exempt from release under section 29(1)(a) of FOISA. Mr Hutchison asked the Executive to review this decision, noting that the response had not referred to the distinct requests, and had not indicated how the decision was reached that the public interest in withholding the information outweighed that in release. Following this review, the Scottish Executive confirmed that it held information that fell under the scope of only two of the eleven requests. It confirmed the decision that each document was exempt from release under section 29(1)(a) and also judged that other exemptions also applied. Mr Hutchison applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Scottish Executive had acted in accordance with the requirements of Part 1 of FOISA by withholding the documents requested by Mr Hutchison under sections 29(1)(a), 29(1)(b) and section 30(a). He agreed that the public interest favoured the maintenance of the exemptions in relation to these documents.

The Commissioner did not accept that the use of the application of the exemption in section 30(b)(ii) of FOISA had been justified in relation to any of the documents falling under the scope of Mr Hutchison's request.



Appeal

Should either Mr Hutchison or the Scottish Executive 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. Sections 4 and 5 of FOISA provide mechanisms by which organisations and office holders can be brought under its scope. Currently FOISA applies to around 10,000 Scottish Public Authorities, which are either public sector bodies or office holders listed in schedule 1 to the Act, or companies wholly owned by one or more of the authorities listed in schedule 1.
2. Under Section 4 of FOISA, the Scottish Ministers have the power to add or remove public sector organisations or office holders to or from the schedule 1 list.
3. Under section 5 of FOISA, the Scottish Ministers have the power to designate as a Scottish Public Authority any person or organisation which is neither a public body nor the holder of a public office but:
 - a) Appears to the Scottish Ministers to exercise functions of a public nature; or
 - b) Provides, under a contract with a Scottish Public Authority, any service whose provision is a function of that authority.
4. The power in section 5 thereby allows for private sector organisations to be brought under the scope of FOISA where, for example, they are engaged in a PFI/PPP contract with a public authority to carry out any of its functions.
5. To date, no organisations have been added to schedule 1 via the powers under section 4 of FOISA, and none have been designated as public authorities under section 5. In 2004, the Scottish Executive committed to bring forward a consultation paper on the criteria for extending the scope of the Act using these powers. However, no consultation had been issued or announced by the time of Mr Hutchison's requests described below.



6. This situation has moved on in the intervening period. On 3 October 2005, the Minister for Parliamentary Business announced that a review of various aspects of the operation of FOISA would be undertaken, and that this would include, among other things, consideration of the scope of FOISA and the use of powers under sections 4 and 5. This consultation was launched on 12 December 2005.

Mr Hutchison's requests to the Scottish Executive

7. Mr Hutchison emailed eleven distinct requests for information to the Freedom of Information Unit of the Scottish Executive (the FOI Unit) on 28 March 2005. These requests sought access to communications relating to the exercise of powers under sections 4 and 5 of FOISA between, variously, the FOI Unit, the Scottish Ministers, the Scottish Information Commissioner and the Scottish Prison Service.
8. The Scottish Executive's response, issued on 14 April 2005, informed Mr Hutchison that the information he had requested was exempt from release under section 29(1)(a) of FOISA, which applies to information which relates to the formulation or development of government policy. The Scottish Executive also informed him of its conclusion that the public interest in withholding the information outweighed that in release.
9. Mr Hutchison wrote again to the Scottish Executive on 17 April 2005 to request a review of this decision. His letter noted that the Executive's response had not referred to the eleven distinct requests for information. He observed that this response failed to expand upon the use of the exemption in relation to information sought under each request. Mr Hutchison's letter also noted that the Scottish Executive had not indicated how it had reached a view that the public interest was better served by withholding rather than releasing the information.
10. The Scottish Executive notified Mr Hutchison of the outcome of its review in a letter dated 17 May 2005. This upheld the decision that section 29(1)(a) applied to all information sought under Mr Hutchison's requests. It also concluded that the exemption in section 30(b)(ii) applied to all relevant documents, and that the exemptions in section 29(1)(b) and section 30(a) applied to some of the documents.
11. The Scottish Executive acknowledged that the initial refusal notice of 14 April could have set out more clearly and explicitly those questions for which material was held by the Scottish Executive and those for which an exemption was being claimed.



12. A detailed annex to this letter provided responses to each of Mr Hutchison's eleven requests independently. These confirmed that no information was actually held by the Executive in relation to nine of the requests. For the two requests for which relevant information was held, more detailed reasoning was provided to explain the application of exemptions and consideration of the public interest when reaching the decision to withhold this. This annex also provided further information falling outside the scope of the requests that the Executive considered might be of interest to Mr Hutchison.
13. Mr Hutchison then applied for a decision by me in a letter dated 17 May. His appeal relates only to the two requests for which information is held by the Scottish Executive. These sought:
 - a) All communications and minutes/transcripts of meetings between the FOI Unit and the Scottish Prison Service regarding the designation of private prisons as "Scottish Public Authorities" under section 5 of FOISA, for the period of May 6th 2004 to the present day (28 March 2005).
 - b) All communications and minutes/transcripts of meetings between the Scottish Ministers and the FOI Unit regarding the consultation on the criteria for the designation of persons or bodies as "Scottish Public Authorities" under section 5 of FOISA as announced in Parliamentary answer S2W-7833, for the period of May 6th 2004 to the present day (28 March 2005).
14. Mr Hutchison suggested that the period between the passing of FOISA and its full implementation in January 2005 had given the Scottish Executive two years to reach a decision on whether and what bodies to designate using its power under section 5, and particularly whether to designate private sector contractors providing public services. He added that the failure to reach a decision on the exercise of that power was effectively an unexplained government decision not to use the power (at least in the interim). Mr Hutchison argued that there was a very strong public interest in getting an explanation as to why the Scottish Executive had chosen not to exercise a power it was given by Parliament. Mr Hutchison put forward further detailed arguments as to why he considered the public interest to favour release, and these are detailed in paragraph 49 below.

Investigation

15. Mr Hutchison's application for a decision was received on 17 May 2005 and allocated to an investigating officer.



16. The appeal was validated by establishing that he had made a valid information request to a Scottish public authority under FOISA and had appealed to me only after asking the Scottish Executive to review the response to his request.
17. The investigating officer wrote to the Scottish Executive on 25 May 2005 informing it that an appeal had been received and that an investigation into the matter had begun. The Scottish Executive was invited to comment on the case in terms of section 49(3) of FOISA.
18. The Scottish Executive was also asked to provide the following:
 - a) Copies of all information falling under the scope of the two requests under consideration.
 - b) Details of which exemptions were judged to apply to each document and the reasoning behind their application.
 - c) Details of the rationale behind the conclusion that the public interest in withholding the information outweighed that in release.
 - d) Details of the processes followed in responding to Mr Hutchison's requests for information and subsequent request for review.
19. The Scottish Executive responded to these requests in a letter dated 13 June 2005.
20. Initially, 7 documents (numbered 1 – 7 in the document schedule) were provided and identified as falling under the scope of Mr Hutchison's request. However, further communications confirmed that two of the documents did not actually fall under the scope of the requests under consideration. As a result, documents 6 and 7 were later returned to the Scottish Executive. A further document was later added after the investigating officer noted that document 5 referred to an email that appeared to be relevant but was not included within the schedule. I have numbered this document 8.
21. The table overleaf lists the documents that are under consideration in this case, and the exemptions that the Scottish Executive judged to apply to each.



Document	Description	Exemptions applied
Document 1	email from an official to the Minister for Parliamentary Business (copied to various other recipients), attaching a minute and draft consultation paper.	29(1)(a), 30(b)(ii)
Document 2	email from an official forwarding document 1 to various recipients (including a Scottish Prison Service official) and seeking comments	29(1)(a), 30(b)(ii)
Document 3	email exchange between officials from the Scottish Executive and the Scottish Prison Service following from document 2	29(1)(a), 30(b)(ii)
Document 4	email from the Deputy Minister for Finance and Public Service Reform and a subsequent exchange between officials following from document 1	29(1)(a) and (b), 30(a) and (b)(ii)
Document 5	email from an official to the Minister for Parliamentary Business (copied to various other recipients) attaching a document containing draft responses to Parliamentary Questions	29(1)(a), 30(b)(ii)
Document 8	email from an official to the Minister for Parliamentary Business (copied to various other recipients), attaching two draft letters (which were never finalised or sent).	29(1)(a), 30 (a) and (b)(ii)

The Commissioner's analysis and findings

22. In this case, multiple exemptions have been judged to apply to each document. Below, I will address and set out my conclusions in relation to the application of each exemption in turn, before finally considering the public interest in relation to this information.



Section 29(1)(a)

23. All documents relevant to this case have been withheld under section 29(1)(a), which applies to information that relates to the formulation or development of government policy. In considering whether the Scottish Executive's reliance upon this exemption is justified, the key question is therefore that of whether these communications relate to the development or formulation of policy.
24. In his request for review of the Scottish Executive's initial response to his requests, Mr Hutchison noted that criteria for designation of under section 5 of FOISA are set out within the law itself. He went on to ask what further policy formulation could be required. He also observed that various statements about the use of powers under section 5 had been made by the Minister for Justice (then Jim Wallace MSP) during FOISA's passage through the Scottish Parliament.
25. In its submission to me, the Scottish Executive acknowledged that the policy on section 5 is essentially entrenched in FOISA and has been set out by previous ministers. However, it also stated that the Scottish Executive considers it of primary importance to allow time for the practices and processes around FOISA to be honed for the organisations currently covered before bringing other organisations under its scope.
26. The Scottish Executive stated that there was a need to take time to consider the detail of the criteria to be applied when considering particular bodies for designation. It added that Ministers were actively considering the issue and until their deliberations were complete, little useful information on timing could be provided.
27. I agree that section 5 of FOISA does create a broad policy framework for the Ministers in that it creates a power to designate organisations and provides broad criteria for determining which organisations this power might be applied to. However this power is discretionary and the framework is not prescriptive. Section 5 does not indicate when this power should be used, how the criteria should be interpreted, and therefore which bodies should or should not be designated, for how long, or for which purposes. These are all policy decisions for the Scottish Ministers and the process of determining the framework within which the powers under section 5 will be used is therefore a policy making process.
28. Each of the documents under consideration here relates directly to the development of policy on the use of powers under section 5. They include submissions to ministers, the presentation of options and the cases for and against different approaches.



29. I conclude therefore that the exemption in section 29(1)(a) was correctly applied in this instance to all six of the documents under consideration.
30. This exemption (along with the others claimed in this case) is of course qualified, and so before reaching a decision to withhold, a judgement must be reached on whether the public interest in doing so outweighs that in release. The public interest is addressed in paragraphs 47 - 58 below following the consideration of other exemptions relevant to this case.

Section 29(1)(b)

31. This exemption applies to information that relates to Ministerial communications. The Scottish Executive applied this exemption to document 4, which includes an email from the Deputy Minister for Finance and Public Service Reform to officials, and subsequent emails between these officials.
32. Document 4 therefore contains a Ministerial communication, and further emails that relate to this. I agree that it falls under the scope of section 29(1)(b).

Section 30(a)

33. The exemption in section 30(a), which applies when release would or would be likely to substantially prejudice the maintenance of the convention of collective responsibility of the Scottish Ministers, has been applied by the Scottish Executive in relation to documents 4 and 8.
34. The Scottish Ministers operate on the basis of collective responsibility. This convention dictates that decisions reached by the Executive are binding on all its members once made and the internal processes through which a decision has been made should not be disclosed. Ministers are expected to abide by them and defend them as necessary. Such decisions, however, are normally announced and explained as the decision of the Minister concerned. Collective responsibility also applies to junior Scottish Ministers even though they are not members of the Executive.
35. Documents 4 and 8 each contain statements of the views of individual ministers on how to move forward in determining the Scottish Executive's policy on the use of powers under section 5 of FOISA. Given that the policy formulation process was ongoing at this point, these may not reflect the final position reached once the deliberative process concluded.
36. I accept that release of information that sets out these views would have the potential to undermine the convention of collective responsibility in relation to this (albeit relatively minor) policy area.



37. The exemption in section 30(a) applies only where release would be likely to substantially prejudice this convention however. Information should not simply be withheld because it reveals that a Minister has at some point expressed a view that is not in complete agreement with an agreed policy, or which relates to a policy decision not finalised. Factors that might influence a judgement on whether the impact of release would be likely to be substantially prejudicial include whether individual Ministers are still in post, or still members of the administration; the timing of the potential release; and whether the policy in question is still under development.
38. In this case, the policy making process in question is ongoing, and the ministers in question are both still members of the administration. I accept that to release of some information in documents 4 and 8 at this point could be substantially prejudicial to the convention of collective responsibility. Therefore, I conclude that this exemption has been correctly applied in this instance.
39. However, I do not consider this exemption to apply to the two documents identified by the Scottish Executive in their entirety. Within document 4, I only accept that this exemption applies to the main text of the email from the Deputy Minister for Finance and Public Service Reform. In document 8, I only accept that this exemption applies to paragraphs 1 and 2 of the email of 15 March, and the two draft letters.
40. I conclude that the Executive wrongly applied this exemption to the parts of documents 4 and 8 that fall outside those identified in paragraph 39 above.

Section 30(b)(ii)

41. This exemption applies to information for which release would or would be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation. Although it was not initially cited as an exemption relevant to Mr Hutchison's requests, at review it was judged to apply to all six documents under consideration here.
42. I have commented on the application of this exemption in a number of my decisions (particularly, decisions 015-2005, 041-2005, 057-2005 and 067-2005) and I have made clear that I expect the use of this exemption to be based upon the effects of release of the specific information under consideration.



43. In various cases, including this one, the Scottish Executive appears to have applied the exemption in section 30(b)(ii) on a class basis, on the assumption that “routine” release of certain types of information, such as internal discussions or advice, would have an inhibitive effect on such exchanges in future. In the decisions listed above, I have emphasised that release in one case should not be taken to imply that such communications will be “routinely” released in future.
44. The Executive’s submission to me on the application of this exemption stated very generally that release of these documents would have a substantially inhibitive effect on the exchange of views between both Ministers and the officials concerned, such as would cause damage to the discussions that need to take place around policy issues.
45. I am not persuaded by the Scottish Executive’s case in relation to the application of this exemption. It makes no reference to the specific content of the advice and views exchanged in the documents under consideration, while these vary considerably in content and sensitivity. For the most part, the advice and views expressed by officials are balanced, considered, and unexceptional. There is nothing to make me think that release of these documents would make officials more reticent in advising their Ministers in future.
46. I conclude that the application of the exemption in section 30(b)(ii) was not justified in this instance.

Consideration of the public interest

47. I have decided that the Executive was correct in applying the exemption in section 29(1)(a) to each of the documents under consideration in this case. I have also found that section 29(1)(b) was correctly applied to document 4, and section 30(a) was correctly applied to parts of documents 4 and 8.
48. These three exemptions are all qualified. Before reaching a final conclusion about whether the Executive acted in accordance with Part 1 of FOISA in withholding the six documents, I must consider whether the public interest in doing so outweighs that in release.

Submissions on the public interest

49. Mr Hutchison’s application explained in detail why he considered the public interest in this case to favour release of the documents. He highlighted four arguments in favour of release.



- a) Firstly, he suggested that the government's failure to consult or give reasons for its decision not to exercise its power under sections 4 and 5 of FOISA was a prima facie indication that it had no proper reasons. He suggested that this exposed the government to judicial review of the decision not to exercise the powers.
 - b) Secondly, he noted that individuals or organisations considering tendering for public sector contracts were faced with uncertainty as to whether contractors would have responsibilities under FOISA.
 - c) Thirdly, he argued that it was in the public interest for the public to know the division of responsibilities between the Ministers and the Scottish Prison Service in relation to policy making with regard to freedom of information.
 - d) Finally, he noted that the Scottish Prison Service was in the process of preparing a public sector bid to run one of the planned new prisons. He suggested that it would be in the public interest to know how officials in the Scottish Prison Service regarded the argument that there should be a level playing field between the public and private sectors on freedom of information.
50. The Scottish Executive's submission provided reasons for its view that the public interest in this case favoured the withholding of the information. These were:
- a) Ministers and officials need to consider policy options in a "free space" and conduct rigorous and candid assessments without there being premature disclosure. Disclosure would endanger the provision of and the quality of dialogue that takes place between Ministers and officials.
 - b) The inhibiting effect of disclosure would have a damaging effect on the quality of government. If Ministers are to make decisions based on strong advice and to be able to discuss options, a secure environment in which to do so is required.
 - c) In relation to collective responsibility of Ministers, this principle requires that Ministers can argue freely in private while maintaining a united front once a decision is reached. This in turn requires that the privacy of opinions expressed and advice offered is maintained.

Conclusions on the public interest

51. Mr Hutchison's arguments in relation to the public interest must be considered in relation to the context in which they were made. At that time a commitment had been made to consult, but a consultation process had not been announced or launched. It was therefore unclear whether the Ministers had decided not to do so, or whether they had any plans to exercise their powers under section 5.



52. Mr Hutchison argued, essentially, that release would have provided clarity on the Scottish Executive's thinking on this issue and so would be in the public interest.
53. In decision 057/2005, I considered a case where certain sections of an Act of Parliament had not yet been commenced 15 years after they had been passed. There, I concluded that it was in the public interest that the reasons for this lengthy delay were understood, and so this consideration favoured release in relation to a range of documents that would increase this understanding.
54. In this case, the relevant provisions of FOISA were commenced on 30 September 2002, but the powers they created have not yet been used by the Ministers. In the period up to the start of 2005, the attention of officials and Ministers was, as we might expect, focussed upon the implementation of FOSIA for those bodies already under its scope. I think it unwarranted to suggest that just 5 months after full implementation, the failure to use or confirm plans for the use of powers under section 5 of FOISA is a matter of significant public concern.
55. We now know that the Executive has launched a consultation that will address some of the concerns raised by Mr Hutchison, especially the first and second in paragraph 50 above. However, my conclusion is based on the circumstances at the time of his request, and so would have been the same had there been no such launch in the interim.
56. Furthermore I am also of the view that the information contained in the documents withheld would not, if released, address the third and fourth concerns raised by Mr Hutchison in paragraph 49 above.
57. Although the Scottish Executive's arguments with respect to the public interest were made in a very generic way in this case, nevertheless the issues of harm raised are applicable to the specific information requested. (I should say that this may not always be the case if such an approach is taken in other circumstances.)
58. Given that I do not find that the public interest in releasing the information would outweigh the harm in so doing I find that the Scottish Executive acted in accordance with Part 1 of FOISA in withholding these documents.



Decision

I find that the Scottish Executive acted in accordance with the requirements of Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding documents 1, 2, 3, 4, 5, and 8 as detailed above. However, I do not accept that the exemption in section 30(b)(ii) of FOISA applies to any of the documents under consideration in this case, and I have concluded that section 30(a) only applies to the parts of documents 4 and 8 identified in paragraph 39.

Kevin Dunion
Scottish Information Commissioner
20 December 2005