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**From:** Rosemary Agnew

**Sent:** 30 May 2013 10:54

**To:** [REDACTED]

**Cc:** Euan McCulloch (emcculloch@itspublicknowledge.info); Margaret Keyse; Alison Davies; Sarah Hutchison (shutchison@itspublicknowledge.info)

**Subject:** 2013.05.30 TC RA to SB re: [REDACTED]

[REDACTED]

Please could you forward this email to the file as a record of my phone call to [REDACTED] this morning.

thanks

Rosemary

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DL 01334 464 620

Spoke to [REDACTED] for approximately 15 minutes about the [REDACTED] decision. I am sympathetic to their concerns but felt we had dealt with this case properly and that the onus was on Ministers to say they wanted elements of a submission to be kept confidential.

Main points were:

1. My position is we can't tweak the wording because that is effectively changing the decision. To change as they suggest is more than simply correcting typos. SG's view is we can. I invited them to pay for me to take external legal advice on that if they felt strongly about it, but I was not going to do that for myself as I am clear about my position. I also pointed out that changing the wording now, would alert [REDACTED] to the fact something had changed which could carry reputational risks – to me for not being seen to be independent.
2. [REDACTED]
3. I explained that other circumstances where I would consider not using information provided in submissions is if the authority asked me not to, for whatever reason. I pointed out that the onus was on the authority, the Ministers in this case, to alert me, not for me to second-guess. This is set out clearly in our letter to them inviting comments under s49 where we state - **Where the Commissioner considers that the disclosure is necessary for discharging her functions under FOISA/the EIRs, some of the information contained in the submission may be shared with the applicant to allow**

him/her/it/them to comment on relevant matters. Similarly, where the Commissioner considers it necessary, the contents of the submission will be referred to in any decision issued as a result of the application. Where your authority considers that the submission or parts of the submission should not be shared in this way, please let me know, explaining (with reference to Part 2 of FOISA/to the exceptions in the EIRs) why this is the case. While your authority's views will be taken into account, the final decision on whether information will be disclosed will be the Commissioner's. As there had been no request to keep this element of the submission confidential (see also point 5) we did not automatically consider doing so.

4. I explained that I had gone on to consider this morning in light of this issue whether it was reasonable for Ministers to have been aware of how the submission might be used, notwithstanding the issue of specifically asking for things to be kept confidential. I had been through a number of our decisions from the past 12 months concerning section 12 and concluded that Ministers should be familiar with how we word such decisions and therefore how we use submissions – examples are 211/2012, David Rule and Special Advisers diary, 195/2012 [REDACTED] and foreign expenses travel, 160/2012 – Implementation of LS/CMI Risk Assessment tool.
5. I also pointed out that at the meeting earlier in the week, SG told us that the [REDACTED] approves the approach they take and so in light of the previous points we would have had no reason to assume that they wanted to make parts of the submission confidential in order to maintain [REDACTED]. [REDACTED] was concerned that [REDACTED] would only have approved the submission not realising how it would be used. I referred back to earlier points about [REDACTED] being theirs to apply, how Ministers should be aware from earlier cases how we approach things and that it was an issue for them not me.
6. There was an inference that we were trying to make a point with this decision. I assured [REDACTED] that was absolutely not the case. We dealt with it in exactly the same way that we deal with all section 12 cases, referring back to the previous points saying if they compared it, they would see that is the case. I do not have a vested interest beyond being fair and consistent which I felt I had been in light of their submissions – especially as they had been at such great pains to tell me that the [REDACTED] approved their approach.
7. [REDACTED] said Ministers were concerned that I had not paid enough attention to the very sensitive issue of [REDACTED]. I said I appreciated that they were concerned but:
  - a. I was and am only too aware but as explained above, I saw no reason to question the use of the submission in this case
  - b. It highlighted the importance of dealing with requests and applications on a case-by-case basis. I cannot take the approach that because something is sensitive it should automatically be considered as part of my decision making, nor should it automatically prompt me or my staff into questioning the submission – the onus is clearly on the authority. It may be that they wish reference to [REDACTED] in submissions to apply to every case

involving [REDACTED] but it is for them to argue it each time in the context of the case.

- c. Implying I should take [REDACTED] into account automatically was inappropriate. I am required to be independent and impartial. If I were to effectively treat the issue of [REDACTED] as an overriding public interest argument (or harm argument) I would not be exercising my powers properly and it would certainly not be impartial or independent.

**From:** Margaret Keyse  
**Sent:** 04 June 2013 10:03  
**To:** Rosemary Agnew  
**Subject:** RE: Text for [REDACTED] for discussion

Great email, Rosemary. I've made one very minor change (in blue).

If you could copy me into the email when it's sent, I'll attach it to the file and make sure Colin knows what's going on.

Thanks

Margaret



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The SIC's understanding is that Ministers would have requested this be kept confidential at the time they made their submissions to the Commissioner, but for whatever reason didn't. Having realised that references to [REDACTED] are in the decision they would now like it redacting as they believe it should have been provided in confidence.

I am sympathetic to the Ministers' position on this, but have some concerns and questions which I feel only fair to raise with Ministers before agreeing to the request.

The first point concerns the Ministers' and Commissioner's independence. It is in the public interest that the Commissioner is not only independent, but is seen to be independent. There is a reputational risk to my office that responding to such a request will be seen as a loss of independence and bowing to

pressure from Ministers. It is also important to the reputation of Ministers that the Commissioner is viewed as independent and that requests such as this are made on sound technical grounds.

The second point is a concern that publishing the decision in redacted form will draw attention to the redacted information and in turn lead to further information requests of both my office and the Ministers. In order that we are prepared to reply to such requests appropriately, **could Ministers please set out the reasons they wish the information to remain confidential, as they would have at the time it was provided to her.** I am not seeking a long detailed response that might be given if applying a FOISA exemption, but a statement that sets out the Ministers' position on why they would have an expectation of confidentiality, making reference to the type of information and why it should be redacted.

I apologise if this seems overly pedantic, but given the sensitivity of [REDACTED] [REDACTED] at the moment, I believe it to be not only in our respective interests, but also in the interests of ensuring FOISA operates impartially.

I will do my best to respond to you as quickly as possible with a view to resolving it this week, but please note I am away from the office a lot from Wednesday lunchtime, for the rest of the week and will not be available at all on Thursday afternoon.

Rosemary Agnew  
Scottish Information Commissioner

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regarding the redacted text, I would suggest that the section 30(c) exemption would be appropriate because [REDACTED] would substantially prejudice the effective conduct of public affairs (we of course discussed last week why it would not be possible to use the section [REDACTED] exemption in this type of case).

In relation to your summary of events, we have taken on board your point about the need to make clear in each appeal case where there is material which we do not want included in the Decision notice. We will seek to do that, although I was under the impression that, given that we still have a difference of views over the interpretation of section 45 FOISA, we had made clear that we did not wish any information from our submissions to be divulged without our explicit consent (beyond what is necessary in order to justify your decisions) so, to that extent, we would not agree with the position set out in the summary. Previous decisions on cost grounds where information provided by the Scottish Government was replicated in the Decision notice did not relate to [REDACTED] where there are particular sensitivities and we would therefore not have expected those to be used as precedents. We had also understood that your office was alert to the particular sensitivities around [REDACTED]

These will obviously be matters that we will need to discuss further for the future [REDACTED]

I am of course happy to discuss this further if you have any queries.

Best regards

[REDACTED]  
[REDACTED]  
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