



Scottish Information
Commissioner

**Decision 079/2007 Kathleen Nutt and the Keeper of
the Records of Scotland**

File on Jock Stein and honours

**Applicant: Kathleen Nutt, The Sunday Times
Authority: Keeper of the Records of Scotland
Case No: 200601059
Decision Date: 23 May 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 079/2007 Kathleen Nutt and the Keeper of the Records of Scotland

File relating to Jock Stein and honours – request refused and refusal upheld on review – application to the Commissioner for a decision – authority’s decision not upheld

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2 (Effect of exemptions); 41(b) (Communications with Her Majesty etc. and honours); 57 (The expression “historical record”); 58 (Falling away of exemptions with time).

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

Facts

Ms Nutt requested a file relating to the late Jock Stein from the Keeper of the Records of Scotland (the Keeper). The Keeper responded by advising that the file was exempt from disclosure under section 41(b) of FOISA, as it related to the exercise by Her Majesty of Her prerogative of honour. Ms Nutt was not satisfied with this response and asked the Keeper to review his decision. The Keeper carried out a review and, as a result, notified Ms Nutt that the original decision had been upheld. Ms Nutt remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Keeper had failed to deal with Ms Nutt’s request for information in accordance with Part 1 of FOISA. He required the Keeper to release the information withheld to Ms Nutt.



Background

1. On 15 February 2006, Ms Nutt wrote to the Keeper requesting access to a particular file. She referred to it including information on the late Jock Stein and dating from 1967/70.
2. On 29 March 2006, the Keeper wrote to Ms Nutt in response to her request for information. He advised that the file had been exempted under section 41(b) of FOISA (Communications with Her Majesty etc. and honours; the exercise by Her Majesty of Her prerogative of honour) and as such would not be available for public consultation until 60 years from the last date on the file.
3. The same day, Ms Nutt wrote to the Keeper requesting a review of his decision.
4. On 16 May 2006, the Keeper wrote to notify Ms Nutt of the outcome of his review. This confirmed the original decision without amendment.
5. On 13 June 2006, Ms Nutt wrote to my Office, stating that she was dissatisfied with the outcome of the Keeper's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Nutt 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 that request. The application was then allocated to an investigating officer.
7. On 1 August 2006, the Keeper was notified in writing that an application had been received from Ms Nutt and was asked to provide my Office with its comments on the application (as required by section 49(3)(a) of FOISA) and specified items of information required for the purposes of the investigation. The Keeper responded with his comments and the information requested.
8. The investigating officer subsequently contacted the Keeper, asking him to respond to specific questions on the application.



The Investigation

9. The Keeper advised that he considered all of the papers in the relevant file to relate to the exercise by Her Majesty of Her prerogative of honour (and therefore to be exempt under section 41(b) of FOISA), with the exception of two documents, numbered 13 and 17. He had determined following the commencement of the investigation that these two documents were not in fact exempt under any provision of FOISA and therefore provided Ms Nutt with copies.
10. The Keeper explained why he considered the balance of the public interest to favour maintaining the exemption rather than disclosure of the information withheld, placing particular weight on the need to maintain the integrity of the honours system. I will consider these arguments in depth in my Analysis and Findings below.
11. The Keeper also argued that section 30(b)(i) and section 30(b)(ii) of FOISA applied to the information withheld, but later withdrew its reliance on these exemptions. In doing so, he accepted that (by virtue of sections 57 and 58(1) of FOISA) the exemptions could not be claimed more than 30 years after the last record in the file had been created.
12. Arguing that the balance of the public interest favoured disclosure, Ms Nutt stated that there was a public interest in knowing why Mr Stein, one of Britain's most successful football managers, never received as high an honour as comparable figures such as Sir Matt Busby, Sir Alex Ferguson or Sir Alf Ramsay. She referred to the age of the information withheld (at least 37 years) and pointed out that many of the individuals involved would no longer be living.

The Commissioner's Analysis and Findings

13. I accept the Keeper's view that the information withheld in this case (i.e. the contents of the file requested by Ms Nutt less the two documents released during my investigation) relates to the exercise by Her Majesty of Her prerogative of honour and therefore is exempt information under section 41(b) of FOISA. The key issue for me, therefore, is the application of the public interest test in terms of section 2(1)(b) of FOISA: in all the circumstances of this case, is the public interest in disclosing the information outweighed by the public interest in maintaining the exemption?



14. Given the class nature of the section 41(b) exemption, it will be in considering the public interest that it is appropriate to examine the content of the information withheld, including its relative sensitivity and the potential effects of disclosure.
15. The Keeper has argued that there may be a “public interest” in the issue to which the information relates, in that various groups of members of the public may be interested in the information. On the other hand, he argues that disclosure of the information would not be “in the public interest”, as no public concerns would be allayed or public benefit achieved by its release. Ms Nutt claims that it would be in the public interest to know why Mr Stein was not honoured in the same manner as other leading football managers.
16. I think the Keeper has understated the extent to which there is a public interest in disclosure of this information . There is a general public interest in information being accessible, to enhance scrutiny of the decision-making process and thereby improve accountability. The exemption in section 41(b) is subject to the public interest test and I can see no reason in principle why that general public interest should not apply to the decision-making process in relation to honours as it does to any other decision making by public servants. However, given the nature of this exemption, I think it is correct to identify specific reasons why this particular information should be revealed before the expiry of the 60 year period during which the exemption can be maintained.
17. The Keeper has suggested that whilst there may be public interest in the issue from sports or Celtic FC historians or ordinary fans interested in the details of Jock Stein’s life, it is not actually in the public interest to release this information as no public concerns would be allayed. I think it has to be recognised that football is an important part of Scottish popular culture and that the progress of Celtic FC under the management of Jock Stein was a significant episode in the history of Scottish football. In 1967 the team became the first from Britain to win the European Cup. The decision to honour Jock Stein with a CBE was generally seen not just as an honour for the man himself but in recognition of the club’s achievement. However, successful managers in England, for example, Sir Alf Ramsay and Sir Matt Busby, had been knighted immediately after their signal successes in 1966 and 1968. There was undoubtedly public debate as to why Stein’s recognition was somewhat belated and why he did not receive a similar honour in all the circumstances. Given the prominence of the sport, and the controversy which has ensued over this decision, I would accept that there is a public interest in the release of information that casts light on this question and therefore that there is a public interest in the release of the information withheld.



18. However, set against this has to be any consideration as to why it would not be in the public interest to release the information. The Keeper has argued that there is a public interest in maintaining the exemption by reason of the significant press coverage that would be attracted by disclosure of the information. While recognising the passage of time since the events covered and Mr Stein's death in 1985, he argues that it is necessary to consider the feelings of Mr Stein's family and those of the families of other people mentioned in the documents. He appears convinced that disclosure of the information would lead to negative and intrusive press coverage which would be distressing to family members, and indeed that the coverage could undermine the significant progress made in developing good relations between Scotland and England on football related matters.
19. I accept that there may be public interest arguments for withholding certain information given arguments of substance that its release would, or would be likely to, cause public disorder or significant alarm or distress to specified individuals or groups. In this case, however, the arguments presented to me under this heading appear to be merely speculative, although I have pressed the Keeper to be more specific about the risks and to substantiate them. Having considered the information withheld, I am not persuaded that it includes anything that would surprise, let alone distress or inflame any reasonable person, or indeed that it is likely that a distressing or inflammatory interpretation could reasonably be placed on it by the media. The possibility of the information being misinterpreted is not a reason for withholding it in the public interest.
20. In all the circumstances, therefore, I am unable to accept the Keeper's arguments in relation to the feelings of those referred to in the withheld information, or any apprehension of wider disorder.
21. The Keeper also refers to the strong public interest in ensuring that the integrity of the honours system remains intact. He suggests that disclosure would be very likely to lead to those providing information on candidates for honours in the future being less candid in their views regarding the merits and suitability of those individuals, making the selection process more difficult and drawn out, with the possibility that worthy candidates might not be nominated or that less worthy ones (at least in the public perception) might be. As a consequence, it is argued, public confidence in (and respect for) the honours system might be eroded. He argues that the processes for considering recommendations for honours have not changed markedly since the period covered by Ms Nutt's request and that the need remains (in the interests of fair and balanced conclusions) for civil servants to be able to express forthright views without reserve or fear of lobbying or subsequent repercussion. Prospective recipients might also be less willing to accept awards in the knowledge that views expressed during the consideration process might be made public.



22. Once again, I am sure some or all of these arguments will be relevant in appropriate cases, in relation to certain information. Undoubtedly, it is important that nominations for honours can be considered fairly on the basis of adequate information. Section 41(b) is not, however, an absolute exemption and the public interest must be considered on a case-by-case basis, taking full account of the content of the information the applicant is seeking. The age of the information will be one relevant consideration, and it is likely that there will be cases where the public interest will favour withholding for the whole of the 60-year period during which the exemption can be maintained. In this case the recipient is not alive; those involved in deliberating on the honour are almost certainly not involved now. The status of the individual being considered for an award will also be relevant: Mr Stein was a highly public figure in life and remains a figure of some historical interest now, but others under consideration will be more private individuals for whom the issues may well be different. In every case, the content of what is withheld will be of supreme importance.
23. As I have indicated earlier in this decision, I can find nothing in the information withheld which would be surprising to any reasonably informed person, at least in Scotland. Some views are expressed robustly in the course of deliberation, but I think it has to be borne in mind that they were so expressed over a period of 3 years which commenced approximately 40 years ago. To my mind, there is nothing in these views or in the way in which they are expressed which, considering the individuals and the matters under discussion as well as the time which has elapsed, could be expected to have a significant inhibiting effect on the expression of views on similar questions today. I accept that the process of deliberation in this area may not have changed substantially in the intervening 40 years (although I should be surprised if sporting figures were discussed in quite the same terms today as then), but undoubtedly public expectations in relation to transparency have. There may be compelling arguments for the deliberative process in relation to honours remaining private at the time and for some considerable time afterwards (as clearly the exemption envisages), but I think it is unrealistic and unnecessary for the full protection of section 41(b) for the whole period of 60 years to apply in each and every case. This particular information will be available in 20 years and I do not see what would change to the extent that the inhibiting effect would be any greater now than it would be then, given the age and nature of the material. I am not persuaded therefore that the integrity of the honours system demands the full 60 year protection in the case I am considering here.
24. In all the circumstances, therefore, having balanced the competing interests in disclosure and in the information being withheld, I am satisfied that the public interest in maintaining the exemption under section 41(b) is not sufficiently strong to outweigh that in disclosure. Consequently, I must conclude that the Keeper was not correct to exempt the information under that section.



Decision

I find that the Keeper of the Records of Scotland (the Keeper) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Ms Nutt. In exempting the information requested under section 41(b) of FOISA, the Keeper failed to comply with section 1(1) of FOISA.

I therefore require the Keeper to provide Ms Nutt with the information withheld within 45 days of receipt of this decision notice.

Appeal

Should either Ms Nutt or the Keeper 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 decision notice.

Kevin Dunion
Scottish Information Commissioner
23 May 2007



APPENDIX

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 –

- (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.

- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;
- (b) section 26;
- (c) section 36(2);
- (d) section 37; and
- (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.



41 Communications with Her Majesty etc. and honours

Information is exempt information if it relates to-

...

- (b) the exercise by Her Majesty of Her prerogative of honour.

57 The expression “historical record”

- (1) For the Purposes of this Part, a record becomes a “historical record” at the end of that period of thirty years which commences at the beginning of the calendar year following that in which the record is created.
- (2) Where records created at different dates are for administrative purposes kept together in one file or other assemblage, all the records in that file or assemblage are to be treated for the purposes of this Part as created when the latest of those records is created.

58 Falling away of exemptions with time

- (1) Information contained in a historical record cannot be exempt information by virtue of any of sections 28 to 31, 33(1), 36, 37, 40 and 41(a).
- (2) Information cannot be exempt information by virtue of-
 - (a) section 41(b) after the end of that period of sixty years; or

...

which commences at the beginning of the calendar year following that in which the record containing the information is created.