

## FOISA Exemptions and its Implications for Public Authorities

*Fiona Killen discusses the approach taken by the Scottish Information Commissioner to the application of the FOISA exemptions relating to policy advice and discussion and the effective conduct of public affairs and its implications in terms of cultural change within Scottish public authorities.*

The Freedom of Information (Scotland) Act 2002 (“the Act”) has now been fully in force for just over 2 years. In 2006, we saw the ‘bedding down’ of the Act, with the issue of 236 decision notices by the Scottish Information Commissioner in respect of appeals to the Commissioner by applicants refused information by public authorities, compared to only 90 decision notices issued in 2005. Towards the end of 2006, judgements were also issued in respect of some of the decisions of the Commissioner appealed to the Court of Session.

Overall, freedom of information appears to have successfully entered the public consciousness. The latest report of the Commissioner, following a public awareness survey, shows that over three quarters of respondents are aware of their rights under the Act. Of those who reported having made requests under the Act, 76% had received some or all of the information requested and 68% agreed that, as a result of the Act, more public authority information was now available. However, the survey also found that people remain to be convinced that the culture within public authorities is changing to become more open and accountable.

Of the more frequently used exemptions in the Act, the exemptions to disclosure contained in section 30, relating to policy discussion and advice, are perhaps one of the best indicators of the extent of cultural change within public authorities.

The section 30 exemptions have required the Commissioner to issue some detailed judgements in relation to scope, particularly in respect of appeals against the Scottish Executive’s refusal to disclose information.

Section 30 of the Act specifically provides that information held by Scottish public authorities is exempt if its disclosure would or would be likely to inhibit substantially the free and frank provision of advice (s30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (s30(b)(ii)). It also provides an exemption where disclosure of information would prejudice substantially the maintenance of collective cabinet responsibility (s30(a)) or the effective conduct of public affairs (s30(c)).

A further exemption covering information relating to policy formulation or development is contained in section 29(1)(a) of the Act. However, this exemption is only available in respect of information held by the Scottish Administration and so, although frequently cited by the Scottish Executive in response to requests, is not able to be applied by authorities not forming part of the Scottish Administration.

None of the exemptions in sections 29 and 30 of the Act are absolute exemptions, so the authority citing the exemptions still has to consider the public interest in disclosure balanced against the public interest in maintaining the exemption. Where such considerations are evenly balanced, the presumption is to be in favour of disclosure.

A key case brought before the Commissioner involving the application of the policy and advice exemptions is case of *William Alexander and the Scottish Executive* (Decision

057/20005). Mr Alexander had applied to the Scottish Executive for information regarding the commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The Scottish Executive refused to provide some of the information requested, citing a number of exemptions, including those in section 29 and 30. Mr Alexander appealed the Scottish Executive's decision to the Commissioner. The Commissioner accepted that some of the information withheld by the Scottish Executive did fall within the exemptions within sections 29 and 30, as claimed by the Executive. However, he also found that exemptions, particularly those within section 30, had been incorrectly applied in respect of a number of pieces of information.

He stated that, where Ministers' names were mentioned in documents but no details of their views and opinions were given, the disclosure of such information did not constitute a threat to collective cabinet responsibility and so the exemption in section 30(a) did not apply. Where the Executive had claimed the very broad exemption in s 30(c), i.e. that disclosure of certain information would prejudice the effective conduct of public affairs, the Executive had not provided sufficient reasons to support its use of that exemption in relation to a number of documents. After his own inquiry, the Commissioner found that, although some documents were covered by the exemption, a proportion of these should be disclosed on the basis of the public interest. Other documents were not covered at all.

Crucially, the Commissioner held that the Executive's application of the exemptions in section 30(b)(i) and (ii) had been incorrect due to the adoption of a 'class-based approach'. The Executive had withheld information by virtue of the information falling within the 'class' or 'category' of 'advice and opinion', rather than looking at the actual content of each specific piece of information and considering whether disclosure would have the substantially inhibiting effect cited in the exemption. The Commissioner's decision notice distinguished between 'class' and 'content' exemptions and stated that, in respect of section 30(b) exemptions, authorities must consider the subject matter of the advice or opinion, the content, the manner in which it was expressed and whether the timing of release would have a bearing on the level of any inhibition.

The Scottish Executive did not accept the decision of the Commissioner and appealed to the Court of Session (*The Scottish Ministers v The Scottish Information Commissioner (William Alexander's Application)*). The Scottish Ministers accepted that the Executive's initial application of section 30 had been too broadly expressed in stating that disclosure of "any advice or opinion is likely to constrain officials and other stakeholders from providing candid advice in the future". However, they also argued that the Commissioner had failed to recognise the possibility of the section 30 exemptions identifying exempt information by reference to particular classes or groups of documents, without regard to their particular content. It was argued that, whilst section 30 did not, per se, provide a class exemption, its application in some circumstances might involve identification of documents by class. It was claimed that the Commissioner had erred in law in concluding that engagement of section 30 exemptions must necessarily involve a document-by-document analysis and by excluding the possibility of a narrower class of information.

In response, the Commissioner stated that section 30 does not provide class exemptions, expressly or by implication. Whilst each case should be judged on its merits, the 'private space' claimed necessary by the Scottish Executive was not afforded the comfort of a class exemption. The approach adopted by the Executive had been distracting and confusing. The Commissioner considered that, given the professional integrity of officials, there was no justification for the suggestion that they would fail to record advice to Ministers as a result of the possibility of disclosure. The Ministers' arguments were

described as having a ‘theoretical air’, going to the merits of the Commissioner’s decision rather than its legal basis. Whilst recognising that apparently innocuous documents in isolation could be viewed differently in context, authorities still needed to examine particular content before reaching a view on disclosure.

On 23 January 2007, the Court of Session issued its Opinion, finding in favour of the Commissioner. The Court held that the Commissioner had rightly rejected the Scottish Ministers’ arguments as too broad and was unable to find any error of law in the Commissioner’s approach. It held that the use of an *a priori* classification in relation to the section 30 exemptions would inhibit rather than advance the requisite exercise for applying the exemptions in this section. Each document should be assessed in the manner proposed by the Commissioner in order to establish whether disclosure would have an inhibiting effect.

The Court reiterated these points in its Opinion in the case of *The Scottish Ministers v The Scottish Information Commissioner (David Elstone and Martin Williams’s Applications)*, concerning information withheld about a decision not to call in a planning application.

Overall, the exemptions within section 30 of the Act are perhaps some of the least clear-cut in terms of their scope. Section 30 is the only section in Part 2 of the Act in respect of which the Commissioner has not issued a Briefing Note. It does not contain the established legal tests contained in some other sections and, by its nature, is likely be applied subjectively by authorities as they make their own assessment of the extent to which their operations may be harmed by disclosure, or the level of inhibition their own personnel may experience. Recent cases suggest that some authorities are adopting an interpretation of the section 30 exemptions more closely corresponding to that of the Commissioner. However, a significant number of other cases decided recently by the Commissioner indicate that many authorities are still applying the section 30 exemptions too widely.

The interpretation of the policy and advice exemptions adopted by the Commissioner, in addition to upholding the rights of applicants, is a strong vehicle for cultural change within public authorities. Different points of view will no doubt emerge on the application of the section 30 exemptions as more cases come before the Commissioner and the courts, and arguments will be made about how disclosure might impact upon discussions and advice within authorities. The arguments put forward in these cases will continue to be one of the clearest indicators of the cultural change sought within Scottish public authorities by the introduction of freedom of information legislation. They will therefore be very interesting ones to watch.

*For further information please contact Fiona Killen on:  
fiona.killen@andersonstrathern.co.uk*