

# Decision Notice



Decision 053/2009 Mr Vincent Waters and the Scottish Ministers

Communications among COSLA, Scottish Ministers and Civil Servants

Reference No: 200801778  
Decision Date: 8 May 2009

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Waters requested from the Scottish Ministers (the Ministers) copies of letters passing among the Convention of Scottish Local Authorities (COSLA), the First Minister, the Cabinet Secretary for Finance and civil servants within a particular timeframe. The Ministers responded by providing some of the information requested, but withholding the remainder on the basis of section 30(b)(i) and (ii) of FOISA. Following a review, where the Ministers upheld their original decision to withhold the information, Mr Waters remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, where the Ministers decided to withhold the information on the basis of section 30(c) of FOISA rather than section 30(b)(i) and (ii), the Commissioner found that the Ministers had failed to deal with Mr Waters' request for information in accordance with Part 1 of FOISA. The Commissioner could not accept that disclosure of the information in question would be capable of substantially prejudicing relations between central and local government (as had been argued) and required the Ministers to release the information.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 30(c) (Prejudice to effective conduct of public affairs).

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

## Background

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1. On 10 October 2008, Mr Waters wrote to the Ministers requesting the following information:  
*Please provide copies of all communications and files sent from and to COSLA, that were from or to:*
  - (a) *The First Minister*
  - (b) *The Cabinet Secretary for Finance*



(c) *Civil Servants and others within the departments of the finance and sustainable growth portfolio.*

*Timeframe: 4th May 2007 to today [10 October 2008].*

2. In response to his request for information, the Ministers wrote to Mr Waters, advising that if they were to proceed on the basis of the request (as outlined above) it would be rejected on the grounds of the excessive cost which would be incurred in responding. The Ministers therefore asked Mr Waters to consider focusing the request on something more specific. Mr Waters responded to the Ministers by confirming that;  
  
*“ . . . the request could be reduced to encompass only letters sent via post between the parties indicated in the request.”*
3. The Ministers responded on 11 November 2008, confirming that they held information falling within the scope of Mr Waters’ request and providing him with certain of the information requested. In withholding the remainder of the information, the Ministers cited section 30(b)(i) and (ii) of FOISA, stating that 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 deliberations.
4. On 12 November 2008, Mr Waters wrote to the Ministers requesting a review of their decision. In particular, Mr Waters drew the Minister’s attention to a previous decision of the Commissioner, stating that the burden was on the authority to determine that the damage likely to be caused rose to the level of substantial. Mr Waters did not believe that the harm in this case would be “substantial”.
5. The Ministers notified Mr Waters of the outcome of their review on 9 December 2008. In their response, the Ministers upheld their original stance without amendment.
6. On 9 December 2008, Mr Waters wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers’ review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Waters 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 that request.



## Investigation

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8. On 16 December 2008, the Ministers were notified in writing that an application had been received from Mr Waters and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested. In their response the Ministers stated that they maintained their application of section 30(b) of FOISA to some of the withheld information, but confirmed that they now wanted to cite section 25(1) in relation to the remaining information. The case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to clarify a number of points and justify their reliance on any provisions of FOISA they considered applicable to the information requested.
10. In responding to the Commissioner, the Ministers provided a schedule detailing the documents already disclosed to Mr Waters in response to his information request. They went on to confirm that with respect to the remaining information being withheld, made up of a covering letter and four attachments, they wished to apply section 25(1) of FOISA to the attachments and section 30(c) to the covering letter. The Ministers confirmed that they no longer wished to rely on section 30(b)(i) and (ii) of FOISA.
11. With respect to the information to which they applied section 25(1), the Ministers confirmed that their failure to notify Mr Waters that this information was already publicly available was an oversight on their part and that they would contact Mr Waters regarding this. The Ministers provided links to the four attachments on the Scottish Parliament website, confirming that these were taken from the Financial Memoranda of various Bills. During the course of the investigation the Ministers notified Mr Waters of these links. The investigating officer subsequently received confirmation from Mr Waters that this information had been provided to him.
12. On the basis that links to the attachments were subsequently released to Mr Waters, and noting that the earlier failure to release them does appear to have been an oversight, this investigation focuses only on the Ministers' decision to withhold the covering letter under section 30(c) of FOISA. The Ministers arguments to support their stance are discussed in the Commissioner's analysis and findings section below.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Waters and the Ministers and is satisfied that no matter of relevance has been overlooked.



### Section 30(c) – Prejudice to effective conduct of public affairs

14. In order for the Ministers to be able to rely on the exemption under section 30(c) of FOISA, the disclosure of the information withheld would have to "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption, and the Commissioner expects any public authority citing it to show what specific harm would be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
15. For section 30(c) to apply, the harm must be at the level of substantial prejudice. In the Commissioner's view, this means that it must be both real and significant, as opposed to hypothetical or marginal. For it to be likely, there would require to be a significant probability of the harm occurring.
16. The Ministers stated in their submissions that the letter from the Scottish Government to COSLA (i.e. the letter withheld) would not have been written in any expectation of publication, arguing that its disclosure would cause substantial prejudice not only to free and frank comment but also to relations between the Scottish Government and COSLA (and by extension Scottish Councils), a relationship it believed to be crucial to ensuring effective governance.
17. The Ministers added that the work to which the letter referred (consideration by the Scottish Parliament's Finance Committee of ways in which the Financial Memoranda of Bills could be improved) was ongoing. They contended that while the concerns of the Finance Committee in respect of Financial Memoranda were a matter of public record, in their view release of specific internal information relating to continuing assessment of the matter, part way through an incomplete process, would prejudice the process itself. As a consequence, they submitted, the effective outcome of the process, which depended on co-operation between the Scottish Government and local authorities, would be compromised.
18. The Commissioner's view is that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.
19. The Commissioner has carefully considered the content of the covering letter which has been withheld under section 30(c) of FOISA, and in particular a specific part of the letter to which Ministers have drawn his attention. He cannot accept that it is of such sensitivity that disclosure would have the effect described by the Ministers to him. Consequently, he does not accept that disclosure of this information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. Having reviewed the content, and noting that concerns relating to the quality of Financial Memoranda are already a matter of public record, he is unable to accept the relevance of the Ministers' arguments to the information in question.



20. In particular, the Commissioner is not persuaded that release of this particular letter would have the damaging effect suggested by the Ministers on the relationship between the Scottish Government and COSLA or local authorities. The Commissioner accepts that the letter relates to an important issue, and indeed that the maintenance of effective working relations between central and local government is crucial to the effective governance of Scotland, but he can only describe the content of the letter as innocuous, particularly in the context of a debate which is a matter of public record. Essentially, it is a request for factual information. The Commissioner cannot believe that relations between the different tiers of government are so finely balanced that disclosure of this information would have any appreciable effect on them (he also notes, incidentally, that the view expressed by the Ministers on the effect of disclosure appears to be theirs alone, there being no suggestion that COSLA's views on the matter have ever been canvassed). Therefore, the Commissioner finds that the information in the letter is not exempt in terms of section 30(c) of FOISA.
21. The exemption in section 30(c) of FOISA is subject to the public interest test contained in section 2(1)(b) of FOISA. However, as the Commissioner is satisfied that the exemption does not apply in this case he is not required to go on to consider the public interest.

## DECISION

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 of FOISA in responding to the information request made by Mr Waters. He found that the exemption in section 30(c) of FOISA did not apply to the information withheld from Mr Waters. Consequently, the Scottish Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Scottish Ministers to disclose the information withheld from Mr Waters by 22 June 2009.

## Appeal

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Should either Mr Waters or the Scottish 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 decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**8 May 2009**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

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

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.