

[redacted]
FOI Unit
15 May 2018

Cabinet Secretary for Health and Sport

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002
INTERVENTION BY THE SCOTTISH INFORMATION COMMISSIONER INTO SCOTTISH
GOVERNMENT FOI PRACTICE
INFORMATION ABOUT INDIVIDUAL CASES

Introduction

1. As you are aware, as part of his interview with you, the Scottish Information Commissioner wishes to discuss two specific FOI cases.
2. This minute provides an assessment of the matters that the Commissioner may wish to discuss, based on the information contained in the case file and the FOI tracker.
3. For each case, your private office will provide copies of the advice that went to you on publication, the responses from your office, and the correspondence that was issued to the requester.
4. The Commissioner has not indicated to us the specific matters that he wishes to discuss. What follows is our assessment, based on the case file and the FOI tracker.

FOI/17/00947

Details of the case

Name of requester	[redacted], Herald and Times Group
Date of request	6 April 2017
Directorate	Communications, Ministerial Support and Facilities
Lead official	[redacted]
Stage concluded	Review (original decision overturned)

Timeline

<u>Date</u>	<u>Event</u>
6 April 2017	<i>Request received</i> Request for reports received by Paul Gray's office from the NHS Chief Executives' Group from 2013 to September 2016.
[date unknown]	Two documents were identified as being within scope and Paul Gray was content that they be released.
3 May 2017	Case handler sought advice from FOI Unit because the documents had previously been withheld in relation to other FOI requests. FOI Unit advised that there was no reason to withhold, and that the previously suggested exemptions "certainly wouldn't be applicable". Those exemptions related to the formulation of Scottish Government policy (section 29(1)(a)) and Ministerial communications (section 29(1)(b)).

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4 May 2017	Draft response sent to Ms Robison for clearance. It proposed to release both documents, noting Paul Gray was content.
8 May 2017	<i>20 day deadline for responding to the request</i>
18 May 2017	Requester sought an update.
22 May 2017	Paul Gray's office sought further views from officials on whether the documents should be released or not.
23 May 2017	Anne Aitken, Head of Strategic Change Division (Health Workforce and Strategic Change Directorate) responded in relation to the Board Governance paper, saying: [redacted]
25 May 2017	Ms Robison's private office responded to the submission of 4 May as follows: [redacted]
25 May 2017	Officials were asked for contributions to explain the application of the exemption in section 29(1)(a), in light of Ms Robison's views.
30 May 2017	Responses received from officials responsible for both documents within scope of the request.
31 May 2017	<i>Response sent to requester</i> Both documents withheld.
1 June 2017	<i>Review sought by requester</i> Requester contended that the balance had been struck wrongly in applying the public interest test. She also noted that the exemption had been applied in a blanket fashion, without explaining why it applied to each document.
7 June 2017	Reviewer appointed.
12 June 2017	Reviewer concluded that both documents should be released and sought advice from FOI Unit.
14 June 2017	FOI Unit responded, observing that the reviewer's conclusions were in line with its advice on the initial request.
16 June 2017	Reviewer sent draft submission recommending release to Ms Robison's private office.
21 June 2017	PS/Special advisers responded advising that Davie Hutchison had considered and remained "of the view that neither of the 2 documents should be released – they should be exempted under s.29.(1)(a)". He commented: [redacted]
21 June 2017	The FOI Unit advised that the Commissioner would not accept the application of the exemption in a blanket fashion, and that its view was that there were insufficient grounds to justify withholding the documents entirely.
21 June 2017	PS/Special advisers then proposed that information in the documents should be redacted instead.
29 June 2017	<i>Deadline for responding to review</i> <i>Review response issued to requester</i> Finance paper released with redactions. Board Governance paper released unredacted.

Potential matters for discussion

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- Cause of the delay in responding to the original request
- Thinking on the blanket application of the section 29(1)(a) exemption at request stage and in initial consideration of the review
- Reasons for the decision to withhold the documents, given the differences of view between those involved in handling the case

FOI/16/01545

Details of the case

Name of requester	[redacted], Daily Record
Date of request	12 October 2016
Directorate	Population Health
Lead official	[redacted]
Stage concluded	Review (original decision overturned)

5. The Minister involved in this case was Ms Campbell, but the topic is within Ms Robison's portfolio responsibilities.

Timeline

<u>Date</u>	<u>Event</u>
12 October 2016	<i>Request received</i> Request for details from between April 2015 and October 2016 of any meetings and correspondence between [redacted] Scottish Professional Football League and SG officials in relation to the issue of sectarianism and anti-social and offensive behaviour in Scottish professional football. Requester also sought agendas, minutes and email correspondence on the same topic.
9 November 2016	<i>20 day deadline for responding to the request</i>
9 November 2016	Case handler sent a draft response to special advisers for advice (the email erroneously says "clearance"). It proposed that the agenda of a meeting and four emails arranging a meeting between the SPFL and Ministers should be released, and that two briefings should be withheld on the basis of the section 29(1)(a) exemption (formulation of SG policy).
11 November 2016	Davie Hutchison telephoned case handler, explaining that he considered that much of this material was outwith the scope of the request and asking for it to be removed.
13 November 2016	Requester sought an update.
14 November 2016	Special advisers' private office passed on further comments on the draft response from Davie Hutchison to the case handler.
15 November 2016	Request sent to Ms Campbell for clearance.
16 November 2016	Ms Campbell confirmed that she was content.
16 November 2016	<i>Response sent to requester</i>
21 November 2016	<i>Review sought by requester</i> [Request for review not on file]

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15 and 19 December 2016	Reviewer sought advice from FOI Unit. FOI Unit gave advice that her conclusions would involve substituting a new decision for the original, and releasing additional information.
20 December 2016	<i>Deadline for responding to review</i>
20 December 2016	Draft review response sent to special advisers for comment. The reviewer and FOI Unit took the view that the material withheld should be released.
21 December 2016	PS/Special advisers advised that Davie Hutchison continued to wish to withhold the material proposed for release as being out of scope.
22 December 2016	FOI Unit set out its detailed reasoning in support of disclosure.
9 January 2017	FOI Unit sought an update from PS/Special advisers.
23 January 2017	FOI Unit met Davie Hutchison to discuss the case.
24 January 2017	FOI Unit updated reviewer on outcome of discussion with Davie Hutchison, commenting: “ [redacted] So he has agreed that the information in pages 1 to 8 of your scanned documents should be released, subject to the redaction of “Elections and potential new Ministers – opportunities and challenges” and “Measuring football performance/ success/ outcomes” from the 18 April 2016 agenda (on page 7). You’ll need to apply the section 30(c) exemption to cover this – I’ve added appropriate wording to your draft review response.”
24 January 2017	Reviewer revised draft response and sent it to Ms Campbell for clearance.
31 January 2017	Ms Campbell sought clarification on whether release would set a precedent and asked whether the letter was unnecessarily apologetic.
1 February 2017	FOI Unit confirmed that no FOI response set a precedent for future cases and reworded the letter so far as it mentioned an incorrectly-applied exemption.
3 February 2017	Ms Campbell clarified that she thought the paragraph about application of the public interest test, which she thought too detailed.
6 February 2017	FOI Unit advised that the paragraph in question was the minimum required to fulfil the legal requirement to apply the public interest test, and so could not be removed.
13 February 2017	<i>Review response issued to requester</i>

Potential matters for discussion

- Reasons behind the differences of view about the scope of the request and what should be released
- The time taken for decisions to be reached at review stage

Conclusion

6. You are invited to note the information in this minute.

[redacted]
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[redacted]

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Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Minister for Public Health and Sport					X

Paul Gray
 Barbara Allison
 Andrew Scott
 David Rogers
 Ian Davidson
[redacted]
[redacted]
 Liz Lloyd
 Stuart Nicolson
 Davie Hutchison
 John Somers
[redacted]
[redacted]