

Decision Notice



Decision 019/2014 Mr Paul Hutcheon and the Scottish Ministers

Changes to the Ministerial Code

Reference No: 201300060

Decision Date: 10 February 2014

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 5 November 2012, Mr Hutcheon asked the Scottish Ministers (the Ministers) for information on changes made to the version of the Scottish Ministerial Code published in December 2011.

Following a review, the Ministers relied on a number of exemptions in FOISA to withhold information from Mr Hutcheon. These included sections 30(b)(ii) (substantial inhibition to the free and frank exchange of views) and 36(1) (confidentiality, as they considered the information to be subject to legal advice privilege).

During the Commissioner's investigation the Ministers disclosed further information to Mr Hutcheon. They also confirmed they were applying an additional exemption to some of the withheld information: section 30(c) of FOISA (which relates to prejudice to the effective conduct of public affairs).

The Commissioner did not accept the Ministers' arguments in relation to all of the withheld information and therefore required them to disclose information to Mr Hutcheon.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(ii) and (c) (Prejudice to effective conduct of public affairs) and 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 5 November 2012, Mr Hutcheon asked the Scottish Ministers for:
 - a) All files, correspondence and communications on the changes made to the version of the Scottish Ministerial Code published in December 2011;
 - b) All files, correspondence and communications showing who suggested and approved the changes made to that version of the Scottish Ministerial Code.



2. Having received no response to his request, on 15 December 2012 Mr Hutcheon requested a review in respect of the Ministers' failure to respond.
3. The Ministers notified Mr Hutcheon of the outcome of their review on 21 December 2012. They explained that published information on the changes was exempt under section 25(1) (information otherwise available) of FOISA. They included a link to this information on the Scottish Government website.
4. The Ministers withheld information on discussions among Ministers and officials under section 30(b)(ii) of FOISA. They withheld other information, which they believed to be subject to legal professional privilege, under section 36(1) of FOISA.
5. On 29 December 2012, Mr Hutcheon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Hutcheon 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 January 2013, the Ministers were notified in writing that an application had been received from Mr Hutcheon 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 the application of the exemptions identified in their response to Mr Hutcheon.
9. With their submissions in support of these exemptions, the Ministers provided arguments to the effect that some of the information to which they had applied section 36(1) of FOISA should also be withheld under section 30(c).
10. During the investigation, Mr Hutcheon acknowledged that the information for which the Ministers relied on section 25(1) of FOISA was otherwise accessible to him. He confirmed that he did not require a decision on this information. He also confirmed that he was not seeking information containing explicit legal advice. Neither set of information will, therefore, be considered further in this decision.
11. Part of the information previously redacted from one document was disclosed to Mr Hutcheon during the investigation. The Ministers' earlier decision to withhold this information will not be considered further in this decision.



- Further submissions were sought, and obtained, from the Ministers and Mr Hutcheon during the investigation.

Commissioner's analysis and findings

- 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 Hutcheon and the Ministers. She is satisfied that no matter of relevance has been overlooked.
- The Scottish Ministerial Code (the Code) provides a code of conduct and guidance on procedures for members of the Scottish Government. This covers the First Minister, Cabinet Secretaries, Law Officers and junior Scottish Ministers. The Code is revised at the commencement of each new Parliamentary term, the most recent version being published on 13 December 2011.

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

- Under section 30(b)(ii) of FOISA, information is exempt information if its disclosure would or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. Public authorities must assess whether officials or others would be deterred from providing views in future, if the information were disclosed. The exemption cannot be applied unless there are reasonable grounds for anticipating that disclosure would, or would be likely to cause, substantial inhibition. To be substantial, the inhibition must be of real and demonstrable significance.
- The Ministers relied on this exemption for information redacted from parts of emails disclosed to Mr Hutcheon (the Commissioner notes that some of the information redacted from document R15 falls outwith the scope of the investigation, and so will not consider this information further). They argued that the redacted information concerned the views of individuals involved in the process of making changes to the Code. They believed that if there were to be an expectation that such information would routinely be made public, this might cause those individuals to be reluctant to raise detailed queries about the implications of a change in policy (at least in writing).
- The Ministers acknowledged that although such questions could be raised orally, it aimed to ensure that Ministerial business was transacted as smoothly and rapidly as possible and at minimum cost to the public purse. With this in mind, they believed email to provide a highly practical vehicle for such textual queries to be resolved. In this case, the Ministers explained, a number of recipients had an interest in the queries raised and so it was important to give them the opportunity to contribute to the answers provided.
- The Ministers considered it essential for there to be a record of the nature of Ministers' queries and how they were resolved. They believed this to be particularly important in the case of a



document such as the Code, which is revised on a periodic basis as it allowed a record to be kept of the reasons why particular amendments were made, allowing lessons to be learned and thus improving the quality of each successive edition. Avoiding “reinventing the wheel” also helped ensure that costs of each edition were kept to a minimum.

19. The Ministers argued that if they were to feel inhibited from raising and obtaining written answers to questions arising in relation to a developing policy document such as the Code, then the quality of their scrutiny would undoubtedly suffer and the quality of the succeeding editions would, over time, be diminished.
20. Detailed and personal feedback from Ministers was also an important part of the quality control process, the Ministers submitted. The Ministers believed it would be harder for officials to produce a document meeting their present and future needs, without the expectation that a new policy document would be read in detail by Ministers, and without the discipline of having to respond to their questions.
21. From reading the submissions provided by the Ministers, together with information available on the Scottish Government’s website about the changes made to the Code, the Commissioner notes that the names and roles of those individuals involved in the process are publicly available, with some information on their involvement in the process.
22. A significant amount of the redacted information makes it clear that particular queries or comments have been made by those individuals. Given the senior roles of these individuals within the Scottish Government, the Commissioner considers it would be reasonable to expect that they would be involved in discussion and debate on the Code and whether changes should be made to it. The Commissioner considers it unreasonable to assume that the First Minister would draft such an important document without significant input from officials.
23. The Commissioner considered the content of the withheld information along with the Ministers’ submissions, bearing in mind in particular the context in which the views were expressed. She accepts that disclosure of *some* of the withheld information in this case would be likely to result in such points not being made as fully in future, at least not a form capable of future reference. She also accepts this would amount to substantial inhibition of the free and frank exchange of views for the purposes of deliberation.
24. Given the routine nature of the other redacted information and its lack of sensitivity, the Commissioner does not accept that disclosure of this information would be capable of causing substantial inhibition from commenting or raising queries in future. Therefore, the Commissioner is unable to agree with the Ministers that disclosure of this information would cause the harm envisaged. She has reached this conclusion in relation to all of documents R9 and R11, and also in relation to parts of all of the other documents withheld under this exemption.
25. The Commissioner has therefore concluded that only some of the withheld information is exempt in line with section 30(b)(ii) of FOISA. For that information, the Commissioner must go on to consider the application of the public interest test in section 2(1)(b) of FOISA.



26. The Ministers relied on the exemption in section 36(1) for redacting information from page 5 of document R8, which the Commissioner does not consider to be exempt under section 30(b)(ii). This duplicates document R7, and the Commissioner will consider it as such, under section 36(1), below.
27. The Ministers have not applied any other exemption to the remainder of the information the Commissioner has found not to be exempt under section 30(b)(ii). Consequently, she must require the Ministers to disclose all of this information to Mr Hutcheon. This applies to all of the information redacted from documents R9 and R11, and elements of the information in all the other documents withheld under this exemption. The Commissioner will provide the Ministers with marked-up copies of these documents, indicating the information to be disclosed.

Public interest test

28. The Ministers recognised some public interest in seeing all of the points raised in full, and who raised them, since there had been a degree of interest in the changes made to the Code and understanding why these changes were made.
29. The Ministers considered there to be a stronger public interest in withholding the redacted information, particularly where it formed only a small part of the package of information released in response to requests made by Mr Hutcheon and others. The Ministers did not believe that it would add to public understanding if the redacted information was released.
30. The Ministers submitted that disclosure of this might lead readers to the erroneous view that portions of the Code had been influenced by the personal views of individual Ministers or Special Advisers. This could, the Ministers explained, serve to reduce the authority of the Code, which derived authority from the fact that it was the expression of the First Minister's personal guidance to all his Ministers without distinction. The Ministers believed there was a strong public interest in retaining the authority of the Code.
31. Other points which, in the Ministers' view, supported the public interest in withholding the information included those detailed in paragraphs 17 to 20 (inclusive) above. They highlighted the importance of maintaining a full record of the policy-making process, for the historical record and to assist with future updates. They considered this to be of particular importance for a document such as the Code, which is revised and updated over a long period.
32. Mr Hutcheon submitted that the Code was a hugely important document, laying down the standards expected of Ministers.
33. Mr Hutcheon commented that unlike the MSP code of conduct, the changes to the Ministerial version had no parliamentary scrutiny. He argued that any changes were made as a result of dialogue between unelected civil servants and Ministers. Given that this issue was about ethics more than public policy, he submitted, the public were entitled to know the basis of why, and who, changed the code.



34. The Commissioner has considered the arguments from both the Ministers and Mr Hutcheon. In relation to the information she has found to be exempt under section 30(b)(ii).
35. The Commissioner recognises the significant public interest in how this code was drafted and by whom, but considers this interest to have been met considerably by the information disclosed or published already. The Commissioner does not accept that this interest would be advanced to any appreciable extent by release of the information she has found to be exempt under section 30(b)(ii).
36. In all the circumstances, therefore, the Commissioner finds that the public interest in disclosing this information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA.
37. Consequently, the Commissioner finds that the Ministers were entitled to withhold the remaining information to which they applied the exemption in section 30(b)(ii) of FOISA.

Section 36(1) - Confidentiality

38. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, which includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Ministers argued applied in this case. This covers communications between legal advisers and their clients in which legal advice is sought or given.
39. There are conditions which must be fulfilled for legal advice privilege to apply:
 - a. The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the Ministers.
 - b. The legal adviser must be acting in his/her professional capacity, and
 - c. The communications must occur in the context of the legal adviser's professional relationship with his/her client.
40. The Ministers explained why they considered these conditions to be met in relation to the documents in question. These were, the Ministers asserted, either communications made or effected for the principal or dominant purpose of seeking or giving legal advice, or documents evidencing the subject matter of such communications. The withheld material covered the process of officials corresponding with legal advisers about their advice and seeking advice or clearance from those advisers on changes to the Code. There were also references informing Ministers or officials that legal advisers were reviewing and providing advice on aspects of the Code. The Ministers believed disclosure of any of this material would breach legal professional privilege by divulging detailed information about the points being considered by lawyers, the extent of their comments and the time taken in reaching agreement on a final form of words. They identified the legal advisers involved.



41. In his submissions, Mr Hutcheon explained that he did not want to receive information in any documents which are from legal advisers to the Scottish Government offering explicit legal advice. This has been taken into account by the Commissioner in reaching her decision.
42. Mr Hutcheon noted that he was suspicious that the Ministers were using section 36(1) to include information which went beyond the “direct provision of legal advice”.
43. In response to Mr Hutcheon’s point, the Commissioner would observe that legal advice privilege extends to relevant communications in both directions (i.e. from the client as well as from the legal adviser) and not simply to communications imparting legal advice. Having considered the content of the withheld information and the Ministers submissions, the Commissioner is satisfied that elements of the information meet the conditions set out in paragraph 39 above. She is satisfied that this is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
44. The Commissioner cannot accept the Ministers’ arguments in relation to all of the information withheld under section 36(1). While information does not have to be legal advice to fall within the ambit of legal advice privilege, it does have to involve a professional legal adviser directly. References to the involvement of legal advisers or the obtaining of legal advice in communications or other documents not involving legal advisers directly, and making no reference to the substance of the legal advice concerned, will not qualify.
45. In the case of most of the information for which the Commissioner does not accept the application of section 36(1), the Ministers have also applied the exemption in section 30(c) of FOISA. This will be considered further below. The one exception is the information redacted from document R22, for which no other exemption has been claimed. The Commissioner therefore requires the Ministers to disclose this information to Mr Hutcheon.
46. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the information withheld by the Ministers is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test

47. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O’Brien* [2009] EWHC 164 (QB).¹ The section 36(1) exemption has not been considered

¹ <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>



by the Court of Session in Scotland. While the High Court's decision is not binding on the Commissioner, she agrees with the reasoning in that case.

48. The Ministers considered that, on balance, the public interest lay in favour of maintaining the exemption. They acknowledge that disclosure of the withheld information would enhance the scrutiny of their actions. They also recognised some general public interest in being satisfied that the Code gave Ministers appropriate guidance to ensure that they upheld the highest standards of propriety, including its interaction with relevant legal obligations.
49. The Ministers acknowledged a possible public interest where disclosure would make a significant contribution to debate on a matter of public interest. The Ministers recognise that in this case there had been a high level of interest in the changes made to the Code, and particularly whether they were relevant to the handling of the FOI request from Catherine Stihler MEP (which resulted in the Commissioner's *Decision 111/2012*).
50. The Ministers also accepted that disclosure of the information would make transparent the reasons why changes were made to the Code.
51. Against these arguments for disclosure, the Ministers submitted that they must weigh the strong public interest in maintaining confidentiality of communications between legal advisers and client, and the consequent harm to the public interest if that confidentiality was not maintained.
52. In relation to transparency, the Ministers considered the public interest to have been met by existing disclosures of information. On balance, they saw no basis for concluding that the general public interest in disclosure could be so highly compelling as to outweigh the inherent public interest in the confidentiality of legal communications.
53. As indicated above, Mr Hutcheon commented that if the withheld information was not the direct provision of legal advice, then the public interest favoured disclosure. While the nature and content of the information will be relevant, the Commissioner does not accept that as a general proposition.
54. There will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where:
 - the requirement for disclosure is overwhelming
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.



55. After careful consideration, the Commissioner is satisfied that none of the considerations set out above apply here. She acknowledges that a considerable amount of information has been published or disclosed to serve the public interest in transparency in relation to the changes to the Code.
56. The Commissioner acknowledges the strong inherent public interest in maintaining legal professional privilege. She accepts it is in the public interest that all organisations, including the Ministers, are able to obtain and consider legal advice on a confidential basis. In this case, the Commissioner has been unable to identify any public interest of equal or greater weight which would favour disclosure.
57. On balance, therefore, the Commissioner is satisfied, in all the circumstances of the case, that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption in section 36(1).
58. Consequently, where she has found information to be exempt under section 36(1) of FOISA, the Commissioner finds that the Ministers were entitled to withhold the information under that exemption.

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

59. Section 30(c) 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 be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from such disclosure.
60. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. 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 be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
61. The Commissioner takes the view that it is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration and the timing of the request, must be taken into consideration.
62. The Ministers identified a number of items of information, the disclosure of which they believed would be likely to prejudice the effective conduct of public affairs substantially. They provided reasons for this position, founded in established constitutional principle. The Commissioner is



unable to describe these submissions in further detail without giving an indication of the content of the withheld information.

63. The Commissioner has considered these submissions carefully. In the light of the constitutional arguments presented, which she accepts as well-founded in the circumstances, she accepts that substantial prejudice to the effective conduct of public affairs would be a likely consequence of disclosure. She would emphasise that in reaching this conclusion, she is not stating that a particular class of information automatically engages the exemption in section 30(c). The Commissioner will consider the circumstances of a case on a case-by-case basis, as she would expect any authority to do.

Public interest test

64. The Ministers acknowledge some public interest in ensuring openness and transparency in providing information about the process of revising the Code. In this connection, they noted the large amount of information already published or made available to Mr Hutcheon, which they believed met this interest.
65. The Ministers argued that there was a stronger public interest in withholding the information under consideration here as disclosure would not add to the public's understanding of the substance of the changes made to the Code or their legal basis. As with the Ministers' submissions on substantial prejudice, the Commissioner is unable to describe these submissions in further detail without giving an indication of the content of the withheld information.
66. Mr Hutcheon submitted that this case did not concern civil service advice for a policy that had never been enacted. He contended that it concerned changes to a Code governing Ministerial behaviour, and as the public and MSP's were not invited to participate in this process, he argued that the public is entitled to know who took part in the secret process and what changes were made.
67. The Commissioner agrees with Mr Hutcheon that there is a public interest in understanding why particular changes were made to the Code and who was involved in making these changes. She is satisfied that information published or disclosed already goes a considerable way towards meeting that public interest. She does not believe disclosure of the information to which the Ministers have applied section 30(c) would make a further significant contribution to meeting that interest.
68. In the circumstances of this particular case, in relation to the information under consideration, the Commissioner accepts that there is a public interest of some substance in maintaining the position advanced by the Ministers.
69. On balance, the Commissioner has concluded, in all the circumstances of this case, that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(c) of FOISA.



70. As a consequence, the Commissioner finds that the Ministers were entitled to withhold all of the information to which they applied this exemption.

DECISION

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

The Commissioner finds that the Ministers were entitled to withhold information under sections 30(b)(ii), 30(c) and 36(1) of FOISA.

The Commissioner does not accept that the Ministers were correct to withhold all of the information to which they applied sections 30(b)(ii) and 36(1) of FOISA. In the case of the information withheld under section 30(b)(ii), no other exemption was claimed by the Ministers. In the majority of cases where she does not accept that section 36(1) applied, the Commissioner finds that the information could properly be withheld under section 30(c) of FOISA.

In withholding information where they were not entitled to do so under any of the exemptions claimed, the Commissioner finds that the Ministers failed to deal with Mr Hutcheon's request in accordance with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to disclose to Mr Hutcheon the information wrongly withheld, as identified in paragraphs 27 and 45 of this decision, by 27 March 2014.

Appeal

Should either Mr Hutcheon 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
10 February 2014



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.

...

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.

...

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