



Scottish Information
Commissioner

**Decision 031/2007 Mr Bill Scott and the Scottish
Parliamentary Corporate Body**

*Request for information relating to the position of SSP
parliamentary staff in the event of SSP MSPs' parliamentary
allowances being withdrawn or reduced*

Applicant: Mr Bill Scott

Authority: Scottish Parliamentary Corporate Body

Case No: 200503173

Decision Date: 15 February 2007

**Kevin Dunion
Scottish Information Commissioner**

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Decision 031/2007 Mr Bill Scott and the Scottish Parliamentary Corporate Body

Request for information, correspondence and guidance relating to the position of Scottish Socialist Party parliamentary staff in the event of SSP MSPs' parliamentary allowances being withdrawn or reduced – some information withheld under section 30 (Prejudice to effective conduct of public affairs) and section 36 (Confidentiality) – partially upheld by Commissioner

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 30(b) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Scott requested from the Scottish Parliamentary Corporate Body (SPCB) information, correspondence and guidance relating to the position of Scottish Socialist Party (SSP) Parliamentary staff in the event of SSP MSPs' parliamentary allowances being withdrawn or reduced.

Some of the information requested was provided by the SPCB. However, the SPCB refused to provide some of the information on the basis that the information was exempt under sections 30(b) (Prejudice to effective conduct of public affairs) and/or 36(1) (Confidentiality) of the Freedom of Information (Scotland) Act 2002 (FOISA).

Mr Scott was dissatisfied with this response and requested the SPCB to review its decision.

As a result of this review the SPCB released three documents which were withheld in its original response but upheld its original decision in relation to the remaining documents.

Mr Scott was dissatisfied with this response and applied to the Scottish Information Commissioner for a decision.



After investigation, the Commissioner found that the SPCB had failed to act in accordance with Part 1 of FOISA in withholding some of documents under the exemptions contained within sections 30 and/or 36 of FOISA.

The Commissioner ordered the release of documents where the requirements of section 30 or section 36 of FOISA were not met.

Background

1. On 19 August 2005, Mr Scott requested by email from the SPCB information relating to the withdrawal or reduction of SSP MSPs' parliamentary allowances, specifically the impact on SSP parliamentary staff. The full request was as follows:

Request information: any written guidance, information or reports emanating from the Scottish Parliament's Chief Executive's office in regards to the position of SSP parliamentary staff in the event of SSP MSP's parliamentary allowances being withdrawn or reduced; any written guidance, information or reports offered to the Scottish Parliament's Presiding Officer; the Scottish Parliament's Business Bureau or Standards Committee by the Chief Executive's office; Committee Clerks or other Scottish Parliament civil servants in regards to sanctions imposed on SSP MSPs and their consequent effect on SSP parliamentary staff; copies of any e-mails, letters or memoranda emanating from the Chief Executive's Office, the Presiding Officer's Office; Standard Committee Clerk's Office, Personnel Department and Allowances Office on the subject of SSP parliamentary staff's position in the event of their employers' allowances being reduced or withdrawn.

2. The SPCB replied to Mr Scott's request on 20 October 2005. The SPCB supplied Mr Scott with a number of documents which fell within the scope of his request. However, some information was redacted from a number of these documents and other documents were withheld in their entirety on the basis that the information contained within was exempt from release under sections 30 and/or 36 of FOISA.
3. In a letter dated 25 October 2005 Mr Scott detailed his dissatisfaction with this response and requested that the SPCB review its decision.
4. On 17 November 2005 the SPCB replied to Mr Scott's request for review. As a result of the internal review the SPCB decided to release three documents (documents 58, 62 and 64) which it had previously withheld. With regard to the remaining documents, the SPCB confirmed its original decision to withhold these under sections 30 and/or 36 of FOISA.



5. On 25 November 2005 Mr Scott wrote to the Scottish Information Commissioner, stating that he was dissatisfied with the outcome of the SPCB's internal review and applied to the Commissioner for a decision in relation to the SPCB's response.
6. The case was then allocated to an investigating officer and the application validated by establishing that Mr Scott had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to his request.

The Investigation

7. On 5 December 2005, my Office wrote to the SPCB, giving notice that an appeal had been received and that an investigation into the matter had begun and inviting comments from the SPCB as required under section 49(3)(a) of FOISA. In particular, the SPCB was asked to provide copies of the information withheld, along with detailed analysis of its application of the relevant exemptions.
8. The SPCB replied on 20 January 2006, enclosing its statements on the case and supporting documentation.

The Commissioner's Analysis and Findings

9. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Scott and the SPCB and I am satisfied that no matter of relevance has been overlooked.

Background information

10. On the 30 June 2005, the Scottish Parliament unanimously endorsed a recommendation and report by its Standards and Public Appointments Committee to apply sanctions in response to that day's conduct of four Scottish Socialist Party MSPs in the Parliament Chamber.
11. These sanctions were imposed during the month of September 2005 and consisted of the following:
 - i. Exclusion from all proceedings of the Parliament



- ii. Right of access to the parliamentary complex withdrawn
- iii. Right of access to parliamentary facilities and services withdrawn
- iv. Salaries and allowances withdrawn.

Documents outwith scope of Mr Scott's request

- 12. Mr Scott's request related to the implications of the sanctions imposed on SSP MSPs, specifically their impact on SSP parliamentary staff.
- 13. Having reviewed the documents withheld by the SPCB I consider a number of these to fall outwith the scope of Mr Scott's request. I find that the content of the following documents relate directly to the implications of the sanctions for SSP MSPs rather than how these sanctions would affect SSP parliamentary staff: 21, 38, 59, 61 and 65.

Section 30 - Prejudice to effective conduct of public affairs

- 14. With regard to the remaining documents, the SPCB withheld a number of them on the grounds that the information contained within them was exempt from release under sections 30(b)(i) and 30(b)(ii) of FOISA.
- 15. The exemptions in sections 30(b)(i) and 30(b)(ii) concern prejudice to the effective conduct of public affairs and state respectively that information is exempt if its disclosure under FOISA would, or would be likely to, inhibit substantially (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
- 16. In applying the exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA the chief consideration is not whether the information constitutes advice or opinion (although this is likely to be relevant), but whether the release of information would inhibit substantially the free and frank provision of advice or (as the case may be) exchange of views for the purposes of deliberation.
- 17. As highlighted in my previous decision 077/2006 (Paul Hutcheon and the Scottish Executive), as "inhibit" is not defined in FOISA 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 relevant decision.



18. In my view, the standard to be met in applying the tests in each part of section 30(b) is high. When considering the application of these exemptions, 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. For example, this would involve considering:
 - a) the subject matter of the advice or opinion;
 - b) the content of the advice and opinion itself;
 - c) the manner in which the advice or opinion is expressed, and
 - d) whether the timing of the release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought , might be more substantially inhibiting than once a decision had been taken).
19. The SPCB withheld the following documents in their entirety under section 30(b)(i) and 30(b)(ii) of FOISA: 10, 12, 13, 18, 19, 20, 23, 24, 27, 29, 32, 33, 37, 39, 41, 42, 43, and 66. The SPCB submitted that the disclosure of this information, which was shared on a confidential basis, would inhibit substantially the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
20. The SPCB also redacted information from document 14 on the basis that the exemptions contained within sections 30(b)(i) and 30(b)(ii) applied.
21. With regard to documents 10, 13 and 18, I have noted that a substantial amount of information contained within these documents duplicates or is identical to the content of document 9, which has been released in full to Mr Scott. I have therefore only considered the attachment to document 13 and two e-mails from document 10 (Friday 1 July 2005 16:53 and 4:40 pm) in the course of this investigation. As document 18 is an identical duplicate of document 9, I have not considered document 18 as part of the investigation.
22. Having considered each document in turn and I am satisfied that the requirements of sections 30(b)(i) and/or 30(b)(ii) have been met in the following documents: 12, 13 (attachment), 19, 20, 23, 32, 33, 37 and 43.
23. Documents 23 and 37 consist of e-mail exchanges discussing the operational implications of the sanctions imposed. These exchanges clearly reflect a free exchange of views and opinions for the purpose of deliberation. I am satisfied, given that the process of deliberation relating to the practicalities of the sanctions imposed was still underway at the time of Mr Scott's request, that the release of such documents would have a substantially inhibiting effect on future discussions of a similar nature.



24. With regard to documents 13 (attachment), 20, 32, 33 and 43, I am satisfied that these documents reflect the early stages in the drafting process and contain comments for the purposes of further deliberation. I am satisfied that the release of these documents, which differ in substance from the final versions, would substantially inhibit future exchanges of advice or opinion for the purpose of deliberation.
25. Similarly, I consider document 19 and document 12 to reflect the exchange of opinion for the purposes of deliberation. I am satisfied that release of such speculative discussion documents would substantially inhibit any future exchanges of advice or opinion for the purposes of deliberation.
26. However, I am not satisfied that the necessary requirements of section 30(b)(i) or 30(b)(ii) have been met in the following documents: 10 (e-mails Friday 1 July 2005 16:53 and 4:40 pm), 24, 27, 29, 39, 41, 42 and 66.
27. Similarly, I am not satisfied that the redactions made to document 14 satisfy the requirements of section 30(b)(i) or 30(b)(ii).
28. Having considered each document in turn, I am not satisfied that documents 24, 27 and 66 or the redactions made to document 14 reflect, or might reasonably be expected to have any effect on, the provision of advice or the exchange of views for the purpose of deliberation. Consequently, I cannot accept that the information in question falls within either of the exemptions claimed and therefore cannot uphold the SPCB's reliance on the exemptions to withhold the information.
29. Although I consider documents 10 (e-mails Friday 1 July 2005 16:53 and 4:40pm), 29, and 39 to contain the provision of advice or exchange of opinion, I am not satisfied that disclosure of these documents would inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation, given the innocuous nature of the comments made therein.
30. Documents 41 and 42 reflect the later stages in a drafting process. I am satisfied that these documents contain exchanges of views and the provision of advice. However, I am not convinced that disclosure of the information in these documents, given the that the comments were made in the final stages of the drafting process, relate to minor amendments and do not detract from the substance of the final version, would (or would be likely to) inhibit substantially the future provision of free and frank advice or the future free and frank exchange of views as argued by the SPCB.
31. Consequently, I cannot uphold the SPCB's reliance on the exemptions in sections 30(b)(i) or 30(b)(ii) to withhold documents 10 (e-mails Friday 1 July 2005 16:53 and 4:40 pm), 24, 27, 29, 39, 41, 42 or 66, or to redact parts of document 14.



Consideration of the public interest

Documents 12, 13, 19, 20, 23, 32, 33, 37 and 43

32. Sections 30(b)(i) and (ii) is subject to the public interest test contained in section 2(1)(b) of FOISA. Having determined that a number of documents fall within the scope of these exemptions I must go on to consider whether the public interest in disclosing the information requested is outweighed by the public interest in maintaining the exemptions.
33. The SPCB submits that the public interest in maintaining these exemptions outweighs the public interest in the disclosure of this information. The SPCB argues that there is a real risk that if this information were disclosed, such information would not be shared in future thereby prejudicing the effective conduct of the SPCB's business on the matter to which the information relates.
34. Mr Scott submits that the decisions reached and the recommendations made to Parliament not only had consequences for the four SSP MSPs, who were subsequently suspended for one month, but for their staff whose wages were deducted from allowances paid to the four MSPs.
35. Mr Scott believes that decisions of the Parliament should be subject to public scrutiny and accountability. Mr Scott believes that the secrecy surrounding the Standards Committee's deliberations and the advice that the Committee was offered by civil servants to be unhealthy and that it can only be in the public interest to determine whether this was indeed a fair hearing.
36. Having read the documents, I am of the view that they would provide limited if any benefit in respect of the public interest arguments made by Mr Scott.
37. In all the circumstances, I am satisfied that the public interest in allowing the SPCB to receive advice and clarify such matters in a process of free and frank exchanges, without fear of subsequent disclosure, outweighs that in disclosure in this case.
38. I am satisfied, therefore, that the SPCB acted in accordance with FOISA in withholding documents 12, 13(attachment), 19, 20, 23, 32, 33, 37 and 43.



Section 36 - Confidentiality

39. Section 36(1) of FOISA allows a public authority to withhold information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. It covers advice from a solicitor to a client and information passed by a client to their solicitor for the purposes of obtaining legal advice, and this includes staff in a public authority taking legal advice from solicitors employed within the same authority. In such a case the public authority, as client, has the right to waive confidentiality of communications and must waive it where it is in the public interest to do so.
40. The SPCB redacted information from documents 11 and 55 and withheld in their entirety documents 17 (duplicate of document 9) and 34 on the grounds that the information was exempt from release under section 36(1) of FOISA. The SPCB submits that this information consists of legal advice.
41. As document 17 duplicates the information provided in document 9, which has been released in full to Mr Scott, I am not required to consider document 17 as part of this investigation.
42. Having reviewed the redactions made to document 11 and document 55, I am not satisfied that the information withheld reflects the exchange of legal advice from solicitor to client. I find that the SPCB acted incorrectly in withholding this information under the exemptions cited.
43. However, I am satisfied that documents 34 reflect the provision of internal legal advice, and therefore am satisfied that these documents meet the requirements of section 36(1).
44. Section 36(1) is a qualified exemption in that it is subject to the public interest test. I must now go on to consider whether the public interest would in maintaining the exemption outweighs that in the information being released.
45. The SPCB submits that it is essential for the proper operation of the SPCB that it should be able to seek and consider legal advice in confidence. The SPCB argues that disclosure of the information contained in this paper would seriously prejudice the SPCB's ability to conduct its business properly, which would not be in the public interest. The SPCB concludes that the public interest in withholding this information outweighs the public interest in releasing it.



46. As I have noted in a number of previous decision notices, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
47. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases.
48. Regarding document 34, bearing in mind my consideration of the public interest in relation to the information withheld under section 30(b), I have not found any public interest which outweighs the principle of maintaining confidentiality in this instance.

Technical Breaches of FOISA

49. During the investigation, I have also considered whether the SPCB complied with the timescales laid down in FOISA when responding to Mr Scott's request.
50. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information.
51. In this instance the SPCB failed to respond to Mr Scott's initial request within the 20 working day period allowed; taking approximately twice the stipulated maximum period to respond, I do not require it to take any action in respect of this breach.

Decision

I find that the Scottish Parliamentary Corporate Body (SPCB) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding documents 12, 13(attachment), 19, 20, 23, 32, 33, 37 and 43 under sections 30(b)(i) and 30(b)(ii) of FOISA and document 34 under section 36(1) of FOISA.



However, I find that the SPCB misapplied sections 30(b)(i) and 30(b)(ii) to documents 10, 14, 24, 27, 29, 39, 41, 42 and 66. I also find that The SPCB misapplied section 36(1) to the redactions made to documents 11 and 55. I require the SPCB to release these documents to Mr Scott (in unredacted form where disclosure has been made already with redactions).

I find that the SPCB's response to Mr Scott's initial request failed to comply with section 10(1) of FOISA in not responding within the 20 working day period allowed. I do not require the SPCB to take any action in respect of this breach.

As I cannot require the SPCB to comply with this decision notice within the appeal period of 42 days, I require the SPCB to take the steps required to comply within 45 days of this notice.

Appeal

Should either the Mr Scott or the SPCB 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.

Kevin Dunion
Scottish Information Commissioner
15 February 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

10 Time for compliance

- (1) ... a Scottish public authority receiving a request for which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
- (a) ... the receipt by the authority of the request.

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
- (ii) the free and frank exchange of views for the purposes of deliberation;

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.