

Decision Notice



Decision 235/2013 Mr Mark McLaughlin and the Scottish Ministers

Legal advice on the position of an independent Scotland within the European Union

Reference No: 201301497

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www.itspublicknowledge.info

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Summary

On 16 May 2013, Mr McLaughlin asked the Scottish Ministers (the Ministers) for the advice they had received from Law Officers on the position of an independent Scotland within the European Union. The Ministers withheld the information under the exemptions in sections 29(1)(c) (provision of advice or request for the provision of advice by the Law Officers) and 36(1) of FOISA (legal professional privilege). Following a review, Mr McLaughlin remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Ministers had properly applied section 29(1)(c) of FOISA and that the information was exempt from disclosure.

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)(c) and (4) (definition of “the Law Officers”) (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 16 May 2013, Mr McLaughlin wrote to the Ministers requesting “the text of the specific legal advice from Law Officers on the position of an independent Scotland within the European Union.”
2. Having received an acknowledgement, but not a response, Mr McLaughlin sought a review from the Ministers on 20 June 2013.
3. The Ministers notified Mr McLaughlin of the outcome of their review on 26 June 2013. The Ministers apologised for the delay in their response. They confirmed that they had received legal advice from the Law Officers on the position of an independent Scotland within the European Union. The Ministers informed Mr McLaughlin that they considered the advice was exempt from disclosure in terms of sections 29(1)(c) of FOISA on the basis that the information related to a request for the provision of advice from the Law Officers. The Ministers



also considered the information was exempt from disclosure in terms of section 36(1) of FOISA on the basis that it comprised privileged communications between legal adviser and client. The Ministers informed Mr McLaughlin that they were of the view that the public interest favoured withholding the information.

4. On 26 June 2013, Mr McLaughlin 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.
5. The application was validated by establishing that Mr McLaughlin 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

6. On 9 July 2013, the Ministers were notified in writing that an application had been received from Mr McLaughlin and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested (a joint opinion provided by the Lord Advocate and the Solicitor General), and the case was then allocated to an investigating officer.
7. 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.

Commissioner's analysis and findings

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

Section 29(1)(c) - request for the provision of advice by Law Officers

9. The Ministers applied the exemption in section 29(1)(c) of FOISA to the information withheld from Mr McLaughlin.
10. Under section 29(1)(c) of FOISA, information held by the Scottish Administration is exempt from disclosure if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The definition of "Law Officers" in section 29(4) includes the Lord Advocate and the Solicitor General for Scotland.



11. The Commissioner is satisfied that the information withheld from Mr McLaughlin relates to a request for the provision of advice by the Law Officers as well as to the provision of that advice. The information is therefore exempt from disclosure under section 29(1)(c) of FOISA.

The public interest test

12. Section 29(1)(c) is a qualified exemption, which means that, even if the exemption applies, the application of the exemption is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in maintaining the exemption (i.e. withholding the information) outweighs the public interest in disclosing the information. Unless it does, the information must be disclosed.
13. In his application, Mr McLaughlin commented that the independence referendum is unlike any other Government policy and will be decided by the people of Scotland; therefore, they need to be in “full command of best available information to make an informed decision.” In respect of the Ministers’ review, which stated:

“The Scottish Government remains entirely confident of the common sense position, supported by a number of eminent experts in EU affairs, that following a Yes vote, Scotland would notify its intent to remain a member of the EU and would negotiate the specific terms of that continued membership in the period between the referendum and the first day of independence”

Mr McLaughlin commented:

“The phrase ‘entirely confident’ does not reflect the unanimous view of the Scottish, Westminster or European parliaments or a large section of Scottish and European society. “Negotiate the specific terms” also contains inherent uncertainty. Individuals in every realm, including the SNP’s allies in Europe, have raised issues which call this position into question... It is only through disclosure of the Scottish Government’s own hopefully balanced and objective Law Officer advice that the Scottish people can judge the veracity of this statement and cast their vote accordingly.”

14. Mr McLaughlin referred to other public interest arguments in favour of disclosing the advice. These included the importance of allowing people access to the advice to produce an informed decision by people which would take into account Scotland’s future position in Europe. That is, in effect, that people needed to be aware at the earliest information about the position of Scotland in Europe. Mr McLaughlin also supplied articles and quotations to support his case and his view of the importance of disclosure of the withheld information.
15. The Ministers acknowledged that there was a public interest in disclosure of this legal opinion given that Scotland’s status as an EU member and the process of it attaining EU membership are matters which have attracted significant media interest. Nevertheless, they were of the view that the public interest in maintaining the exemption in section 29(1)(c) outweighed the public interest in the disclosure of the information.



16. The Ministers explained that they took the view that the fact that the Government had sought advice from the Law Officers on this issue (and the fact that advice had been received) was one which was appropriate to disclose. (The Law Officers' Convention, as reflected in paragraphs 2.30 to 2.35 Scottish Ministerial Code,¹ states that the fact that legal advice has or has not been given by the Law Officers must not be revealed outwith the Government without the Law Officers' prior consent.) This disclosure was in the light of the exceptional circumstances prevailing at the time.
17. The Ministers recognise that the legal question over Scotland's position in Europe post-independence has been widely publicised: that it is of fundamental importance to the referendum debate and to people in Scotland, the rest of the United Kingdom and the European Union (and beyond). After the signing of the Edinburgh Agreement in October 2012, the Scottish Government acknowledged the significant public interest in knowing that the Government's position was informed by consultation with its Law Officers. The Lord Advocate agreed this approach in advance of the Deputy First Minister's statement to Parliament of 23 October 2012. However, the Ministers emphasised that they do not consider that the same public interest arguments apply to disclosure of the content of the advice itself.
18. The Ministers' view was that there is a strong public interest argument in upholding the Law Officers' Convention and in avoiding undermining that Convention. The Ministers referred to the decision of the High Court of Justice in *HM Treasury v The Information Commissioner*, [2009] EWHC 1811 (Admin)², and the related witness statement by Jonathan Jones, in respect of the public interest arguments in support of the Law Officers' convention.
19. The Ministers explained that the purpose of the Convention was to enable the Government to obtain full and frank legal advice on matters of particular sensitivity, complexity or uncertainty, from its Law Officers in confidence when it is appropriate to do so, without publicly identifying those matters or coming under pressure to refer matters to the Law Officers unnecessarily.
20. The Ministers commented that the ability to obtain legal advice was particularly important in the period leading up to the referendum where there will be a great deal of political, public and media scrutiny of the Scottish Government's proposals. In areas such as this, which are the subject of political debate, an expectation that advice and discussions could be released would, in the Ministers' view, lead inevitably to the consequent advice being much more circumspect and, therefore, less effective.
21. As stated previously (in *Decision 178/2013*³), the Commissioner accepts that the forthcoming referendum will potentially effect a momentous change in Scotland's constitutional position. In her view, it is essential that the public are able to make an informed decision when making their choice in the referendum. The Commissioner believes that disclosure of the matters considered to be of particular relevance by the Ministers could assist the public in better understanding these issues.

¹ <http://www.scotland.gov.uk/Publications/2011/12/01141452/3>

² <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1811.html>

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2013/201301263.aspx>



22. Disclosure could contribute to openness and accountability and would allow the public some insight into matters which are considered by Ministers to be of particular relevance in relation to the issue of an independent Scotland's relationship with the EU. The Commissioner believes that disclosure of the information could provide a more informed public understanding of the Ministers' considerations of constitutional matters and the wider topic of public international law. There is clearly a significant public interest in the disclosure of the advice.
23. The Commissioner has considered all the points made by Mr McLaughlin, including articles and other information in the public domain, about the public interest in disclosure of the information. Mr McLaughlin drew the Commissioner's attention to the Law Society of Scotland's publication *Scotland's Constitutional Future*⁴, and to the Law Society's press release on this document, which states:
- "Membership of the European Union continues to be a vexed question. We think people should have more information about an independent Scotland's future membership of the EU and, while acknowledging the right of government not to disclose legal advice received, we think both the Scottish and UK Governments should publish the Law Officer legal advice they have been given to help provide clarity for voters."*
24. Mr McLaughlin's view is that it is important that the information be provided at an early opportunity to allow people to come to an informed decision.
25. The Commissioner has pointed out in many decisions that the courts recognise the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Where information relates to the seeking and providing of advice by Law Officers, FOISA provides specific protection from disclosure under the terms of section 29(1)(c) of FOISA. The Commissioner recognises there is a strong public interest both in maintaining the protection that this affords the Law Officers, and in the interests of good governance.
26. It is also of considerable weight in the circumstances of this case that the Ministers have given a commitment to setting out their position on EU membership in the forthcoming White Paper. Ministers have stated that the White Paper will reflect the legal advice they have received (the Ministers have recently announced that the White Paper will be published on 26 November 2013). The Ministers have stated publicly that the proposed position on EU membership which will be set out in the White Paper will be consistent with, and will rely on, the legal advice provided by the Law Officers (i.e. the advice which is the subject of this decision).
27. As the Commissioner has noted previously, when she receives an application and comes to a decision as to whether the public authority complied with Part 1 of FOISA in responding to the request, she must consider the position as at the time the public authority issued its response to the request for review (see paragraph 31 of the opinion of the Lord President in *The*

⁴ http://www.lawscot.org.uk/media/647741/scotlands%20constitutional%20future%202013_main.pdf

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Scottish Ministers v The Scottish Information Commissioner [2006] CSIH 8)⁵. In this instance, Mr McLaughlin was notified of the outcome of the review on 26 June 2013.

28. In the Commissioner's view, the exemption in section 29(1)(c) clearly creates an expectation that requests for advice to, and advice received from, the Law Officers should be protected under FOISA. The Commissioner accepts that such requests will usually relate to matters of particular sensitivity and considers it is in the public interest that Ministers are able to seek and receive such advice in confidence.
29. Having considered the competing arguments for and against disclosure at the time of the review, the Commissioner is not persuaded that there is an overriding public interest in the disclosure of the information withheld from Mr McLaughlin. In particular, the Commissioner acknowledges the Ministers' commitment to setting out their position on EU membership in the forthcoming White Paper. That commitment was given before the Ministers' review.
30. On balance, therefore, the Commissioner finds that the public interest in maintaining the exemption in section 29(1)(c) outweighs the public interest in the disclosure of the information withheld by the Ministers in this case. The Commissioner therefore finds that the Ministers were entitled to withhold the legal advice from Mr McLaughlin.
31. Having reached this conclusion, the Commissioner has not gone on to consider the remaining exemption (section 36(1) of FOISA) applied to this information by the Ministers.

DECISION

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

⁵ <http://www.scotcourts.gov.uk/opinions/2007CSIH08.html>



Appeal

Should either Mr McLaughlin or the Scottish Ministers (the 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
23 October 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-

...

- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or

...

- (4) In this section-

...

"the Law Officers" means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland; ...

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