



Scottish Information  
Commissioner

**Decision 077/2006 Mr Paul Hutcheon and the Scottish Executive**

*Request for emails on abstinence in relation to the sexual health strategy*

**Applicant: Mr Paul Hutcheon**  
**Authority: Scottish Executive**  
**Case No: 2005001479**  
**Decision Date: 16 May 2006**

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

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## Decision 077/2006 – Mr Paul Hutcheon and the Scottish Executive

***Request for all emails on abstinence in relation to the sexual health strategy – certain information withheld - section 29(1)(a) formulation of government policy - section 29(1)(b) Ministerial communications – section 30(a) collective responsibility of the Scottish Ministers – section 30(b)(i) and (ii) - consideration of the public interest test - decision partially upheld by the Commissioner***

### Facts

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Mr Hutcheon requested all emails sent from the Health Department and the Health Minister's office between September 2004 to "the current day" (14 February 2005) on abstinence in relation to the sexual health strategy. The Scottish Executive (the Executive) released certain emails, but indicated that the majority were exempt under section 29(1)(a) (formulation of government policy) and section 29(1)(b) (Ministerial communications) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Executive advised that, in this case, the public interest in maintaining the exemption in section 29(1)(a) outweighed that in disclosing the information, because Ministers and officials needed to be able to think through all the implications of particular options. Mr Hutcheon sought a review of this decision. The Executive subsequently upheld this decision on review. Mr Hutcheon then requested that the Commissioner investigate.

### Outcome

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The Commissioner found that the Executive partially complied with Part 1 of FOISA by withholding certain information requested by Mr Hutcheon. However, he also found that certain information was not exempt under the exemptions cited by the Executive and ordered the release of certain information.

The Commissioner found that the Executive failed to comply with Part 1 of FOISA in failing to respond to Mr Hutcheon's request for information and his request for review within 20 working days in breach of section 10(1) and section 21(1) of FOISA.

The Commissioner does not require the Scottish Executive to take any remedial steps in relation to these technical breaches.

## Appeal

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Should either the Executive or Mr Hutcheon 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

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1. On 14 February 2005, Mr Hutcheon requested the following information from the Executive:
  - All emails sent from the Health Department and the Health Minister's office from September 2004 to the current day on abstinence in relation to the sexual health strategy.
2. The Executive responded to Mr Hutcheon's request on 15 March 2005, indicating that certain emails could be released. These were attached. It indicated that the majority of emails from the Health Department and Health Minister's Office between September 2004 and the current day on abstinence in relation to the sexual health strategy were exempt under sections 29(1)(a) and section 29(1)(b) of FOISA. These related to the formulation or development of government policy and Ministerial communications, respectively.
3. The Executive indicated that it had applied the public interest test and had decided that in this instance the public interest in maintaining the exemption as set in section 29(1)(a) (there was no reference to section 29(1)(b) at this point in the letter) outweighed that in disclosure of the information because Ministers and officials need to be able to think through all the implications of particular options.
4. Mr Hutcheon sought a review of this decision on 15 March 2005. He indicated that he did not believe that the exemptions cited were appropriate in this case.



5. The Executive responded to the request for review on 18 April 2005. It advised that it had carefully reviewed the papers. The Executive confirmed that the exemptions under section 29(1)(a) and section 29(1)(b) applied. It confirmed that it had also reapplied the public interest test and was of the view that withholding the information outweighed its release on the grounds stated in its previous response.
6. On 18 April 2005, Mr Hutcheon applied to my Office for a decision. He indicated that he believed disclosure of this information was in the public interest.
7. The case was allocated to an investigating officer.

## The Investigation

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8. Mr Hutcheon's appeal was validated by establishing that he had made a request to a Scottish public authority (i.e. the Executive), and had appealed to me only after asking the authority to review its response to his request.
9. The investigating officer contacted the Executive on 5 May 2005, 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 Hutcheon's case in terms of section 49(3)(a) of FOISA and to provide supporting documentation for the purposes of the investigation.
10. In particular, the Executive was asked to provide my Office with copies of all emails relevant to Mr Hutcheon's request and to mark clearly those that had been released. The Executive was asked to expand on its analysis of the exemptions applied and of the application of the public interest test. The Executive was also asked to provide further information on its process of review and any guidance it had relied on in forming a decision.

## Submissions from the Scottish Executive

11. The Executive responded on 21 June 2005. The Executive provided a schedule that listed 21 emails relevant to Mr Hutcheon's request. It indicated that three of these emails had been released in full. One other document had been partially released.



12. The Executive advised that all of the documents identified as being relevant to this request were important parts of the records of the development of the sexual health strategy. It advised that this had been a significant policy initiative of the Executive, the development of which necessitated detailed and thorough discussions about all the issues involved, many of which were particularly sensitive.
13. The Executive indicated that some of the documents included advice to the relevant Minister and his communication of his views to officials. The Executive indicated that release of such information when so little time had elapsed would be to the detriment of future internal communications which were vital to the operation of effective government.
14. The Executive submitted that there was a significant public interest in ensuring that policy formulation and development could take place in an arena which would enable rigorous and frank debate about the merits and demerits of alternative courses of action, without fear that such considerations would be picked over out of context. The Executive indicated that if there was a perceived risk of internal discussions being made publicly available so soon, their quality would be undermined.
15. The Executive advised that an exemption under section 29(1)(a) applied to all the information withheld, as it directly related to the formulation of government policy.
16. The Executive advised that an exemption under section 29(1)(b) also applied to documents 18, 19 and 21 as they comprised records of Ministerial discussions.
17. The Executive advised that section 30(a) should, in retrospect, also have been applied to some of the documents. Under section 30(a) information is exempt if its disclosure under FOISA would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.
18. The Executive argued that many of the documents comprise concerns and issues raised specifically by the Health Minister. The Executive indicated that it operated on the basis of collective responsibility which requires that Ministers should be able to express their views frankly and a degree of privacy of opinions expressed therefore maintained. The Executive considered that due to the harm that would be caused to the future of such exchanges by the release of these documents, the balance of the public interest lay in withholding them.



19. The Executive also advised that the exemptions in section 30(b)(i) and (ii) applied to many of the documents. The Executive submitted that the exchange of views and provision of advice between Ministers and officials is an essential part of all policy making and that the work of government is founded on these free and frank exchanges; any inhibition caused by an inability to have these in a non-public capacity would therefore have direct negative consequences for the quality of its policy making.

### **Submissions from Mr Hutcheon**

20. In response to my invitation, Mr Hutcheon put forward a number of submissions about why this information should be released. He is of the view that the public is entitled to know the factual, statistical and evidential basis of Ministerial decisions. According to Mr Hutcheon, policy advice given by civil servants is exempt, but the reasoning behind a decision, including when and why it was taken is a matter of public interest.
21. Given that the publication of the sexual health strategy was delayed, Mr Hutcheon considers that information regarding items that were dropped and eventually included in the final draft should be disclosed.
22. He considers that the decisions taken and the reasoning behind them are very much in the public interest. He considers that if the information contains advice from civil servants or summaries or original copies of communications between Ministers, then this information should be withheld. However, information showing the decisions reached and why, including the evidential basis, motive and the influence of third parties, should be published.
23. He is particularly interested in the issue of “abstinence” in relation to the sexual health strategy, which, he submitted, was a late addition to the sexual health strategy. The motive and evidential basis of the inclusion of “abstinence” is, in his view, a matter of the public interest, because it is now pivotal to Scotland’s sexual health strategy.

### **Analysis and findings**

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24. It might be helpful to provide some background information on the Scottish Executive’s sexual health strategy and its development to give some context to the information under discussion.



25. In August 2002, the Minister for Health and Community Care appointed an expert Reference Group to draw up a strategy for improving sexual health in Scotland. The Reference Group reported in September 2003 with a document entitled *Enhancing Sexual Wellbeing in Scotland: A Sexual Health and Relationships Strategy: Proposal to the Scottish Executive*. The proposals set out in the report were issued for consultation by the Executive on 12 November 2003. The Executive subsequently published an analysis of the responses it had received to the consultation document.
26. On 27 January 2005, the Executive published its own sexual health strategy entitled *Respect and Responsibility: Strategy and Action Plan for Improving Sexual Health*. Mr Hutcheon's request therefore relates to the development of a now finalised policy.
27. The Executive has cited a series of exemptions in this case. It has advised that section 29(1)(a) applies to all of the documents withheld (except Document 3) and that section 29(1)(b), section 30(a) and section 30(b)(i) and (ii) apply to certain of the documents withheld. I will initially consider the application of each exemption to each of the documents withheld and the application of the public interest test.
28. Documents 1, 2, and 4 have been released. Document 3 has been partially released.
29. The Executive has identified a number of documents relevant to this request. Most of the documents comprise email exchanges rather than one single email. While the email exchanges address the issue of "abstinence" in respect of the sexual health strategy (in line with Mr Hutcheon's request) it does not follow that every email within that exchange mentions the word "abstinence". However, it will relate to an email in which this issue was raised.

#### **Application of section 29(1)(a) formulation of government policy**

30. Section 29(1)(a) of FOISA states that information held by the Scottish Administration (defined as members of the Scottish Executive, junior Scottish Ministers and their staff, and non-Ministerial office holders of the Scottish Administration and their staff) is exempt if it relates to the formulation or development of government policy
31. The section 29 exemption is sometimes referred to as a "class-based" exemption, a term which was adopted during the consultation process for the proposed Scottish freedom of information legislation to describe the scope of the exemption. This would suggest there is a presumption that this section of FOISA exempts any information from disclosure that falls into this class. However, as the Executive's internal guidance on exemptions in FOISA states: "It is not the nature of the document itself that is determinative but the substance of the information contained within it." The exemption is also subject to the public interest test, which I will go on to consider later.



32. Section 29(2)(a) of FOISA states that any statistical information used to provide an informed background to the taking of a policy decision is not to be regarded as relating to the formulation or development of the policy in question and should therefore be released upon request.
33. In considering whether this exemption applies to each of the documents withheld in this case, I have taken the view that “formulation” means the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs and recommendations/submissions are put to a Minister.
34. I have also taken the view that “development”, although sometimes used interchangeably with “formulation,” may go beyond this stage. It may refer to the processes involved in improving on or altering or recording the effects of existing policy.
35. I will consider the application of section 29(1)(a) to each of the documents withheld under this exemption.

*Document 5 – email exchange*

36. This email exchange post-dates the publication of the sexual health strategy. It seemed to me that the content relates to the implementation or promotion of the policy rather than to its formulation or development. For this reason I queried with the Executive whether information such as this fell within section 29(1)(a).
37. The Executive acknowledged that certain documents relate to the presentation and publicity of the published strategy. However, it disagreed that this does not relate to the development or formulation of policy. The Executive argued that one cannot consider how policy will develop unless one considers how it will be communicated and what effect that communication will have on target audiences or how a nascent policy is likely to be received. It argued that the presentation and communication of policy decisions are an intrinsic part of government policy.
38. The Executive submitted that the publication of the sexual health strategy does not constitute a “full stop” on the development of the Executive’s policy on the issues in hand; its subsequent presentation and promotion is itself an important part of policy work.





39. The use of the term “relates” in section 29(1)(a) means that the scope of this exemption is potentially very broad. In general, I do not accept the Executive’s argument that information relating to the publicity, communication and presentation of a policy automatically falls within the exemption. In my view, it is necessary to consider the actual content of the information and how closely it is connected with the policy’s development. Where a significant amount of time has elapsed since the publication of the policy I am unlikely to accept that a draft article or other presentation material would fall within the exemption.
40. However, I accept that given the timing of the communication and its proximity to the publication of the finalised strategy that the information relates to the strategy’s formulation and therefore falls within the scope of section 29(1)(a).

*Document 6 – email exchange*

41. This email exchange post-dates the publication of the strategy and discusses its presentation in a press article. The Executive submitted that the presentation and publicity of the published strategy are intrinsic parts of government policy and could be considered an integral part of its formulation.
42. Due to the proximity of this information to the publication of the finalised strategy and for the reasons set out in paragraphs 38-39 above I accept that this information falls within the scope of section 29(1)(a).

*Document 7 – email exchange*

43. This email exchange discusses the handling of an external report on the strategy and spans both pre- and post-publication of the strategy. This information relates to the communication and presentation of the policy and the accuracy of the report. Due to the proximity of this information to the publication of the finalised strategy and for the reasons set out in paragraphs 38-39 above I accept that this information falls within the scope of section 29(1)(a).

*Document 8 – email exchange*

44. This email exchange discusses a press article on the sexual health strategy. Due to the proximity of this information to the publication of the finalised strategy and for the reasons set out in paragraphs 39-40 above I accept that this information falls within the scope of section 29(1)(a).

*Document 9 – email exchange*



45. This email exchange includes information sought by the Minister on a number of points. It also includes information about the presentation of the policy. The first email from the Minister seeks information on existing guidance on certain aspects relating to sexual health. I consider that given the proximity of these discussions to the publication of the strategy that the information contained within the emails fall within the scope of section 29(1)(a).

*Document 10 – single email*

46. This email, sent on the publication date of the strategy, seeks an explanation of information contained within the sexual health strategy. The date of this email raises the question of whether the information can relate to policy formulation and development. The Executive agreed that it was arguable whether section 29(1)(a) applies to this document.
47. It seems to me that the timing of this discussion is crucial. Given its proximity to the date of publication it seems to me that this information does, in my view, “relate” to the formulation of the policy.
48. Therefore I am satisfied that this document is exempt under section 29(1)(a).

*Document 11 – email exchange*

49. This email is a response to the email exchange covered by Document 9 above. I consider that given the proximity of these discussions to the publication of the policy that the information contained within the email falls within the scope of section 29(1)(a).

*Document 12 – email exchange*

50. This email forwards the draft Ministerial statement on the sexual health strategy. For the reasons set out in paragraphs 38-39 above, I accept that the information in this document falls within the scope of section 29(1)(a).

*Document 13 – email exchange*

51. This email exchange discusses the draft letters accompanying the distribution of the sexual health strategy. This document also notes the discussion of the statement to be made by the Minister on publication of the sexual health strategy and lists the individuals and organisations that should be contacted as a lead up to the statement being made. In addition, further advice is sought on a number of points and action agreed. For the reasons set out in paragraphs 38-39 I accept that the information in this document falls within the scope of section 29(1)(a).

*Document 14 – email exchange*



52. This email exchange discusses particular information in the sexual health strategy. I consider that the discussion relates to formulation of the policy and falls under section 29(1)(a).

*Documents 15, 16 and 17 – email exchanges*

53. These email exchanges continue on from the discussion above. I accept that these discussions relate to the formulation of policy and are exempt under section 29(1)(a).

*Document 18 – email exchange*

54. This document comprises five emails. The majority of the first email discusses the actual content of the sexual health strategy and advice is sought by the Minister on several points. I accept that this information constitutes the formulation of policy and is exempt under section 29(1)(a).
55. The last four emails discuss the publication of the strategy and the timing of the launch. For the reasons set out in paragraphs 38-39 above, I accept that the last four emails are also exempt under section 29(1)(a).

*Document 19 – email exchange*

56. This email exchange comprises two emails, the first of which is the first email contained in Document 18 discussed above. I am satisfied that the second of these emails also relates to the formulation of policy and is exempt under section 29(1)(a) for the reason set out above in relation to Document 18.

*Document 20 – email exchange*

57. This document comprises two emails, the first sent on 9 December and the second the response from the Minister dated 23 December 2005. The first email discusses the issues raised on the development of the strategy and also provides a briefing on these points by officials. The second email is the Minister's response. Although the Minister's response does not contain substantive discussion of the issues, he raises issues in relation to one point. Therefore, I am satisfied that both emails relate to the formulation of policy and are therefore exempt under section 29(1)(a).

*Document 21 – single email*

58. This document sets out the Minister's views on a number of matters of substance relating to the policy formulation, which were discussed at a meeting. The document also sets out the points agreed at the meeting, including the next steps to be taken.
59. I am satisfied that this document is exempt under section 29(1)(a) in that it relates to the formulation or development of government policy.



60. In summary I am satisfied that the following documents are exempt under section 29(1)(a):

Documents 5 to 21.

#### Disclosure of factual information

61. Section 29(3) states that where information has been exempted under section 29(1)(a), the Scottish Administration (defined as members of the Scottish Executive, junior Scottish Ministers and their staff, and non-Ministerial office holders of the Scottish Administration and their staff) must have regard to the public interest in the disclosure of any factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
62. I have considered the documents which I am satisfied are exempt under section 29(1)(a) and am of the view that none of the documents contain what could be described as statistical or factual information.

#### Application of the public interest test

63. Section 29(1)(a) is subject to the public interest test contained in section 2(1)(b) of FOISA. Therefore, even though the information falls within the exemption set out in section 29(1)(a), I must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in withholding it.
64. It is worth emphasising at the outset that there is a general public interest in making information held by public bodies accessible to enhance scrutiny of decision-making processes and thereby improve accountability and participation. This goes to the heart of freedom of information legislation. Without an adequate knowledge of the basis upon which decisions are made, the public will not have an opportunity to call public authorities to account; nor can they hope to participate in the decision-making process and contribute to the formation of policy and legislation if that process is hidden from view.



65. Information is exempt by virtue of section 29(1)(a) if it falls into a particular class of documents; that is, where the information relates to the formulation or development of government policy. In considering the application of this exemption, the authority is not required to consider the significance of the content of the information nor consider the effect of disclosure. This is in contrast to exemptions contained in, for example, section 33(1)(b) or section 30(b)(ii) where the authority is obliged to consider not only whether the information is of a certain type or nature, that is, that it involves commercial interests or advice, but must also demonstrate that disclosure would “prejudice substantially” or “substantially inhibit” that interest. In those exemptions, therefore, the authority must consider the significance and sensitivity of the information as well considering the harm resulting from or effect of disclosure.
66. In the case of section 29(1)(a), however, the information will be covered by this exemption simply if it relates to the development of government policy regardless of how routine or insignificant the information may be. The use of the term “relates” ensures that the application of section 29(1)(a) is so broad as to include even the most innocuous information.
67. As a result, there is clearly a two stage process that an authority relying on section 29(1)(a) must follow. That is:
  - Does the information relate to the formulation or development of government policy?
  - If yes, in all the circumstances of the case, is the public interest in disclosure of the information outweighed by the public interest in withholding it?
68. Given the class nature of section 29(1)(a), the second stage is likely to involve consideration of the actual content of the information withheld, including its relative sensitivity and the effect of disclosure.
69. Section 2(1)(b), which contains the public interest test, is worded in such a way as to assume that disclosure would be in the public interest rather than in withholding it. The test is that in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption. Therefore it is for the authority to show why, on public interest grounds, the information should not be released. To proceed otherwise would leave us in a position where innocuous and non-sensitive information relating to policy formulation would rarely be released because no resounding public interest argument could be found to justify disclosure.
70. The Executive made a number of further submissions as to why this information should not be released on public interest grounds and I will address these in turn.



71. The Executive has argued that it has demonstrated that there is a strong public interest in its operations with stakeholders being as transparent as possible by releasing information about meetings held with parties outwith the Executive. While this is to be commended I need to consider whether this argument is relevant to the consideration of the public interest in respect of the information withheld.
72. It seems to me that it does not necessarily follow that because information relating to the subject matter of a request is already in the public domain, additional information cannot be requested or indeed disclosed to a member of the public. This in itself will not justify withholding additional information sought by the applicant. However, I accept that release of information relating to the subject matter may demonstrate due process and a desire to be transparent on the part of the authority and can be taken into account when considering the public interest test.
73. The Executive considered that there is an overriding public interest in withholding the internal minutes and therefore protecting such internal discussions which are necessary to examine the shape policy is taking and issues that arise.
74. The Executive advised that it did not accept that the sensitivities of discussions are automatically diminished once policy agreement has been reached, such as with the publication of a key document such as the sexual health strategy. It argued that there is a clear need for there to be private discussions of all options, however radical or unpopular, particularly when reaching decisions on such contentious issues. The Executive submitted that the publication of a key document does not signify the conclusion of the policy area; the sexual health strategy has itself now to be taken forward by the Executive and stakeholders, and so it is still very much a live issue. The Executive argued that the subject matter of the strategy was of particular sensitivity.
75. The Executive argued that if there is a perceived risk of these discussions, which take place in various forums, ranging from formal meetings to exchanges of email, being routinely made publicly available, their quality and the willingness of policymakers to continue working in such a manner would be significantly undermined.
76. The Executive argued that release of these documents would be to the detriment of future decision making, inhibiting the internal deliberations of sometimes contentious issues.
77. Finally, the Executive emphasised that whilst the information may be of speculative interest to the public this does not equate with “the public interest.”



78. As a general point, it is worth noting the comments of the Information Commissioner in Queensland in the case of *Roy Eccleston and the Department of Family Services and Aboriginal and Islander Affairs* (“the Eccleston case”):

*I consider that the electorate in general... is aware that conflicting interests have to be reconciled in most difficult policy areas in which governments have to make decisions, and that there would be something severely deficient with the processes of government if alternative views and different policy options were not being put, and on occasions strongly, in advice received by the Government.*

79. In Eccleston, the Queensland Information Commissioner emphasised that even if it was conceded that there would be a decrease in the frankness and candour in discussions and comments, it would not follow that the efficiency and quality of the debate would suffer. While the comments of the Queensland Commissioner are clearly not binding on me, they provide a useful analysis of the arguments put forward by governments to protect information relating to internal deliberations. Would the release of information that showed considered, temperate and constructive comments and amendments lead to the inhibition of quality debate and discussion?
80. It might also be argued that where the content of the discussion, comment or proposal is substantive there is even more reason to see the context in which this amendment was made, by whom and the reason behind it.
81. Nonetheless, the realities of policy development are such that the individuals contributing to these discussions are less likely to record their strongly held opinions and objections or point to a fundamental misunderstanding by a Minister if they believe this information might subsequently become public. The benefits of open government need to be balanced against the risk that comments, proposals and advice that should be expressed are no longer recorded because of fear of disclosure.
82. However, it would appear that the Executive wishes to ring fence all internal deliberations on public interest grounds so that civil servants feel free, if they wish, to express strong views or potentially unwelcome advice. This approach aims to protect all information, regardless of the actual content, the context in which it was made or its proximity to actual policy formulation, on the basis that civil servants might feel inhibited in offering advice or exchanging views.
83. I have already emphasised that due to the class nature of section 29(1)(a) authorities must consider the actual content of the information when considering the public interest test. I am unable to accept an approach which casts a blanket protection, on public interest grounds, over a class of information.



84. In considering the public interest an authority may reasonably argue that the type and nature of the information or even process to which the information belongs raises an expectation of sensitivity; for example, where the information relates to ongoing negotiations. However, ultimately, that argument will only stand where the content of that information demands protection.
85. I have therefore considered the content of each document withheld to determine whether the public interest in disclosing the information is outweighed by the public interest in withholding it. In considering each document I have taken into account the desirability of providing access to information about the policy-making process and how and when decisions are reached and the general need for openness and transparency in government. These factors weigh strongly in favour of release.
86. On the other hand, I have also considered the sensitive nature of the subject matter of this strategy, the strongly held and often diverse opinions of stakeholders and the timing of this request for information. Mr Hutcheon's request was made a matter of weeks following the publication of the strategy. Therefore the sensitivity of any information would not have diminished. A key factor in determining whether the public interest would favour disclosure is the nature of the discussions and comments recorded. Where the exchanges or information is routine in nature this will normally point to disclosure. On the other hand, if I consider that disclosure of the information is likely to significantly harm the candour with which such exchanges or discussions are recorded in the future then this raises an expectation that the information will be withheld.
87. Even where the information has the requisite sensitivity I will still order disclosure where I consider there is some overriding reason for disclosure. This would arise, for example, where there is evidence of maladministration, wrongdoing or deviance from usual processes. However, there may be other compelling reasons in any given case for the disclosure of sensitive information.
88. Applying the above discussion to documents 5 to 21 described above I have reached the following conclusions.
89. I am satisfied that the public interest in disclosing the information contained in the following documents is not outweighed by the public interest in withholding the information. In these cases, I consider the information to be routine in nature and/or the discussion to be such that its disclosure would not harm the candour with which officials and Ministers communicate, provide advice and express views of substance:





Document 6 (email 1), Document 8 (emails 1 and 4), Document 9 (email 3), Document 11 (email 3), Document 12 (emails 2, 3 and 4), Document 13 (emails 2, 4, 5 and 7), Document 14 (emails 1, 3, 6-9), Document 15 (emails 1, 3, 6-7), Document 16 (emails 1, 3-7), Document 17 (emails 1 and 4), Document 18 (emails 2, 3, 4 and 5), Document 19 (email 2), Document 20 (email 2)

90. I am satisfied that the public interest in disclosing the information contained in the following documents is outweighed by the public interest in withholding the information.

Document 5, Document 6 (email 2), Document 7, Document 8 (emails 2, 3 & 5), Document 9 (emails 1 & 2), Document 10, Document 11 (emails 1 and 2), Document 12 (email 1), Document 13 (emails 1, 3 & 6), Document 14 (emails 2, 4 & 5), Document 15 (emails 2, 4, 5), Document 16 (email 2), Document 17 (emails 2 and 3), Document 18 (email 1), Document 19 (email 1), Document 20 (email 1), Document 21.

91. The Executive applied a series of exemptions to the information withheld and I will go on to consider each of these to the information withheld.

#### **Application of section 29(1)(b) Ministerial communications**

92. The Executive has applied section 29(1)(b) to documents 18, 19 and 21 because, it submitted, they record the discussions that took place between Ministers.
93. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt if it relates to Ministerial communications. Section 29(4) goes on to provide that “Ministerial communications” means any communication between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or any committee of that Cabinet).
94. Therefore for information to fall under this exemption there must be a communication between Ministers.
95. I accept that this exemption is not limited to actual communications between Ministers, such as a letter or email from one Minister to another, but could also cover records of discussions between Ministers. I will consider the application of this exemption to each of the documents identified.



96. This document comprises five emails. The majority of the first email discusses the actual content of the sexual health strategy and advice is sought by the Minister on several points. The last four emails discuss the publication of the strategy and the timing of the launch.
97. The fifth email in this document is an email from the Minister for Health and Community Care to the Minister for Parliamentary Business. I also accept that emails 1 and 3 in this group record discussions between Ministers. However, it is not clear to me how the second and fourth emails fall within section 29(1)(b). It is not evident from the sender and recipient of these emails or from their actual content that these are communications between Ministers.
98. As a result, I accept that emails 1, 3 and 5 fall within the terms of section 29(1)(b) but the Executive has failed to demonstrate why emails 2 and 4 are Ministerial communications.

*Document 19 – email exchange*

99. This email exchange comprises two emails, the first of which is the first email contained in Document 18 discussed above. I am satisfied that the second of these emails also relates to Ministerial communications in that it conveys an additional point to the discussion in the first email.

*Document 21 – single email*

100. This document sets out the Minister's views on a number of matters of substance relating to the policy formulation, which were discussed at a meeting. The document also sets out the points agreed at the meeting, including the next steps to be taken.
101. The meeting was attended by the Minister for Health and Community Care and the Deputy Minister along with a number of officials. However, while the wishes of the Minister are recorded there is no mention of any explicit exchange between the Ministers. As I understand it, the Executive is applying section 29(1)(b) to this information because two Ministers attended the meeting.
102. In consultation with the Executive on this point it contended that because it would not be known whether the record was confined to a discussion between Ministers or whether it was broader than this (that is, including officials), the Executive was erring on the side of caution. The Executive went on to submit that the information needs only to *relate* to Ministerial communications and disagreed that this limits the exemption to only explicit exchanges or correspondence. It pointed to its internal guidance on exemptions which specifies that the definition of Ministerial communications provided by section 29(4) shows that there are various types of such communications – among which are references to ministerial discussions, records of meetings or conversations.



103. While I accept that Ministerial communications may well include records of meetings and notes of discussions I am unable to accept the application of this exemption to any record or note simply because more than one Minister was present. To accept such an interpretation would mean that all unattributed records of discussions would fall under this exemption regardless of the size of the meeting, its purpose and regardless of whether the Ministers present actually had any contact.
104. Where the record of a meeting or discussion does not make explicit a communication between Ministers I would need to have further information about the meeting to be satisfied that section 29(1)(b) applies. I would need to know, for example, the purpose of the meeting; whether the meeting was set up as a discussion between Ministers or whether its purpose was for the Minister to give instructions to the officials present or whether it was a general discussion between Ministers and officials, with the latter playing an active role.
105. In this case, the Executive pointed to a statement which refers to both Ministers. In the body of the text, where views are attributed they are attributed to the Minister (rather than to both Ministers).
106. However, having looked at the information I consider that it is reasonable to infer from the statement at the beginning of this minute that the subsequent comments (other than those directly attributed to the Minister) were made by both Ministers and that they, therefore, reflect a communication between the Ministers.
107. In the circumstances, I am prepared to accept that section 29(1)(b) applies to the information contained in Document 21.
108. As with the exemption contained in section 29(1)(a) of FOISA, the exemption in section 29(1)(b) is subject to the public interest test contained in section 2(1)(b) and as set out above. Given that I have upheld the use of the exemption in section 29(1)(b) in relation to emails 1, 3 and 5 of Document 18, Document 19 and Document 21 I must now go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in withholding the information.



109. In its submissions to me the Executive provided further reasons why this information should not be released on public interest grounds. The Executive submitted that whilst it accepted that the presumption is that the public interest favours disclosure of information, there is also an important public interest in maintaining the principle of collective responsibility on which Scottish Ministers operate. The Executive indicated that it accepted that there may indeed be a fine balance between the two in relation to these documents, but particularly given that in all instances there are other exemptions which apply – indicating the sensitivities surrounding them – it considered that on balance the public interest lies in withholding the information.
110. The Executive submitted that the nature of collective responsibility is such that the Cabinet presents a united front on policy issues developed by the Minister with the relevant specialism. Paragraph 2.3 of the Ministerial Code states that ‘Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed and advice offered within the Executive should be maintained.’
111. The Executive submitted that each of these documents set out particular Ministers’ views on the strategy and the direction it should take. The public interest arguments against the release of this type of information is made explicit in the Ministerial Code. Additionally, the outcome of the discussions recorded in these documents are reflected in the final published version of the strategy, and the Executive believed there would be limited public benefit in their disclosure that would override the need to prevent diminution of the quality of internal debate.
112. The Executive’s additional arguments made in respect of the public interest in relation to section 29(1)(b) are confusing. The Executive appears to be arguing that the Ministerial Code and the requirements of collective responsibility make explicit the arguments supporting withholding this information on public interest grounds. However, concerns about the need to preserve the convention of collective responsibility are addressed in section 30(a). The Executive appears to be seeking to rely on another exemption when considering the public interest test.
113. Even if an authority considers that disclosure of the information would undermine the notion of collective responsibility, the authority is still required to consider whether the public interest in any given instance would point to disclosure. This requires consideration of the actual content of the material being withheld. I may accept that information is exempt because its disclosure would undermine collective responsibility. It does not follow, however, that as a result disclosure would not be in the public interest.



114. As I indicated above, the consideration of the public interest test must be an entirely independent process, independent, that is, from the considerations that apply when assessing the application of the original exemption.
115. I have addressed the Executive's additional submissions in respect of the public interest in paragraphs 69-86 above. I do not propose to revisit these.
116. After considering the arguments for and against disclosure as discussed above, I am satisfied that the public interest in disclosing the following information is not outweighed by the public interest in withholding the information:

Document 18 (emails 3 and 5), Document 19 (email 2)

117. After considering the arguments for and against I am satisfied that the public interest in disclosing the following information is outweighed by the public interest in withholding the information:

Document 18 (email 1), Document 19 (email 1), Document 21

#### **Application of section 30(b)(i) & (ii)**

118. The Executive also applied section 30(b)(i) to the following documents:
- Documents 13 and 20
119. The Executive applied section 30(b)(ii) to the following documents:
- Documents 3 (small part), 5, 7, 8, 9, 11, 12, 13, 14, 15, 18
120. Section 30(b)(i) states that information is exempt information if its disclosure under FOISA would, or would be likely to, inhibit substantially the free and frank provision of advice. Section 30(b)(ii) states that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. The exemptions in section 30(b) therefore allow for information to be withheld if its disclosure would inhibit the imparting or commissioning of advice, or the offering or requesting of opinions or considerations.
121. "Inhibit" is not defined in FOISA. However, I take the view that in this context it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. "Deliberation" tends to refer 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. The information must reveal the "thinking process" or reflection that has gone into the decision.



122. The exemptions in section 30(b) acknowledge that the prospect of disclosure of information which reveals internal thinking processes may be detrimental to the ultimate quality of decision making within a public authority, and that this will lead to less candid and robust discussions, insufficient records being created, hard choices being avoided and ultimately the quality of government being undermined.
123. In my view the standard to be met in applying the test in section 30(b) is high. When considering the application of section 30(b) each request should be considered on a case by case basis, taking into account the effects anticipated from the release of the particular information involved. This would involve considering:
- the subject matter of the advice or exchange of views
  - the content of the advice or exchange of views
  - the manner in which the advice or exchange of view is expressed, and
  - whether the timing of release would have any bearing (releasing advice or views 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).
124. The Executive's submissions in respect of the exemptions under section 30(b) were very brief. It submitted that the exchange of views and provision of advice between Ministers and officials is an essential part of all policy-making. It argued that the work of government is founded on these free and frank exchanges; any inhibition caused by an inability to have these in a non-public capacity would therefore have direct consequences for the quality of its policy-making.
125. I have considered the application of section 30(b) to the documents identified. In each case I have looked carefully at the content of the information in the context of the criteria set out in paragraphs 118-122 above.

*Document 3 - single email*

126. Document 3 has been released apart from a comment and the names of the sender and recipients. I consider that the Executive has not demonstrated the necessary harm (i.e. substantial inhibition of the free and frank exchange of views for the purposes of deliberation) that would result if this information were to be released. Therefore I do not accept that section 30(b)(ii) applies to this information.

*Document 5 - email exchange*



127. I am satisfied that the disclosure of this information meets the requirements of section 30(b)(ii) in that disclosure of this information would be likely to inhibit substantially the free and frank exchange of views.

*Document 7 – email exchange*

128. This email exchange discusses the handling of an external report on the strategy and spans both pre- and post-publication of the strategy. This information relates to the communication and presentation of the policy and the accuracy of the report. I have considered the content of this exchange and am satisfied that disclosure of this information would be likely to inhibit substantially the free and frank exchange of views in terms of section 30(b)(ii) of FOISA.

*Document 8 - email exchange*

129. This email exchange of 5 emails discusses a draft press article on the sexual health strategy. The email exchange discusses the content and reproduces the text of the article with tracked-changes. Having reviewed the content of the exchange I am satisfied that certain comments fall within the scope of section 30(b)(ii) in that disclosure would be likely to inhibit the free and frank exchange of views. However, I consider that the release of the following information would not, or would not be likely to, inhibit substantially the free and frank exchange of views: emails 1 and 4 in this exchange.

*Document 9 – email exchange*

130. This email exchange includes information sought by the Minister on a number of points. It also includes information about the presentation of the policy. The first email from the Minister seeks information on existing guidance on certain aspects relating to sexual health. Having considered the content of this exchange I am satisfied that the first two emails fall within the scope of section 30(b)(ii). However, I do not consider that the disclosure of the third email would, or would be likely to, inhibit substantially the free and frank exchange of views.

*Document 11 – email exchange*

131. This email is a response to the email exchange covered by Document 9 above. Having considered the content I do not consider that the information reveals anything the disclosure of which would, or would be likely to, inhibit substantially the free and frank exchange of views. Therefore I find this information does not fall within the scope of section 30(b)(ii).

*Document 12 – email exchange*



132. This email forwards the draft Ministerial statement on the sexual health strategy. I am satisfied that the disclosure of the email attaching the draft and draft statement itself would, or would be likely to, inhibit substantially the free and frank exchange of views. I do not consider that the disclosure of the remaining three emails would, or would be likely to, inhibit substantially the free and frank exchange of views and therefore take the view that they do not fall under the scope of section 30(b)(ii).

*Document 13 – email exchange*

133. This email exchange discusses the draft letters accompanying the distribution of the sexual health strategy. This document also notes the discussion of the statement to be made by the Minister on publication of the sexual health strategy and lists the individuals and organisations that should be contacted as a lead up to the statement being made. In addition, further advice is sought on a number of points and action agreed. The Executive applied both section 30(b)(i) and (b)(ii) to this email exchange. I consider that section 30(b)(i) applies to email 6 and that section 30(b)(ii) applies to emails 1 and 3. However, I am not satisfied that disclosure of emails 2, 4, 5 and 7 would, or would be likely to, inhibit substantially either the free and frank provision of advice or the free and frank exchange of views and consequently find that emails 2, 4, 5 and 7 are not exempt under either parts of section 30(b).

*Document 14 – email exchange*

134. This email exchange discusses a particular statement in the sexual health strategy and its exact meaning (see discussion on Document 10 above). Having considered the content of the emails I find that the disclosure of emails 2, 4 and 5 would be likely to inhibit substantially the free and frank exchange of views and are therefore exempt in terms of section 30(b)(ii). However, I do not consider that the information contained in the remainder of the emails in this exchange, that is emails 1, 3 and 6-9, are of sufficient sensitivity or frankness that their release would, or would be likely to, inhibit substantially the free and frank exchange of views and there do not consider them to be exempt under section 30(b)(ii).

*Document 15 – email exchange*





135. This information continues the email exchange described above in respect of Document 14. I accept that emails 2, 4 and 5 meet the harm test as set out in section 30(b)(ii). I do not consider that the content of emails 1, 3, 6-7 is such that its disclosure would be likely to inhibit substantially the free and frank exchange of views in terms of section 30(b)(ii) of FOISA. Therefore the exemption in respect of these emails is not upheld.

*Document 18 – email exchange*

136. This document comprises five emails. The majority of the first email discusses the actual content of the sexual health strategy and advice is sought by the Minister on several points. The last four emails discuss the publication of the strategy and the timing of the launch. I have considered the content of the emails and while I am satisfied that disclosure of the first email is likely to inhibit substantially the free and frank exchange of views, I find that the content of the last four emails is routine information the disclosure of which would not result in the harm required by section 30(b)(ii).

*Document 20 – email exchange*

137. This document comprises two emails. The first email discusses the issues raised by the Cross Party Group on the development of the strategy and also provides a briefing on these points by officials. The second email is the Minister's response. The Executive submitted that section 30(b)(i) (provision of advice) applied to this information. I consider that the content of the first email meets the requirements of section 30(b)(i). However, I consider that the information contained in the second emails reveals little of consequence and as a result is not exempt by virtue of section 30(b)(i).

*Summary*

138. In summary, therefore, I find the following information to be exempt by virtue of either sections 30(b)(i) or (ii):

Document 5, Document 7 (with exception of published report), Document 8 (emails 2, 3 & 5), Document 9 (emails 1 & 2), Document 12 (email 1), Document 13 (emails 1, 3 & 6), Document 14 (emails 2, 4 & 5), Document 15 (emails 2, 4 and 5), Document 18 (email 1), Document 20 (email 1).

*Application of the public interest test*



139. Section 30(b) is subject to the public interest test contained in section 2(1)(b) of FOISA and therefore I must go on to consider whether the public interest in disclosing the information requested is outweighed by the public interest in withholding the information requested. The Executive did not make any additional submissions concerning the public interest in respect of the application of section 30(b). I have addressed the Executive's original submissions in respect of the public interest above and my own thinking and do not intend to repeat them here.
140. However, slightly different considerations will apply when considering the public interest test in respect of section 30(b). This exemption, unlike section 29(1)(a) and (b) requires consideration of the actual content of the information and the likely effect of disclosure. An authority attempting to rely on section 30(b) must be able to show that disclosure would inhibit substantially the specified interest. In this case, I have accepted that certain documents set out in paragraph 138 above do fulfil the necessary requirements of section 30(b).
141. After considering the content of the information withheld under section 30(b) and the public interest grounds discussed above, I am satisfied that the public interest in disclosing the following information is outweighed by the public interest in withholding the information.
142. In reaching this decision I have considered the desirability of making information available to the public and the general need for transparency and accountability in decision making. However, I have also taken into account that Ministers and officials should be able to discuss matters of substance freely and openly, the timing of this request and the sensitivity of the subject matter. I find that there is no overriding public benefit in the disclosure of this information when weighed against the harm that would be likely to result.

Document 5, Document 7, Document 8 (emails 2, 3 & 5), Document 9 (emails 1 & 2), Document 12 (email 1), Document 13 (emails 1, 3 & 6), Document 14 (emails 2, 4 & 5), Document 15 (emails 2, 4 & 5), Document 18 (emails 1), Document 20 (email 1).

143. I therefore find that the Executive was wrong to rely on one of the exemptions contained in section 30(b) in respect of the remaining information withheld by the Executive in terms of section 30(b).

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

144. The Executive also submitted that certain information was exempt by virtue of section 30(a). It submitted that many of the documents comprise concerns and issues raised specifically by the Health Minister. The Executive has applied section 30(a) to the following documents:

Documents 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 21



145. The Executive referred to its internal guidance on section 30 which explains that the Scottish Executive operates on the basis of collective responsibility which requires that Ministers should be able to express their views frankly and a degree of privacy of opinions expressed therefore maintained. The Executive indicated that it considered that due to the harm that would be caused to the future quality of such exchanges by the release of these documents, the balance of the public interest lies in withholding them.
146. Section 30(a) states that information is exempt if its disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers. The concept of collective Ministerial responsibility is a long-standing constitutional convention which is not regulated by statute but is formalised in the Ministerial Code, which provides guidance on the convention. Collective responsibility enables Ministers to express their views in the expectation that they can argue freely and frankly in private, whilst maintaining a united front once decisions have been reached. Section 30(a) provides for the exemption of information if its disclosure would prejudice substantially the convention.
147. In subsequent correspondence the Executive indicated that it considered that to undermine the principle of collective responsibility, information does not have to demonstrate explicit disagreement between Ministers. The Executive indicated that certain documents clearly show particular Ministers' views in relation to a number of issues, which may not necessarily be in line with the final approach adopted by the Ministers collectively.
148. I understand that the Executive is applying section 30(a) to the documents listed in paragraph 144 above on the basis that they all contain information about views expressed by the Minister. The Executive has not applied this exemption on a partial basis. That is, it has not suggested that the Minister's views are simply redacted and the remainder of the information released. Further, the Executive has taken no account of the nature and content of the views expressed. The view expressed may simply amount to a deadline when the revised version should be supplied, or relate to a matter of substance but at a mundane or routine level. It is difficult to see how disclosure of information in such cases would prejudice substantially the convention of collective responsibility.



149. In order to rely on section 30(a) the Executive is required to do more than asserting that the documents contain views expressed by the Minister and therefore should be protected. In order for the maintenance of the convention of collective responsibility to be prejudiced substantially the views would need to be significant. Circumstances where the disclosure of information might prejudice the maintenance of the convention of collective responsibility could arise where the view expressed was at variance with the final policy or where the information revealed disagreement by another Minister or where the view expressed was outwith the scope of the Minister's responsibility.
150. I consider that the Executive has failed to demonstrate why section 30(a) applies to the information withheld in each case and how disclosure of this information would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers.

#### Technical breaches of FOISA

151. The Executive did not respond to Mr Hutcheon's initial request for information or his request for review within 20 working days, as required by FOISA. In the former case, the Executive responded within 21 days and in the latter case within 23 days.

#### **Decision**

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The Scottish Executive partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 by withholding certain information requested by Mr Hutcheon.

However, I find that the Scottish Executive did not comply with Part 1 of FOISA in withholding other information and accordingly I require the Executive to release the following documents to Mr Hutcheon within two months of receipt of this information notice.

Document 3(unreleased part), Document 6 (email 1), Document 8 (emails 1 and 4), Document 9 (email 3), Document 11 (email 3), Document 12 (emails 2, 3 and 4), Document 13 (emails 2, 4, 5 and 7), Document 14 (emails 1, 3, 6-9), Document 15 (emails 1, 3, 6-7), Document 16 (emails 1, 3-7), Document 17 (emails 1 and 4), Document 18 (emails 2, 3, 4 and 5), Document 19 (email 2), Document 20 (email 2)

I find that the Scottish Executive failed to comply with Part 1 of FOISA in failing to respond to Mr Hutcheon's request for information and his request for review within 20 working days in breach of section 10(1) and section 21(1) of FOISA.

I do not require the Scottish Executive to take any remedial steps in relation to these technical breaches.



Scottish Information  
Commissioner

**Kevin Dunion**  
**Scottish Information Commissioner**  
**16 May 2006**