



Scottish Information
Commissioner

Decision 041/2005 – Mr Reiner Luyken and the Scottish Executive

Request for the report on which Scottish Ministers based their decision to refuse consent for community purchase of land under the Land Reform (Scotland) Act 2003

Applicant: Mr Reiner Luyken
Authority: The Scottish Executive
Case No: 200502196
Decision Date: 25 October 2005

Kevin Dunion
Scottish Information Commissioner

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Decision 041/2005 – Mr Reiner Luyken and the Scottish Executive

Request for the report on which Scottish Ministers based their decision to refuse consent for community purchase of land under the Land Reform (Scotland) Act 2003 – information withheld under section 30(b)(i) and (ii) (effective conduct of public affairs: substantially inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation) – consideration of public interest in withholding submissions to Scottish Ministers.

Facts

Mr Luyken asked the Environment and Rural Affairs Department of the Scottish Executive (“the Executive”) for a copy of the full report that served as the basis for the decision by the Scottish Ministers not to consent to Coigeach Community Company Ltd. (“the CCC”) to proceed with buying Drumrunie Forest Estate under the Land Reform (Scotland) Act 2003.

The Executive decided that this information should not be supplied on the basis that it was exempt under section 30(b)(i) and (ii) of the Freedom of Information (Scotland) Act 2002 (“FOISA”). The Executive considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information, and argued that the reasons for the decision had already been provided in a letter communicating the decision to the CCC.

Outcome

The Commissioner found that the Executive generally had insufficient grounds for withholding the information in question under the exemptions in section 30(b)(i) and (ii). The nature of the information withheld was such that its release would not be likely to inhibit substantially the free and frank provision of similar advice or the free and frank exchange of views for the purposes of deliberation.

The Commissioner requires the Executive to provide Mr Luyken with the information he requested, with the exception of one paragraph which may be withheld.



Appeal

Should either Mr Edwards or the Executive wish to appeal against my 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 19 March 2005 Mr Luyken asked the Executive to supply a copy of the full report that served as the basis for the decision by the Scottish Ministers not to consent to the CCC buying Drumrunie Forest Estate under the Land Reform (Scotland) Act 2003.
2. The Executive replied on 18 April 2005, advising Mr Luyken that the report was exempt from disclosure under section 30(b)(i) and (ii) of FOISA. In its view, the public interest in disclosure was outweighed by the need to ensure that Ministers can take decisions on the basis of the best available advice, being confident that such advice is given without reserve.
3. Mr Luyken asked for a review of this decision on 28 April 2005. The Executive's response of 25 May 2005 confirmed the original decision and pointed out that a full explanation of the reasons for the rejection of the "right to buy" application had already been provided in its letter of 18 March 2005, which had informed the CCC of the decision.
4. Mr Luyken applied to me for a decision on 6 July 2005. In his application he questioned the Executive's view that the public interest in this case lay in withholding the information, particularly as the officer who had carried out the review of the decision had acknowledged that "there is a strong public interest in the disclosure". Mr Luyken argued that the decision to refuse the CCC the right to buy, while granting this right to the neighbouring Assynt Foundation, raises questions about the way in which the Land Reform legislation is being operated.
5. Mr Luyken's application was accepted and an investigating officer allocated to the case.



The investigation

6. Mr Luyken's application was validated by establishing that he had made his request to a Scottish public authority, and had appealed me only after requesting the authority to review its response to his request.
7. A letter was sent to the Executive on 2 August 2005, informing it that an appeal had been received and that an investigation into the matter had begun.
8. The Executive was asked to supply a copy of the report requested by Mr Luyken and was given an opportunity to provide any further comments and submissions supporting the decision to withhold the report from the Mr Luyken in terms of section 49(3)(a) of FOISA. Both were provided by the Executive.

The Commissioner's Analysis and Findings

Application of section 30(b)(i) and (ii)

9. Sections 30(b)(i) and (ii) allow information to be withheld if it would, or would 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.
10. As I have said in a previous decision (015-2005), it is my view that the standard to be met in applying the tests in sections 30(b)(i) and (ii) is high. In applying these exemptions the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views. 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, or would be more reticent or less inclusive.



11. The Executive has argued that the report is clearly intended to present advice and views to Ministers and to provide a basis for their decision. It takes the view that the issue is not the disclosure of any particular part of the information, but the importance of preserving the confidence in the process by which advice is provided to Ministers by officials, and that this means the information should be considered as a whole. The Executive is of the opinion that disclosure of the submission itself “would by its very nature inhibit substantially the provision of advice or exchange of views as part of a deliberative process in the future” as the candour with which officials present advice or opinion will be diminished if they perceive that this information could be “routinely disclosed”.
12. In my view it is important for public authorities to treat each request for information on a case by case basis. Release of internal communications in one case should not be taken to imply that such communications will be “routinely” released in future. The individual circumstances of each case must be taken into consideration and the public interest in each case assessed on its own merits. Now that FOISA has come into force, it is also important for officials within Scottish public authorities to recognise that previous assumptions of confidentiality may have to be re-assessed in line with the new legislation.
13. It seems to me that the argument advanced by the Executive implies that submissions to Ministers should be regarded as a class of documents which should generally be treated as exempt from disclosure, as the disclosure of any part of such advice will erode the candour with which officials provide such advice in future.
14. This argument has several weaknesses. Firstly, there is nothing in the Act to suggest that submissions to Ministers should be treated as a special class of documents. Instead, advice and expressions of opinion are to be exempt from disclosure only where this would have a substantially inhibiting effect in future.
15. Secondly, to insist that the release of any advice to Ministers, regardless of its substance, would substantially inhibit officials from providing any candid advice negates any sensible application of the harm test. As I have consistently stated I expect requests for information to be assessed on an individual basis, taking into account the effects anticipated from the release of the particular information involved. This would have to consider:
 - the subject matter of the advice or opinion,
 - the content of the advice and opinion itself,
 - the manner in which the advice or opinion is expressed, and



- whether the timing of release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken).
16. The Executive suggests that if officials perceive that this type of information could be routinely disclosed, the candour with which advice or opinion is communicated will be diminished. As I have made clear my decision in this case does not mean that release is “routine” but is based on the specific considerations of the case. However I would suggest that the consequence of the Executive’s line of thinking is that officials should be able to routinely rely on knowing that their advice and opinion, however innocuous or sensitive, however blandly or trenchantly expressed will be withheld unless some specific public interest overwhelms the normal practice of doing so. That is not how FOISA works. Authorities considering section 30(b)(i) and (ii) exemption need to still remind themselves that applicants do have a right to the information, unless the claim of substantial inhibition can be justified.
17. In this case the report withheld from Mr Luyken is generally of a factual nature, summarising the points on which the proposal for Ministers is based, and making a recommendation for Ministers’ consideration. I do not accept that the release of such straightforward, factual advice would substantially inhibit officials from participating in this type of correspondence in future.
18. However I regard the content of paragraph 7 of annex A as being a frank expression of opinion of the type which could be inhibited substantially and so the Executive is entitled to withhold it.

Consideration of the public interest test

19. As I have said above I do not accept that, for the most part, the release of the information in the documents withheld would have such a substantially inhibiting effect on the future performance of officials. As a consequence the exemption provided for by section 30(b)(i) or (ii) does not apply. It follows that I do not need to consider the public interest arguments put forward by the Executive regarding this information.
20. However I have held that paragraph 7 of Annex A is exempt and the public interest test must be applied to the information contained within it.
21. The Executive has acknowledged that there are often clear public interest arguments for disclosure of information which would enhance public understanding of decision making procedures, but argues that in this case the release of information revealing the advice and opinions of officials involved in that process would, in future, inhibit officials from providing a clear analysis of all the issues on a policy area, which would be to the detriment of effective government and therefore would not serve the public interest.



22. Although the Executive has not addressed paragraph 7 directly, on my reading its contents are not such that the public interest in disclosure outweighs the substantially inhibiting effect of releasing such opinion.

Decision

I find that the authority has not dealt with the applicant's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA), as detailed in paragraphs 9 - 20 above.

I therefore require the Executive to release the report to Mr Luyken with the exception of paragraph number 7 of Annex A. For the avoidance of doubt, I do not consider that there is any information contained in the report, including names, which constitutes third party personal data which should be considered exempt under section 38(1)(b) of FOISA.

I am obliged to give the Scottish Executive at least 42 calendar days in which to supply Mr Luyken with the information as set out above. In this case, I require the Scottish Executive to take these steps within 45 calendar days of the date of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
25 October 2005