

# Decision Notice



Decision 206/2011 Mr John W H McLean and the Scottish Public Services  
Ombudsman

Complaints handling process

Reference No: 201101152  
Decision Date: 11 October 2011

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**Kevin Dunion**  
Scottish Information Commissioner

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## Summary

Mr McLean requested from the Scottish Public Services Ombudsman (the SPSO) information relative to its complaints handling process. The SPSO responded by providing some information whilst withholding the remainder on the basis that it required a degree of privacy and breathing space to consider, redraft and review internal processes. Following a review, as a result of which some further information was provided, Mr McLean remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPSO had failed to deal with Mr McLean's request for information in accordance with Part 1 of FOISA, by incorrectly withholding information in terms of section 30(c) of FOISA. He was not satisfied that disclosure of this information would, or would be likely to, cause prejudice to the effective conduct of public affairs in the ways the SPSO had claimed. The Commissioner required the SPSO to provide the information to Mr McLean.

## 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); 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 4 January 2011, Mr McLean wrote to the SPSO requesting certain information relative to its complaints handling process. This was withheld section 30 of FOISA (Prejudice to the effective conduct of public affairs).
2. On 23 March 2011, Mr McLean again wrote to the SPSO with a new request for the following information:
  - i) The revised complaints handling process guidelines and procedures;



- ii) Input documents to review, “including MOM’s, internal & external correspondence from / to all parties”;
  - iii) Reports, seminars, notes etc;
  - iv) Any available information “that would be beneficial for the comprehension of the formal review process & results”.
3. The SPSO responded on 21 April 2011. Mr McLean was provided with the first four sections of the revised complaints handling process guidance and was informed that the final two sections should be finalised over the following few weeks. In relation to this remaining information, the SPSO referred to previous correspondence (i.e. in response to the 4 January request), which had explained that it required a certain degree of privacy and breathing space to consider, redraft and review internal processes. It would therefore not be releasing the documents which remained to be finalised, or the related internal communications.
  4. On 21 April 2011 Mr McLean wrote to the SPSO, stating he was dissatisfied with the response on the basis that there would not appear to be any constraint on the SPSO providing the final two sections of the document requested, in effect requesting a review of the SPSO’s response to part i) of his request.
  5. The SPSO wrote to Mr McLean on 26 April 2011, indicating that it was unable to provide the remainder of the guidance information for the reasons detailed in its email of 21 April 2011. The SPSO informed Mr McLean that he had the right to request a review of the decision or of the handling of his request, with details of how he could exercise this right.
  6. On 7 June 2011 Mr McLean wrote to the Commissioner, stating that he was dissatisfied with the way in which the SPSO had handled his request for information and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. As a result, the SPSO was contacted and agreed to deal with Mr McLean’s email of 21 April 2011 as a request for review and respond accordingly. Mr McLean then withdrew this initial application to the Commissioner.
  7. The SPSO notified Mr McLean of the outcome of its review on 17 June 2011. The SPSO informed Mr McLean that the final two section of the guidance had not been finalised and approved. While providing some further information on the process of developing the guidance, it adhered to its original decision to withhold the remaining two sections of the guidance, citing section 30(c) of FOISA in support of this.
  8. On 27 June 2011 Mr McLean wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SPSO’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
  9. The application was validated by establishing that Mr McLean 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. As Mr McLean’s request for review related to part i) of his request only, an application to the Commissioner could be accepted in respect of that part of the request only: Mr McLeod was advised of this.



## Investigation

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10. On 6 July 2011, the SPSO was notified in writing that an application had been received from Mr McLean and asked to provide the Commissioner with any information withheld from him. The SPSO responded with the information requested, indicating that the information was withheld under section 30(c) of FOISA. The case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the SPSO, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the SPSO was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
12. The SPSO responded to the effect that it was relying upon section 30(c) of FOISA to withhold the information requested. The relevant submissions obtained from both the SPSO and Mr McLean will be considered fully in the Commissioner's analysis and findings 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 McLean and the SPSO and is satisfied that no matter of relevance has been overlooked.

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

14. Section 30(c) of FOISA exempts information if its disclosure "would 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 (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
15. As the Commissioner has said in previous decisions, it is his view that the standard to be met in applying the tests contained in the section 30(c) exemption is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood that actual substantial prejudice will occur at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).



16. The SPSO stated that Scottish public authorities required a certain degree of privacy and breathing space to consider, write, redraft, and review internal processes before they were more widely circulated, both internally and externally. The SPSO contended that releasing internal guidance before it had been completed or signed off could result in future inhibition and limit its ability to produce and review its internal processes and guidance effectively. It also submitted that release of this type of internal information could prejudice its ability to offer an effective public service, or to meet its wider purpose, due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.
17. The SPSO made reference to a previous decision by the Commissioner, *Decision 105/2008 Mr Rob Edwards and the Scottish Ministers*<sup>1</sup>, which dealt with section 30(b)(i) and(ii) of FOISA and in which in relation to draft responses and draft minutes the Commissioner confirmed that there should be permitted some breathing space to consider, review and redraft such communications and that substantial future inhibition might be expected to result if such documents were released. It should however also be noted that at paragraph 41 of that decision the Commissioner stated that the information so withheld must be treated on a case-by-case basis: release of information in one case need not imply release in another case and that the nature and content of the information in question must be considered, rather than considering "advice" or "exchange of views" as categories of information.
18. The SPSO also made reference to *Decision 105/2007 Paul Hutcheon and the Scottish Executive*<sup>2</sup>, where the Commissioner accepted that release of information from minutes relating to a process which remained ongoing might well harm that process but that once a matter is concluded, it was harder to argue that disclosure could cause significant harm to the process. While noting that this conclusion was reached in relation to the application of the exemptions in section 30(b) of FOISA (rather than that in section 30(c)), the Commissioner acknowledges the potential relevance of the approach taken in that connection to the matters under consideration here.
19. In this case, however, it is not evident to the Commissioner (having considered the nature and content of the withheld information, together with the SPSO's submissions) why disclosure of the withheld information should cause substantial prejudice to the effective conduct of public affairs so as to bring it within the scope of the exemption in section 30(c) of FOISA. The arguments presented by the SPSO are generic in nature, rather than specific to the withheld information and the circumstances of the request, and in any event relate largely to inhibition to the review and drafting process. These are matters more appropriately dealt with by the exemption in section 30(b)(ii), provided its particular requirements can be met. (Whilst the SPSO provided submissions relative to section 30(b)(ii), those submissions related only to information which does not fall within the scope of part i) of Mr McLean's request and are not considered relevant to the information being withheld in response to part i) of his request. The SPSO has made it quite clear, however, that the information withheld from Mr McLean within the scope of part i) was withheld under section 30(c) of FOISA.)

<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200700579.asp>

<sup>2</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200501427.asp>



20. The SPSO's submissions also refer to prejudice to the SPSO's ability to offer an effective public service or meet its wider purpose, due to the disruption caused by disclosure and the diversion of its resources in managing the impact of that disclosure. The SPSO does, not, however, explain, how such disruption or diversion might manifest themselves, and this is by no means apparent to the Commissioner. Given simply an assertion that these would be consequences of disclosure, with no more detailed indication of their nature or magnitude, or of how they might be expected to come about, the Commissioner cannot accept them as either amounting to substantial prejudice (to the effective conduct of public affairs) or as likely to follow from disclosure.
21. The Commissioner does not accept, therefore, that the SPSO was correct to withhold the information under the exemption in section 30(c) of FOISA.
22. As the Commissioner is not satisfied that the information was correctly withheld under section 30(c) of FOISA, he is not required to go on to consider the application of the public interest test in section 2(1)(b). As no other exemption has been claimed to justify this information being withheld, he requires the SPSO to disclose the information (that is, the draft complaints handling process guidance, insofar as not already disclosed to him) to Mr McLean.

## DECISION

The Commissioner finds that the Scottish Public Services Ombudsman (the SPSO) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McLean, by incorrectly withholding information in terms of section 30(c) of FOISA.

The Commissioner therefore requires the SPSO to provide Mr McLean with the information withheld (see paragraph 22 above), by 25 November 2011.

## Appeal

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Should either Mr McLean or the Scottish Public Services Ombudsman 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**  
**11 October 2011**





## 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.

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- (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.