

Decision Notice



Decision 299/2013 Mr Mark McLaughlin and the Scottish Ministers

Scotland's position in Europe post-independence

Reference No: 201202350

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Summary

On 20 April 2012, Mr McLaughlin made seven requests to the Scottish Ministers (the Ministers) for information on Scotland's future in Europe. The subject matter of his requests included Scotland's membership of the EU, whether it would have to join the euro and whether Scotland would be required to join the Schengen area. The Ministers disclosed some information to Mr McLaughlin, but withheld other information. Following a review, Mr McLaughlin remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers disclosed more information to Mr McLaughlin, the Commissioner found that the Ministers were entitled (at the time of their review) to withhold the remaining information under a number of different exemptions, all of which are considered in the decision.

The Commissioner also found that the Ministers had failed to respond to Mr McLaughlin's requests and request for review within the time limits set down by FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 10(1)(a) (Time for compliance); 21(1) (Review by Scottish public authority); 25(1) (Information otherwise accessible); 29(1)(a) and (c) and (4) (definition of "government policy", "Law Officers" and "Ministerial communications) (Formulation of Scottish Administration policy etc.); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs); 36(1) (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 On 20 April 2012, Mr McLaughlin made seven separate requests to the Ministers for all published and unpublished documents, emails, evidence, legal advice, advice to Ministers, plus any other relevant material the Scottish Government, Ministers, Civil Servants, Special Advisers and any other staff have sent or received regarding:
 1. whether an independent Scotland will be required to join the Schengen area
 2. whether an independent Scotland will be able to join the UK/Ireland Free Travel Area
 3. the likelihood of Scotland or England erecting border posts if Scotland becomes independent
 4. whether an independent Scotland will become a successor state to the European Union or will become an accession country and have to reapply for entry
 5. whether an independent Scotland will be required to join the euro currency
 6. whether an independent Scotland would retain the UK's European budget rebate if it remains in the European Union
 7. the likelihood of other European Member States vetoing Scotland's entry to the EU if it becomes independent
2. Mr McLaughlin wanted information produced since the Scottish Parliament election in May 2007.
3. The Ministers responded to requests 1, 2 and 3 on 23 July 2012 and to requests 4, 5, and 6 on 25 July 2012. Some of the information falling within the scope of these requests was already in the public domain. The Ministers therefore withheld this information under section 25 of FOISA, on the basis that it was information Mr McLaughlin could reasonably obtain other than by requesting it under FOISA. The Ministers provided Mr McLaughlin with a link to that information. The Ministers withheld the remaining information under a number of exemptions in FOISA.
4. On 26 July 2012, Mr McLaughlin wrote to the Ministers requesting a review of their decisions for requests 1-6. Mr McLaughlin commented that there was a strong public interest in the disclosure of the information.
5. The Ministers notified Mr McLaughlin of the outcome of their review on 26 September 2012. They remained of the view that some of the information was exempt in terms of section 25 of FOISA. For the remaining information, whilst the Ministers acknowledged the public interest in transparency, they concluded that that public interest in withholding the information outweighed the public interest in release.



6. On 14 November 2012, 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.
7. The application was validated by establishing that Mr McLaughlin 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 responses to those requests.
8. Mr McLaughlin's application related to all seven of his requests. However, Mr McLaughlin did not realise at that point that the Ministers had not replied to request 7, which means the Commissioner is unable to investigate the Ministers' failure to respond to request 7. The Commissioner understands that Mr McLaughlin intended to make a further request to the Ministers for this information.

Investigation

9. On 21 November 2012, 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.
10. The Ministers provided some of the information (five documents for requests 1, 2, and 3) on 27 November 2012 and the case was then allocated to an investigating officer. On 29 November 2012, the Ministers advised the Commissioner that additional information had been located and it would take considerably longer to collate than anticipated.
11. The investigating officer contacted the Ministers on 17 December 2012, 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. The Ministers were also asked to provide the Commissioner with the remaining information that had been withheld from Mr McLaughlin.
12. By 5 March 2013, the Ministers had still not provided the Commissioner with the rest of the information withheld from Mr McLaughlin. As a result, the Commissioner issued an information notice to the Ministers in terms of section 50(1)(a) of FOISA, requiring them to provide the Commissioner with the information. Although the information notice was not complied with in full by the date on which the Commissioner required the information to be provided to her, the remaining information was subsequently provided to the Commissioner within a timescales that meant enforcement action was not necessary. The Commissioner comments on this at the end of the decision.



13. The Ministers provided submissions on requests 1, 2 and 3 on 5 April 2013 and on requests 4, 5 and 6 on 18 April 2013. They confirmed that they wished to rely on the exemptions in sections 25(1), 29(1), 30 and 36(1) of FOISA to withhold the information from Mr McLaughlin and set out why they believed the exemptions applied. They also commented on their failure to respond to Mr McLaughlin's requests and requirement for review within the timescales set down by FOISA.
14. At the same time, the Ministers provided the Commissioner with the information they held which fell within the scope of the Mr McLaughlin's requests.
15. The Lord Advocate also provided the Commissioner with a small amount of additional information which he considered might fall within the scope of Mr McLaughlin's requests on 16 April 2013. The Commissioner subsequently confirmed she believed that some of this information fell within the scope of Mr McLaughlin's request (two of the documents had already been provided to the Commissioner directly from the Ministers).
16. On 5 July 2013, the Lord Advocate provided the Commissioner with submissions as to why the information he had provided and which fell within scope was exempt from disclosure under sections 29(1)(c), 30(b)(i) and (c) and 36(1) of FOISA. Subsequent references to submissions being made by the Ministers include submissions made by the Lord Advocate.
17. On 13 May 2013, the Ministers disclosed some information to Mr McLaughlin that they had previously withheld. The information comprised extracts from core briefs prepared by Scottish Government officials in February 2012.
18. The Ministers disclosed further information to Mr McLaughlin on 12 August 2013.

Commissioner's analysis and findings

19. 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 Mr McLaughlin and by the Ministers (including the Lord Advocate). She is satisfied that no matter of relevance has been overlooked.
20. It should be noted that the Commissioner's decision cannot disclose the content of the withheld information. This limits the Commissioner in setting out her full reasons for coming to her decision.
21. In some cases, the Ministers applied several exemptions to the same information. If the Commissioner finds that an exemption was correctly applied to information, she will not go on to consider whether any of the other exemptions also applied to that information.



22. Following Mr McLaughlin's request, the Ministers responded to press queries about Scotland's position in Europe with a clear statement that, upon independence, the Scottish Government expected to negotiate a settlement with the UK as regards the share of the UK's current net contribution to the EU budget that Scotland would be responsible for during the remainder of the current EU budget period (i.e. up to 2020). The Ministers explained that they held no information in relation to the preparation of such statements from before the date of Mr McLaughlin's request.
23. The Ministers told the Commissioner they believed that information in two of the documents they had provided fell outwith the scope of Mr McLaughlin's requests. Having studied this information, the Commissioner agrees. (As noted above, the Commissioner also agreed with the Lord Advocate that some of the information he had provided did not fall within the scope of Mr McLaughlin's requests.)
24. For request 6 (whether an independent Scotland would retain the UK's European budget rebate if it remains in the European Union), the Ministers withheld a limited amount of information under sections 29(1)(a) and (b) of FOISA. The Ministers confirmed that they did not hold any other information in relation to request 6. The Ministers explained that they confirmed that any analysis carried out had been focused on Scotland's notional share of the rebate under the *current* [the Ministers' emphasis] constitutional arrangements, rather than under independence, and so would not fall within the scope of Mr McLaughlin's request. The Commissioner agrees with this assessment.

Section 25(1) - Information otherwise accessible

25. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. This exemption is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
26. In her briefing on section 25¹, the Commissioner makes it clear that any public authority applying this exemption needs to be alert to its duty to provide advice and assistance to a requester in terms of section 15(1) of FOISA. Paragraph 3.7 of the briefing notes that the authority should take steps to ensure that the exact information requested is actually reasonably accessible elsewhere. Authorities should not assume that the applicant will know where and how the information can otherwise be obtained, and should provide guidance on how it can be accessed.
27. In this case, the Commissioner is satisfied that the information to which the Ministers applied the exemption in section 25(1) of FOISA (Parliamentary Questions, etc.) is information which is reasonably accessible to Mr McLaughlin. She is also satisfied that the Ministers supplied sufficient detail to permit Mr McLaughlin to access the information: indeed, Mr McLaughlin supplied the information to the Commissioner as part of his application.
28. She is therefore satisfied that the exemption applies.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>



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

29. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as members of the Scottish Executive and junior Scottish Ministers, and non-ministerial office holders of the Scottish Administration, and their respective staff) is exempt information if it relates to the formulation or development of government policy.
30. The Commissioner's view, as expressed in her briefing² on the application of section 29 is that:
- "formulation" suggests the early stages of the policy process, where the options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers; while
- "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.
31. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will then determine which of these should be translate into political action and/or legislation and when.
32. The Ministers applied section 29(1)(a) to documents such as Cabinet papers and communications about such papers.
33. The Ministers explained that the issue of an independent Scotland's membership of the EU is a policy area in which they continue to develop a detailed position. They submitted that, given the number of views continuing to be expressed by commentators both within Scotland and in other EU member states, the Government needs to develop a policy position having considered all possible views and having taken account of positions which may be inconsistent with the Government's views on the issue.
34. The Commissioner accepts that the information in question is information which relates to the development of government policy and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA.
35. 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. If the two are evenly balanced, the presumption should always be in favour of disclosure.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>



36. It should be noted that, when considering the public interest, the Commissioner is required to consider the position as at September 2012, when the Ministers carried out a review of Mr McLaughlin's requests. This means that the Commissioner cannot take account of matters such as the recent publication of the White Paper, "Scotland's Future: Your Guide to an Independent Scotland", published on 26 November 2013,

The public interest in relation to section 29(1)(a)

37. The Ministers acknowledged that there was a strong public interest in understanding what Scotland's status will be in relation to its EU membership. They commented that it was public knowledge that the Scottish Government intended to publish a full account of its position as regards the process for securing continued membership of the EU (the White Paper referred to above). The Ministers were of the view that releasing information which represented a developing policy view or a partial account of the issue could be taken out of context or represented as the Government position on an issue upon which the Government had yet to fully state a position.
38. The Ministers submitted that this was an issue of critical importance to the current constitutional debate and it was therefore imperative that the internal process of policy development and preparations for consideration of the policy by Cabinet was as thorough as possible to allow Ministers to form a collective view. Release of the withheld information would, in the Ministers' view, be contrary to the public interest which they thought best served by the Government having the space to consider internally all aspects of this policy issue before stating a public position fully informed by a comprehensive suite of advice.
39. Mr McLaughlin, on the other hand, argued that the public interest lay in disclosing the information. He argued it was important that people have access to this information at an early stage to allow them to make an informed decision on Scotland's future position in Europe.
40. There is no doubt that Scotland's constitutional future in relation to the EU is a matter of considerable and significant public interest; it will affect everyone in Scotland and the UK to some extent. As the Commissioner has said in previous decisions, it is not unreasonable to conclude that the public interest in disclosing information about the Scotland's future status in the EU will be considerable.
41. In weighing up the arguments against disclosure, the Commissioner notes that much of the withheld information relates to an early stage of policy development and some of the information comprises earlier versions of published information.
42. The Commissioner recognises the public interest in ensuring that all options are explored and considered by the Ministers, which may require some private space to be afforded where ideas can be considered and an initial range of views gathered. In an important constitutional issue (such as Scotland's future in Europe), the Commissioner acknowledges that there is a strong public interest in a degree of private space to allow options to be considered.



43. The Commissioner agrees that there is a significant public interest in disclosure of the information as it would contribute to openness and accountability and would assist the public in understanding the very important policy issue under consideration and the consequences of policy decisions.
44. The Ministers commented that releasing early versions of documents which were subsequently published would not add to the public's understanding of the Scottish Government's position. Having studied the early versions of the documents, the Commissioner would agree. Disclosure would undoubtedly allow Mr McLaughlin to understand how the published information came to be created and how the Ministers came to publish the information, but it would add little to the understanding of the Government's position.
45. The Commissioner considers Mr McLaughlin's arguments on the public interest to be well-founded. However, on balance, given that the information which has been withheld relates to such an early phase of policy development, she has concluded that there is a significant, and greater, public interest in Ministers being able to consider a range of options, some of which would be discarded or developed further in the later stages of policy development. For this reason, she accepts, on balance, that there is a greater public interest in maintaining the exemption in section 29(1)(a) of FOISA than in disclosing the information covered by Mr McLaughlin's request.
46. In the Commissioner's view, it is in the public interest that all options can be explored and considered candidly by the Ministers and that space should be afforded for doing so before reaching a settled public view. This would enable the Ministers to consider a range of options, some of which could be rejected or further developed in the future. In particular, the Commissioner considers it is in the public interest that Ministers should be able to develop and formulate policies fully, without being drawn into a public debate on matters that may never form part of their finalised policy position.
47. She is therefore satisfied that the exemption in section 29(1)(a) should be maintained.

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

48. 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 to any request for the provision of such advice. The phrase "Law Officers" is defined in section 29(4) (see the Appendix).
49. Section 29(1)(c) is a qualified exemption, which means that, even if the exemption applies, the exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
50. Having considered the information withheld under this exemption, the Commissioner is satisfied that it falls within the exemption in section 29(1)(c).



The public interest in relation to section 29(1)(c)

51. Having concluded that the information is exempt under section 29(1)(c), the Commissioner is required to consider the application of the public interest test in section 2(1)(b) of FOISA.
52. The Ministers submitted that it was imperative that they are able to receive free and frank legal advice on matters of constitutional importance and that those providing the advice are free to consider all the relevant aspects and deal with them comprehensively without the risk of that advice being released in the public domain where it may be taken out of context or referred to partially.
53. They were therefore firmly of the view that the public interest was served by the Ministers continuing to be able to receive confidential legal advice on that basis.
54. The Ministers commented that they had already made it clear that any published documents on this issue, including the White Paper referred to above, would be informed by and fully consistent with the legal advice they had received. They did not consider there to be any public interest in releasing advice which, if taken out of the proper context of being part of the process of policy development, may serve only to confuse the public about the Government's position.
55. The Commissioner has considered all of the submissions put to her regarding the public interest in this case. She accepts that the information under consideration in this case concerns a matter of considerable importance and consequence. The Commissioner acknowledges that there would be a significant public interest in its disclosure.
56. The Commissioner recognises that the forthcoming referendum will potentially effect a momentous change in Scotland's constitutional position. In her view, it is essential that the electorate should be able to make an informed decision when making their choice in the referendum. The Commissioner believes that disclosure of information relating to the provision of legal advice by any of the Law Officers (or relating to any request for the provision of such advice) could assist the public in better understanding these issues.
57. She has also considered the strong public interest in ensuring that all organisations, including the Scottish Government, are able to obtain and consider legal advice on a confidential basis. The courts recognise that there is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
58. The Commissioner also notes that the Ministers had committed to setting out their position on EU membership in the White Paper.
59. The Commissioner has considered whether the passage of time since the advice was sought or received reduces the public interest in maintaining the exemption. However, it is clear that, at the time the Ministers carried out a review (the relevant date, for the Commissioner's purposes), the issue remained under active discussion and the Ministers' policy position had yet to be published.



60. In this instance, the Commissioner is not satisfied that the public interest in disclosure of this particular information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between the Ministers and its Law Officers.
61. The Commissioner considers the fact that the Law Officers have reviewed the content of the specified publications largely addresses the public interest in ensuring that their content is legally accurate. Having considered the competing arguments for and against disclosure, the Commissioner is not persuaded that there is an overriding public interest in the disclosure of the information withheld in response to Mr McLaughlin's request. In particular, the Commissioner acknowledges the Ministers' commitment to setting out their position on EU membership in the forthcoming White Paper.
62. She is therefore satisfied that the exemption in section 29(1)(c) should be maintained.

Section 30(b)(ii) - inhibition to the free and frank exchange of views

63. For the Ministers to rely on the exemption in section 30(b)(ii) of FOISA, they must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
64. The Commissioner expects public authorities applying this exemption to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly foreseeable) future, not simply that harm is a remote possibility. In addition, the harm in question should take the form of substantial inhibition from the exchange of views for the purposes of deliberation in as free and frank a manner as would be the case if disclosure were not expected. The word "substantial" is important here: the degree of inhibition has to be of real and demonstrable significance.
65. The information withheld is a comment or a view expressed in respect of a parliamentary question.
66. The Ministers submitted that it was vital that Ministers and officials feel able to set out and discuss their views and advice frankly and in confidence as part of the process of reaching a decision on a particular matter. They also submitted that it was vital that Ministers and officials are not discouraged in future from either providing frank advice or comments or from keeping a record of what advice or comments have been provided because of concerns about those contributions being released and potentially misinterpreted or taken out of context.
67. Disclosure of this type of information would, the Ministers submitted, be likely to inhibit substantially the free and frank exchange of views for the purposes of deliberation; if such communications were disclosed during the development of policy or thinking in what is a sensitive area, officials would feel constrained from expressing full and frank views in the future. This would, according to the Ministers, be to the substantial detriment of the policy and decision-making processes.



68. Having read the information in question, the Commissioner accepts, for the reasons put forward by the Ministers, that its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. She therefore concludes that the Ministers correctly applied the exemption in section 30(b)(ii) of FOISA to the information.
69. Having concluded that the Ministers correctly applied the exemption in section 30(b)(ii) of FOISA to this information, the Commissioner must next consider the public interest in relation to the information.

The public interest in relation to section 30(b)(ii)

70. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA.
71. The Ministers submitted that there was a strong public interest in high quality policy and decision-making: for the Government to succeed in upholding that public interest, officials need to be free to consider, as in any other organisation, all available options. They need to be able to debate options rigorously, to expose all their merits and demerits and to understand their possible implications, without the fear of premature disclosure, which might close off discussion and development of better options. Their candour in doing so, the Ministers submitted, will be affected by their assessment of whether the content of their discussions will be disclosed in the near future, especially when it may undermine or constrain the Government's view on settled policy or on policy which is under discussion and development.
72. The Ministers also argued that there is a strong public interest in ensuring that, where necessary, advice in areas of on-going policy development can take place in "a non-public arena which will enable rigorous and frank debate without fear that such considerations will be picked over out of context." The Ministers also argued that it is in the public interest for decision-making to be based on the best advice available, with a full consideration of all the options.
73. The Commissioner acknowledges that, in this case, there is a public interest in the Ministers being able to exchange views and comments in the preparation of an answer to a parliamentary question. In the circumstances, the Commissioner accepts that, if disclosure would limit the scope or frankness of such discussions in future, this could diminish the quality of the Ministers' preparation for responses to such questions; this would be contrary to the public interest.
74. Taking account of the information in question, the Commissioner has concluded, given that disclosure would not give any significant insight into the preparation of the response to the parliamentary question, or assist in the public's understanding of the Ministers' position, that the public interest in maintaining the exemption in section 30(b)(ii) outweighs that in disclosure of the information withheld.
75. The Commissioner is therefore satisfied that the exemption in section 30(b)(ii) should be maintained.



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

76. Under section 30(c), information is exempt 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” indicates that the harm envisaged by this particular exemption is distinct from the harm envisaged by the exemptions in sections 30(a) and (b).)
77. The Ministers submitted that disclosure of the information, which comprises advice to the Lord Advocate, would expose and substantially prejudice the workings of the Lord Advocate’s confidential advisory support office; this would undermine the effective performance of the Lord Advocate’s role as Law Officer. The disclosure of the information would be likely to lead to high levels of questions and scrutiny about what the Law Officers were (or were not) being advised on, when and by whom.
78. Having viewed the information withheld in this case, the Commissioner considers it likely that such detailed information might not have been provided were there to be an expectation of disclosure. The existence of the class-based exemption in section 29(c) of FOISA, and of paragraph 2.35 of the Scottish Ministerial Code of Conduct³ (which states that the fact that legal advice has or has not been given by the Law Officers and the content of any legal advice must not be revealed outwith the Scottish Government without the Law Officers’ prior consent), highlights the sensitivity of the work of the Lord Advocate and his advisory support office. Disclosure of the content of any dealings with the office could have a deleterious effect on the running of government, by allowing individual members to make capital out of the fact that advice has, or, just as importantly has not, been sought from the Lord Advocate. The Commissioner is therefore satisfied that the information in question is exempt under section 30(c) of FOISA.
79. The exemption in section 30(c) is subject to the public interest test, so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure.

The public interest in relation to section 30(c)

80. It was the Ministers’ view that disclosure of this information was not in the public interest.
81. The Ministers agreed that there is a public interest in knowing the extent to which briefings for Ministers on a matter of significant public interest is informed by or underpinned by advice from the Lord Advocate. As noted above, the information withheld here consists of advice to the Lord Advocate. While there may be a public interest in knowing what advice the Lord Advocate had received, this would be outweighed by the public interest in protecting legal professional privilege and in protecting the private space for the Law Officers to deliberate and inform themselves before providing advice to the Scottish Government.
82. The Commissioner has also taken into account Mr McLaughlin’s comments on the public interest (set out above in relation to the exemption in section 29(1)(a)).

³ <http://www.scotland.gov.uk/About/People/14944/684>



83. When balancing the public interest, the Commissioner recognises the general public interest in public authorities being transparent and accountable. The Commissioner also recognises that there is a significant public interest in the disclosure of information which would inform the public of the advice given to Ministers on the future constitution of Scotland.
84. However, the Commissioner must weigh this against the public interest in ensuring that the Lord Advocate's office can carry out its work effectively. She notes that the information which has been withheld is legal advice given to the Lord Advocate; the fact that it is not the view of the Lord Advocate lessens, in the Commissioner's view, the public interest in the disclosure of the advice.
85. As noted elsewhere in this decision, the Commissioner must take account of the fact that the courts recognise that there is a strong public interest in legal advice being withheld on administration of justice grounds. (This is dealt with in more detail in the discussion on section 36(1) below.)
86. On balance, having weighed up the arguments advanced by Mr McLaughlin, the Ministers and the Lord Advocate, the Commissioner finds that the public interest in maintaining the exemption in section 30(c) of FOISA outweighs the public interest in disclosure of the information.
87. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA should be maintained.

Section 36(1) - Confidentiality

88. Section 36(1) of FOISA provides that information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
89. For the exemption to apply to this type of communication, certain conditions must be fulfilled. The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate. The legal adviser must be acting in his/her professional capacity and the communications must occur in the context of the legal adviser's professional relationship with his/her client.
90. In this case, the Ministers submitted that the exemption in section 36(1) applied to some of the information falling within the scope of Mr McLaughlin's request, by virtue of it constituting legal advice provided to the Ministers (as client) by legal advisers, including the Lord Advocate, acting in their respective professional capacities.



91. As the Ministers acknowledge, it has been confirmed by the Lord Advocate⁴ that three documents (*Choosing Scotland's Future* (August 2007); *Your Scotland, Your Voice* (November 2009) and *Your Scotland, Your Referendum* (January 2012)) were underpinned by legal advice.
92. Having considered the Ministers' submissions and the withheld information, the Commissioner is satisfied that information under consideration comprises communications between legal adviser and client, provided in circumstances in which legal advice privilege could apply.
93. Information cannot be privileged, however, unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal advice privilege) could be maintained in legal proceedings. In other words, the claim must be capable of being sustained at the time the exemption is claimed. For this to be the case, the information must possess the quality of confidence at that time (at least up to the point at which the authority carries out its review and communicates the outcome to the applicant).
94. This means that a claim of confidentiality will not be capable of being maintained where information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of all or part of the information under consideration, any privilege associated with that information (with or the relevant part) is also effectively lost.
95. Having considered the Ministers' submissions and the contents of the withheld information, the Commissioner is satisfied that the legal advice referred to above has not been made public, either in full, or in summary. While it is clear that legal advice has underpinned various documents, the detail of the advice provided to the Ministers was not contained within the specified Government publications to which it referred (see paragraph 91). (As noted elsewhere, the Commissioner is not able to take into account the publication of the White Paper in November 2013.)
96. The Commissioner is therefore satisfied that the information withheld under section 36(1) of FOISA comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. As a result, the Commissioner accepts that the information sought by Mr McLaughlin is exempt from disclosure under section 36(1) of FOISA.
97. 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.

The public interest in relation to section 36(1)

98. The courts recognise that there is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds (see, for example, *Three Rivers District Council and others v Governor and Company*

⁴ <http://www.scotland.gov.uk/Resource/0042/00426754.pdf>



*of the Bank of England*⁵). The Commissioner will generally apply the same reasoning to communications attracting legal professional privilege.

99. The Ministers were firmly of the view that the public interest was served by Ministers continuing to be able to receive confidential legal advice on that basis. The Ministers submitted that it was imperative that they were able to receive free and frank legal advice on matters of such constitutional importance and that those providing the advice were free to consider all the relevant aspects and deal with them comprehensively without the risk of that advice being released in the public domain where it may be taken out of context or referred to partially.
100. The Ministers also referred to their statement that any published documents on this issue, including the White Paper, would be informed by and fully consistent with the legal advice they had received. They therefore did not consider there to be any public interest in releasing advice which, if taken out of the proper context of being part of the process of policy development, may serve only to confuse the public about the Government's position.
101. In addition, the Ministers stated that they did not consider there was any public interest in the disclosure of the withheld information in order to provide further information on what Scotland's status would be on independence in relation to its EU membership. Although she cannot set them out here in full, the Commissioner accepts the Ministers' submissions that this is the case. (The legal advice on EU Membership, which Nicola Sturgeon, Deputy First Minister, referred to in her statement to Parliament on 23 October 2012, does not fall within the scope of Mr McLaughlin's request as it was not held by the Ministers when his request was received.)
102. The Commissioner has considered all of the submissions put to her regarding the public interest in this case. She accepts that the information under consideration in this case concerns a matter of considerable importance and consequence. The Commissioner acknowledges that there would be a significant public interest in its disclosure.
103. As noted previously, the Commissioner recognises that the forthcoming referendum will potentially effect a momentous change in Scotland's constitutional position. In her view, it is essential that the electorate should be able to make an informed decision when making their choice in the referendum. The Commissioner believes that disclosure of the legal advice obtained by the Ministers for the purposes of the published Scottish Government papers could assist the public in better understanding these issues.
104. She has also considered the strong public interest in ensuring that all organisations, including the Scottish Government, are able to obtain and consider legal advice on a confidential basis.
105. The Commissioner also notes that the Ministers had given a commitment to setting out their position on EU membership in the White Paper and that this would reflect the legal advice they had received.

⁵ (2004) UKHL 48



106. In this instance, and at the time of the Ministers' decision on review, the Commissioner is not satisfied that the public interest in disclosure of the legal advice in question is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client. Having considered the competing arguments for and against disclosure, the Commissioner is not persuaded that there is an overriding public interest in the disclosure of the legal advice in response to Mr McLaughlin's request.
107. The Commissioner therefore considers that the exemption in section 36(1) should be maintained.

Procedural breaches

108. Mr McLaughlin made his information requests on 20 April 2012. The Ministers did not respond until 23 (requests 1-3) and 25 (requests 1-6) July 2012. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
109. It is a matter of fact that the Ministers did not provide a response to Mr McLaughlin's request for information within 20 working days. The Commissioner therefore finds that they failed to comply with section 10(1) of FOISA.
110. Mr McLaughlin sought a review on 26 July 2013. The Ministers issued a response on 26 September 2013. 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.
111. It is a matter of fact that the Ministers did not provide a response to Mr McLaughlin's requirement for review within 20 working days. The Commissioner therefore finds that they failed to comply with section 21(1) of FOISA.
112. The Ministers advised the Commissioner that they had received an exceptional number of requests in relation to Scotland's constitutional future, which had put an additional pressure on officials working in the relevant policy areas and had led to delays. The Ministers assured the Commissioner that they work to meet the statutory deadlines as often as possible.
113. As noted above, the Ministers failed to issue a response to request 7. Given that Mr McLaughlin did not raise this matter in his request for review (he did not realise at that stage that the request had not been responded to), the Commissioner was unable to investigate this failure.



Compliance with the information notice

114. The Ministers were asked to provide the Commissioner with the information withheld from Mr McLaughlin on 21 November 2012. By 5 March 2013, the Ministers had not provided the Commissioner with all of the information. This led to the Commissioner issuing a formal information notice to the Ministers, requiring them to provide her with the information and with their submissions on the information by 18 April 2013. In the event, following on-going communications and finally a telephone call to the Ministers, the Ministers complied in full with the information notice on 5 July 2013.
115. The delays by the Ministers greatly extended the time it took to complete this investigation. In the circumstances, the Commissioner would have been entitled to refer the failure to comply with the information notice to the Court of Session under section 53 of FOISA (failure to comply with a notice can be treated as contempt of court by the Court of Session). Indeed, it was made clear to the Ministers that the Commissioner was considering taking this action. Given that the Ministers subsequently provided the Commissioner with the information and the submissions, she decided not to take enforcement action. However, she may react differently if future information notices are not fully complied with in time.

DECISION

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

For the reasons set out above, the Commissioner finds that the Ministers were entitled to withhold the remainder of the information from Mr McLaughlin on the basis that it was exempt under sections 25(1), 29(1)(a) and (c), 30(b)(ii) and (c) and section 36(1) of FOISA.

However, the Commissioner finds that the Ministers failed to respond to Mr McLaughlin's requests for information and a review within the time limits set down by sections 10(1) and 21(1) of FOISA. The Commissioner also finds that the Ministers failed to comply with section 1(1) by initially withholding information which was disclosed to Mr McLaughlin during the investigation.



Appeal

Should either Mr McLaughlin 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
20 December 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 –

- (a) section 25;

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...



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.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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;

...

- (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-

"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;

"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;

"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

...



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-

...

(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.

36 Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be
maintained in legal proceedings is exempt information.

...