

Decision Notice



Decision 229/2013 Mr Alistair Sloan and the Scottish Ministers

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Reference No: 201300907

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www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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



Summary

On 26 January 2013, Mr Sloan asked the Scottish Ministers (the Ministers) for information relating to Part II of the Scottish Civil Justice Council and Criminal Legal Assistance Bill, which relates to Criminal Legal Assistance. The Ministers provided some information and referred Mr Sloan to other information which was already publicly available. The Ministers withheld some information on the basis that various exemptions of FOISA applied.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the information as information relating to the formulation of Scottish government policy or whose disclosure would be likely to cause substantial prejudice to the effective conduct of public affairs (the public interest in all cases favouring 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)(a) and (4) (Formulation of Scottish Administration policy etc.); 30(b) and (c) (Prejudice to effective conduct of public affairs).

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. On 26 January 2013, Mr Sloan wrote to the Ministers requesting information relevant to the Scottish Civil Justice Council and Criminal Legal Assistance Bill. Full details of Mr Sloan's request are set out in Appendix 2 to this decision.
2. The Ministers responded on 28 February 2013. In line with section 25(1) of FOISA, the Ministers stated that some of the information was already available to Mr Sloan, providing him with relevant website links. The Ministers also identified information which they withheld from Mr Sloan, on the basis that section 29(1)(a) and (b), and section 30(a),(b) and (c) of FOISA applied.



3. On the same date, Mr Sloan wrote to the Ministers requesting a review of their decision. Mr Sloan asked the Ministers to reconsider their application of the exemptions relied upon to withhold information (with the exception of section 25(1)), putting forward what he believed to be strong public interest reasons for disclosure.
4. The Ministers notified Mr Sloan of the outcome of their review on 4 April 2013. They concluded that the original decision to withhold the information should be confirmed without modification.
5. On 8 April 2013, Mr Sloan wrote to the Commissioner's office, 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 Sloan 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 25 April 2013, the Ministers were notified in writing that an application had been received from Mr Sloan and were asked to provide the Commissioner with any 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 exemptions applied in communications with Mr Sloan.
9. The Ministers disclosed further information to Mr Sloan during the investigation. He confirmed that he still required a decision in respect of the remaining withheld information.

Commissioner's analysis and findings

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



Background to request

11. Mr Sloan's request related to the passage of the Scottish Civil Justice Council and Criminal Legal Assistance Bill. The Bill proposed to introduce contributions to criminal legal aid. There was much media interest and controversy during the passage of the Bill, with lawyers taking part in one-day boycotts at several sheriff courts and protesting outside the Scottish Parliament in response to some of the measures proposed in the Bill¹.
12. Mr Sloan's request was submitted shortly following the passing of the Bill by the Scottish Parliament in January 2013. It received Royal Assent on 5 March 2013
13. Information from each of the seven documents which remain withheld has been disclosed to Mr Sloan; no document has been withheld in its entirety.

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

14. The Ministers withheld information from one document in terms of section 29(1)(a) of FOISA.
15. The Commissioner has considered the content of the document and has concluded that much of it falls outwith the scope of Mr Sloan's request. In what follows, she will consider those parts which fall within the scope of the request only.
16. Under section 29(1)(a), information held by the Scottish Administration (which includes 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.
17. As noted above, for information to fall under this exemption, it need only "relate" to the formulation or development of government policy.
18. Mr Sloan acknowledged that this exemption was "... most probably engaged", but argued that the public interest had been incorrectly weighed by the Ministers. Having considered the information and the relevant submissions, the Commissioner agrees that the information falls within the scope of the exemption.
19. The information relates to the regulations under preparation for implementation of Part II of the Bill. The Ministers explained that at the time of the request, scoping to ascertain exactly what was required was still underway. At the time of the Ministers' submissions to the Commissioner, development of the relevant regulations continued, with drafts being prepared for sharing with key stakeholders.

¹<http://www.bbc.co.uk/news/uk-scotland-glasgow-west-20512367>



The public interest test

20. The Ministers accepted that disclosure of certain information relating to the preparation of secondary legislation might enhance public scrutiny of decision making and policy making processes and therefore transparency and accountability. They recognised that disclosure might also inform debate on those matters still to be defined through the regulations which were under preparation at the time of the request.
21. The Ministers argued that the public interest in this was outweighed by the public interest in maintaining a space for free and frank exchange of views and advice, to allow them to consider a full range of options in a developing policy. The development of this policy, following as a result of the passage of the Bill, was not yet complete at the time of the request (or the time of the Ministers' submissions to the investigating officer). They also argued that release of information relating to working assumptions (on matters related to the passage of the Bill), while deliberation on these points was still at a sensitive stage with key stakeholders, would be likely to prejudice that deliberation and discussions of any alternatives with representative bodies.
22. The Ministers considered it to be in the public interest that information which might be detrimental to the provision of public services was not prematurely released. They explained that the misuse of detailed information on negotiations during the passage of the Bill contributed to a situation in which members of the public were more likely to appear in custody courts without legal representation. In the circumstances, the Ministers considered the public interest in maintaining the exemption significantly outweighed that in its release.
23. Mr Sloan argued that one of the fundamental concerns of the legal profession in respect of Part 2 of the Bill was the risk to the accused's rights under article 6 of the European Convention on Human Rights and Fundamental Freedoms. He highlighted the fundamental importance of article 6 rights in a democratic society and argued that Government should be held to account where there were legitimate concerns about the way in which its policy might affect these rights. Mr Sloan argued that this could not be done effectively without being aware of exactly what information the Ministers had taken into account in respect of these rights.
24. Mr Sloan stated that any situation resulting in something as drastic and unprecedented as strike action taken by solicitors needed proper scrutiny, and this was a strong public interest factor favouring release of the withheld information.

The Commissioner's conclusions on the public interest test

25. The Commissioner has considered carefully the comments made by both Mr Sloan and the Ministers when balancing the public interest test.
26. The Commissioner recognises that there is a significant public interest in disclosure of the information, as this would assist the public in understanding the basis on which the Ministers made relevant policy decisions. The Commissioner accepts that the controversy surrounding these policy decisions lends weight to this argument.



27. Equally, the Commissioner notes that the information highlights particularly contentious areas and contains views on the suggested response from the Ministers on these specific issues, expressed freely while the policy remained in the course of development. In all the circumstances of the case, the Commissioner considered there to be a significant public interest in allowing Ministers to obtain all the relevant guidance and advice during this process.
29. The Commissioner has also considered Mr Sloan's points about the legal profession's concerns about Human Rights and the reaction of the profession to the bill, and how the Government should be held to account in this regard. The Commissioner recognises the public interest in ensuring that Ministers are accountable and transparent, but considers that in the circumstances of this case, this interest can be met without disclosing the information. Ultimately, it is the decision of Parliament, not the decision of Government, as to what bills and orders become law and for the terms of such legislation. In reaching these decisions there are opportunities (e.g. through consultation and giving of evidence) which would give Mr Sloan and the profession (and any other person) formal opportunity to voice their concerns.
30. Taking account of the timing of Mr Sloan's request, and recognising that the public interest in non-disclosure would be likely to diminish over time, the Commissioner has concluded that (at the time the Ministers dealt with Mr Sloan's request and requirement for review) the public interest in disclosure was outweighed by the public interest in maintaining the exemption in section 29(1)(a).
31. The Commissioner therefore concludes that the Ministers were justified in withholding information under section 29(1)(a) of FOISA.

Section 30(b)(i) and (ii) – Prejudice to effective conduct of public affairs

32. The Ministers relied upon sections 30(b)(i) and (ii) of FOISA in withholding "purpose and effect notes" prepared for the Minister. They explained that these contained information relating to discussion about legislation which was yet to be implemented. Having reviewed the document, the Commissioner has concluded that only appendices G and H fall within the scope of Mr Sloan's request, as information relating to concerns of the legal profession in relation to Part II of the Bill.
33. Appendices G and H were released during the investigation, with the exception of three small extracts. The Ministers relied upon sections 30(b)(i) and (ii) in relation to this information.
34. In order for the Ministers to rely on these exemptions, they must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The exemptions are subject to the public interest test in section 2(1)(b) of FOISA.



35. It is the Commissioner's view, as stated in previous decisions, that the standard to be met in applying the tests contained in these exemptions is high. In applying the exemptions, the chief consideration is not whether the information constitutes advice or opinion, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice or the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.
36. As with other exemptions importing a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would require to be at least a significant probability of it occurring.
37. Each request should be considered on a case-by-case basis, taking into account the effects on the future provision of advice or exchange of views anticipated from disclosure of the particular information involved. The content of the withheld information must be considered, taking into account factors such as its nature, subject matter and manner of expression, and also whether the timing of disclosure would have any bearing: releasing advice or views while a decision was being considered, and for which further views were still being sought, for example, could be more substantially inhibiting than disclosure once advice was taken.
38. The Ministers argued that disclosure of the information at the time of the request would have been likely to inhibit the free and frank provision of advice or exchange of views relating to the development of specific policy intentions of the Bill and their implementation, particularly between public bodies and key stakeholders. The Ministers stated that release would also have been likely to inhibit negotiations with the Law Society of Scotland.
39. The Ministers stated that the bulk of the information in the purpose and effect notes was provided by the Scottish Government's legal advisers to aid and inform policy development and decisions. The Ministers stated that the information still withheld relates to policy still under development.

Mr Sloan's submissions

40. With respect to the application of these exemptions, Mr Sloan argued that the Ministers had not sufficiently demonstrated the harm they alleged would occur from releasing the information. Mr Sloan argued that there must be more than just a mere possibility of prejudice, there must be evidence that the probability of the harm alleged occurring was significant and that prejudice would be substantial.

The Commissioner's conclusions

41. The Commissioner must consider the position as at April 2013, when the Ministers notified Mr Sloan of the outcome of their review of his request. The Bill was passed on 29 January 2013, a matter of days after Mr Sloan made his original request. However, drafting of secondary legislation was still underway at the time of the review. The Commissioner notes that much of this document, insofar as falling within the scope of Mr Sloan's request, was



released during the investigation, with the Ministers recognising that much of it was by then factual information and that enough time had passed to sufficiently lower the risks from disclosure.

42. The Commissioner has considered the content of the information still withheld, and notes that it relates to concerns surrounding the secondary legislation. In relation to these items, the Commissioner accepts that the risks put forward by the Ministers were substantial and were still present at the time of their review. Consequently, she accepts that the exemptions in section 30(b) of FOISA were applied properly to this information.

The public interest

43. The Ministers submitted that at the time of the request, the public interest in releasing the information was outweighed by that in maintaining a space for free and frank exchange of views and advice, to allow them to consider a full range of options in developing policy which was to follow passage of the Bill, i.e. the formulation of regulations. The Ministers stated that the release of the information relating to working assumptions on these matters ahead of full deliberation of the relevant points would have been likely to prejudice that deliberation and the discussion of any alternatives with representative bodies. The Ministers also considered it in the public interest that information which might be detrimental to the provision of public services was not released.
44. Mr Sloan contended that the circumstances of this case meant that protecting the effective conduct of public affairs was best served by releasing the information into the public domain. In making this argument, Mr Sloan referred again to the significant and unprecedented steps taken by legal professionals in relation to this subject matter.
45. The Commissioner accepts that there is a strong public interest that Ministers receive high quality advice, particularly in contentious areas. She also recognises the strong public interest in transparency and accountability in the decision-making process. However, she notes that the decision-making process, with regards to the secondary legislation, was still underway at the relevant time and that the information under consideration relates to areas of particular sensitivity.
46. Given the above and the timing of Mr Sloan's request, the Commissioner accepts, in all the circumstances of this case, that the public interest in maintaining the exemption in sections 30(b) outweighs the public interest in disclosure of the information. She has considered the public interest arguments presented by Mr Sloan, but does not find that these could be furthered significantly by disclosure of the information in question.

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

47. 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.

48. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must 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. It 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.
49. In his application to the Commissioner, Mr Sloan argued that the Ministers had not sufficiently demonstrated the harm they alleged would occur from releasing the information. He further believed that the public interest in releasing the information was not outweighed by the public interest in maintaining the exemption.
50. The Ministers explained that the documents to which they applied section 30(c) were prepared for the First Minister's information. The Ministers stated that their decision to withhold this information was directly linked to the public interest test and related primarily to the relationship of the Scottish Government with the Law Society of Scotland and the legal profession, and to the level of disruption experienced by the courts and those within the justice system on the dates when action was taken by solicitors.
51. Two of the documents to which the Ministers applied section 30(c) consisted of extracts from Scottish Cabinet Analysis of Current Affairs and Events (SCANCE) notes. The Ministers explained that these notes have a specific purpose, which is to inform the Cabinet of current or forthcoming issues which may be of interest, sensitive or impact upon the Scottish Government. They contain speaking notes for the relevant Cabinet Secretary.
52. The Ministers argued that they must be able to maintain a space for free and frank exchange of views and advice, to allow them to consider a full range of options relating to the preservation of effective working relationships with outside bodies, the breakdown of which might have an unfavourable effect on the people of Scotland. Full dissemination of these points, the Ministers submitted, would be likely to prejudice that deliberation and discussion of any alternatives with representative bodies.
53. The Ministers explained, the legal profession took action at the end of 2012 and the beginning of 2013 to register their disapproval of the collection of contributions in criminal legal assistance. At the time of their submissions (and at the time they dealt with Mr Sloan's request) the Ministers stated that this matter had not yet been resolved and their relationship with the Society and the profession was still tense. The documents in question detailed the reaction of the profession to the Bill and the possible Scottish Government response. The Ministers considered it likely that further action was possible. Consequently, the Ministers concluded that it was not in the public interest for that information to be released and complicate the professional relationship further: disclosure would be likely to further prejudice deliberation and discussion of alternatives.



54. The Ministers recognised the public interest in openness and transparency. However, given the timing as explained above, they argued to release the information would risk inflaming an already tense relationship and escalating disruption to the wider justice system as a result.
55. In addition to the arguments considered above in relation to section 30(b), Mr Sloan highlighted access to justice as a fundamental tent of democracy: it was vital that the regulations as drafted did not harm this.

The Commissioner conclusion

56. The Commissioner has taken account of the content of this information and she accepts that disclosure, at the time the Ministers dealt with Mr Sloan's request and requirement for review, would have been likely to prejudice substantially the relationship between the Ministers, the Law Society and the legal profession.
57. In reaching this conclusion, she notes, as Mr Sloan acknowledges, that unprecedented strike action had been taken by solicitors near the time of this request and that the relationship between these parties was tense, and remained so at the time of the request and review.
58. 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 which would contribute materially to this interest. The Commissioner has also given weight to the context of this request, and specifically to the tensions between the Scottish Government, the Law Society and the profession, and particularly the impact further disruptive action could have. She is satisfied that the public interest favours maintaining the exemption on this occasion.
59. The Commissioner therefore finds that the Ministers were entitled to withhold this information under section 30(c) of FOISA, but recognises that the harm associated with disclosure will diminish over time.
60. As the Commissioner has determined that the Ministers were correct to withhold all of the information remaining withheld under the exemptions considered above, she is not required to consider the application of section 29(1)(b) of FOISA in this case.

DECISION

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



Appeal

Should either Mr Sloan 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.

Rosemary Agnew
Scottish Information Commissioner
18 October 2013



Appendix 1

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-

- (a) the formulation or development of government policy;

...

- (4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and

- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...



30 Prejudice to effective conduct of public affairs

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



Appendix 2

Mr Sloan's request

I seek the following information from the Scottish Ministers:

- a) The full content of any recorded minutes of meetings between the Law Society of Scotland (or representatives of) and the Cabinet Secretary for Justice (or representatives of) in relation to Part II of the Bill (i.e. the part that relates to Criminal Legal Assistance). This request covers the period of 4 October 2012 until 26 January 2013.
- b) The full content of any briefing papers or other information held by the Scottish Ministers which discusses the concerns of the legal profession in relation to Part II of the Bill (i.e. the part that relates to Criminal Legal Assistance). This request covers the period 1 July 2013 [sic] to 26 January 2013. The scope of this request extends only to that information which was created by the Scottish Ministers (as a public authority).
- c) Any information held which relates to the selection of £82 as the point at which contributions would begin. (Explanation: This part of the request aims to understand why the Government selected £82 as a starting point as a concession; the evidence supporting £82.)
- d) Any information held that could be considered to be an Equalities Impact Assessment of the £82 starting point rather than the originally proposed £68 starting point.