

<b>Decision 053/2006 Professor Sheila Bird and the Scottish Prison Service</b>
<i>Monthly performance statistics for prisoner escort and court custody services contract</i>

**Applicant: Professor Sheila Bird**  
**Authority: Scottish Prison Service**  
**Case No: 200502194**  
**Decision Date: 24 March 2006**

**Kevin Dunion**  
**Scottish Information Commissioner**

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## **Decision 053/2006 – Professor Sheila Bird and the Scottish Prison Service**

***Monthly performance statistics for prisoner escort and court custody services contract – section 30(c) effective conduct of public affairs – section 33(1)(b) commercial interests – section 36(2) actionable breach of confidence***

### **Facts**

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Professor Bird requested certain monthly statistics from the Scottish Prison Service, an agency of the Scottish Executive, relating to the performance of Reliance Secure Task Management Limited, the provider of prisoner escort and court custody services under a contract with the Scottish Ministers. The Scottish Prison Service refused to provide this information, citing the exemptions in sections 33(1)(b) (substantial prejudice to commercial interests) and 36(2) (actionable breach of confidence) of the Freedom of Information (Scotland) Act 2002 and arguing in relation to section 33(1)(b) that the public interest in withholding the information outweighed that in disclosing it. Professor Bird sought a review of the Scottish Prison Service's decision. On review, the Scottish Prison Service upheld the decision to withhold the information on the basis of the exemptions cited in the initial notice of refusal, concluding in addition that the information was also exempt from disclosure in terms of section 30(c) (substantial prejudice to the effective conduct of public affairs) of the Freedom of Information (Scotland) Act 2002. Professor Bird applied to the Commissioner for a decision.

### **Outcome**

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The Commissioner found that the Scottish Prison Service had applied Part 1 of FOISA correctly by applying the exemption in section 36(2) to all of the information withheld, with the exception of the number of incidents of death or suicide in custody per month. The Commissioner required the Scottish Prison Service to provide Professor Bird with the number of incidents of death or suicide in custody for each of the months of November and December 2004, within two months of the date of this decision notice.

The Commissioner found that the Scottish Prison Service had not acted in accordance with Part 1 of FOISA in applying the exemptions in sections 30(c) and 33(1)(b) of FOISA to the information withheld. The Commissioner did not require the Scottish Prison Service to take any action in this connection.

## Appeal

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Should either Professor Bird or the Scottish Prison Service 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

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1. Professor Bird wrote to the Scottish Prison Service (SPS), an agency of the Scottish Executive, on 21 January 2005, requesting for the months of November and December 2004 the monthly performance statistics (performance indicators and service credits) provided to the SPS by Reliance Secure Task Management Ltd (Reliance) under the contract between the Scottish Ministers and Reliance for the provision of prisoner escort and court custody services across Scotland.
2. The SPS refused Professor Bird's request in a letter dated 18 February 2005. Citing the exemption in section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA), it argued that disclosure of the statistics would be likely to prejudice substantially the commercial interests of Reliance. Negative reaction to the release of similar information in the past had contributed to a reduction in Reliance's share price and had a major impact on its recruitment in Scotland. This in turn had affected Reliance's ability to implement the contract on schedule, which in turn led to the imposition of financial penalties. There had been an ongoing negative impact on staff retention, impacting on service quality and generating additional costs in the areas of recruitment and training. In the opinion of the SPS and Reliance, there was a strong risk of similar adverse impact occurring if the information requested were to be released. In support of this exemption, the SPS argued that the public interest in disclosure of the information did not outweigh the public interest in avoiding the likely prejudice to Reliance's commercial interests and in avoiding the disruption outlined above.
3. In addition, the SPS considered that the information might be exempt under section 36(2) of FOISA. Performance figures for the contract were published on the SPS website in a format agreed with Reliance in terms of the contract and Reliance would regard the release of the figures in any other form as an actionable breach of confidence.

4. Professor Bird wrote to the SPS on 7 March 2005, requesting a review of the SPS's decision. The SPS responded on 11 April 2005, confirming that sections 33(1)(b) and 36(2) both applied to the information requested, for the reasons put forward in the refusal notice of 18 February 2005. In addition, the review concluded that section 30(c) of FOISA (substantial prejudice to the effective conduct of public affairs) applied to the information, on the basis that publishing the information could impact negatively on the relationship between the SPS and Reliance (which would not be in the public interest).
5. Professor Bird was dissatisfied with the SPS's decision on review and applied to me for a decision as to whether her request for information had been dealt with in accordance with Part 1 of FOISA. An investigating officer was allocated to the case.

## Investigation

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6. Professor Bird's application was validated by establishing that she had made a valid request for information to a Scottish Public authority under FOISA and had applied to me only after asking the SPS to review its response to her request.
7. The investigating officer wrote to the SPS on 8 August 2005, requesting its comments on Professor Bird's application and seeking in particular the following information:
  - a) The 33 performance indicators together with total service credits reported on to the SPS by Reliance for November 2004, and
  - b) A copy of the agreement between the SPS and Reliance signed on 18 May 2004, relating to the form in which the main contract for the provision of prisoner escort and court custody services could be published.

The SPS was also asked to provide a detailed analysis of the application of the exemptions claimed to the information withheld, with an analysis of the public interest test.

8. The SPS responded on 24 August 2005, providing the information sought by the investigating officer. Introducing its analysis of the exemptions applied, it stated that it was relying considerably on the responsibilities placed on the parties by the contract between the Scottish Ministers and Reliance for the provision of prisoner escort and court custody services dated 3 November 2003 (the Contract), a copy of which had been provided to me in connection with an earlier investigation (see below). This gave Reliance the right to require the removal of any of the sections of the Contract before it was published and provided, at Clause 33.2 of Schedule 3, that:

“No announcement or information concerning this Contract , the entering into of this Contract, its contents or the performance of the Services shall be made or released, or be authorised to be made or released by either of the parties without the prior written consent of the other.”

The form in which the contract should be published had been agreed on 18 May 2004 and the SPS noted that the Commissioner had accepted (in considering a request by Nicola Sturgeon MSP that the full terms of the Contract be released under the Scottish Executive Code of Practice on Access to Information) that “the terms of the confidentiality clause permit [the SPS] to withhold the information requested by Ms Sturgeon”.

9. The SPS realised the importance placed on the release of appropriate performance information, however, and had approached Reliance in an attempt to gain agreement for the regular release of relevant figures. Despite considerable efforts on the part of the SPS, Reliance had been very reluctant to do so. Nevertheless, a further agreement under Clause 33.2 had been concluded with Reliance on 3 June 2004 and a copy was enclosed: it provided for the release of information under three main headings; prisoner movements, performance and financial. Further, in his decision on Ms Sturgeon’s request, the Commissioner had highlighted areas in which the public would have a legitimate interest in the performance of the Contract, in particular the use of funds and the numbers of prisoners transported, and performance in these key areas was covered in the information published, which was accessible on the SPS website. Finally, the management of the Contract had been the subject of significant Parliamentary and media scrutiny since its commencement in April 2004, including
- (i) a report by the Auditor General,
  - (ii) appearances by SPS, Reliance and the Justice Minister at the Justice 2 Committee, and
  - (iii) a Ministerial statement to Parliament about the operation of the Contract.

There had been some high-profile operational issues but the SPS was of the view that often comment by observers had been disproportionate to the actual scale of the incident, placing significant financial and reputational pressures on Reliance and requiring careful management by the SPS.

10. In relation to the section 36(2) exemption, the SPS reaffirmed that it had sought Reliance's agreement to the release of the information requested. The release of the information was specifically governed by Clause 33.2, the information was not covered by the agreement of 3 June 2004 and Reliance had not given any separate agreement to its release. The SPS stated that the information had the necessary quality of confidentiality both under terms of the Contract and as defined by FOISA and its release would be an actionable breach of confidence.
11. Arguing that the section 30(c) exemption applied to the information withheld, the SPS stated how opposed Reliance was to the release of information falling outwith the terms of the 3 June 2004 agreement, having presented considerable argument in relation to the effect such release would have on its commercial business. The initial phase of implementation of the Contract had required considerable adjustment on the part of the criminal justice agencies involved and the development of a close working relationship between them (and in particular the SPS) and Reliance. The Contract had now stabilised, but there remained challenges over service delivery and adherence to contractual requirements. The success of the Contract continued to require mutual respect and professionalism. To release information governed by the 18 May and 3 June agreements would have jeopardised the relationship between the parties at the initial stage and made it much more difficult to drive through the required changes, while even now it would have significant ongoing ramifications for the operation of the Contract.
12. In addition, the SPS was the main purchaser of custodial services within Scotland and was in the course of putting additional services out to competition (as well as planning to retender the Contract in time). It was crucial that it could approach a market which had sufficient competition and a key component of this was how the SPS was viewed by the market as a customer. Its corporate reputation was inextricably linked to this and it could expect the market to diminish and costs to increase, to the detriment of the Scottish taxpayer, if it were seen to disregard formal agreements or apply contracts in anything but an even handed manner. It was, however, aware, that confidentiality clauses should not generally be entered into in future.

13. With regard to the public interest, the SPS pointed to the Commissioner's decision on Ms Sturgeon's request and the areas identified by the Commissioner in which the public would have a legitimate interest in the performance of the Contract, in particular the use of funds and the numbers of prisoners transported. The information now published on the SPS website showed performance in these key areas and the public interest in seeing the additional information requested was far lower. There was a stronger public interest in maintaining the established working relationship with Reliance than in releasing the additional information.
14. Finally, the SPS addressed the section 33(1)(b) exemption. It returned to the commercial reputation of the service provider, which it argued was an integral part of its commercial make up. The interpretation of statistical data had often been slanted so as to be critical of the company and this was claimed to have had an adverse effect on the group's share price and on the recruitment and retention of staff, the latter leading in turn to additional costs of advertising and training. On this basis, it was argued that there would be substantial prejudice to the commercial interests of Reliance if the information were to be released. It was correct that Reliance should be able to protect any commercial advantage they might have derived from the Contract and, while the argument might not be as strong now, at the time of the request Reliance had been in the process of bidding for escorting contracts in England and Wales and the potential detriment from release of the information would have been all the more significant.
15. In considering the public interest, the SPS argued that release of the information would not enhance scrutiny of decision making processes. Performance measures were generated automatically by Reliance and therefore performance against the requested headings did not contribute to decisions. The release of the agreed schedule of performance measures, on the other hand, did allow the public and interested bodies to consider whether or not the performance measurement regime was appropriate for such a contract and overall how Reliance was performing and whether the service offered good value.

### **Submissions from Reliance**

16. Reliance has advised the SPS of its position in relation to the section 36(2) and section 33(1)(b) exemptions and its comments have been forwarded to me by the SPS along with its own submissions. These comments have been noted along with the SPS's submissions, although they were not invited by me. Reliance has stated:

- (i) On section 36, that the legal requirements for an actionable breach of confidence are met and that there is no overriding public interest in favour of disclosure. Therefore, the exemption applies. Clause 33.2 of the Contract permits disclosure “insofar as required ... by law”, but Reliance contends that this only permits disclosure under FOISA where the SPS is satisfied that no exemption applies.
- (ii) On section 33(1)(b), that disclosure would be damaging to its business reputation and confidence in it, its financial position and its ability to compete in the market (through the release of market-sensitive or commercially useful information). The performance information requested is inextricably linked to pricing and therefore detailed disclosure could compromise the confidential costings and prices negotiated with the SPS. Clause 33 of the Contract and the agreement of 3 June 2004 were agreed with this in mind. Reliance argues that the public interest in withholding information is supported by the likely deterrent effect of disclosure on companies providing the SPS with commercially sensitive information in future and the likely adverse effect of disclosure on the SPS’s bargaining position in future contractual negotiations. Other public interest factors weighing against disclosure are that the information is commercially sensitive and offers no more insight than the information already available on the issue, and that specific information relating to the request is already in the public domain.

### **Submissions from Professor Bird**

- 17. Professor Bird has argued that private companies which deliver public services should be scrutinised to at least the same level as are public servants in the delivery of public services, and that disclosure would allow monitoring of performance against what was offered by Reliance in its tender and provide assurance about the safety of prisoners, staff and the public. Withholding the information is inconsistent with ministerial accountability for stewardship of the public services and with the SPS’s own traditions of openness. In any event, the confidentiality afforded by the Contract is partial only, given public scrutiny of deaths in custody through fatal accident inquiries and of prisoner escort services by HM Chief Inspector of Prisons. It is her understanding that the Inspector’s powers extend to inspection and publication of performance data.



## Commissioner's analysis and conclusions

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### The information requested

18. Schedule 2 of the Contract sets out the basis on which Reliance is to monitor and report to the SPS on its performance against the Contract. It also provides the method for calculating service credits, payable to the SPS in the event of poor service by Reliance. A series of performance measures is listed and Reliance is required to monitor performance against these and report on that performance to the SPS monthly. Certain measures attract a direct penalty for each relevant incident, while others attract service credits only if the specified target standard (i.e. a specified number of relevant incidents) is not met. There are detailed provisions for calculating service credits and a specified format for monthly reporting. Copies of the monthly reports for November and December 2004 would fulfil Professor Bird's information request.
19. Schedule 3 of the Contract comprises the Conditions of Contract. Clause 33 is entitled "Publicity". It provides in 33.1 that the Contract may be published by the SPS, provided it has first removed any sections Reliance believes to contain operationally or commercially sensitive information. Clause 33.2 goes on to provide that, subject to publication of the contract itself as provided for in 33.1:

"No announcement or information concerning this Contract, the entering into of this Contract, its contents or the performance of the Services shall be made or released, or be authorised to be made or released by either of the parties without the prior written consent of the other, except that either party may make such announcement or release such information (or authorise the making or releasing of same) in so far as required to do so by law."
20. The Contract itself, including Schedule 2 without financial information, has been published in accordance with the agreement of 18 May 2004 and is available on the SPS website.
21. I am satisfied that the monthly reports provided under Schedule 2 fall within the terms of Clause 33.2. On 3 June 2004, Reliance and the SPS reached agreement as to the format and content of a monthly summary of performance information, which could be published by either party following agreement as to the relevant figures. It contains information under the following headings and sub-headings and is also published on the SPS website:
  - (i) Prisoner movements (police custody to court, prisons to court, hospital to court, court to court and other – all expressed in numbers of movements, with a total);

- (ii) Performance (on time delivery to court (percentage) and prisoners unlawfully at large (number)); and
  - (iii) Financial (total monthly payment due to Reliance, net of service credits).
22. There is no other agreement between the parties in respect of the publication of performance information and therefore there is no authority in terms of the Contract for the publication of the majority of the information contained in the monthly performance reports provided under Schedule 2. As I have indicated to Professor Bird already, I am not in a position to comment on whether or not HM Chief Inspector of Prisons has the power to require the publication of any of the information contained in these reports.

### **Application of section 36(2)**

23. In terms of section 36(2) of FOISA, information is exempt if it was obtained by a Scottish public authority from another person and if its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. The SPS asserts that disclosure of the information requested would be an actionable breach of confidence and therefore that the information is exempt under section 36(2) of FOISA. Clearly, the information was received by the SPS from another person (Reliance): the remaining question is whether disclosure would indeed constitute a breach of confidence actionable by Reliance or any other person.
24. For an action of breach of confidence to be successful, there are three main requirements:
- (i) The information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
  - (ii) The information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.
  - (iii) There must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. It is established that the detriment may be potential rather than actual and need not be financial.

25. In Decision 02/04 in respect of Ms Sturgeon's request for the Contract itself, I questioned whether Clause 33 complied with best practice in line with the guidance for entering into contracts under the Code of Practice on Access to Scottish Executive Information. I have the same concerns regarding its compatibility with the relevant provisions (paragraphs 41 to 49) of the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under FOISA (the Section 60 Code). Nevertheless, I must accept now (as then) that the clause exists and in the circumstances of the present case I accept that the SPS and Reliance have complied with the requirements of 33.2 in determining what information relating to the performance of the Contract should be made public. That information is what is published monthly on the SPS website: it does not include the majority of the information contained in the monthly performance reports provided under Schedule 2.
26. With one exception (regarding which see paragraph 27 below), I am satisfied that the categories of information reported on under Schedule 2 of the Contract have the necessary quality of confidence. The same can be said of all of the service credits. This is not information which is accessible to the public already. The information remains subject to Clause 33.2 of the Contract: the parties have not agreed to its release and have complied with the requirements of the Clause when agreeing to the publication of other information covered by the Clause. It is therefore subject to an obligation of confidentiality. Finally, I am satisfied from the submissions of the SPS and Reliance that there is at least a reasonable likelihood of some detriment to Reliance as a consequence of disclosure.
27. I am not satisfied that any of the defences to an action of breach of confidence are capable of applying in this case. The information in question is clearly of some value and substance and therefore can hardly be described as useless or trivial. It could not have been known to the SPS (certainly not in the form in which it was communicated) before it was communicated in accordance with the Contract and (subject to what I say at paragraph 27 below) I have no reason to believe that it has entered the public domain subsequently. Finally, while I accept that disclosure might contribute to debate on, for example, questions of public safety, I am not persuaded that there is an overwhelming public interest in disclosure which is sufficient to override the public interest in maintaining confidentiality: for that public interest to exist, there would require to be a far clearer connection between the release of the information and the alleviation of any related risk to the public than can reasonably be said to exist in this case.

28. I do have one reservation in connection with my statement that the information requested has the necessary quality of confidence and that relates to the number of incidents of death or suicide in custody (performance measure 2(a)). Death is a matter of public record. Any death in legal custody will in time become the subject of judicial (and therefore public) scrutiny through either a fatal accidental inquiry or criminal proceedings. It seems to me inconceivable that any death in custody could escape media scrutiny for more than a few hours. In all the circumstances, I find it impossible to conceive of circumstances in which any incident of death in custody could remain outwith the public domain at the time of submission of the relative monthly performance report and therefore cannot accept that this performance measure (i.e. the number of incidents, not the relative service credit information) has the necessary quality of confidence. With the exception of that piece of information, however, I accept that disclosure of the information requested would constitute a breach of confidence actionable by Reliance and therefore that section 36(2) of FOISA applies.

**Application of section 33(1)(b)**

29. Section 33(1)(b) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. In this case, it has been argued that the commercial interests of Reliance would be prejudiced substantially by disclosure.
30. I note the submissions made in this connection by the SPS and accept that there has been (and continues to be) adverse media reporting on the implementation of the Contract. That may have had the effects ascribed to it by the SPS, although I have received nothing from the authority which would indicate, never mind substantiate, a connection between the adverse reporting and the effects claimed. In any event, however, the relevant question for me to consider is not whether media comment on the operation of the Contract (adverse or otherwise) would or would be likely to cause substantial prejudice to Reliance's commercial interests, but rather whether the release of the information requested can be expected to have that effect.

31. The SPS has submitted what appears to be anecdotal evidence that media comment on information released in 2004 had an immediate negative impact on the Reliance Group's share price and on its ability to recruit staff. Assuming a causal link could be established between the release of the (unspecified) information in question and detriment to Reliance (and I am not persuaded that it has been on the basis of the information provided to me), I have been given no indication of the degree of harm suffered by Reliance or of its duration. In addition, I have to note that the harm in question has been ascribed to media comment on the information released in 2004 and not to the release itself. I cannot accept that adverse media comment follows inevitably from the release of information and have received nothing to persuade me that it would do so inevitably in this particular case. There is no reason for believing that the information requested would be inherently negative in its nature and impact, and in any event it is always open to an authority to put information that may appear negative in its proper context. I accept that the implementation of the Contract has been controversial from the outset, but that controversy does not in itself provide justification for withholding information about the Contract, or for the assertion that the release of further information would be detrimental to the service provider: indeed, the release of further information might provide an opportunity to rectify misapprehensions about the Contract and might in fact place the provider in a better light.
32. The SPS has also argued that the information requested is itself market sensitive or commercially useful to Reliance's competitors. This appears to be based on the premise that disclosure of the monthly performance figures would enable the pricing structure of the contract, and therefore Reliance's costs and profit margins, to be calculated. I cannot accept this. Firstly, I fail to see how any useful information about the pricing structure for the Contract could be arrived at from consideration of the information requested and the published version of the Contract. I do not understand how this could be done without making unverifiable assumptions and I have received no information from the SPS to assist me in doing so. In any event, I would question the value of such information (relating as it does to particular contract requirements and a contract which commenced in 2003) to competitors bidding for contracts elsewhere (albeit for similar work) when Professor Bird made her request under FOISA. While I accept that information about Reliance's costs and profit margins would be commercially sensitive (albeit potentially less so with the passage of time), there is nothing in the information I have received which suggests to me that access to the pricing structure for the Contract (assuming it were something that would be relatively straightforward to calculate if the information requested were to be released) would by itself make it any easier to calculate these figures.

33. In all the circumstances, therefore, I am not satisfied that disclosure of the information requested would, or would be likely to, prejudice substantially the commercial interests of Reliance. Therefore, I cannot accept that the exemption in section 33(1)(b) was applied correctly to the information requested.
34. Although I am not required to do so in this case, I will go on to consider whether the public interest disclosing the information requested would be outweighed by the public interest in maintaining the section 33(1)(b) exemption.
35. Basically, what the SPS has argued in relation to the public interest is that there is adequate information in the public domain already to allow the public to determine whether the performance management regime is appropriate to the Contract, how Reliance is performing and whether the service represents good value. Given that performance against the headings covered by the information request does not contribute to decision making, release of the information would not enhance decision-making processes. Against any benefit in disclosure would have to be weighed the adverse effect on Reliance's business. I have also noted the points made by Reliance in relation to the public interest.
36. On the other hand, I do not think it can be disputed that the Contract and its performance as a whole are legitimate areas of public interest and debate. In a civilised society, it is entirely proper for the public to wish to be satisfied that services to those in custody are managed appropriately, with a view to securing both the safety of all of those likely to be affected by the process and the welfare of those detained. I find it difficult to argue that publication of any of the performance measures in the monthly report would not contribute to informed public debate in this area. The SPS has claimed that a reasonable estimate of the monthly service credits might be arrived at from the performance information which is in the public domain already, read with the terms of the contract as published, but I fail to see how this could be done. So many of the areas of performance covered by the monthly report submitted by Reliance are simply not addressed in the published reports.
37. I agree in principle with Professor Bird that private companies which deliver public services should be scrutinised to at least the same level as are public servants in the delivery of public services. Public authorities are all subject to their own respective performance monitoring and reporting regimes and contracting out should not be seen as an excuse for diminishing the public scrutiny afforded in this area. It is not for me to determine what particular performance monitoring and reporting requirements should apply to an authority, but I do not regard it as being in the public interest that the public should receive less information about the performance of a public service simply because that service is provided by an external contractor on the relevant authority's behalf.

38. I think it also has to be borne in mind that any adverse reporting on Reliance's performance (and consequently any adverse effect on Reliance's commercial interests) is likely to derive from performance which is itself unacceptable to a greater or lesser degree in terms of the Contract. The performance measures identified in Schedule 2 have been identified with a purpose and that is to record and penalise incidents which fall short of the standards required by the Contract. There is a legitimate public interest in being assured that matters of this significance are being addressed – and, for that matter, in being aware of the degree of failure to perform on the contractor's part – even if the information is generated automatically. There is also a legitimate public interest in being satisfied that incidents attract penalties of appropriate severity.
39. Having weighed the SPS's arguments as to why disclosure would not be in the public interest against the reasons why it appears to me that it would be, I am not satisfied that the public interest in withholding the information would outweigh that in disclosure.

#### **Application of section 30(c)**

40. The SPS has highlighted the prejudice it believes would be caused to the working relationship between it and Reliance if the information were to be released in contravention of the Contract. It has argued that this would have wider ramifications, given that a number of SPS services are being exposed to or prepared for competition and that its reputation as a customer is therefore crucial. Deliberately disregarding existing agreements or being seen to apply them in anything other than an even handed manner would be likely to diminish the potential interest in future contracts and thus increase costs. Referring to the information published by agreement between it and Reliance, the SPS argued that there was a far lower public interest in the release of the remaining performance information, and that what public interest existed was outweighed by the stronger public interest in maintaining the working relationship which had developed between the parties to the Contract.
41. Following this line of argument, the SPS asserts that the information is exempt under section 30(c) of FOISA. In other words, its disclosure would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

42. I have some difficulty with this as an independent line of argument. Undoubtedly, the effective delivery of any public service through an external contractor depends to a large extent on the working relationship between the commissioning authority and the contractor. Mutual trust and good faith are key components of a good contractual relationship and I have no doubt that the parties have done much to develop these in setting up and managing the Contract. I have no reason to believe, however, that these attributes would be threatened in any way by disclosure of the information in accordance with FOISA.
43. The SPS refers to existing agreements being contravened or disregarded. That is not the purpose of FOISA insofar as existing binding obligations of confidentiality are concerned, as should be clear from my consideration of section 36(2) above. The situation would be different, of course, if there were no such obligation in the Contract, but if that were the case the mutual understandings of the parties relative to the disclosure of information would be different. I have received nothing from the SPS to substantiate the assertion that, should disclosure otherwise be required under FOISA, that disclosure would be prejudicial (never mind substantially so) to the effective working relationship that has been built up between the SPS and Reliance.
44. In any event, both public authorities and those interested in public sector contracts have to be aware that these contracts must now be procured, concluded and managed in a new environment, which recognises the requirements of FOISA and the Section 60 Code. Therefore, authorities should commission on the basis that non-disclosure provisions will be the exception rather than the rule, while contractors should approach any commissioning process on the basis that the majority of information relating to the contract and its performance will be in the public domain. Consequently, there should be a common understanding that confidentiality will not be the norm and all concerned should approach the market with that in mind (in the same way as they do in relation any other significant legislative change). Practice in relation to pre-existing contracts should not be taken as any guide to what should happen in the future.
45. Taking all of the above considerations into account, I am not persuaded that the exemption in section 30(c) of FOISA has any application to this case.



46. As I am satisfied that the section 30(c) exemption does not apply in this case, I am not required to apply the public interest test to its use. I will, however, say in passing that Decision 02/04 was not intended to list exhaustively all of the information relating to the Contract and its performance the publication of which would be in the public interest. I identified some reasons why the Contract was of public interest (which is another matter entirely), but at no point did I attempt to enumerate (as the SPS appears to think I did) categories of performance information which it would be in the public interest to publish. I do not think it would have been appropriate, or for that matter possible, for me to have done so in the context of that particular decision.

## **Decision**

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I find that the Scottish Prison Service (SPS) applied Part 1 of FOISA correctly by applying the exemption in section 36(2) to all of the information withheld, with the exception of the number of incidents of death or suicide in custody per month. I now require the SPS to provide Professor Bird with the number of incidents of death or suicide in custody for each of the months of November and December 2004, within two months of the date of this decision notice.

I find that the SPS did not act in accordance with Part 1 of FOISA in applying the exemptions in sections 30(c) and 33(1)(b) of FOISA to the information withheld. I do not require the SPS to take any action in this connection.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**24 March 2006**