

Decision 209/2006 Mr David Hutchison and Scottish Executive

Manifesto BriX briefings for 2003 Scottish Parliamentary Election

Applicant: Mr David Hutchison

Authority: Scottish Executive

Case No: 200502741

Decision Date: 17 November 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Facts

Mr Hutchison requested a copy of all communications, minutes, papers and draft programmes for government for each political party, including all speculative programmes for government for each political party (and possible coalitions) for 1999 to 2007. The Scottish Executive (the Executive) refused this request, citing sections 25, 30(b)(i), 30(b)(ii) and 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Outcome

The Commissioner found that the Executive had incorrectly applied the exemption under section 25 of FOISA to the information requested by Mr Hutchison.

The Commissioner found that the Executive had incorrectly applied the exemption under section 30(b)(ii) of FOISA to the information requested.

The Commissioner found that the Executive had incorrectly applied the exemption under section 30(c) of FOISA to part of the information requested.

The Commissioner found that the Executive had correctly applied section 30(b)(i) of FOISA to the majority of the information requested by Mr Hutchison and therefore had dealt with the request partly in accordance with Part 1 of FOISA. The Commissioner found, however, that this exemption had been applied incorrectly to the remainder of the information requested and therefore that in respect of that information the Executive had failed to deal with Mr Hutchison's request in accordance with section 1(1) of FOISA.

The Commissioner required the Executive to release the BriX Manifesto Briefing notes, subject to redaction of exempt information, to Mr Hutchison within 45 days of receipt of this Notice.

Appeal

Should either the Executive or Mr Hutchison 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

1. On 15 July 2005, Mr Hutchison sent an email to the Scottish Executive (the Executive) requesting “all communications, minutes, papers and draft programmes for government for each political party; including all speculative programmes that take the possibility of coalitions of political parties forming the Scottish Executive of 1999 – 2003”, and also the same information in respect of the Scottish Executive of 2003 – 2007. He requested the information be supplied in electronic format if possible.
2. The Executive acknowledged (5 August 2005) this request and said that it would be unable to respond within the required timescale.
3. Mr Hutchison treated this letter as a refusal to provide the information and on 16 August 2005 (after the relevant 20 working days had expired) wrote to the Executive seeking review of this refusal.
4. The Executive responded to the request on 26 August 2005 explaining that it did not hold the information requested, but that it held information which could be relevant to the applicant’s request: it held notes (called Manifesto BriX Notes) compiled by the Executive on the implications of the manifesto commitments of the Scottish political parties prior to the 2003 Scottish Parliamentary election. However, the Executive issued a refusal notice stating that this information was exempt under section 30(b) of FOISA.
5. On 26 August 2005, Mr Hutchison intimated to the Executive by email that the information described in its letter of 26 August 2005 was relevant to his request and sought review of the refusal to provide this information.
6. By letter of 13 September 2005 the Executive communicated the outcome of its review, explaining to Mr Hutchison that his request was not dealt within the 20 working days due to it being received during the peak holiday period of the summer Parliamentary recess and apologising for any inconvenience caused. The review held that the information was exempt under section 30(b) of FOISA.

7. Mr Hutchison contacted my office by email (16 September 2005) requesting an investigation into the refusal of the Executive to provide him with the requested information.
8. The case was allocated to an investigating officer.

The Investigation

9. Mr Hutchison's appeal was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to his request.
10. The investigating officer then contacted the Executive on 6 October 2005 for its comments on the application of the exemptions claimed and on the application as a whole, in terms of section 49(3)(a) of FOISA. The Executive responded on 4 November 2005, providing comments on its use of the exemptions along with the withheld material (an electronic version of its Manifesto BriX Notes). In the course of the investigation it provided further information clarifying its submissions.

Submissions from the Executive

11. The Executive advised that it held internal briefing notes which had been prepared to consider the implications of the manifesto commitments of the political parties prior to the 2003 Scottish Parliamentary election. These notes were part of an internal corporate briefing system (called BriX notes) within the Executive's intranet to supply civil servants and Ministers with information and guidance. The BriX notes which dealt with manifesto commitments were called Manifesto BriX Notes ("the Notes"). Unlike the majority of BriX notes, the Notes were accessible only by the few civil servants responsible for post-election planning. They were used by senior officials involved in supporting the post-election negotiations to draw up "A Partnership for a Better Scotland".

12. The Executive said that the Notes contained factual descriptions of political proposals permeated with interpretation of the commitments, and analysis of the implications and practicality of those commitments. The Executive claimed that there were three “threads” evident in the Notes: factual statements, intertwined with both interpretation and analysis. That is, each note had a factual description of a political manifesto proposal. Secondly, each note had, where needed, interpretation of that proposal. Thirdly, each note usually had an analysis of the manifesto commitment (for example its practicality for implementation, any financial, staffing or media implications) in which opinions were expressed. The Executive claimed that these three “threads” were “intertwined” within each note.
13. The Executive explained that the sources of the factual content were the party manifestos (which were quoted or paraphrased in the Notes) and extracts from newspaper articles. The Executive submitted that this information was in the public domain and the exemption in section 25 of FOISA applied to the content.
14. The Executive was asked to clarify whether section 25 (or section 30(b) or section 30(c)) applied to information within the Notes which gave details of who had created that note and when it was created, and similar information. The Executive said that this part of the Notes did not fall within Mr Hutchison’s request, which was for notes considering the implications of the manifesto commitments of the Scottish political parties prior to the 2003 election. The Executive regarded information about who created the note, when it was created, and the like, as not within the scope of the request. However, it stated that were such information considered to be within the request, it believed that the exemptions already cited from section 30(b) and section 30(c) would apply.
15. The Executive argued that the content (the interpretation and analysis) of the Notes was covered by the exemptions in section 30(b)(i), section 30(b)(ii) and section 30(c) of FOISA. It argued that the Notes were infused with views and advice and it was essential to maintain a “private arena” in which officials could freely exchange advice and views and that disclosure would inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation. Additionally, it argued that disclosure of the Notes would create a danger that there could appear, through an analysis of the complete Notes, to be partiality and political bias on the part of the Civil Service. A consequence would be the reluctance of civil servants to engage in free and frank discussion of political pre-election commitments. The Executive also argued that section 30(c) applied since disclosure would prejudice substantially the effective conduct of public affairs, in the sense of preparation for post-election governance.

16. In respect of the public interest, the Executive stated for the exemptions in section 30(b)(i), section 30(b)(ii) and section 30(c) of FOISA that it would not be in the public interest if civil servants were reluctant to prepare detailed contingency plans. Without the Manifesto Notes there would be no smooth transition after an election: were there to be a change in the party holding political power, there would be no detailed planning of the implications of that party having power, and there would be a consequent “short term paralysis of the Civil Service”. This was not in the public interest, the Executive argued. In conclusion, the Executive stated that the public interest in favour of maintaining the exemptions stated strongly outweighed the public interest in disclosure.

The Commissioner’s Analysis and Findings

Scope of the request

17. Firstly, I shall consider the scope of Mr Hutchison’s request.
18. Mr Hutchison asked for:

“...all communications, minutes, papers and draft programmes for government for each political party, including all speculative programmes that consider the possibility of coalitions of political parties forming the Scottish Executive of 1999 – 2003” and also the same information in respect of the Scottish Executive of 2003 – 2007.
19. The Executive stated that it did not hold this information i.e. it did not hold draft programmes for government or speculative programmes for coalition government. However, it held information which might be of interest to the applicant: it stated that it was involved in “the production of notes considering the implications of the manifesto commitments of the Scottish political parties prior to the 2003 election”. The Executive stated that “this information could be considered relevant to your request”.
20. Mr Hutchison stated that he did consider “the notes [and all materials relating to them] considering the implications of the manifesto commitments of the Scottish political parties prior to the 2003 election” to be relevant to his requests.
21. The review by the Executive stated that it was content that “the content and subject matter of the notes is considered exempt under section 30(b)”.

22. It is my view that Mr Hutchison's request (as clarified in his email of 26 August 2006) is for the complete Notes (including details about the creation of each note) produced for the 2003 election. In any event, given that the 26 August email was Mr Hutchison's substantive request for review and made no mention of the first part of his original request (for documents relating to the previous term of the Scottish Parliament), I can only consider his request insofar as it relates to the later period.
23. Having considered the Executive's submissions and the Notes, I do not accept that Mr Hutchison's request was confined only to implications within the Notes. It is my view that his request was for the Notes and this would include details of their preparation (which would be contained within each note). Mr Hutchison phrased his acknowledgement that he wanted his request to cover this material by inserting the phrase "and all materials relating to them". He asked for the "notes [and all materials relating to them] considering the implications." I do not regard the information contained within each note relating to aspects of its creation as outwith the scope of his request.

Section 25 - Information otherwise accessible

24. Section 25(1) states:

"Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information."

Where information is already available to the applicant there is no need to provide an alternative right of access through FOISA. The Executive argued that the factual information in the briefings was available on the websites of the political parties or by contacting the relevant party offices. The implications and analysis of the manifesto commitments (in terms of legislation, timescales, finance, etc) were not otherwise accessible, and the Executive did not claim this. On being asked, the Executive stated that there was no selectivity in manifesto briefings i.e. all manifesto commitments were subject to briefings.

25. The Executive had claimed that section 25 of FOISA applied to the material. It clarified its position (26 July 2006) that section 25 applied to the description of the respective manifesto commitments and parties, and also to the factual information which was intertwined within individual notes.

26. I do not accept that the information requested by Mr Hutchison is information which the applicant can reasonably obtain other than by requesting it under section 1(1). I do not regard the requirement that the applicant access several websites or contact the offices of several political parties as making the relevant parts of the Notes information which Mr Hutchison can reasonably obtain otherwise than requesting it. The applicant would be required to access the manifesto documents and extract the manifesto commitments. The applicant would need to interpret what constituted a manifesto commitment. I do not consider the briefings as information which the applicant can reasonably obtain other than by requesting it under section 1(1). While the Executive used the sources it has identified to compile part of the Notes, that does not make the source information equivalent to its briefings, or any part of them. A person would be required to interpret the manifestos and extract information – i.e. to decide what are the factual aspects of the respective parties' publications. The same arguments apply in respect of factual information intertwined within the Notes.
27. I do not regard section 25(1) of FOISA as applying to any of the material in the Notes and find that the Executive wrongly applied this exemption. I do not regard section 25 as applicable to the single line descriptions of Manifesto Commitment and Party in the Notes, or to factual content within the individual Notes.

Application of section 30(b)

28. Section 30(b) states:
- “Information is exempt information if its disclosure under this Act-
- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
- (ii) the free and frank exchange of views for the purposes of deliberation.”
29. The Executive has argued that section 30(b)(i) and section 30(b)(ii) of FOISA both apply to the information withheld. The public interest test applies to section 30. This means that even if I find that the information is exempt in terms of section 30(b)(i) or section 30(b)(ii), I must order release of the information unless I find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld.

30. The Executive argued in its clarification that exemptions apply to whole documents. As I have said, I do not regard the information that details the creation of the note to fall outwith the scope of the request, nor do I consider any information within the notes to fall within section 25. Consequently, I have considered the whole Notes in respect of the application of section 30(b).
31. As I have indicated in previous decisions, the main consideration in determining whether this group of exemptions is triggered is not so much whether the information constitutes advice or (as the case may be) an exchange of views – although obviously that will be relevant in the majority of cases – but rather whether the release of the information would, or would be likely to, have the substantially inhibiting effect required for the relevant exemption to apply.
32. The Notes are used for post-election planning and preparedness. I accept that these Notes are used in a context of preparing and providing advice, which may be offered depending in the outcome of the elections and that their content can constitute advice (in terms of section 30(b)(i)).
33. In respect of section 30(b)(ii), “deliberation” refers to the evaluation of the competing arguments or considerations that may have an influence on a public authority’s course of action. It will include expressions of opinion and recommendations, but will not include purely factual material or background information. I do not accept that the Notes are an exchange of views for the purposes of deliberation. Whilst there may have been deliberation in the preparation of the Notes, and there may have been a free and frank exchange of views with Ministers when the Notes were put forward or used, the actual Notes appear to me to be a concluded document. As I said in paragraph 31, the test is not whether the information constitutes an exchange of views, but that it whether disclosure would, or would be likely to inhibit substantially such an exchange. However, in most cases the fact that the information is not an exchange of views for the purposes of deliberation will give substantial weight to the argument that release of the information would not be likely to inhibit substantially such an exchange of views for the purposes of deliberation.
34. In respect of section 30(b), the harm required to engage the exemption must take the form of substantial inhibition from expressing advice and/or views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word “substantial” is important here: the degree to which the person is likely to be inhibited in expressing themselves must be of some real and demonstrable significance. I would suggest that for the section 30(b) exemptions to apply I should be looking for harm which is significant enough to have a material effect (or at least be likely to have a material effect) on the outcome of the process of which the giving of advice and/or deliberation forms part.

35. The use of these exemptions by the Executive involves the following argument: disclosure could result in an unjustified appearance of partiality on the part of the Civil Service and would remove the present assurance against disclosure (the “private arena”), which would result in a change in the content of briefings (they would be less candid and comprehensive) resulting in a reduction in preparedness for any post-election political change, with a consequent detriment to public affairs. The consequence would be a reluctance to prepare such notes (to avoid accusations of bias) before subsequent elections, or the preparation of less detailed (and effective) notes.
36. The Executive stated that the notes are a vital part of the smooth running of government and avoid the “upheaval” which results from a lack of preparation in the event of change of political leadership.
37. Having seen the Notes, I accept that disclosure of their full content would be likely to inhibit substantially the free and frank provision of advice. I accept the Executive’s contention that civil servants would be less likely to prepare the Notes with the content which they have previously if they believed that these Notes could be disclosed. I accept that this would undermine the purpose for which the Notes exist i.e. the preparedness for the consideration and implementation of political manifesto commitments.
38. However, I do not accept the arguments that disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice in respect of certain elements of the Notes, being those parts describing the subject of each note and similar matters of fact.
39. I find that the following information within each note does not fall within the terms of section 30(b):
 - Posted at:
 - Conversation:
 - Posted to:
 - Subject:
 - Last updated:
 - Lead official:
 - Party:
 - SE Department:
 - SE Group:
 - Manifesto Commitment:

40. Disclosure of this information will enable the applicant (and the public) to be aware of the Notes prepared (in terms of the subject matter, when they were prepared and the department responsible for the preparation, and the like).
41. I have therefore concluded that the exemption in section 30(b)(ii) does not apply to the Notes, but that the exemption in section 30(b)(i) applies to most of the Notes (with the exceptions set out at paragraphs 38-40 above). As I have determined that the information withheld from Mr Hutchison falls within the scope of the exemption contained in section 30(b)(i) of FOISA, I am required to consider the application of the public interest test.

Consideration of the public interest

42. Having decided that section 30(b)(i) applies to the Notes, I shall now consider the public interest. The exemption in section 30(b)(i) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA.
43. The Executive emphasised the need for a “private arena” for officials for preparation and consideration and that loss of this space would harm the quality of government by inhibiting officials from rigorous and frank debate. The essence of this argument is that the quality of governance is affected by the degree to which officials can create and use certain types of information (for example, of a critical nature). The Executive contends that diminution of this private arena will have a consequence of reduced information during government, especially at transition periods, and a consequent reduction in efficacy. Broadly, the balancing of the public interest is efficacy of governance in a transition phase with transparency and accountability in respect of an aspect of governance.
44. In balancing the public interest, I have considered such factors in favour of release as increased scrutiny of government i.e. the public would be able to view the contents of the Notes and, for example, assess the accuracy and quality of briefings used, or that would have been used, in the post-election transition. Additionally, disclosure would give the public an insight into how the Civil Service operates, especially in relation to Parliamentary elections, and this would increase transparency and accountability.
45. In respect of the public interest, against release are such factors as the risk of unpreparedness because of reluctance by officials to prepare detailed briefings; an undermining of the constitutional relationship between the Civil Service and ministers during a parliament; and any possible undermining of present or future legislative initiatives or legislative programme.

46. I think it is important in this case to look at the specific content and purpose of the information.
47. Senior civil servants, having established the manifesto commitments of the parties, consider what might be the implications of giving effect to those commitments in terms of, for example, legislation, resources and budgetary costs.
48. I can understand the way in which it would be interesting in political quarters, in the media and indeed more generally for these views to be known. It might be argued that it would allow parties to see whether civil servants understood and had fairly assessed their proposals. Parties may benefit from seeing costs attached to their proposals or from the professional assessment of the implications to which they give rise.
49. However, they may also take issue with these assessments or discern some preference; they may also look to use any assessment to portray their own proposals as well founded or their opponents as ill founded.
50. Apart from the general interest in seeing views expressed on matters of public debate it is not clear to me why it is in the public interest for these views to be made available to the extent that the harm caused by disclosure would be warranted. The senior officials are not using their assessment to influence outcomes: their views are not given expression (in fact quite the opposite – great care is taken to insulate those views from circulation even amongst colleagues.) For all of those proposals which do not subsequently form part of the programme of government the issues raised in the Notes are not taken any further.
51. I can see public interest arguments against disclosing the Notes of such recent currency. The manifesto commitments of each party in 2003 presumably remain a reasonable guide to their current policies and thinking. It would not be in the public interest for senior civil servants' assessments, compiled for the sole purpose of preparing the way for an incoming government, to be used in judgement on the policies being advanced in the lifetime of the current Parliamentary session by government and opposition parties.
52. I have accepted that the effect of disclosure would or would be likely to substantially inhibit primary contributors to these Notes such that they may not advance concerns and views on proposed policies which would be important to draw to the attention of the incoming government, or even that an assessment of the Manifesto commitments in advance of a new government taking office may not be made at all.

53. I have come to the conclusion that in all the circumstances of this case, which involves the specific commitments in the 2003 manifestos, that the public interest in disclosing the information is outweighed by that in maintaining the exemption. Therefore, I accept that the exemption in section 30(b)(i) of FOISA applies to the Notes, with the exception of that information specified in paragraph 39 above.

Application of section 30(c) - Prejudice to the effective conduct of public affairs

54. Section 30(c) of FOISA exempts from release information, the disclosure of which would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. It states:

“Information is exempt information if its disclosure under this Act would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.”

55. The Executive applied similar reasoning in respect of section 30(c) as it did in respect of section 30(b): that release would result in reluctance by the Civil Service to prepare such briefings with a consequent unpreparedness for a transition in governance. This transition, involving preparedness in the sense of contingency plans, and more generally the constitutional role of the Civil Service, constituted the “conduct of public affairs” required in section 30(c).
56. As I have said, I do not regard the information that details the creation of a note within the Notes to fall outwith the scope of the request.
57. Having decided that the majority of the information within the Notes falls within the exemption of section 30(b)(i), and that it is not in the public interest to disclose this information, I am now required only to consider whether the remaining information (as described in paragraph 39), and which I do not consider falling within the terms of section 30(b), falls within the terms of section 30(c) of FOISA. Only if I accept that this information does fall within section 30(c) am I required to consider the public interest, meaning that the application of this exemption is subject to the public interest test set out in section 2(1)(b) of FOISA. I am not required to consider if the information which I have already decided does not require to be disclosed would also fall within section 30(c).

58. In giving consideration to whether the information falls within the terms of section 30(c) I have taken account of the submissions of the Executive and Mr Hutchison, and I do not accept that the disclosure of that part of information within the Notes (described at paragraph 39), which includes the subject, the manifesto commitment and the like, falls within the terms of section 30(c) of FOISA. Senior civil servants would not fail to prepare such material simply because the fact that they had made such preparation, and the subject matter of the note could be disclosed. I do not accept that disclosure of this information would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
59. Having decided that the exemption in section 30(c) does not apply to the information, I am not required to consider the public interest.

Disclosure Required

60. Having found that the exemptions under sections 25, 30(b) and 30(c) of FOISA do not apply to all of the information withheld by the Executive, I therefore require the Executive to release for each individual Manifesto BriX Note (contained within the material supplied as Manifesto BriX Notes) the information contained under the following format headings:
- From:
 - Posted at:
 - Conversation:
 - Posted to:
 - Subject:
 - Last updated:
 - Lead official:
 - Party:
 - SE Department:
 - SE Group:
 - Manifesto Commitment:

61. As I have indicated in previous decisions, in terms of section 12(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed an amount prescribed by regulations made by the Scottish Ministers. Regulation 5 of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (“the Fees Regulations”) state that the amount prescribed for the purposes of section 12(1) is £600. While the possibility of this limit being exceeded in providing information to Mr Hutchison was raised by the Executive in the passing, I cannot accept (on the basis of the information provided to me by the Executive) that the cost to the Executive of performing the relatively straightforward task of releasing the information described in paragraph 60 above– i.e. the Notes subject to the redactions described – would exceed the projected cost limit contained in regulation 5 of the Fees Regulations.

Technical

62. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the receipt of the request to comply with the request for information. The Executive did not respond to Mr Hutchison’s request for information within this timescale.

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 respond to Mr Hutchison’s request for information within 20 working days as required by section 10(1).

I do not accept that part of the information in question is available other than by requesting it under section 1(1) of FOISA and therefore is exempt information by virtue of section 25 of FOISA. I find that the Scottish Executive failed to comply with Part 1 of FOISA by misapplying section 25(1) of FOISA.

I find that the Executive had incorrectly applied the exemption under section 30(b)(ii) of FOISA to the information requested and in that respect failed to deal with Mr Hutchison’s request in accordance with section 1(1) of FOISA.

I find that the Executive had incorrectly applied the exemption under section 30(c) of FOISA to part of the information requested and in that respect failed to deal with Mr Hutchison’s request in accordance with section 1(1) of FOISA.

While I accept that most of the information withheld from Mr Hutchison is exempt under section 30(b)(i) of FOISA, I do not accept that this section applies to exempt all of the information withheld.

I find that the Scottish Executive has not dealt with Mr Hutchison's request for information in accordance with Part 1 of FOISA. In failing to release information to Mr Hutchison (as specified in paragraph 60 above), the Scottish Executive has breached section 1(1) of FOISA. The reasons for my findings are fully detailed above.

I require the Scottish Executive to release to Mr Hutchison the information specified in paragraph 60 above.

I cannot require the Scottish Executive to release the information to Mr Hutchison until the time allowed for an appeal to be made to the Court of Session has elapsed. I therefore require the Scottish Executive to provide the information to Mr Hutchison within 45 days of the date of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
17 November 2006