Opinion of the Court delivered by The Lord President

The Scottish Ministers
v
The Scottish Information Commissioner
(William Alexander's Application)

and

The Scottish Ministers
v
The Scottish Information Commissioner
(David Elstone and Martin Willams's Applications)

SUMMARY

23 January 2007

The First Division of the Court of Session has refused appeals by the Scottish Ministers against decisions made by the Scottish Information Commissioner in respect of applications made to him by (1) Mr. William Alexander and (2) Mr. David Elstone and Mr. Martin Williams.

Mr. Alexander had requested the Scottish Ministers to give him information in relation to advice given to Ministers and in relation to other matters pertinent to why sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 had not been brought into force. These sections made provision by which any professional or other body might, subject to certain statutory arrangements, enable its members to acquire rights to conduct litigation on behalf of members of the public and rights of audience in the courts. The Scottish Ministers, with the exception of certain documents which they released, refused that request. Mr. Alexander applied to the Commissioner who accepted as justified some of the objections taken by the Scottish Ministers to the release of information but ordered the release of certain other information held by them. In the appeal against the Commissioner's decision the Scottish Ministers argued that the Commissioner had failed to recognise that in some cases it might be possible, where the exemption in question was based on the prejudicial effect of releasing information, to identify exempt information by reference to classes or groups of documents - without necessarily having regard to their particular content. The court rejected that argument, concluding that in relation to such an exemption it was necessary to proceed by examination of the content of individual documents. A number of other criticisms made by the Scottish Ministers to release of information were also rejected by the court.

Mr. Elstone and Mr. Williams had each requested the Scottish Ministers to give them paperwork/correspondence surrounding the decision of the Scottish Ministers not themselves to decide an application made to North Ayrshire Council for planning consent for a waste disposal and ecological conservation site are at Trearne Quarry, Gateside. Their requests were refused. They each applied to the Commissioner who decided that in some instances the Scottish Ministers had insufficient grounds for withholding the information in question. He ordered the release of that information. In appealing against his decision the Scottish Ministers again argued that the Commissioner had failed to recognise the possibility of identifying exempt information by reference to classes or groups of documents. They also advanced certain other arguments. Again the court upheld the Commissioner's decision.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full report of the Court is the only authoritative document.

The full opinion will be available on the Scottish Courts website today at this location: *http://www.scotcourts.gov.uk/opinions/2007CSOH8.html*

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lord Nimmo Smith
Sir David Edward

[2006] CSIH 8
XA2/06 and XA6/06

OPINION OF THE COURT

delivered by THE LORD PRESIDENT

in

APPEALS

by

(1) THE SCOTTISH MINISTERS
Appellants;

against

THE SCOTTISH INFORMATION COMMISSIONER
(**William Alexander's Application**)
Respondent;

and

(2) THE SCOTTISH MINISTERS
Appellants;

against

THE SCOTTISH INFORMATION COMMISSIONER
(**David Elstone and Martin Williams's Applications**)
Respondent:

_____

Act: Keen, Q.C., McBrearty; Office of the Solicitor to the Scottish Executive
Alt: Cullen Q.C., M. Ross; Brodies, LLP

23 January 2007

Mr. Alexander's application - Background

[1] On 1 November 1990 the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 received the Royal Assent. By section 75(2) it was provided that its provisions should come into force on such days as the Secretary of State (now the Scottish Ministers) might appoint. Sections 25 to 29 inclusive made provision under which any professional or other body might, subject to certain statutory arrangements, enable any of its members who was a natural person to acquire rights to conduct litigation on behalf of members of the public and rights of audience in the courts. Sections 25 to 29 have not been brought into force.

[2] Mr. William Alexander has an interest in these provisions. On 5 January 2005 he wrote to the Minister for Justice asking to be provided with any information which the Scottish Ministers held regarding the coming into force of sections 25 to 29. The information requested comprised:

(a) information including, but not restricted to, details of any advice given to Ministers and notes of meetings;

(b) this information to include the source of the suggestion that the commencement of sections 25 to 29 will be a burden on the courts; whether this view was taken regarding all the courts in Scotland and, if not, which courts;

(c) information about a meeting or meetings with the Lord President, intimated by officials in January 1997;

(d) information about a request made by Ross Finnie, MSP on 10 January 2003 to the Justice Minister Jim Wallace, asking for clarification on why a commencement order for sections 25 to 29 of the Miscellaneous Provisions Act had not been brought in by the Executive.

[3] The Scottish Ministers responded by letter dated 7 February 2005 advising Mr. Alexander that the information relating to points (a) and (b) was exempt from disclosure under section 29(1)(a) and (b) of the Freedom of Information (Scotland) Act 2002 ("the 2002 Act"), that information relating to point (c) was not held by the Scottish Ministers and that, subject to certain information already provided to Mr. Alexander, information relating to point (d) was exempt under section 29(1)(b).

[4] Mr. Alexander asked the Scottish Ministers to review their decision. They did so and by letter dated 10 March 2005 maintained their response to points (c) and (d) of the request but, in relation to points (a) and (b), identified 32 documents which were covered by exemptions but which, they concluded, it would be in the public interest to release, in whole or in part, and 6 documents to which no exemption applied and which should therefore be released. In relation to other information held by them and relevant to the request they maintained their position that such information should not be released. In that regard they relied upon a wider range of exemptions than had been relied on earlier.

[5] On 11 March 2005 Mr. Alexander applied to the respondent for a decision as to whether the request for information from the Scottish Ministers had been dealt with by them in accordance with Part 1 of the 2002 Act. Thereafter the respondent carried out his own inquiry, which included an examination of a substantial number of documents which the Scottish Ministers had withheld from Mr. Alexander and an analysis of these documents against the exemptions relied on. On 24 November 2005 the respondent issued his decision on Mr. Alexander's application to him. By that decision he held that certain information held by the Scottish Ministers was such as had justifiably been withheld from disclosure to Mr. Alexander; certain other information he ordered to be released. In that respect he required the Scottish

Ministers to provide Mr. Alexander with the documents, in whole or in part, specified in an appendix annexed to his decision. Against that decision the Scottish Ministers have appealed to this court under section 56 of the Act.

The exemptions discussed in the appeal

[6] The exemptions relied on by the Scottish Ministers and discussed in the course of the appeal were those provided for by sections 25(1), 36(1), 28(1), 29(1)(a), 30(b) and 30(c) (arranged in the order in which they are dealt with in the respondent's decision). None of these confers an absolute exemption. Accordingly, the obligation to disclose 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" (section 2(1)). The specified sections are in the following terms:

> "25(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information".
>
> "36(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information".
>
> "28(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration."
>
> [Section 28(2) defines 'administration in the United Kingdom' as including 'the Government of the United Kingdom' and 'the Scottish Administration'].
>
> "29(1) Information held by the Scottish Administration is exempt information if it relates to -
>
> (a) the formulation or development of government policy;

... ".

"30 Information is exempt information if its disclosure under this Act -

...

(b) would, or would be likely to, inhibit substantially -

(i) the free and frank provision of advice; or

(ii) the free and frank exchange of views for the purposes of deliberation; or

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs".

The respondent's approach to the public interest in disclosure

[7] In circumstances where the respondent reached the view that a non-absolute exemption applied, he required to consider the public interest in disclosing the information. He expressed his views on that public interest at paragraphs 78-87 of his decision as follows:

"**Public interest in access to the information requested**

78. I consider the public interest in the information withheld to be mainly focused on the following areas:

a) the reasons for the postponement of legislative measures passed by a democratically elected parliament some 15 years ago.

b) the general debate around the issue of competition in the legal services market.

The delay in commencing sections 25 to 29

79. It is not uncommon for sections of an Act of Parliament to have

commencement delayed in this way (at the time of writing, 39 Acts passed between 1990 and 1995 have sections which have never been brought into force). However, it seems to me to be reasonable for citizens to question why legislation has still not been commenced after 15 years. A democratic society is entitled to expect that legislation passed by its elected representatives in Parliament will be brought into force unless there are good reasons for not doing so, and citizens are entitled to know those reasons unless there is a greater public interest in keeping them secret.

80. Mr Alexander has pointed out that the equivalent legislation came into force in England and Wales 15 years ago under the Court[s] and Legal Services Act 1990, and that plans for increasing competition still further are currently being considered there. He believes that he should be able to challenge the reasons for the delay in Scotland, but cannot do so until he is given access to the facts behind the decision to delay commencement.

81. Documents already released show that, at several points during the last 15 years, Ministers or officials agreed that sections 25 to 29 of the Miscellaneous Provisions Act should be brought into effect, and even proposed dates by which work on implementation should start,. This strengthens the public interest in gaining access to information which would fully explain why such agreements were overturned or set aside.

82. Mr Alexander is not the only person to have asked why these measures have never been commenced. MSPs on the Scottish Parliament's public petitions committee asked the same question when considering a

petition brought by Mr Alexander, and in 2002 the Scottish Consumer Council asked why the present policy view has been taken, expressing surprise that the provisions have never been brought into force.

83. The Executive has stated that it has already advised Mr Alexander of the Executive's reasons for not yet commencing this legislation and that release of the documents considered in this case would add little to the information in the public domain. However, it is clear to me after studying the documents in this case that the reasons for non-commencement have changed over time, and are more complex and varied than the reasons presented to Mr Alexander.

Competition in the legal services market

84. It could be argued that the implementation of sections 25 to 29 of the Miscellaneous Provisions Act has not so far been a matter of widespread national concern in Scotland. However, the issue of opening up competition in the provision of legal services has been increasingly attracting attention (including a draft directive from the European Commission in February 2004) and approaches have been made to the Executive from a range of bodies including the Scottish Consumer Council, the Chartered Institute of Patent Agents and the Office of Fair Trading.

85. The Westminster Parliament has recently announced proposals for reform of the legal profession in England and Wales, following the report received from Sir David Clementi in 2004. The government proposes to allow outside firms to own and run law firms in England and Wales - the so-called 'Tesco law'. Following the government's

announcement, several media reports highlighted the disparity between the legal services market for consumers in England and Wales and those in Scotland.

86. Mr Alexander has argued that proper debate on the issue will not take place without general access to all the relevant information. He believes that commencing sections 25 to 29 would go some way towards obtaining affordable justice for people who have no means of paying high legal fees and who are not successful in obtaining legal aid. Mr Alexander has pointed out the differences between England and Scotland in this respect.

Public Interest - Conclusion

87. I believe that the issues considered above demonstrate a strong public interest in the release of information that would explain why sections 25 to 29 of the Miscellaneous Provisions Act have never been commenced. The exemptions applied to such information must be considered in the context of the public interest in releasing the information."

No challenge was made to the reasoning in these paragraphs.

The respondent's reasoning in relation to the exemptions in sections 30(b) and (c)

[8] The main focus in the excellent debate with which we were favoured was upon the respondent's treatment of the exemptions provided for in section 30(b) and (c). In that regard the respondent stated:

"**Sections 30(b)(i) and (ii) - inhibit substantially provision of advice or exchange of views**

66. Sections 30(b)(i) and (ii) allow information to be withheld if it would, or would be likely to, inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

67. In applying these exemptions the main consideration is not whether the information constitutes advice or opinion, but whether the release of the information would inhibit substantially the provision of advice or the exchange of views. The Executive's guidance to its staff on the application of section 30(b) points out that the word 'inhibit' suggests a suppressive effect, so that communication in future would be less likely, or would be more reticent or less inclusive.

68. The Executive has argued that disclosure of any advice or opinion is likely to constrain officials and other stakeholders from providing candid advice in future, which will substantially prejudice the conduct of public affairs by jeopardising the effectiveness of government. The Executive appears to have treated the exemptions in section 30(b)(i) and (ii) as class exemptions, rather than assessing whether the release of the particular advice or opinion contained within each document would be capable of having an inhibiting effect. I do not accept that the release of any statement of advice or opinion in one case necessarily implies that such information would be released in other cases. Each case brought to me for decision is assessed on the facts and circumstances surrounding that particular case. My views on the use of this exemption are discussed more fully in my decision 041/2005.

69 As the Executive has not provided me with specific reasons why each

document withheld under these exemptions would substantially inhibit the provision of advice or opinion in future, I have made my own assessment of the effects of releasing the information, based on the apparent sensitivity of the information and its relationship to the public interest issues identified in paragraphs 78 -87. I have found that the exemptions in 30(b)(i) and 30(b)(ii) have been misapplied to the following documents:

[A list of documents is then given]

70. In the following cases, I have found that the exemptions in sections 30(b)(i) and (ii) were correctly applied, but the public interest issues identified in paragraphs 78 - 87 below outweigh the exemption.

[A list of documents is then given]

In several instances other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.

71. In the following case, I have concluded that the exemption in section 30(b)(i) should be upheld and part of the information withheld:

[A part document is then specified]

72. I have also decided that certain information should be withheld under section 30(b), even although the Executive has not cited this exemption in relation to the documents concerned. I consider that all or part of information in the documents cited below would, if released, be likely to inhibit substantially the free and frank provision of advice or free and frank discussion. Full details are in the schedule of documents at Appendix 1.

[Two documents are then specified]

Section 30(c) - Prejudice to effective conduct of public affairs

73. Section 30(c) allows public authorities to withhold information that would 'otherwise prejudice substantially the effective conduct of public affairs'. This is a broad exemption, and I expect any public authority citing it to show what specific harm would be caused to the conduct of public affairs by the release of the information.

74. As with sections 30(b)(i) and (ii), I do not consider that the Executive has provided me with sufficient justification for the use of the exemption in 30(c) where it has been applied to documents in this case. I have therefore made my own assessment of the likely effects of releasing the information concerned, based on the nature of the information and its relevance to the public interest issues identified in paragraphs 78 -87.

75. On this basis I have decided that some of the information in the following documents should be withheld under this exemption:

[A list of documents and part-documents is then given]

76. I have decided that the public interest (as discussed in paragraphs 78 - 87 below) in the following documents is sufficiently strong to justify their release even though the exemption in section 30(c) has been correctly applied:

[A list of documents and part-documents is then given]

Other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice.

77. I consider that the exemption in section 30(c) has been misapplied to

the following documents:

[A list of documents is then given]

Other exemptions have been applied to these documents: these exemptions are considered elsewhere in this decision notice."

Submissions for the appellants in respect of the application of section 30

[9] Counsel for the Scottish Ministers acknowledged that the argument advanced to the respondent on behalf of the Executive had been too widely expressed in the proposition that

" ... disclosure of any advice or opinion is likely to constrain officials and other stakeholders from providing candid advice in future, which will substantially prejudice the conduct of public affairs by jeopardising the effectiveness of Government" (paragraph 68).

However, the respondent, it was submitted, had (in the reasoning which followed) excluded the possibility of there ever being a narrower class or type of information which, viewed as a class or type independently of the particular content of individual documents, qualified for exemption under section 30. He had erred in law in concluding that the engagement of these exemptions must necessarily involve a document by document assessment. While the general objective of the statute was to allow greater access to information, including advice given and views expressed, it was clearly necessary that Ministers (or other public persons) and their advisers should have a measure of "private space"; otherwise there were risks that disclosure would be made before views had properly matured and that the public record would be incomplete due to an increased tendency not to record advice given. Section 29 conferred an express (non-absolute) exemption in relation to categories of

information. Section 30(b) and (c) provided for further exemptions where the disclosure of the information would have, or would be likely to have, certain effects, namely, substantial inhibition or likely substantial inhibition of the free and frank provision of information or the free and frank exchange of views for the purposes of deliberation and substantial prejudice or likely prejudice otherwise to the conduct of public affairs. It was not necessarily the content of individual documents which would have such effects; a class of documents, irrespective of individual content, might equally engage this exemption. Section 18(1) (which provided that an authority might in certain circumstances give a notice which did not disclose whether the information requested existed or was held) might apply to such a class of information. Classes of information applicable to section 30 might include such as disclosed that a particular proposal (say, the building of a nuclear power station) was being discussed by Ministers or officials or that advice was being given by officials to Ministers about such a proposal, quite apart from the content of any advice given. So, while section 30 did not *per se* provide for a class exemption, its application might in some circumstances involve the identification of documents by class. The respondent's error of law lay in his failure to recognise that possibility. Section 30 was in terms concerned with the effect of disclosure. That effect might result from a document being within a class, the disclosure of which would or might have the adverse effect - quite irrespective of the content of particular documents. The fact that a class of document might be engaged by section 30 did not mean that they would not be disclosed; it meant only that they would qualify for the weighing exercise under section 2. In his decision 041/2005 (*Luyken* v *The Scottish Executive*, 25 October 2005) the respondent had, particularly at paragraph 15, made a similar error by listing, in bullet points, elements which turned upon individual content without having due

regard to class effect. Moreover, in dealing with these exemptions the respondent had failed to maintain a clear distinction between the engagement of the relevant exemption and the application of the public interest test in section 2. He had further erred in adopting (in relation to section 30(b)) "apparent sensitivity" as the sole test and, in relation to section 30(c), a "nature of the information" test, rather than the statutory criteria. Moreover, the respondent had failed to give proper and adequate reasons for his decision that in the circumstances these tests were met. Reference was made to *Wordie Property Co. Ltd.* v *Secretary of State for Scotland* 1984 SLT 345, per Lord President Emslie at page 348, *Singh* v *Secretary of State for the Home Department* 2000 SC 219, at pages 222E-223A, *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33, per Lord Clyde at page 49D-F and *South Bucks D C* v *Porter (No. 2)* [2004] 1 WLR 1953, per Lord Brown of Eaton-under-Heywood at page 1964. Cases which dealt with the use of public interest immunity certificates were not relevant. Reference in that connection was made to *Glasgow Corporation* v *Central Land Board* 1956 SC (HL) 1, especially per Lord Radcliffe at pages 19-20, *Conway* v *Rimmer* [1968] AC 910, especially per Lord Upjohn at pages 993-4 and *Burmah Oil Co.* v *Bank of England* [1980] AC 1090, per Lord Keith of Kinkel at page 1133. In the present case the court was concerned about the inhibition on the recording of advice, not the giving of advice. It was also concerned with general freedom of information as of right not, as in the cases cited, with the off chance that in some future litigation the court might order disclosure for the particular purposes of that litigation. Here the legislature had recognised that disclosure might have the effect of inhibiting the free and frank provision of advice, etc.

Submissions for the respondent in respect of the application of section 30

[10] Counsel for the respondent in opening observed that, while "information" had been defined in the Oxford English Dictionary as "instructive knowledge" (there was no definition in the statute), an applicant did not need to explain why he wanted the information requested; subject to the exemptions and to the application, where relevant, of the public interest test, he was entitled under section 1 to be given the information. The statute had created a new public interest, namely, a public interest in disclosure of information by public bodies in Scotland, the list of which (given in Schedule 1 to the Act) was long. As regards the exemptions in section 30, counsel for the Scottish Ministers had acknowledged that what had been put to the respondent in argument to him had been too broad a claim. He was now being criticised for failing to accept an argument not put to him and for not acknowledging a class approach, the formulation of which was even yet far from clear or obvious. The Scottish Ministers' argument had a theoretical air about it. It appeared to be based on a hypothetical class of information of significantly narrower definition than that which had been identified to the respondent or, in the course of the discussion, to the court. A class approach was inappropriate to the exemptions provided for by section 30, which were content-based exemptions. The appellants could not exclude the respondent's jurisdiction by stamping a file with "Advice to Ministers" or the like. In contrast to section 29 (which did provide for class exemption in respect of information held by the Scottish Administration) section 30, neither expressly nor by implication, provided for exemption by class for information which had a much wider range than that to which section 29 applied. Each case in which information was sought required to be considered in its own circumstances. "Private space" was not to be protected by the comfort of a class approach. There was no justification for the suggestion that civil

servants would fail to record the advice they gave to Ministers. The trenchant observations made by Lord Keith, albeit in the context of public interest immunity certificates, at page 1133 in *Burmah Oil Co.* v *Bank of England* were in point. Given the integrity of the professional staff in the Scottish Administration, the argument advanced by the Ministers was odd. In any event, it appeared to go to the merits of the respondent's decision rather than to the legal basis of it. Assistance could be obtained from European jurisprudence where the necessity for a concrete, individual examination in relation to access to information had been approved (*Verein fur Konsumenteninformation* v *Commission of the European Communities* [2006] 2 C.M.L.R. 60, especially at paragraphs 69-71). As the respondent had recognised, there might be documents which, if viewed in isolation, might appear to be innocuous but which, if viewed in a wider context, might engage the exemption; but it was necessary to examine the particular documents as well as the context before reaching a view. The introduction of a class approach to section 30 was a distraction and simply led to confusion. On a fair reading of the respondent's decision read as a whole, including both paragraphs which preceded and those which followed the particular discussion in paragraphs 66 to 77, the respondent had clearly distinguished between the engagement of the exemption and, if engaged, whether section 2 required the disclosure of the information. He had in paragraph 68 made a cross reference to his decision in 041/2005, the relevant terms of which (particularly paragraph 15) required to be read into the present decision. "Sensitivity" was clearly linked to the public interest consideration referred to in section 2. In assessing the strengths and weaknesses of the section 2 public interest consideration the respondent had inevitably been engaged in a weighing exercise of that consideration against the maintenance of the exemption. The respondent had complied with the duties imposed

on him by section 49(6) of the Act. To the extent that there was an obligation on him at common law to give proper and adequate reasons for his decision, the respondent had done so. The standard was not an exacting one (*South Bucks D C* v *Porter (No.2)*, per Lord Brown at page 1964). The appellants had ready access to all the documents in question and could, and should, read the decision in light of the treatment of each document. Had the respondent endeavoured to give further particularisation, he would have been at risk of disclosing the contents of the documents. To do so would have risked the commission of a criminal offence under section 45 of the Act.

Discussion of the application of section 30

[11] Section 1(1) of the Act provides:

> "A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority".

There is accordingly no restriction on the persons who on application are entitled to be given information held by an authority; the scheduled list of public authorities in Scotland subject to the obligation to give information is extensive. That the statute creates or at least acknowledges a public interest in the disclosure of requested information is confirmed by the terms of section 2(1) which requires, in the case of non-absolute exemptions, the weighing of "the public interest in disclosing information" against the public interest in maintaining the exemption.

[12] Section 1 confers a general entitlement to information but is subject to sections 2, 9, 12 and 14 (section 2(6)). Section 9 is concerned with fees, section 12 with excessive cost of compliance and section 14 with vexatious or repeated requests. Otherwise, the broad effect of section 1 is restrained only by section 2 and the

exemptions referred to in it. As each is an exemption to a general entitlement it is for the public authority relying on it to demonstrate that the exemption is engaged.

[13] Certain of the exemptions apply by reason of the information in question being of a specified type or class - for example, section 25(1) (information otherwise accessible), section 29(1)(a) (formulation or development of Scottish Administration policy), section 36 (confidentiality). Others, including section 30, apply by reason of the prejudicial effect which disclosure would have or would be likely to have. In each case it may be necessary at some stage to examine particular information potentially disclosable in order to ascertain whether or not it falls within an exemption. But the approach will be different. In the former case one will begin with the defined class and then ascertain whether relevant information falls within it. Thus, it may be possible to conclude, without scrutiny of the content of each particular document, that a group of documents (for example, all the documents in a particular file) falls, as a group within the scope of the exemption in question. In the latter case one will necessarily begin with the scrutiny of relevant individual documents and the ascertainment of whether they contain particular information which, read in the context of related information, has or is likely to have the specified prejudicial effect. That is because it is only after such scrutiny that it will be possible to say whether such information will have or is likely to have such an effect. The circumstance that one ends up with a "class", namely, with pieces of information of that particular kind, does not mean that a class-based approach to the exercise is ever legitimate. In any event, whatever the procedural mechanisms employed, no method based on classification was suggested to us which could satisfactorily and usefully have been adopted, either generally or in any particular way, for the purposes of the section 30 exemption in the present case.

[14] It is clear and acknowledged that the argument presented by the Executive to the respondent and recorded by him at paragraph 68 was too widely expressed. The respondent rightly rejected that argument. We are unable to find any error of law in the alternative approach which he adopted, namely, (1) that each case was to be assessed on the facts and circumstances of that case and (2) that the proper approach was to assess whether the release of the advice or opinion contained within each document would be capable of having an inhibiting effect. That approach acknowledges and applies the principle that a piece of information viewed in context may qualify as being non-disclosable, albeit viewed in isolation it might have appeared to be innocuous. An approach to section 30 based on some *a priori* classification would appear to inhibit rather than to advance the requisite exercise.

[15] In paragraph 69 the respondent proceeded to apply the reasoning of the preceding paragraph. Two exercises were required, first, whether or not the exemption was engaged and, second, if it was, whether in terms of section 2(1)(b) the public interest in maintaining the exemption was outweighed by the public interest in disclosing the information in question. These exercises and their results in terms of disclosure and non-disclosure of documents might have been expressed more clearly than they were in paragraph 69 (as read with the immediately succeeding paragraphs) but, reading these paragraphs fairly and in the context of the way in which similar exercises had been carried out in earlier paragraphs (such as in paragraphs 45-46) and of the respondent's conclusion at paragraphs 88-89, we are satisfied that the respondent properly understood and applied the two-stage test enjoined by the statute.

[16] As to the expression "apparent sensitivity" in paragraph 69, we are not persuaded that this discloses an inaccurate or incomplete approach to the exercise of determining whether or not the exemption was engaged. Section 30 is concerned with

prejudicial or potentially prejudicial effect on the conduct of public affairs (whether by substantially inhibiting the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, or otherwise) by disclosure of the information in question. Clearly such information may be sensitive in a number of respects. If the expression is read in the context of paragraph 15 of decision 041/2005, which is expressly referred to in paragraph 68, it is clear that it embraces sensitivity in relation to issues such as timing, content and subject-matter. In paragraph 15 the respondent said:

> " ... to insist that the release of any advice to Ministers, regardless of its substance, would substantially inhibit officials from providing any candid advice negates any sensible application of the harm test. As I have consistently stated I expect requests for information to be assessed on an individual basis, taking into account the effects anticipated from the release of the particular information involved. This would have to consider:
>
> - the subject-matter of the advice or opinion,
> - the content of the advice and opinion itself,
> - the manner in which the advice or opinion is expressed, and
> - whether the timing of release would have any bearing (releasing advice or opinion whilst a decision was being considered, and for which further views were still being sought, might be more substantially inhibiting than once a decision has been taken)."

[17] As to the duty to give reasons, we accept the submission made on behalf of the respondent that under the statute his duty, where he has decided that an authority has not dealt with a request for information in accordance with Part 1 of the Act, is confined to section 49(6) and that where, as here, the complaint is that the authority

has failed to comply with section 1 of the Act, it is sufficient for the purposes of that statutory duty that the respondent specify that it is in that respect that the authority has failed. However, it was rightly accepted on behalf of the respondent before us that there remains a common law duty on him to give proper and adequate reasons for his decision. A number of familiar authorities were cited in that respect.

[18] It is important, in our view, when considering these authorities to bear in mind that the respondent, in giving reasons for his decision, is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed. That restraint also affects the ability of the court, if provided only with the respondent's decision, to supervise the exercise by him of his powers. In the present case we were not given sight either of the correspondence between the parties prior to the respondent's decision or, except for the list of documents contained in the appendix (restricted essentially to date and parties without disclosure of content), of the information disclosed or undisclosed. In these circumstances the scope for the detection of errors of law is limited. We are unable to find any in relation to the treatment of section 30 or its relationship to section 2. Disclosure may, of course, be made with lawful authority (section 45(1)). Such disclosure may be made to the extent that it is made for the purposes of proceedings, including civil proceedings by virtue of the Act (section 45(2)(d)). In exceptional circumstances resort might be made to disclosure for that purpose.

[19] For these reasons we are not satisfied that any error of law has been demonstrated in relation to the respondent's treatment of the exemption under section 30(b) or the weighing exercise under section 2 of information held to fall within that exemption.

[20] The criticisms made by the appellants in relation to the exemption under section 30(c) were essentially the same as those made in relation to that under section 30(b); the "class" argument is, in our view, ill-founded, the two-stage exercise was sufficiently clearly undertaken and "the nature of the information" was a sufficient explanation in the circumstances of why it was held that the exemption was engaged.

The application of other exemptions

[21] In relation to section 28(1) (relations within the United Kingdom) the Scottish Ministers, in this instance with support from the Department for Constitutional Affairs, presented argument to the respondent that, although none of the information withheld by them under section 28 had any protective marking to indicate that the information was in any way sensitive, disclosure of any of the relevant documents would substantially prejudice relationships between the Government of the United Kingdom and the Scottish Executive, by deterring officials from sharing experiences of policy operation in the future. The Department also pointed out that the documents in question related to an area of law reform "which remains of considerable interest and debate from a policy perspective at this current time".

[22] In this instance the appellants submitted that the respondent had again erred in law by failing to recognise that the public interest in withholding documents might apply to a class or group of documents. That submission was in substance to the same effect as that advanced under reference to section 30(b) and (c). For the same reasons we reject it. Likewise we are satisfied that the respondent recognised and applied the two-stage test and gave reasons which, under reference to the question whether "release would cause [the Scottish Administration or the Government of the United Kingdom] real, actual and significant harm" were in the circumstances adequate.

[23] In relation to section 29(1)(a) the respondent in his decision accepted that in most cases the exemption was engaged, that is, that the information in question related to the development of government policy. He required thereafter to undertake the weighing exercise enjoined by section 2. In paragraphs 56 and 57 there is perhaps a lack of clarity similar to that earlier discussed in relation to paragraph 69; but again, reading the decision as a whole we are satisfied that the respondent properly understood and applied the two-stage test. The discussion of this exemption involved an additional factor, namely the respondent's conclusion that a distinctive and active phase of policy development started in February 2003. The appellants' counsel submitted that it was not clear how that factor (which they did not maintain itself to be irrelevant) fitted in, for the purposes of the weighing exercise under section 2, with the general policy considerations referred to in paragraphs 78-87. This was interrelated with a contention that perusal of the appendix surprisingly revealed that some post-February 2003 documents had been ordered to be released. In response, counsel for the respondent submitted that the matter of dating was not separate from the general issue of public interest; the dates were simply an aspect of the content of the documents, to be seen in the context of the development of government policy against changes in the political landscape. All the documents listed in the appendix were dated and, by reading it with the relative paragraphs, the respondent's decision-making was clear. Without disclosing information which should not be disclosed, he had adequately explained the basis of his decision.

[24] Again, we are of the view that the respondent's reasoning might have been more clearly expressed than it was but that no error of law has been demonstrated. In this field it may be necessary to distinguish between what it is not in the public interest to disclose because to do so would impede the working of government and

what would by its disclosure simply embarrass Ministers or officials (see paragraph 75 of the code of practice issued by the Ministers under section 60 of the Act). The giving of full reasons for making a particular decision in this field may also be particularly difficult, given the requirement not to disclose information which should not be disclosed. So far as concerns documents dated post-February 1993 which have been ordered to be released, it is clear from the respondent's reference in paragraph 53 to "most cases" that, following the weighing exercise, he has accepted that some, but not all, documents in that period should be disclosed.

[25] As regards section 36 (confidentiality) the appellants' attack was restricted to the adequacy of the reasoning given. In this connection the respondent observed, at paragraph 36, that he was likely only to order release of communications in respect of which a claim to confidentiality could be maintained in legal proceedings "in highly compelling cases". In relation to two documents only did he, having regard to the public interest issues described in paragraphs 79-83 (the delay in commencing sections 25 to 29 of the 1990 Act), hold that the arguments for disclosure outweighed the arguments against. There is nothing in the material before us to demonstrate that in doing so he erred in law.

[26] Section 25 confers an absolute exemption (with respect to information which the applicant can reasonably obtain otherwise than by a request under the Act). A question arose before us in relation only to one document which, among others, had been identified in paragraph 31 for disclosure but which was not listed in the appendix. This was a fax from Mr. Alexander upon which words had been written by an official; only the manuscript was relevant to disclosure. This inconsistency was remedied by the respondent by his producing to us a fresh appendix which, among other changes, included the document in question in the appended list. We would add,

in this regard, that where errors of an administrative nature, as we find this error to have been, are noticed, it should not ordinarily be necessary to bring an appeal to remedy them. The respondent has, in our view, an implicit power to correct administrative errors drawn to his attention.

Mr. Elstone's and Mr. Williams's applications

[27] Trearne Quarry, Gateside, lies within the area for which North Ayrshire Council is the local planning authority. In 2004 that Council had before it an application for planning consent for a waste disposal and ecological conservation area at the quarry. On 4 April 2004 the planning sub-committee of the Council agreed to refer the application to the Scottish Ministers and, subject to an agreement being entered into under section 75 of the Town and Country Planning (Scotland) Act 1997, to grant planning permission subject to 18 conditions. That decision was ratified by the Council on 11 May 2004. On 8 September 2004 the Scottish Ministers advised the Council that they did not intend to issue a direction restricting the grant of planning permission or requiring the application to be referred to them for determination. Accordingly, the Council was free to determine the application in the manner it thought fit.

[28] Mr. David Elstone and Mr. Martin Williams respectively asked the Scottish Ministers to supply copies of "all paperwork" and "all correspondence" surrounding the decision of the Scottish Ministers not to "call in" the application. These requests were refused. After having each sought review by the Scottish Ministers of these refusals, they applied to the respondent for a decision on the matter. It was agreed with these applicants that their cases be conjoined. In due course the respondent issued his decision - to the effect that certain documents withheld by the Scottish

Ministers should be released. The Scottish Ministers have appealed against that decision.

[29] Although a number of exemptions were discussed by the respondent in his decision, only two (section 30(b) and 30(c)) were in issue before us. In relation to the former, counsel intimated that the challenge was restricted to whether there had been a proper approach to the application of the exemption. It was again acknowledged that the argument advanced by the Scottish Ministers against disclosure had been too broadly expressed; but again it was submitted that, as in Mr. Alexander's case, the approach adopted by the respondent precluded consideration of documents on a group or class basis. For the reasons given in relation to Mr. Alexander's case we reject that submission. The respondent, rightly in our view, rejected the contention that the release of the information withheld in this case (revealing the advice and opinions of officials involved in the decision-making procedures) would as a generality inhibit officials in the future from providing a clear analysis of all the issues in a policy area. On the other hand, he held that certain documents, if released, would be likely to inhibit the exchange of similar advice and requests for advice in the future and restricted the order for release accordingly. We are unable to discover any error of law in that discriminating approach.

[30] In relation to section 30(c) two aspects of the effective conduct of public affairs were in issue; first, the deliberations of the Council in respect of the, as yet, unfinalised planning application, the envisaged consent being subject to the entering into of an agreement under section 75 of the 1997 Act; and, second, the possibility that the application might even at that stage be "called in" by the Scottish Ministers. The respondent made his own inquiry into these matters. Enquiry of the local planning authority appears to have elicited a response that, as at 3 August 2005 or

shortly thereafter, planning permission had already been granted. A more accurate description, it emerged, was that, as earlier narrated, the Council had, subject to a section 75 agreement being entered into, agreed to grant conditional planning permission but had not formally granted permission. Before us counsel for the appellants criticised the respondent for proceeding, it was said, on a state of affairs, ascertained by enquiry of the Council at a stage later than the date of the Scottish Ministers' review of the request. Reference was made to sections 47(1)(b) and 49(6) of the Act. It was further submitted that, as far as concerned any prejudice to the effective conduct of public affairs, the respondent had unduly relied on the Council's view of the matter, rather than upon his own judgement.

[31] Although the history of events is not described with complete accuracy in the respondent's decision (and required to be clarified in the course of the hearing before us), there is, in our view, no sound basis for the criticism of him in relation to the matter of timing. It is correct that any issue of alleged failure by a public authority to comply with its statutory obligations falls to be determined as at the date of the authority's notice under section 21(5) of the Act. But it does not appear that in this case the respondent proceeded upon any state of affairs which occurred thereafter. He was, of course, entitled to make such enquiries after that date as he thought fit and reasonably to rely on any information pertinent to events prior to the review notice which he elicited. In the event it does not appear that he relied on any information bearing upon events (as distinct from opinions expressed) subsequent to that date in respect of the practical finality of the application, so far as concerned either the Council or planning officials within the Scottish Administration. In these circumstances the respondent did not, in our view, err in law in respect of the timing issue. On the matter of reliance on the views of others, we are not persuaded that the

respondent did otherwise than take such views into account, arriving at his decision on the basis of his own judgement.

Disposal

[32] For the reasons we have given we shall refuse both appeals.