



Scottish Information
Commissioner

**Decision 164/2007 Mr Mark Howarth and the
Scottish Ministers**

*All correspondence and related documents between the First
Minister or his office and Robert Morris or Morris Furniture group*

**Applicant: Mr Mark Howarth
Authority: Scottish Ministers
Case No: 200600428
Decision Date: 13 September 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 164/2007 Mr Mark Howarth and the Scottish Ministers

Request for all correspondence and related documentation between the First Minister or his office and Robert Morris or Morris Furniture Group – information withheld under section 30(b)(i) and (ii) prejudice to effective conduct of public affairs – Commissioner upheld in part

Relevant Statutory Provisions and other Sources

The Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2 (Effect of exemptions); 30(b)(i) and 30(b)(ii) (Prejudice to effective conduct of public affairs); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority).

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 Howarth requested from the Scottish Ministers (the Ministers) all correspondence between the First Minister or his office and Robert Morris or the Morris Furniture Group, together with all correspondence, notes and documents associated with this exchange.

The Ministers supplied Mr Howarth with a number of documents relating to his request, but withheld others on the grounds that the information within them was exempt from disclosure under a number of exemptions in FOISA, including section 30(b)(i) and section 30(b)(ii).

Mr Howarth was not satisfied with this response and asked the Ministers to review their decision. The Ministers re-examined Mr Howarth's request and upheld the original decision to withhold the information under sections 30(b)(i) and 30(b)(ii).



Mr Howarth believed that the sections 30(b)(i) and 30(b)(ii) of FOISA had been applied incorrectly by the Ministers, and applied to the Scottish Information Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had misapplied sections 30(b)(i) and 30(b)(ii) to certain of the information withheld.

The Commissioner also concluded that the Ministers had failed to respond to Mr Howarth's request and request for review within the timescales set down in sections 10(1) and 21(1).

Background

1. Mr Howarth's request relates to the M74 Completion Scheme; the land on which the Morris Furniture Group's factory is located falls under the route of the M74 completion scheme and was therefore the subject of a Compulsory Purchase Order.
2. On 6 September 2005, Mr Howarth requested by email from the Ministers all correspondence between the First Minister or his office and Robert Morris or the Morris Furniture Group. In addition, Mr Howarth requested all correspondence, notes and documents involving the First Minister or his office and relating to these exchanges.
3. The Ministers replied on 2 November 2005 and supplied Mr Howarth with copies of correspondence exchanged between the First Minister's office and Mr Robert Morris. The Ministers also referred Mr Howarth to other correspondence, which had previously been supplied to Mr Howarth as a result of an earlier request.
4. The Ministers withheld certain information relating to these exchanges, on the grounds that it was exempt by virtue of sections 29(1)(c), 30(b)(i), 30(b)(ii) and section 36(1) of FOISA.
5. Mr Howarth requested a review of the Ministers' response on 18 November 2005. Mr Howarth raised a particular concern that he inferred from previous documents supplied by him that he had not been supplied with all correspondence falling within the scope of his request. He also sought reasoning as to why his initial response had taken longer than the 20 working day period allowed under FOISA.



6. The Ministers responded to Mr Howarth's request for review on 10 January 2006. The Ministers upheld their original decision and apologised for the delay in responding to Mr Howarth's request for review. In addition, they supplied further items of correspondence which had not been released at the time of Mr Howarth's original request and provided some explanation for the delay in responding to his initial request.
7. Mr Howarth contacted my Office on 21 February 2006, stating that he was dissatisfied with the outcome of the Ministers' review and setting out his submissions in respect of the exemptions applied and the public interest.
8. Mr Howarth's appeal was validated by establishing that he had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request. The case was then allocated to an investigating officer.

The Investigation

9. A letter was sent to the Ministers on 9 March 2006 giving notice in terms of section 49(3)(a) of FOISA that an application had been received from Mr Howarth and that an investigation into the matter had begun. The Ministers were invited to comment on the matters raised by the applicant and on the application as a whole. The Ministers were also asked to provide the following information:
 - i. A copy of the information withheld;
 - ii. Detailed analysis of its application of the exemptions claimed to each document.
10. The Ministers replied on the 13 April 2006 enclosing their statements on the case and supporting documentation.
11. In their response to my Office the Ministers identified further items of correspondence which fell within the scope of Mr Howarth's request. They supplied Mr Howarth with these documents during the course of the investigation.
12. The Ministers indicated that due to confusion, caused by a number of overlapping requests made by Mr Howarth, their original response to Mr Howarth had mistakenly cited sections 36(1) and 29(1)(c) to documents which did not relate to this particular request.



13. The Ministers confirmed their position that the information withheld in relation to this request was exempt by virtue of section 30(b)(i) and section 30(b)(ii) of FOISA, adding at this stage that it was also relying on section 29(1)(a).
14. The investigating officer informed Mr Howarth of these changes. Mr Howarth was then given the opportunity to comment on the application of these exemptions.
15. In addition, during the course of the investigation, the Ministers were asked to comment on its application of exemptions, particularly in light of information received as a result of an earlier request made by Mr Howarth.
16. In further communications with this Office the Ministers retracted their reliance on section 29(1)(a) of FOISA.
17. During the course of the investigation Mr Howarth was supplied with additional items which the Ministers identified as falling within the scope of his request.
18. I will consider the submissions of both parties more fully in my analysis and findings below.

The Commissioner's Analysis and Findings

19. The investigation into this case has concentrated on three separate issues:
 - i. Whether the Ministers correctly applied exemptions sections 30(b)(i), and 30(b)(ii) of FOISA to the information withheld;
 - ii. Whether the public interest test was correctly applied;
 - iii. Whether the Ministers complied with the requisite timescales set down in FOISA in relation responding to a request and a request for review.



Application of sections 30(b) - prejudice to effective conduct of public affairs

20. The Ministers withheld two documents from disclosure on the grounds that the information contained within them was exempt from release under section 30(b)(i) and section 30(b)(ii) of FOISA. These documents can be classified as follows:
 - a) A briefing note along with covering e-mail exchanges, to the First Minister detailing a suggested response to a request for a meeting.
 - b) An internal email seeking advice from officials regarding this request.
21. Sections 30(b)(i) and 30(b)(ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, respectively.
22. Further arguments on the application of section 30(b) of FOISA were provided by the Ministers with a letter of 2 May 2007. These were provided in connection with a particular application, but the Ministers claim that they are of general application to all of their cases involving these exemptions. I have taken these arguments into account and I have taken due account of my decision 089/2007 (Mr James Cannell and the Scottish Executive) in reaching a conclusion in this case. In particular, it should be clear that I cannot as a rule accept an automatic presumption that harm will be caused by the release of information simply because it falls into a particular category.

The Ministers' submissions

23. The Ministers submitted that such exchanges formed a vital component in the work carried out by the Ministers; Ministers relied on the expertise and knowledge of officials dealing in the whole spectrum of policy issues. According to the Ministers, they needed to do this in order to keep informed about the developments that took place on important areas of work and to make policy decisions. The Ministers submitted that the release of such advice and views as were contained in this document would have a substantially inhibiting effect on the confidence of Ministers in both requesting and receiving fully free and frank advice.



24. Whilst the Ministers acknowledged that there was a public interest in the terms of the final settlement being made public (which they had been in this instance), they did not consider there to be a corresponding public interest in revealing the negotiations and internal considerations which led to this. The Ministers submitted that such considerations included, of necessity, debate about the perceived strengths or weaknesses of its position in order for a fully informed decision to be made. They asserted that releasing this information about such debate would weaken their position in future negotiations.
25. The Ministers further submitted that although the compensation for the purchase of the Morris Furniture site had been completed, their dealings with Robert Morris were continuing. Therefore the issue was still current. The release of these papers into the wider public domain could therefore, the Ministers argued, affect their ability to negotiate successfully.

Mr Howarth's submissions

26. Within his submissions, Mr Howarth highlighted a letter dated 13 June 2005 from the District Valuer to the Ministers that had been previously released to him. Mr Howarth provided a copy of this letter and submitted that it provided a yardstick by which to measure the Ministers' response to his request. Mr Howarth argued that this letter represented advice and views which were both free and frank. In releasing it the Ministers had admitted, he argued, that its contents could not possibly inhibit substantially further such advice or views. Mr Howarth submitted that by releasing this letter the Ministers had, themselves, set the threshold for exemption very high.
27. Mr Howarth argued that section 30 of FOISA was intended to protect the flow of a certain type of advice rather than its provenance, the status of those that gave the advice not being the salient point.
28. With regard to the public interest, Mr Howarth submitted that public scrutiny was desirable in the case of the M74 project, which had, in his opinion, been assigned the support of the public authorities without an upper limit on the financial commitment from the public purse. He argued that the public interest was served by being able to witness the views of others when it came to agreeing a monetary settlement above the statutory maximum.
29. As I have stated previously in cases where the exemptions under section 30(b)(i) and section 30(b)(ii) have been applied, the standard to be met in applying the tests contained within these exemptions is high. In applying these exemptions the chief consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views.



Document 1

30. The first document withheld from Mr Howarth comprises email exchanges and a briefing note to the First Minister about a suggested response to a meeting request with the First Minister.
31. When considering the application of section 30(b)(i) and 30 (b)(ii) 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:
 - a) the subject matter of an exchange of views
 - b) the content of the advice or exchange of views
 - c) the manner in which the advice or exchange of view is expressed, and
 - d) whether the timing of release would have any bearing.
32. Document 1 consists of a series of e-mail exchanges with a briefing document attached. I consider emails of 30 March 2005 17:00 and 17:31, and 18 April 2005 16:03 and 16:05 as innocuous and administrative, but of little value if removed from the remaining e-mails. However, taking this email exchange as a whole, I am satisfied that it contains advice and exchanges of views for the purposes of deliberation.
33. The briefing document attached to these exchanges described above provides advice and assistance by outlining the main issues for consideration by the First Minister and making a recommendation as to a potential course of action. I am satisfied that this document contains advice and an exchange of views for the purposes of deliberation. However, I have difficulty reconciling the Ministers' arguments as to the effects of disclosure with what they have chosen to release already, in particular the District Valuer's letter of 13 June 2005. That letter contains considerably more sensitive information in relation to the negotiations than the "Background" section of the briefing, the only apparent difference being that in the briefing the relevant information is contained in a document created for the purpose of advising a Minister. The District Valuer's letter is, however, still advice provided by a civil servant to other civil servants in a highly sensitive context and I find it difficult to imagine that the Ministers did not consider the possible impact of release when releasing it in response to an earlier request of Mr Howarth's. I have made it clear in the past that the identity of the recipient of advice or views does not by itself make that advice or views subject to the relevant part of section 30(b) and in this case I do not accept that a case has been made for distinguishing the content of the letter from that of the "Background" section of the briefing. If the Ministers did not regard disclosure of one as having a substantially inhibiting effect, I do not see how they could ascribe that effect to the disclosure of the other.



34. Equally, I regard the “Purpose” section of the briefing as wholly innocuous in any circumstances and can identify no inhibiting effect that would or would be likely to follow from disclosure.
35. I am satisfied, however, given the content and context of the advice and exchange of views contained in the remainder of Document 1 (i.e. the exchange of emails and those parts of the briefing document other than the “Purpose” and “Background” sections) and taking into account the candid manner in which these are expressed, that future such exchanges would be substantially inhibited if the relevant parts of this document were to be released. Having established that this document meet the requirements of section 30(b)(i) and section 30(b)(ii), I will go on to consider the public interest below, after I have considered document 2.

Document 2

36. I note that the majority of this document is in the public domain, having been released to Mr Howarth in a previous response. That part of the document which has not been released before is a single e-mail from the First Minister to the Private Secretary of the Minister for Enterprise, Transport and Lifelong Learning requesting advice. I am not satisfied that the simple request for advice and innocuous comment comprising the relevant information fall within the scope of either of the exemptions in section 30(b)(i) or section 30(b)(ii). I do not accept that the release of this email would be capable of substantially inhibiting any exchanges of this nature in the future. As I am satisfied that neither of these exemptions applies, I am not required to consider the public interest test.

Public interest test

37. Both section 30(b)(i) and section 30(b)(ii) are subject to the public interest test. Section 2(1)(b) of FOISA provides that in all circumstances of the case, where the public interest in disclosing the information is not outweighed by that in maintaining the exemption the information must be disclosed.
38. The Ministers highlighted that the monetary settlement of the Compulsory Purchase Order for the Morris Furniture Group site was now in the public domain. I also note that the Ministers has released a number documents relating to this particular Compulsory Purchase Order (<http://www.scotland.gov.uk/About/FOI/Disclosures/2005/05/m74morris>)
39. I acknowledge that there is a strong public interest in scrutiny of the expenditure of public funds. I also acknowledge the wide public interest in this particular project. However, having reviewed the content of these documents I am not satisfied that disclosure will add anything to the scrutiny of the expenditure of public funds or provide insight to the decision-making process.



40. I have also taken into consideration the fact that negotiations with the Morris Furniture Group were ongoing and remained a current issue at the time the Executive dealt with Mr Howarth's request. With this in mind, I am satisfied with regard to the e-mails in document 1, along with those parts of the briefing document I have accepted as exempt, that the public interest in disclosure is outweighed by that in the Ministers' ability to receive comprehensive advice and conclude their deliberations accordingly. In all the circumstances, therefore, on balance I accept in relation to document 1 (with the exception of the "Purpose" and "Background" sections in the briefing document) that the public interest in maintaining the exemptions in section 30(b) of FOISA outweighs the public interest in disclosure.

Technical Breaches of FOISA

41. Section 10(1)(a) of FOISA stipulates the time within which a Scottish public authority is required to respond to a request for information. Given that no clarification of the request was required by the Ministers and no fees notice was issued, the appropriate time within which the Ministers should have responded in this case was not later than the twentieth working day after receipt of the request. The Ministers failed to respond to Mr Howarth's request for information within that timescale and breached Part 1 of FOISA as a consequence.
42. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt by it of the requirement. The Ministers failed to respond to Mr Howarth's requirement for review within that timescale and breached Part 1 of FOISA as a consequence.

Decision

I find that the Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding document 1 (excluding the information contained under the headings "Purpose" and "Background").

However, I find that the Ministers failed to comply with Part 1 of FOISA in its application of section 30(b)(i) and section 30(b)(ii) to document 2 and the information contained under the headings of "Purpose" and "Background" in document 1. In misapplying these exemptions, it failed to comply with section 1(1) of FOISA. I require the Ministers to release this information to Mr Howarth, within 45 days of receipt of this notice.



I find that the Ministers failed to comply with Part 1 of FOISA in failing to comply with the requisite timescales as set out in sections 10(1) and 21(1) in responding to Mr Howarth's initial request and request for review. I do not require the Ministers to take any action in response to these breaches.

Appeal

Should either Mr Howarth or the Ministers 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 after the date of intimation of this notice.

Kevin Dunion
Scottish Information Commissioner
13 September 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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request 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) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

21 Review by Scottish public authority

- (1) ... a Scottish public authority receiving a requirement for review must ... comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

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; or