



Scottish Information
Commissioner

Decision 231/2006 Mr Jim Thomson and the Scottish Executive
<i>Release of information on related planning applications</i>

Applicant: Mr Jim Thomson
Authority: Scottish Executive
Case No: 200600219
Decision Date: 11 December 2006

Kevin Dunion
Scottish Information Commissioner

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Decision 231/2006 Mr Jim Thomson and the Scottish Executive

Request for copy of the recommendation to Deputy Minister and details of how the Minister reached decision – section 30(b)(i) and (ii) applied – authority submitted that the public interest in disclosing the information was outweighed by the public interest in maintaining the exemptions – section 30(b)(i) and (ii) not upheld by Commissioner

Facts

Mr Thomson wrote to the Scottish Executive (the Executive) seeking information in respect of two interrelated approved planning applications. The Executive supplied certain information but withheld other information under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (FOISA) on the basis that disclosure would, or would be likely to, inhibit substantially (i) the free and frank provision of advice and (ii) the free and frank exchange of views for the purposes of deliberation. Mr Thomson was dissatisfied with this response and in seeking a review indicated that he wished to receive a copy of the recommendation that had gone to the Minister and details of how the (Deputy) Minister had arrived at her decision. On review, the Executive upheld its original decision on the basis that section 30(b)(i) applied. Mr Thomson applied to the Commissioner for a decision.

Outcome

The Commissioner found that the Executive failed to comply with Part 1 of the FOISA by withholding the information requested by Mr Thomson.

The Commissioner required that the information requested by Mr Thomson be supplied to him within 45 days of receipt of this decision notice.



Appeal

Should either the Executive or Mr Thomson 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 10 November 2005, Mr Thomson wrote to the Minister for Communities, an official in the Executive's Planning Division and to the Scottish Executive Inquiry Reporters Unit (SEIRU) and requested the following information:

Planning Application number 04-01040-DET and Planning Application 04-01051-DET
 - A copy of your consideration of this application in note form: Emails, faxes, letters and written reports (Minister for Communities)
 - A copy of your recommendation outlining the reasons why the applications are deemed acceptable (Planning Division)
 - A copy of your report to the Minister outlining the reasons why the application is acceptable (SEIRU)
2. The Executive responded to all requests on 9 December 2005 and provided certain information to Mr Thomson. This information included the factual background contained in Annexes to the Planning Division's submissions to Ministers and subsequent comments by the Deputy Minister for Communities. However, the Executive indicated that certain information was exempt by virtue of sections 30(b)(i) and (ii) of FOISA. The Executive indicated that disclosure of this information would have the effect of substantially inhibiting the provision of free and frank advice and the free and frank exchange of views.



3. In considering the public interest test required by section 2(1)(b) of FOISA, the Executive indicated that there was a public interest in non-disclosure as Scottish Ministers and their officials required the existence and maintenance of a secure environment in which their thinking could be developed and options explored in written communications. The Executive indicated that it was vital that there was an opportunity whereby different options could be explored and deliberated and possibly discarded without concern that such explorations and deliberations could be prematurely disclosed.
4. The Executive argued that if Ministers or senior officers were to take decisions on the basis of the best possible advice they needed to be confident that advice was given without reserve. The Executive indicated that there was a real risk that the disclosure of information of this nature would reduce the effectiveness of such advice in the future.
5. The Executive advised that the public interest in disclosure of this information was outweighed by the public interest in ensuring that internal discussions within government were carried out in a frank and candid manner.
6. Mr Thomson was dissatisfied with this response and on 14 December 2005 he wrote to the Executive indicating that it was essential that he received a copy of the recommendation that had gone to the Minister and details of how the Minister (Depute) arrived at her decision.
7. The Executive responded to this request for review on 20 January 2006. The Executive confirmed the restricted request made in Mr Thomson's letter of 14 December 2005. The Executive advised that the information fell within the scope of section 30(b)(i) and advised that the public interest had been considered afresh. (Later, during the investigation, the Executive confirmed that it considered that the information was also exempt under section 30(b)(ii).
8. The Executive acknowledged the high level of public interest in these proposals and the general public interest in understanding why particular decisions had been made. However, the Executive noted that Mr Thomson had been supplied with a copy of the email from the private office of the Deputy Minister for Communities which set out the reasoning behind the decision to clear the applications back to Stirling Council. The Executive indicated that that email effectively set out how the Minister had arrived at the decision which was one of the key issues on which Mr Thomson had requested information.
9. The Executive reaffirmed the arguments set out in paragraphs 4 and 5 above.



10. In its review, the Executive also considered whether the original request should have been dealt with under the terms of the Environmental Information (Scotland) Regulations 2004 (EIRs) rather than under FOISA. The Executive concluded that some, but not all, of the information within the scope of the original request was environmental information. However, the Executive considered it reasonable in all the circumstances to have dealt with the request under FOISA and did not consider that Mr Thomson had been disadvantaged as a result. The Executive indicated that this was because the exception under regulation 10(4)(e) of the EIRs in respect of internal communications would apply equally to the information Mr Thomson sought, even applying the exception in a restricted way.
11. Mr Thomson was dissatisfied with this response and on 2 February 2006 he applied to my Office for a decision.
12. The case was allocated to an investigating officer.

Investigation

13. Mr Thomson's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.
14. The investigating officer confirmed to both parties that the investigation would be confined to the restricted request made by Mr Thomson on review. That is:
 - A copy of the recommendation that had gone to the Minister and details of how the Minister (Depute) arrived at her decision
15. The investigating officer contacted the Executive on 20 February 2006 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 Thomson's case under section 49(3) of FOISA and to provide supporting documentation for the purposes of the investigation.
16. In particular, the Executive was asked to supply a copy of the information withheld, to provide further analysis of the application of the exemptions cited, and, where appropriate, the application of the public interest test. The Executive was also asked to provide information about how the review was carried out and provide copies of any guidance relied on by the Executive in deciding whether the information should be supplied or withheld.



17. The Executive responded to this letter on 9 March 2006. It provided information about how the requests had been dealt with originally and the process of review. The Executive provided further reasons as to why it considered section 30(b) to apply to the information withheld and its consideration of why the public interest in disclosing the information requested was outweighed by the public interest in maintaining the exemptions. I will address the Executive's submissions in my analysis and findings.
18. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me and I am satisfied that no matter of relevance has been overlooked.

Commissioner's analysis and findings

19. The information forming the basis of this application falls into two separate categories. Mr Thomson requested 1) a copy of the recommendation that has gone to the Minister and 2) details of how the Deputy Minister arrived at her decision. Before I consider these two requests I will first address whether Mr Thomson's request should have been dealt with under EIRs rather than FOISA.

EIRs or FOISA

20. Mr Thomson requested information relating to two interrelated planning applications. On review, the Executive considered whether Mr Thomson's original request for information had been properly dealt with under FOISA or whether it should have been considered under the EIRs.
21. The Executive considered it reasonable in all the circumstances to have dealt with the request under FOISA, even though some of the information could have been considered environmental information, and did not consider that Mr Thomson had been disadvantaged as a result of that. The Executive explained that this was because the exception under regulation 10(4)(e) of the EIRs (under which a public authority may refuse to make environmental information available to the extent that the request involves making available internal communications) would apply equally to the information Mr Thomson sought, even applying the exception in a restrictive way, as is required by regulation 10(2)(a).
22. Given that it is Mr Thomson's restricted request which is the subject of this application, I am obliged only to consider whether this request should have been dealt with under the EIRs. Having considered the information withheld I am satisfied that the request was correctly dealt with under FOISA.



Details of how the Deputy Minister arrived at her decision

23. The Executive indicated that Mr Thomson had received a copy of the Deputy Minister's letter to the Planning Division in which she set out her decision on this matter and the reasons for this decision. The Executive indicated that Mr Thomson had therefore received information in response to this request.
24. I asked the Executive to confirm that it held no other information (emails, telephone notes or minutes of meetings) which provided information on how the Deputy Minister had reached her decision.
25. The Executive confirmed that no further information was held in relation to how the Deputy Minister for Communities arrived at her decision. The Executive advised that there were two verbal discussions between officials and the Deputy Minister but the content of these discussions was not documented.
26. I am satisfied that no further information is held by the Executive in respect of this part of Mr Thomson's request (aside from the information withheld discussed below).

A copy of the recommendation to the Minister

27. The Executive indicated that there were three documents relevant to this part of Mr Thomson's request for information. These comprised a submission to the Minister dated 9 September 2005, Annex 1 to that submission and an emailed submission to the Minister dated 10 October 2005. The factual annexes to the first submission had been released to Mr Thomson in response to his original request.
28. The Executive indicated that the information withheld consisted of planning officials' analysis of Stirling Council's consideration of eight separate planning applications which formed part of the Council's schools PPP planning process.
29. I consider it helpful to provide some general background and context to this application and the information being sought by Mr Thomson. The Executive's website has useful information about the planning process in Scotland and the cases where it is necessary for the Scottish Ministers to intervene in that process.



30. Any application for planning permission which is submitted to a planning authority (in this case, Stirling Council) should conform to policies contained in the development plan, that is, the adopted local plan and the approved structure plan for the area. A planning authority may, however, grant planning permission in respect of an application which does not accord with the provisions of an adopted local plan provided the application has been advertised and consideration has been given to any representations received. In most cases a planning authority will not require the Scottish Ministers' consent where it wishes to grant planning permission for a development which does not accord with the local plan.
31. An application may, however, raise issues of more than local importance or may have been the subject of a substantial body of objection and, in order to ensure that all matters have been properly considered by the planning authority, a Direction (under the terms of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act)) has been made which requires planning authorities to notify the Scottish Ministers if they are minded to grant planning permission in respect of certain categories of development. These are known as "notified applications" and include certain cases where the planning authority has an interest in the proposed development.
32. On receipt of a notified application the development proposal will be considered, alongside all representations and other relevant associated material, by officials of the Executive's Planning Division. The initial assessment, which is carried out by the Division's administrative officials, determines whether the planning authority has provided all material necessary to enable the Scottish Ministers to reach a decision. The application and associated papers will then normally be passed to one of the Division's professional planners to consider whether the planning authority has followed the correct procedures and has taken full account of all relevant material issues, for example, development plan policies, Scottish planning policy guidance etc.
33. Where appropriate, a recommendation will then be made to the Scottish Ministers who must decide whether to clear the application back to the planning authority (in which case it will be free to determine the application as it sees fit) or to call it in for their own determination.
34. In this case, Mr Thomson is seeking access to the recommendation made by one of the Executive's professional planners to the Deputy Minister for Communities in respect of two planning applications. The planning applications involve the proposal for a new school building for Wallace High School at Airthrey Road on a green belt site and a proposal to build new housing on the site of the existing high school.



35. Both planning applications (along with six others) were notified applications. After considering the matter, the Scottish Ministers decided not to issue a direction restricting the grant of planning permission or to require the Council to refer the applications to them for determination. A letter to that effect was issued on 9 November 2005 which also indicated that the Council was authorised to deal with the applications in the manner it thought fit.
36. The Executive is relying on section 30(b)(i) and (ii) to withhold the submissions that went from the Planning Division to the Deputy Minister for Communities on this matter. Section 30(b) states that information is exempt information if its disclosure under FOISA 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.
37. The Executive has argued that there are two aspects to its assessment that section 30(b) applies to the information withheld. It has considered the damage that could be caused by the release of elements of the information and the corresponding damage that would be caused to the process of the exchange of advice and views which it considers is so important to how the Executive carries out its work. The Executive considers that should such internal communications be released, officials may feel less able to set out clearly their analysis of all issues on a policy area, including comments which they may only feel able to make in the knowledge that they remain confidential.
38. The Executive argues that decisions on which government operates are based on the advice provided by officials; any inhibiting factor to this advice would be to the detriment of effective government.
39. While I have not set out in full the submissions made by the Executive in respect of section 30(b), all of them have been considered by me in relation to the information withheld in this matter.
40. As indicated above in paragraph 27 the information withheld in this matter comprises a submission to the Minister dated 9 September 2005, Annex 1 to that submission and an emailed submission to the Minister dated 10 October 2005.
41. It should be noted (and this is made clear in the Deputy Minister's letter of 9 November 2005) that the submissions relate to eight planning applications. Mr Thomson's request, however, is in respect of only two of these applications. As a result, the Executive has marked certain sections of the submissions as being outwith the scope of Mr Thomson's request. I accept that the marked sections are outwith the scope of this application.



42. While all three documents contain some factual information I am satisfied that the majority of the information comprises the views and advice of the professional planner advising the Minister. I also accept that in many cases this information can be described as “free and frank” in that the professional planner provides clear, unequivocal advice (and views) on matters of substance.
43. In order to rely on section 30(b)(i) and (ii) of FOISA, however, an authority must demonstrate that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice and the exchange of views for the purposes of deliberation, respectively.
44. In my view, the standard to be met in applying the harm test in section 30(b)(i) and (ii) is high. Public authorities must be able to show not only that the release of the information would, or would be likely to, inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation, but also that such inhibition would be of a substantial nature.
45. The Executive's guidance to its staff on the application of section 30(b) points out that the word “inhibit” suggests a suppressive effect, so that communication would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive.
46. The Executive has argued that there are two aspects to its assessment that section 30(b) applies. The first of these is consideration of the damage that would be caused if the information covered by this particular request were to be released. In my view, this aspect cannot be considered in respect of the harm test contained in section 30(b). This is because section 30(b) is not concerned with the substantial prejudice to a particular interest, product or service that might occur as a result of disclosure but is rather about consequent inhibition of future practice. Therefore, it seems to me that the damage that might be caused to the specific planning applications or PPP project as a whole are not relevant when considering whether section 30(b) applies - although the perceived resultant damage may, of course, be relevant when considering the public interest test.
47. The Executive has also argued, however, that release of this information would damage the process of the exchange of advice and views which is so important to how the Executive carries out its work. The Executive considers that should such internal communications be released, officials may feel less able to set out clearly their analysis of all issues on a policy area, including comments which they may only feel able to make in the knowledge that they remain confidential.



48. In considering the suppressive effect that release of information might have to future practice in any given case consideration needs to be given to:
- a) who is providing the advice and
 - b) the context in which the advice is being provided
49. As set out above, in the case of notified applications, the application follows a particular process. As I understand it, initially an application is considered by the Division's administrative officials to determine whether the planning authority has provided all material necessary to enable the Scottish Ministers to reach a decision. The application and associated papers will normally then be passed to one of the Division's professional planners to consider whether the planning authority has followed the correct procedures and has taken full account of all relevant material issues.
50. I understand that the recommendation made in this case is a formal submission and it is certainly set out as such. The document appears to follow an established format and all advice is supported by relevant factual information. I mention this because I consider this to be pertinent when considering the extent to which release of such information could have a suppressive effect to future practice. The advice and views are clear, considered and ordered and it is evident that the author has taken time to review the wording and phrasing used in providing this advice. While the document contains a preamble that states that the information would not normally be releasable under FOISA the language is tempered and measured. I assume that this, in part, reflects an expectation on the part of the author that information supplied in this recommendation might be reproduced in the final decision letter from the Deputy Minister.
51. In considering the inhibition that might result if such information were disclosed, it seems to me I need to consider whether there is a risk that this type of information might not be recorded in the future. Clearly, a change in practice of this nature would not enhance transparency in the long term. However, it is clear that these submissions are produced as part of a rigorous process to ensure oversight of planning applications in Scotland. As a result, I cannot see how it would be possible for the Executive to refuse to record such views or advice in the future. It seems to me that the recommendation to the Minister forms an essential part of the notification process.
52. Therefore I do not accept that officials would no longer record these types of views or advice in the future.



53. In *Decision 211/2006* I stated that, in general, I do not accept that disclosure of the Planning Division report would, or would be likely to, substantially inhibit officials from producing reports of similar character and substance in the future. The report puts forward the objective opinions of an experienced official, based on factual evidence and her own professional knowledge. I do not accept that the possibility of future scrutiny would be sufficient to substantially inhibit officials of the Planning Division from making recommendations to Ministers.
54. However, I need to go on to consider whether the views or advice expressed by officials would be less free and frank in the future were this information to be released. In considering this aspect I have taken into account the context in which the advice was provided and the individual who gave this advice. The advice was provided by a principal planner who is acting, it seems to me, in a professional and expert capacity. The author's role is to advise the Minister on the planning aspects pertinent to this case with reference to relevant legislation and policy where appropriate.
55. As the author is acting in a professional capacity he or she will be obliged to give open, clear and full advice. To do otherwise, it seems to me, would be contrary to their professional responsibilities.
56. Further, the Executive will, in any event, wish to retain a record for its own internal purposes and because any decision may subsequently be open to challenge. Therefore it seems to me that release of the information in this case will not inhibit substantially the free and frank provision of advice or exchange of views in future cases because the professional planner will always be under an obligation to provide full and frank advice which reflects accurately any relevant legislation and policy considerations.
57. The Recommendation incorporates advice and views from another department of the Executive and I consider it appropriate to assess this information separately.



58. This information (which amounts to several paragraphs), it seems to me, raises slightly different considerations to that of the planning advice in that it is not attributed to a particular individual. However, while I am content that the views and advice expressed are free and frank I do not consider that disclosure of this information would inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation. I take this view for a number of reasons. Firstly, the advice and views expressed are those that would be reasonably expected in the circumstances (reflecting the different functions and policies of the department concerned) and are again expressed in a temperate and measured language. Secondly, the department supplying this information was no doubt aware that these views would be incorporated into a formal recommendation to the Deputy Minister and would have an impact on the Deputy Minister's decision. Given these particular circumstances I do not accept that in the future such views would not be expressed. Nor do I accept that they would less free and frank.
59. In conclusion, therefore, I do not consider that the Executive has demonstrated that disclosure of this information would substantially inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation given the context within which this advice was provided and, in respect of the planning information, the role and profession of the individual supplying that advice.
60. I therefore find that section 30(b)(i) and (ii) do not apply to the information withheld.

The public interest test

61. The exemptions in section 30(b)(i) and (ii) of FOISA are subject to the public interest test required by section 2(1)(b) of FOISA. In this instance I have gone on to consider whether, in all the circumstances of the case, the public interest in disclosure of this information is outweighed by the public interest in maintaining either or both of the exemptions, as if, contrary to my findings, the exemptions at section 30(b)(i) and (ii) did apply to the information.
62. The Executive has advanced a number of submissions in respect of the public interest test.



63. The Executive acknowledged that there are often clear public interest arguments for disclosure of information which would enhance public understanding of decision making procedures. However, the Executive submitted that, should such internal communications be released, officials may feel less able to set out clearly their analysis of all the issues on a policy area, including comments which they only feel able to make in the knowledge that they remain confidential. The Executive submitted that the decisions on which government operates are based on the advice provided by officials; any inhibiting factor to this advice would be to the detriment of effective government and therefore not in the public interest. The Executive argued that if Ministers are to make important decisions on the basis of the best possible advice, they need to be confident that advice is given without reserve. This is a submission of general application, which is based on the view that if the harm occurs, then generally disclosure is not in the public interest.
64. I accept much of the Executive's argument in principle: I agree that there is considerable public interest in ensuring that Ministers are fully informed about the various factors involved when decisions are taken, and that if officials were substantially inhibited from providing advice or views in a free and frank manner, this could ultimately impinge upon the quality of the decision. There is clearly a strong public interest in avoiding such an outcome.
65. In this particular case, the Executive further submitted that this information included many points of particular sensitivity. The Executive acknowledged that the sensitivities around the information in question were likely to diminish with time. However, in this instance, the original request was made just days after the Minister's decision had been made and only weeks after the date of the provision of advice to her by officials.
66. I am not sure why this is of significance. The Minister had taken her decision and release could not alter that decision. It may have generated more comment at the time than if a long period was allowed to elapse before disclosure but I fail to see what the public interest is in leaving a community without the information until any controversy has subsided.
67. Even if the above points are accepted the question is whether there are countervailing arguments which indicate a strong public interest in support of disclosure. I take the view that it is generally in the public interest to disclose information which enhances scrutiny of decision-making processes and thereby improves accountability and participation.



68. This is particularly the case when it comes to significant planning decisions which affect communities. Strong emphasis is paid to the transparency of decision taking when it comes to planning matters. The 2005 White Paper “Modernising the Planning System” states:
- ”Decisions need to be taken openly and transparently and should be explained to the people they affect. They should be fair and be seen to be fair.” (paragraph 5.3.3)
69. As a consequence, affected individuals and communities are entitled to be and expect to be made aware of proposed developments, to have an opportunity to scrutinise plans and to comment upon them and to have access to formal advice and recommendations made by officials to planning authorities. The public would be able to access advice given to Councillors on a planning committee and to know whether the decision to approve or refuse a planning application was consistent with the views of professional planning officials. Without commenting at all on the substance of the advice given to the Minister in this case, it seems to me that it is the type of advice which, if given by local authority planning officials, would generally be in the public domain. I think there is a strong argument that the information which informs the decision at the final stage of the planning process is made available, consistent with the transparency which has gone before.
70. I also believe that there is significant public interest in the disclosure of information which would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions. These were notified applications and the Scottish Ministers had a statutory duty to decide whether it was necessary to intervene in these applications. In this particular case, the applications were notified to Scottish Ministers because Stirling Council had a financial interest in the application, there had been substantial objections and the proposals were contrary to the Development Plan policies.
71. Development proposals in which the local authority has an interest are a particular focus of the Executive’s White Paper. The White Paper acknowledges that there is a public perception that these applications could be handled with greater transparency and focus. As a result, the proposed improvements to the development planning process “will be central to providing the required transparency”.
72. There is considerable public interest in disclosure of information supplied to the Minister in a case where the Minister decided not to use her powers to call in planning applications despite the many objections they had attracted.



73. I have considered the sensitivities concerning the information in this case (which I have not set out in this decision to avoid disclosing information which is being withheld) as well as the more general arguments made by the Executive. Nevertheless, it seems to me, given the nature and context of this type of planning advice, and in the specific circumstances of the case, that the balance of the public interest lies in disclosure.
74. In conclusion then, if, contrary to my findings, the exemptions at section 30(b)(i) and (ii) did apply, then it is my view that in all the circumstances of this case, the public interest in disclosing the information is not outweighed by that in maintaining either or both of the exemptions.

Decision

I find that the Scottish Executive (the Executive) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with Mr Thomson's request for information.

I find that the disclosure of the information requested would not, and would not be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Therefore, I find that the Executive misapplied sections 30(b)(i) and (ii) in dealing with Mr Thomson's request and consequently failed to deal with the request in accordance with section 1(1) of FOISA.

I require the Executive to disclose the information requested by Mr Thomson within 45 days of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
11 December 2006