

# Decision Notice



Decision 152/2013 Mr Ross Sanderson and the Scottish Ministers

Information relating to a previous request

Reference No: 201300503  
Decision Date: 25 July 2013

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## Summary

On 10 December 2012, Mr Sanderson asked the Scottish Ministers (the Ministers) for information relating to their handling of his previous information request. The Ministers withheld the information under sections 30(c) and 35(1)(g) of FOISA.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold some information under section 30(c). She also found that some of the withheld information was not exempt from disclosure and required the Ministers to disclose it to Mr Sanderson.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemption); 30(c) (Prejudice to effective conduct of public affairs); 35(1)(g) and (2)(a) (Law enforcement)

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 December 2012, Mr Sanderson emailed the Ministers requesting the following information: *“all correspondence or documentation relating to my FOI request ... regarding Scottish Government correspondence with external organisations about the decision to release Abdelbaset Al-Megrahi”*.
2. The Ministers responded on 18 January 2013. The Ministers informed Mr Sanderson that they considered the information to be exempt from disclosure in terms of section 35(1)(g) of FOISA. This was on the basis that disclosure of the information might prejudice substantially the Scottish Information Commissioner’s ability to exercise her functions.
3. On 18 January 2013, Mr Sanderson emailed the Ministers requesting a review of their decision. Mr Sanderson disagreed that the information he was seeking was relevant to the exercise of a public authority’s functions within the meaning of the exemption.



4. The Ministers notified Mr Sanderson of the outcome of their review on 15 February 2013. The Ministers upheld their previous decision in relation to section 35(1)(g) of FOISA. Additionally, the Ministers informed Mr Sanderson that they also considered the information to be exempt from disclosure in terms of section 30(c) of FOISA.
5. On 15 February 2013, Mr Sanderson 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.
6. The application was validated by establishing that Mr Sanderson 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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7. On 20 February 2013, the Ministers were notified in writing that an application had been received from Mr Sanderson and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Sanderson and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### Section 35(1)(g) – law enforcement

10. Section 35(1)(g) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially the ability of a Scottish public authority (or of a public authority which is subject to the Freedom of Information Act 2000) to carry out its functions for any of the purposes mentioned in section 35(2) of FOISA.



11. The exemptions contained within section 35 are all qualified exemptions in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur, and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
12. In this case, the Ministers submitted that disclosure of the information would, or would be likely to, prejudice substantially the Commissioner's role in ascertaining whether a body has complied with its legal duties under FOISA (section 35(2)(a)). The Commissioner is a Scottish public authority for the purposes of FOISA.
13. The Commissioner must consider three fundamental points when considering whether the exemption in section 35(1)(g) applies:
  - (i) does the Commissioner have a function in relation to one or more of the purposes listed in section 35(2)?
  - (ii) if so, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, the Commissioner's ability to carry out one or more of these functions?
  - (iii) even if this is the case, is the public interest in maintaining the exemption outweighed by the public interest in disclosure of the information?
14. The Ministers argued that disclosure of the information would prejudice substantially the Commissioner's ability to exercise her function of investigating and making a fully informed decision on any appeal that Mr Sanderson may have wished to make against their decision on his previous request.
15. The Ministers submitted that, for the FOI appeal process to operate effectively, it was essential that any authority should be able to provide full and frank submissions to the Commissioner setting out the reasoning behind any decision it made on a FOI request. The Ministers submitted that this would help the Commissioner to conduct a high quality investigation of the appeal.
16. The Ministers noted that, at the time of his request on 10 December 2012, Mr Sanderson's previous FOI request was still a "live" case, their review response to the previous request having been issued on 8 December 2012. The Ministers argued that, if the details of their internal discussions about his previous request were to be released before the appeal process had been completed, or even started, it would substantially compromise their ability to explain their position to the Commissioner in the event of an appeal. They argued that this would in turn substantially prejudice the Commissioner's ability to exercise her function of investigating the appeal and making a fully informed decision.



17. In Mr Sanderson's view, correspondence relating to an individual FOI request was not relevant to the exercise of the Commissioner's functions for the purposes of section 35(1)(g). He noted that his request asked about how the Ministers had handled his earlier request, rather than for any further information about the content of the earlier request. Mr Sanderson indicated that he was interested mainly in whether the Ministers dealt with his request appropriately after failing to inform him about a delay, failing to respond to his requests for an update and apparently disclosing the information to journalists before providing it to him.
18. In this case, the Commissioner accepts that her responsibilities under FOISA (see, in particular, Part 4) constitute functions for the purposes of section 35(2)(a), i.e. to ascertain whether a person (in this case, a public authority which is subject to FOISA) has complied with the law (i.e. FOISA).
19. Having considered the withheld information, the Commissioner does not agree with the Ministers that the exercise of her functions under FOISA would be undermined or otherwise prejudiced simply by the disclosure of the information requested in this case. Disclosure would not inhibit her investigation in any way, nor would it prevent her from coming to a fact and evidence based decision about whether the authority had disclosed all of the relevant information and whether it had complied with statutory timescales. Therefore, the Commissioner is unable to accept that disclosure would, or would be likely to, prejudice substantially the exercise of her functions of the kind envisaged by section 35(1)(g).
20. As the Commissioner is not satisfied that the exemption in section 35(1)(g) is engaged, she has not gone on to consider the public interest test.

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

21. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs." "Otherwise" is used to differentiate this exemption from the other varieties of substantial prejudice – such as substantial inhibition to the free and frank provision of advice or exchange of views – covered in other parts of section 30. Section 30(c) is also a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
22. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. Paragraph 11 above sets out the Commissioner's view on substantial prejudice.
23. The Ministers applied this exemption to all of the withheld information. The Ministers' reasons for applying this exemption are the same as their reasons for applying section 35(1)(g). These submissions are summarised at paragraphs 14 to 16 above.
24. Mr Sanderson made generic submissions regarding both exemptions which are summarised at paragraph 17 above.



25. Having considered the withheld information, the Commissioner is not satisfied that the disclosure of the majority of the information requested by Mr Sanderson would cause the prejudice suggested by the Ministers. Much of the information concerns the administrative process of responding to the request. This includes email exchanges concerning updates and clarification of matters relating to progress in responding to the request. The majority of the information is innocuous, factual in nature, and contains nothing that constitutes discussion about how to respond to the request or the content of the response.
26. Consequently, the Commissioner does not consider the exemption is engaged in relation to documents 1 to 5 and in relation to the information attached to document 7 which had been published on the Scottish Government website. The Commissioner now requires the Ministers to disclose these documents to Mr Sanderson.
27. The Commissioner does, however, consider the exemption is engaged in relation to documents 6, 7 (excluding the information published on the Scottish Government website), 8, 9 and 10. The Commissioner considers these documents contain discussions on how to respond to the request, how to approach various aspects of the request, how to correspond with relevant third parties and how to deal with similar requests from other individuals.
28. In the Commissioner's view, the disclosure of such information could compromise the ability of the Ministers to make full and frank submissions to the Commissioner in the future. Consequently, this would, or would be likely to, prejudice substantially the effective conduct of public affairs by having a seriously detrimental effect on the Commissioner's ability to carry out a thorough, robust investigation, should an application on the previous request be submitted by Mr Sanderson.
29. Given that the Commissioner has upheld the application of the exemption in relation to these specific documents, she has gone on to consider the public interest test, as required by section 2(1)(b) of FOISA.

*The public interest test*

30. The Ministers submitted that there was a public interest in protecting the integrity of the appeal process by ensuring that the Scottish Government was able to make full and frank submissions to the Commissioner on any appeal Mr Sanderson may make. They considered such submissions would be compromised by the disclosure of their internal deliberations before the process of appealing to the Commissioner had been completed. Additionally, the Ministers saw no public interest in enabling an applicant to effectively circumvent the statutory appeal process and conduct their own investigation. In the Ministers' view, this was effectively what Mr Sanderson was trying to do.
31. In Mr Sanderson's view, there was no public interest in withholding information relating to the handling of an earlier request, particularly as the information sought previously had already been published. Mr Sanderson considered there was a public interest in knowing how the Scottish Government dealt with a request.



32. In considering the public interest test in relation to the relevant information, the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in decision making. The Commissioner considers this must be balanced against any detriment to the public interest as a consequence of disclosure. Exempt information can only be released under FOISA where the public interest in disclosure is not outweighed by the public interest in maintaining the relevant exemption (i.e. in withholding).
33. The Commissioner's view is that there is a public interest in ensuring high quality decision making and in ensuring the Commissioner is able to consider applications made to her and carry out investigations appropriately. In her view, this would be compromised by placing in the public domain matters such as discussions regarding the appropriate way in which to respond to requests, before she has conducted an investigation and issued a decision. In the Commissioner's view, there is a strong public interest in ensuring that her decisions are made on the basis of full and open submissions from public authorities.
34. Given that Mr Sanderson's current application was made whilst his previous application remained live, the Commissioner has concluded, in this instance, that the public interest in maintaining the integrity of the Commissioner's investigation process outweighs that in disclosure of the information.
35. The Commissioner therefore considers the Ministers were correct to withhold information from the following documents under section 30(c): 6, 7 (excluding the information published on the Scottish Government website), 8, 9 and 10.

## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sanderson.

The Commissioner finds that the Ministers were entitled to withhold some information under the exemption in section 30(c) of FOISA and by doing so, complied with Part 1 of FOISA.

The Commissioner also finds that the remainder of the information was not exempt from disclosure under section 30(c) and that none of the information was exempt under section 35(1)(g) of FOISA. By withholding this information, the Ministers breached Part 1 (and in particular section 1(1)) of FOISA.

The Commissioner therefore requires the Ministers to disclose to Mr Sanderson the information noted at paragraph 26 above by **Monday, 9 September 2013**.



## Appeal

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Should either Mr Sanderson 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 decision.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**25 July 2013**



## 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.



### 35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
  - ...
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - ...
- (2) The purposes are-
  - (a) to ascertain whether a person has failed to comply with the law;
  - ...