

Decision Notice



Decision 214/2013 Mr Simon Murphy and the Scottish Ministers

Minimum pricing of alcohol

Reference No: 201202450

Decision Date: 26 September 2013

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Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 29 September 2012, Mr Murphy asked the Scottish Ministers (the Ministers) for correspondence and other records relating to the minimum pricing of alcohol. The Ministers withheld the information under various exemptions in FOISA. Following an investigation, during which the Ministers disclosed some information to Mr Murphy, the Commissioner found that the Ministers had been correct to withhold the remaining information under section 29(1)(b) of FOISA (on the basis that the information related to Ministerial communications and the balance of the public interest favoured the information being withheld).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(b) and (4) (Formulation of Scottish Administration policy etc.)

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 29 September 2012, Mr Murphy sent three emails to the Ministers requesting:
All emails, letters, civil service minutes of meetings and telephone calls
between (respectively) First Minister Alex Salmond and Nicola Sturgeon MSP; First Minister Alex Salmond and Michael Matheson MSP; and Nicola Sturgeon MSP and Michael Matheson MSP, in each case since May 2011, mentioning “alcohol”, “the Alcohol (Scotland) Act” and “minimum pricing”.
2. The Ministers responded on 26 October 2012, withholding any relevant information they held under sections 29(1)(a) and (b) and 30(a) of FOISA.
3. On 30 October 2012, Mr Murphy wrote to the Ministers requesting a review of their decision. He expressed his disagreement with the application of the above exemptions, and in particular with the Ministers’ application of the public interest test.



4. The Ministers notified Mr Murphy of the outcome of their review on 23 November 2012, upholding their initial decision without modification.
5. On 24 November 2012, Mr Murphy wrote to the Commissioner, stating that he 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.
6. The application was validated by establishing that Mr Murphy made requests 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 those requests.

Investigation

7. On 8 January 2013, the Ministers were notified in writing that an application had been received from Mr Murphy and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. 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. 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 requirements of those exemptions cited in their responses to Mr Murphy.
9. The Ministers confirmed that they held no information involving Mr Matheson and provided details of the searches they had carried out in dealing with the request. They stated that they no longer wished to rely on the exemption in section 29(1)(a) of FOISA, but continued to withhold the information under sections 29(1)(b) and 30(a).
10. Subsequently, the Ministers informed the Commissioner that they only wished to apply these exemptions to specific parts of the withheld information. They released the remainder to Mr Murphy. After this, Mr Murphy confirmed that he wished to continue with his application in respect of that information still being withheld by the Ministers.

Commissioner's analysis and findings

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



Section 29(1)(b) of FOISA – Ministerial communications

12. Section 29(1)(b) of FOISA provides that information held by the Scottish Administration is exempt information if it relates to Ministerial communications. These are defined in section 29(4) as communications between Ministers, including (in particular) communications relating to the proceedings of the Scottish Cabinet or any committee of that Cabinet.
13. Having considered the nature and content of the remaining withheld information, the Commissioner accepts that all of it falls within the definition of Ministerial communications. She is therefore satisfied that it is (and was, at the time the Ministers dealt with Mr Murphy's request) exempt under section 29(1)(b) of FOISA.
14. The exemption in section 29(1)(b) is a qualified one, subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must now, therefore, consider whether, in all the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (i.e. in withholding the information).

Public interest test

15. Mr Murphy referred to cases in which disclosure had been required under the (United Kingdom) Freedom of Information Act 2000, notwithstanding that the information related to the formulation of government policy or collective Cabinet decision-making. In these cases, he noted, the public interest in disclosure outweighed the public interest in maintaining a "safe place" for the candid and confidential discussion and development of government policy.
16. The Commissioner acknowledges that consideration of the public interest may lead to a conclusion of the kind outlined in the previous paragraph. Similar conclusions have been reached under FOISA. However, each case must be considered on its own merits.
17. It was Mr Murphy's view that the public had a right to know about the formation of a policy which affected them, especially a health-related issue such as alcohol pricing.
18. The Ministers identified a strong public interest in high quality policy and decision making by the Scottish Government, and in the properly considered implementation and development of the relevant policies and decisions. For this to happen, Ministers needed to be able to consider all available options and debate them rigorously, so as to fully understand their possible implications. The Ministers submitted that their candour in doing so would be affected by their assessment of whether the discussions would be disclosed in the near future (when disclosure might undermine or constrain the Government's view on policy while it remained under discussion or development – which would not be in the public interest).
19. It was also the Ministers' view that, once a settled policy position had been reached or a collective decision had been made, there was still a high public interest in maintaining collective responsibility for that policy or decision. Disclosure of internal discussions would, the Ministers submitted, be likely to have the effect of undermining the Government's position, and thus the effectiveness of the policy or decision, which would not be in the public interest.



20. The Ministers also considered that a degree of public interest had already been served by the publication of the Alcohol Minimum Pricing Bill and its supporting papers on 1 November 2011 and that there was nothing further to be gained in public interest terms in releasing the withheld information. They highlighted that development of the policy in question continued after the publication of the Bill and (in addition to more specific concerns, which cannot be detailed here) noted that issues remained to be resolved with the European Commission. The matter remained live, therefore, as it had been over the period when the Ministers had dealt with Mr Murphy's request.
21. The Commissioner acknowledges that information relating to policy development (including that involving Ministerial communications) may retain a high level of sensitivity at the time that policy is being formulated and remains under active development, although the sensitivity of that information is likely to decline over time. In the case of the information under consideration here, she acknowledges that the issues remained live at the time the Ministers dealt with Mr Murphy's request and requirement for review (and indeed that they continue to be so, given ongoing discussions with the European Commission and legal challenges, both actual and potential). Having considered the particular information remaining withheld here, she accepts as relevant in the circumstances the particular concerns highlighted by the Ministers.
22. The Commissioner has also considered the extent to which disclosure of the information would contribute to scrutiny of the Ministers' policy and decision making processes, or debate on matters of public interest.
23. On balance, having considered the remaining withheld information and the submissions from both Mr Murphy and the Ministers, the Commissioner concludes that the public interest in maintaining the exemption in section 29(1)(b) of FOISA outweighs that in disclosure of the information. She therefore finds that the Ministers were entitled to withhold the information under section 29(1)(b).
24. Having concluded that the remaining withheld information was properly withheld under section 29(1)(b) of FOISA, the Commissioner is not required to consider the application to that information of the exemption in section 30(a) of FOISA.

DECISION

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information requests made by Mr Murphy, in respect of those matters covered by Mr Murphy's application.

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and the Scottish Ministers



Appeal

Should either Mr Murphy or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Margaret Keyse
Head of Enforcement
26 September 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 -

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

29 Formulation of Scottish Administration policy etc.

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

...

- (b) Ministerial communications;

...

- (4) In this section-

...

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and ...

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