

Data Protection, FOI and
Correspondence Branch
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Our Ref: FOI2014156

3 October 2014

Mr Jonathan Baines
Via email to:

Dear Mr Baines

Freedom of Information (Scotland) Act 2002

I refer to your email dated 4 September in which you made the following request for review (Ref: FOI2014156) under the Freedom of Information (Scotland) Act 2002 ("FOISA"), following a letter of response from Susan Whiteford, Head of Corporate Communications, on 4 September 2014:

"I am writing to request an internal review of Scottish Court Service's handling of my FOI request 'Data Protection concerns leading to Notice to Media'.

I note that you claim three exemptions to disclosure of the information. Each of those is a qualified exemption under FOI(S)A but the public interest test you have undertaken in each case is, to put it at its most charitable, cursory. You describe the policy paper as being concerned with the Scottish Court Service's interactions with the media. I can hardly think of any subject which is more in the public interest than the openness of justice and media access to court information. Given this, surely your analysis of whether the information is to be disclosed should consider these factors?"

I have reviewed this case in detail. In doing so I have confirmed Ms Whiteford's assessment that the only document held by the Scottish Court Service that came within the terms of your request was a policy paper from 2013. This policy paper ran through a number of options in relation to how best to balance media access to court information with the need to protect the integrity of proceedings.

Ms Whiteford applied three exemptions in withholding this paper. I regret to inform you that I agree with her assessment for the following reasons:

Formulation of Scottish Administration Policy / Free and Frank Exchange of Advice

The exemption applied under section 29(1)(a) of FOISA seeks to ensure that Scottish Administration policy can be formulated and developed effectively. The paper in question provided a range of options to the SCS Executive Team and directly concerned the consideration and development of options in relation to access by the media to critical case information. The paper discussed options, risks and possible recommendations.

In applying the public interest test, I have considered the public interest in relation to accountability in Government decision making and the importance of effective media access to the courts to ensure accurate contemporaneous case reporting. I have also considered the importance of providing senior decision makers in an organisation scope to assess policy options with candour and frankness. In doing this I considered whether any of the more factual material contained in the report could be extracted and released at this time, but have concluded that it would be premature to do so whilst policy development remains ongoing.

I concur with the initial decision that the public interest in allowing full and frank consideration of options outweighs the public interest in disclosure. For this reason, I also consider that the section 30(b)(i) exemption in relation to the **free and frank provision of advice** was also correctly applied. Release of this information – in particular whilst policy development is ongoing - would be likely to inhibit substantially the free and frank provision of advice by officials in any future analogous situation. As such, and as indicated in the initial reply, the need to ensure rigorous and informed policy development has been held to outweigh the public interest in disclosure.

Legal Advice

The exemptions cited above apply to the policy paper in its entirety. The third exemption – under section 36(1) of FOISA (“information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings”) – applies to certain sections of the document that contain legal advice. I concur with Ms Whiteford’s assessment that this material must be withheld in the interests of protecting legal professional privilege and that the public interest in maintaining the confidentiality of communications between legal advisor and client in this case is such as to prevent release.

I am sorry not to be of greater assistance. If you still feel dissatisfied, you have the right to lodge a complaint with the Scottish Information Commissioner at the following address:-

Office of the Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St. Andrews
FIFE
KY16 9DS

Yours sincerely

Iain Hockenhull

Head of Correspondence

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