

Decision Notice



Decision 173/2013 Gallaher Limited and the Scottish Ministers

Public Health Levy and Large Retailer Supplement

Reference No: 201201540

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Summary

On 12 March 2012, Gallaher Limited (Gallaher) requested from the Scottish Ministers information relating to the “public health levy” and the earlier proposal for a “large retailers supplement”. The Ministers informed Gallaher that they did not hold some of the information sought and withheld the information identified as falling within the scope of the request under various exemptions in FOISA.

Following an investigation, the Commissioner found that the Ministers were correct to withhold the information sought. She also found that the Ministers failed to respond to Gallaher’s requirement for review within the required timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a), (1)(b) and (2)(c) (Effect of exemptions); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(c) (Prejudice to effective conduct of public affairs); 32(1)(a)(ii) (International relations); 36(1) and (2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 12 March 2012, Gallaher Limited (Gallaher) wrote to the Ministers requesting information showing the following:
 1. any assessment, consideration or discussion of the competence of the public health levy under sections 29 and 54 of the Scotland Act 1998, including (but not limited to) its compatibility with Community law and in particular whether it might qualify as a State Aid measure
 2. any assessment, consideration or discussion of the effect of the public health levy would or might have, or might be capable of having, on competition and/or on trade between Member States of the EU



3. any assessment, consideration or discussion of the competence of the large retailers supplement (set out in the Non-Domestic Rates (Levy) Scotland (No.3) Regulations 2010) under sections 29 and 54 of the Scotland Act 1998, including (but not limited to) its compatibility with Community law and in particular whether it might qualify as a State Aid measure under EU law
 4. any assessment, consideration or discussion of the effect the large retailers supplement would or might have had, or might have been capable of having, on competition and/or on trade between Member States of the EU
 5. any consideration or discussion of whether to notify the public health levy or the large retailer supplement to the European Commission
 6. the reasons why the public health levy had not been, and the large retailer supplement was not, notified to the European Commission.
2. The Ministers responded on 30 March 2012. They informed Gallaher that they were withholding the information requested under a number of exemptions in FOISA. With regard to 1 and 3, the Ministers applied sections 29(1)(a) and 36(1) of FOISA. In respect of 2 and 4, the Ministers withheld information under section 36(2) of FOISA, while informing Gallaher that they held no information relating to the effect of trade between Member States of the EU. With regard to 5 and 6, the Ministers stated that they were withholding information under the exemptions in sections 29(1)(a) and 32(1)(a)(ii) of FOISA. In all instances, where applicable, the Ministers concluded that the public interest favoured maintaining the exemptions applied.
3. On 25 May 2012, Gallaher wrote to the Ministers requesting a review of their decision. In relation to:

Request: 1 and 3

Gallaher questioned the adequacy of the notice they had been given in response to these requests and argued that there were certain public interest arguments which would favour disclosure of the information sought.

Request: 2 and 4

Reiterating these requests, Gallaher asked the Ministers to confirm that they held no information regarding the effect of the measures on trade between Member States. Gallaher also questioned the Ministers' application of section 36(2) of FOISA, arguing that they had failed to apply the correct tests in relation to this exemption.

Request: 5 and 6

Gallaher again queried whether the Ministers had provided adequate notice in response to these requests, and also whether they had applied the appropriate tests in relation to the exemptions claimed. With regard to the Ministers' application of section 32(1)(a)(ii), Gallaher highlighted that the request was not limited to exchanges with the European Commission.



4. The Ministers notified Gallaher of the outcome of their review on 5 July 2012:

Request: 1 and 3

The Ministers confirmed that information was held in terms of section 16 of FOISA, but was considered exempt from disclosure. The Ministers confirmed their reliance on sections 29(1)(a) and 36(1) of FOISA, but also concluded that section 30(b)(i), 30(b)(ii) and 30(c) applied to the information. However, they concluded that the public interest did not favour the withholding of certain elements of the information, and consequently supplied Gallaher with two documents.

Request: 2 and 4

In respect of Gallaher's queries on the application of section 36(2), the Ministers confirmed that they had received the information in question from a third-party and that it was explicitly provided in confidence.

Request: 5 and 6

Again, the Ministers confirmed that the information was held but considered exempt. They confirmed their reliance on section 32(1)(a)(ii) to withhold this information and also sought to rely on sections 30(b)(ii) and 30(c). However, they concluded that section 29(1)(a) should not have been applied.

5. On 10 August 2012, Brodies LLP wrote to the Commissioner on behalf of Gallaher, stating that their client was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Subsequent references to Gallaher in this decision should be read as including references to Brodies acting on behalf of Gallaher.
6. The application was validated by establishing that Gallaher made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 29 August 2012, the Ministers were notified in writing that an application had been received from Gallaher and were asked to provide the Commissioner with any information withheld from it. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The Commissioner is satisfied that some of the information supplied by the Ministers falls outwith the scope of Gallaher's request, as it relates to measures implemented in other jurisdictions. That information will not, therefore, be considered further in this decision.



9. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested (with particular reference to the exemptions claimed in responding to Gallaher).
10. The Ministers' submission that they held no further relevant information will be considered below.
11. The exemptions relied upon in relation to each individual request were clarified during the investigation. Where the Ministers sought to rely on an exemption not previously relied upon (including the application of section 17(information not held) of FOISA), or where it was unclear from the initial response or review outcome that they were seeking to rely on a particular exemption confirmed during the investigation, Gallaher was provided with an opportunity to comment on its application.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Gallaher and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Background to the request

13. In November 2010, the Scottish Government proposed the introduction of a supplementary business rates levy on the largest retail properties in Scotland (the large retailers supplement). This proposal would have applied to all retail properties with a rateable value of more than £750,000. In February 2011, this proposal was annulled by a motion tabled at the Local Government Committee of the Scottish Parliament.
14. The Scottish Government then proposed a new levy on business rates, to apply from 1 April 2012, on businesses with a rateable value of over £300,000 selling both alcohol and tobacco. This has been described as the "public health levy".
15. The request under consideration here relates to the competency of both of these measures under the Scotland Act 1998; their compatibility with Community Law; their effect on competition and/or trade between member states, and whether they might qualify as State Aid measures. Gallaher also sought evidence of any consideration of whether to notify the European Commission of these measures.
16. Gallaher believed the Ministers' "public health levy" amounted to State Aid for the purposes of EU law, and therefore its introduction would be unlawful unless it was first notified to and approved by the European Commission.



17. An individual EU Member State (including the institutions of a devolved administration) may lawfully provide financial assistance to business if such assistance conforms with prevailing EU State Aid rules. A State Aid is a Member State's financial aid to business which meets all the criteria in Article 107(1) of the Treaty on the Functioning of the European Union. In determining whether or not a particular state intervention is State Aid, there are certain criteria which need to be considered by the Member State. These are not relevant to the Commissioner's consideration of this case, but are set out below to place this request within context:
- Is the support granted by the State or through State resources?
 - Does the support confer a selective advantage on an undertaking?
 - Does the support distort or have the potential to distort competition?
 - Does the support affect trade between Member States?
18. Should a Member State believe that a measure it intends to implement might constitute State Aid, it must notify the Commission and seek approval. Any State Aid measure must be approved in advance of implementation.

Information held by the Ministers

19. Gallaher asked the Commissioner to consider whether the Ministers had identified all the information they held which fell within the scope of their request, referring in particular to the Ministers' conclusion (during the investigation) that they held no information falling within the scope of request 6. Gallaher expressed a concern that the Ministers might have interpreted this part of the request too narrowly.
20. The Commissioner has considered the searches described by the Ministers, including the search terms used. She is satisfied that these should have identified any information falling within the scope of the request, applying as broad an interpretation as would be reasonable in the circumstances. On balance, therefore, she is satisfied that the Ministers identified and located all information they held and which was covered by the request.

Section 36(1) – Confidentiality

21. The Ministers contended that the information contained in a number of documents was exempt from disclosure in terms of section 36(1) of FOISA.
22. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege, one aspect of which is legal advice privilege. Legal advice privilege covers communications between lawyer and client in the course of which legal advice is sought or given.



23. For legal advice privilege to apply, certain conditions must be fulfilled. The communication must be with a professional legal adviser, such as a solicitor (including, in most cases, an in-house one) or an advocate. The legal adviser must be acting in their professional capacity as such and the communication must occur in the context of their professional relationship with their client. The information must be confidential between lawyer and client: privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy.
24. While communications between authorities and their own in-house legal advisers are generally covered, there is an exception to this under EU law, specifically in relation to the enforcement of EU competition law. Having considered the information withheld in this case, the Commissioner is satisfied that this exception is not relevant here.
25. The Ministers relied on legal advice privilege in applying this exemption. They considered the information to be confidential communications between lawyers and their clients (Scottish Government officials and relevant Ministers) for the purpose of seeking and receiving legal advice. In their view, therefore, the information in question benefited from legal advice privilege and, given its nature, a claim to confidentiality of communications could be maintained in legal proceedings.
26. Gallaher highlighted that information previously withheld by the Ministers under section 36(1) of FOISA was released at review, subject to redaction. Gallaher noted that the exchange disclosed was between two civil servants (whom it did not believe to be lawyers) and consequently the exchange could not be considered privileged. The Commissioner has considered the redactions made to this document and acknowledges that the exchange is not between lawyer and client, but also notes that the Ministers seek to withhold this information under section 29(1)(a) of FOISA (which will be considered below) rather than section 36(1).
27. The Commissioner has taken account of Gallaher's concerns about the parties to the exchanges in considering the remaining documentation withheld under section 36(1). She acknowledges that document 8 is not an exchange between lawyer and client, but rather a summary of key points arising from, amongst other sources, legal advice. In the circumstances, the Commissioner is not satisfied that section 36(1) applies to this document. However, section 29(1)(a) has also been applied to document 8 and this will be considered below.
28. The Commissioner has also noted concerns expressed by Gallaher about section 36(1) and section 36(2) being applied to the same information. Having considered the withheld information and the Ministers' submissions, she can confirm that the two exemptions have not been applied to the same information.
29. The Commissioner has considered the remaining information withheld under section 36(1) and is satisfied that it either comprises communications with the legal professionals identified by the Ministers in their submissions, in the course of which legal advice is requested or provided, or relates to the consideration of such advice within the relevant departments of the Scottish Government.



30. Gallaher also asked the Commissioner to consider to what extent the privilege in any legal advice might have been waived.
31. For the purposes of FOISA, legal advice privilege is most likely not to apply where confidentiality has been lost as a result of some previous disclosure. Where the whole content, or a comprehensive summary, of the legal advice has been released, confidentiality in the advice will have been lost.
32. Having considered the content of the information withheld and finding no evidence to the contrary, the Commissioner is satisfied that the legal privilege has not been waived as the advice was not made public, either in full or in summary.
33. The Commissioner is therefore satisfied that the withheld information to which section 36(1) has been applied, with the exception of that referred to in paragraph 27 above, is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. Consequently, it is exempt from disclosure under section 36(1) of FOISA.
34. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

35. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England*¹, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
36. The Ministers accepted that there was a significant public interest in transparency and accountability, to allow the enhanced scrutiny of the legality of a public authority's actions and effective oversight of the use of public funds in the development of legislation and policies (and in ensuring best value). However, they considered there to be a greater public interest in enabling decisions on legislation and the development of policies to be taken in a fully informed legal context, and in ensuring that their ability to defend their legal interests was not prejudiced by inappropriate disclosure of the legal analysis.
37. The Ministers considered that disclosure of legal advice had a high potential to prejudice their ability to defend their legal interests, both directly (by unfairly exposing their legal position to challenge) and indirectly (by diminishing the reliance they could place on the advice having been fully considered and presented without fear or favour). They did not consider either outcome to be in the public interest.

¹ <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>



38. The Ministers also identified a risk that lawyers and clients would avoid making a permanent record of the advice given, or make only a partial record, which would also be contrary to the public interest. The Ministers submitted that, as policy developed, it would be important to refer back to the advice given along the way, and therefore it was in the public interest for the record to describe the process of decision making (including any legal advice) accurately and fully.
39. The Ministers argued that, although legal advice could still be provided orally, there would be a greater risk that advice provided in this way could be accidentally misrepresented in advising Ministers. The Ministers stated that their lawyers confirmed during the investigation that they would not wish their legal advice to be divulged, given that it might be used to assist anyone considering bringing forward a legal challenge against the public health supplement.
40. The Ministers explained that, while it is likely that most legal advice would still be provided in writing in future, there is a greater risk that a) advice on particularly controversial issues like those addressed in these documents would be provided orally rather than in writing and/or b) legal advice provided in writing would not be saved in their electronic record document management (eRDM) system. They stated that a) could lead to advice being misrepresented by an official or not disseminated as widely as it would otherwise be, leading to less discussion about the implications of that advice. If b) were to happen, there would not be a long term record of advice provided previously, which could have a detrimental effect on future policy making.
41. Gallaher identified a strong public interest in disclosing information that would show whether the Scottish Ministers had (or believed they had) acted unlawfully in imposing a levy that had very significant financial consequences for the retailers on whom it was imposed, and potentially significant consequences for the producers of the products to which it related. In particular, Gallaher argued that there would be a significant public interest in disclosing any information which would show that the Scottish Government had acted contrary to legal advice on the matter, that the legality of the measure was questionable or uncertain, that no advice was sought on the issue, or that such advice as was sought was not given adequate consideration.
42. Gallaher also submitted that there was a strong public interest in disclosing information which would provide assurance to concerned parties that proper consideration had been given to the concerns raised in its letter of 12 March 2012. Gallaher highlighted that the information supplied to date had not provided such assurances.
43. The Commissioner has considered carefully the public interest arguments presented by each party. She accepts that there is a public interest in ensuring transparency in the decision-making process, particularly where there has been a significant policy decision. She has also considered the strong public interest in ensuring the effective administration of justice, and accepts that it is in the public interest that all organisations, including the Scottish Government, are able to obtain and consider legal advice on a confidential basis: in this case, the Commissioner has been unable to identify any public interest of equal or greater weight which would favour disclosure.



44. On balance, therefore, the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemption in section 36(1). Therefore, she is satisfied that the information to which section 36(1) was applied was properly withheld under that exemption.

Section 36(2) – Confidentiality

45. This exemption contains a two-stage test, both parts of which must be fulfilled before it can be relied upon. The first is that the information must have been obtained by a Scottish public authority from another person. “Person” is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.

Was the information obtained by a Scottish public authority from another person?

46. The document in question was authored and provided to the Ministers by a third-party in the context of their own internal analysis of the impact of the levy on their business. Having considered the information in question, the Commissioner is satisfied that it was obtained from a third-party. She must now go on to consider whether disclosure of the information would constitute an actionable breach of confidence.

Would disclosure of the information constitute an actionable breach of confidence?

47. The second part of the test is that disclosure of the information by the public authority must constitute a breach of confidence, actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that “actionable” means that the basic requirements for a successful action must appear to be fulfilled.
48. Generally, there are considered to be three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
- (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality, and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.



(i) Necessary quality of confidence

49. For information to “have the necessary quality of confidence”, it must be information which is not a matter of public knowledge. The information must have the basic attribute of inaccessibility. The Ministers argued that the information in question fulfilled this criterion as the information is not common knowledge and was provided for the purposes of research and to aid the understanding of the implications of the proposed policy. Having considered the information in question, the Commissioner is satisfied that this information is not common knowledge and could not readily be obtained by Gallaher through any other means. Consequently, she is satisfied that this information has the necessary quality of confidence.

(ii) Obligation to maintain confidentiality

50. The second part of this test is whether the public authority is subject to an obligation to maintain confidentiality in respect of the information. This obligation can either be “express” or “implied”. An implied obligation of confidentiality can arise as a result of the relationship between the parties or the particular circumstances in which information has been obtained.
51. The Commissioner notes that the covering email, supplying the information in question to the Ministers, contains an express obligation of confidentiality. The Ministers argued that they considered there to be an explicit obligation to maintain confidentiality based on the commercially detrimental effect that disclosure could have on the third-party if their figures and research was released into the public domain. The Ministers stated they sought the third-party’s consent to disclose the information, but the third-party confirmed that they would not be content for the information to be disclosed and wished to maintain the confidentiality under which it was provided. The Ministers provided evidence during the course of the investigation that satisfied the Commissioner that the third-party had denied consent to disclosure of this information at the time of the request and maintained the expectation that the information was provided with an express obligation to maintain confidentiality.
52. Having considered the withheld information and the circumstances in which it was imparted, the Commissioner is satisfied that it was provided to the Ministers in circumstances which imposed an obligation to maintain confidentiality. The Commissioner is satisfied that this obligation remained at the time of the request.

(iii) Unauthorised disclosure which would cause detriment

53. The final requirement is that unauthorised disclosure of the information would be to the detriment of the parties that provided the information to the Ministers.
54. The damage need not be substantial and could follow from the mere fact of unauthorised use or disclosure in breach of confidence (in that respect, the test is different from establishing whether, for example, disclosure would, or would be likely to, prejudice substantially the commercial interest of any person when considered the exemption at section 33(1)(b)).



55. The Ministers stated that the third-party in question informed them that the information was commercially sensitive and its public release would have a detrimental impact on their business. The Ministers stated that release of the document would prejudice the third-party commercially, as the information was provided in full in confidence and no other parties had been asked for, or supplied, this level of information. The Ministers state that disclosure would not only provide the third-party's competitors with an unfair advantage, but would also render significant research "void", to the detriment of the third-party which had carried out the research.
56. Having considered the arguments provided, the Commissioner accepts that disclosure of this information would cause detriment to the third-party. In reaching this conclusion, the Commissioner notes that this information was voluntarily imparted to the Ministers and contains commercially sensitive analysis.
57. Having considered each of the relevant tests, the Commissioner is therefore satisfied that disclosure of this information would have constituted an actionable breach of confidence.

Public interest defence

58. While the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and is not subject to the public interest test in section 2(1)(b), the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
59. The courts have identified a relevant public interest defence in cases where withholding information would cover up some serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
60. Gallaher believed there would be a strong public interest in disclosing information that would disclose the extent to which the public health levy (or its predecessor, the large retailers supplement) would or might have a detrimental effect on competition in the affected markets.
61. The Ministers recognised a public interest in understanding the potential relationship between the third-party and the Scottish Government in the case of this research. However, they also argued that there was a strong public interest in ensuring that the Scottish Government was able to engage with stakeholders and third parties without prejudice, and to provide best value for public money and prepare Scottish Government policies in a fully informed and evidentially supported environment.



62. The Commissioner has taken all of the above arguments into account in considering the public interest. While acknowledging there is a clear public interest in transparency and scrutiny in relation to the decision-making process, the Commissioner is not persuaded that the arguments advanced, when considered in the context of the information withheld, are sufficiently compelling to outweigh the strong public interest in maintaining confidentiality in relation to the withheld information.
63. Having considered all the arguments, therefore, the Commissioner does not consider there to be any basis for the disclosure of confidential information on public interest grounds, and consequently is satisfied that the Ministers were justified in withholding information under section 36(2) of FOISA.

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

64. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
65. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
66. The information in question comprises a meeting note and copied correspondence, involving another UK administration and the European Commission. They explained that the note was produced by, and circulated among, Scottish Government officials to support further work, rather than being a formal record of the meeting (at which the Scottish Government representatives were only observing). The copied correspondence related to a similar matter.
67. The Ministers considered it necessary for them to engage in discussion with, and seek opinions and undertake study of information provided by, third parties in the development of policies and in undertaking the work of the Scottish Government. They considered disclosure of this information would be prejudicial to developing relationships, making it less likely that similar information or opportunities would be volunteered in future. They also considered that disclosure of the note would inhibit the freedom and frankness with which such records were written in future. All of this, they submitted, would substantially prejudice the effective conduct of public affairs.



68. The Commissioner has considered these arguments carefully. In the circumstances, she accepts, having taken into account the contents of these records, and the nature of the Scottish Government's involvement in the matters to which they relate, that disclosure of the information would, or would be likely to, prejudice substantially, the effective conduct of public affairs.

Public interest test

69. The Ministers submitted that the relationship between the Scottish Government and the other administrations and the EU was crucial to effective governance in Scotland. They identified an overwhelming public interest in effective governance at both the local and national level. They explained that the Scottish Government had successfully developed a very good, open and transparent relationship with the administrations and the EU, which is to the benefit of the Scottish people. It argued that anything which may prejudice this relationship would be contrary to the public interest.
70. The Ministers believe there was a greater public interest in favour of protecting relations with external stakeholders, which might otherwise be compromised by the release of this information. They argued that maintaining good relationships are clearly in the public interest.
71. The Commissioner has also considered the public interest submissions presented by Gallaher (see above, in relation to section 36(1)).
72. In balancing the public interest, the Commissioner recognises the general public interest in openness and transparency where information could add light to the decision-making process. Having considered the content of the information withheld under section 30(c), she is not satisfied that there is anything there which would contribute materially to this interest. The Commissioner has also given weight to the nature of the Scottish Government's involvement in these matters. In all the circumstances, the Commissioner considers there to be a strong public interest in maintaining the Ministers' ability to obtain such information voluntarily, through informal means such as those employed here.
73. On balance, having weighed up the arguments presented by each party and considered the information withheld, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA is not outweighed by the public interest in disclosure of the withheld information.
74. The Commissioner therefore finds that the Ministers were entitled to withhold this information under section 30(c) of FOISA.

Section 29(1)(a) – Formulation of Scottish Administration policy etc.

75. The Ministers submitted that the information contained in a number of documents was exempt from disclosure in terms of section 29(1)(a) of FOISA.



76. Under section 29(1)(a), information held by the Scottish Administration (the Ministers – see the Scotland Act 1998) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that “formulation” suggests the early stages of the policy process, where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to Ministers. “Development” suggests the processes involved in reviewing, improving upon or amending existing policy: it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
77. As noted above, for information to fall under this exemption, it need only “relate” to the formulation or development of government policy.
78. The Ministers submitted that the large retail supplement and public health supplement were separate policies, introduced either side of an election. The Ministers confirmed that the policies were not, and had not been, intermingled or absorbed into each other. They stated that development of the public health supplement policy had not yet been completed at the time of their submissions, as they were still assessing its impact (and this would determine any necessary reviews or changes required to the policy). In terms of the large retail supplement, the Ministers explained that the policy was announced in November 2010 and a motion to annul the regulations was passed at the Local Government Committee in February 2011. They explained that there was then a Parliamentary debate on a motion to annul those regulations, which was passed on 2 February 2012 (bringing that policy to an end).
79. The Ministers acknowledged that the legislation was now in place, but argued that it was necessary to review and reassess previous policy decisions, reports and projects, based on developments since the introduction of the legislation. From this, they would determine and finalise the appropriate and preferred way forward for the policy on public health. In the circumstances, they considered the policy development stage to be ongoing.
80. Gallaher did not accept that the policy was still in development at the time of its request. It highlighted that the request was made on 12 March 2012, over a month after the relevant regulations were made. It stated that the regulations were free-standing and did not require any further commencement or modification orders to come into force. It argued that the latest stage at which the policy could still have been in development would therefore be immediately before the regulations were made. Gallaher stated that the Ministers’ position in this case, would seem to apply to almost all policy and legislation, with the result that there would rarely be a policy that was not subject to “formulation or development”. This would appear to be a wider interpretation than these words could bear.
81. Having considered the withheld information, the Commissioner accepts that in this case it is information which relates to the formulation or development of government policy and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA. As noted above, for information to fall under this exemption, it need only “relate” to the formulation or development of Government policy. While she has taken account of Gallaher’s comments, she cannot require that the relevant formulation or development remains ongoing at the time the request is made or is being dealt with (although that may be relevant to consideration of the public interest).



82. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

83. The Ministers recognised a public interest in ensuring transparency and accountability in the decision making of government. They considered this to be outweighed by the need for Ministers and officials to have the space in which to fully discuss and develop policies and responses with candour. The Ministers considered it important that consideration could be taken of all, even the most unlikely, outcomes and that Ministers and officials could discuss and debate these in order to reach a considered decision, policy or way forward.
84. In the Ministers' view, if the withheld information were to be released, officials would exercise an increased degree of caution in preparing such papers in future, resulting in a qualitative change in the views expressed, the options offered, the recommendations made and the substance of the actual information. The Ministers argued that it would be likely that officials would not provide such detailed or comprehensive advice in future and, in particular, would be less likely to highlight particular risks, uncertainties or concerns in their written advice during the policy development process. The Ministers submitted that fear over release might incline officials to play down or even ignore any concerns they might have, which could limit the range of options considered. This, in turn, would render the legislative and policy-making process less robust.
85. As indicated above, they also considered the policy development process in this area to remain ongoing: with this in mind, it would be inappropriate to put the information into the public domain while further consideration and change could still be required.
86. Gallaher provided public interest arguments in favour of disclosure, as set out in relation to section 36(1) above.
87. The Commissioner has considered carefully the comments made by both Gallaher and the Ministers when balancing the public interest in relation to this exemption.
88. The Commissioner recognises that there is significant public interest in disclosure of the information, as it would assist the public in understanding the basis on which the Ministers made the relevant policy decisions.
89. The Commissioner notes that the information explores various options, details methods of exploring those options, and contains views and advice on those options in relation to both policies. While recognising that some of the information was specifically created in relation to the large retailer supplement, the Commissioner acknowledges that the factors under consideration may equally apply to the development of the public health levy.



90. In all the circumstances of this case, the Commissioner considers there to be a significant public interest, in the case of complex policies such as these under consideration, that the Ministers obtain all the relevant guidance and advice, and can explore all possible implications. They require to be fully informed to enable them to do this. She acknowledges the risk of early disclosure compromising this process, and thus their ability to consider all of the options fully.
91. Taking account of the timing of Gallaher's request and recognising that the public interest in non-disclosure would likely diminish over time, the Commissioner has concluded that at the relevant time the public interest in disclosure was outweighed by the public interest in maintaining the exemption in section 29(1)(a).
92. The Commissioner therefore concludes that the Ministers were justified in withholding information under section 29(1)(a) of FOISA.
93. As the Commissioner has concluded all of the information under consideration to have been correctly withheld under one of sections 36(1), 36(2), 30(c) or 29(1)(a) of FOISA, she will not go on to consider the application of the other exemptions cited by the Ministers.

Timescales

94. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case.
95. Gallaher submitted its requirement for review on 23 May 2012 and the Ministers responded on 5 July 2012. The Ministers explained that, due to the nature and volume of the information in this case and the fact that, as is necessary, the reviewer was not acquainted with the area of work the request referred to, the review was complicated and required a high degree of consultation with policy colleagues and the FOI unit before an informed decision could be made. They submitted that they kept Gallaher informed during this process.
96. The Ministers apologised for the failure to meet the review deadline and said that they would try to ensure that reviewers were not impeded from meeting the statutory deadlines in future.
97. The Commissioner notes the Ministers' explanation but it is a matter of fact that the Ministers failed to provide a response to Gallaher within 20 working days. Therefore, the Commissioner finds that they failed to comply with section 21(1) of FOISA.



Handling of the request

98. Within its application to the Commissioner, Gallaher raised a number of concerns relating to the handling of its request, specifically in relation to the content of the responses provided by the Ministers and perceived changes in the exemptions applied. The Commissioner has considered these concerns. While it would have been preferable for the Ministers to have identified and applied the relevant exemptions when it first responded to the request, that it changed its approach, is not, in the Commissioner's view, a breach of Part 1. The only identified breach of Part 1 arising from Gallaher's application was in relation to timescales as identified above.

DECISION

The Commissioner finds that the Scottish Ministers generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Gallaher Limited (Gallaher).

She finds that the Ministers were entitled to withhold information from Gallaher as outlined above. She also finds that, by failing to respond to Gallaher's requirement for review within the timescale laid down by section 21(1) of FOISA, the Ministers failed to comply with Part 1. Given that a response was provided, albeit outwith that timescale, the Commissioner does not require the Ministers to take any action in respect of this failure in response to Gallaher's application.

Appeal

Should either Gallaher Limited or the Scottish Ministers wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner
15 August 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

17 Notice that information not held

- (1) Where –

- (a) a Scottish public authority receives a request which would require it either –
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but



(b) the authority does not hold the information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

29 Formulation of Scottish Administration policy etc.

(1) Information held by the Scottish Administration is exempt information if it relates to-

(a) the formulation or development of government policy;

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

32 International relations

(1) Information is exempt information if-

(a) its disclosure under this Act would, or would be likely to, prejudice substantially-

...

(ii) relations between the United Kingdom and any international organisation or international court;

...



36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.