

# Decision Notice

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## **Decision 054/2016: Simon Johnson and the Scottish Ministers**

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### **BBC programming in an independent Scotland**

Reference No: 201501215

Decision Date: 7 March 2016



## Summary

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On 20 November 2014, Mr Johnson asked the Scottish Ministers (the Ministers) for information about BBC programming in an independent Scotland.

The Ministers disclosed some information, but withheld the remainder. Following a review, Mr Johnson remained dissatisfied and applied to the Commissioner for a decision. The Ministers subsequently disclosed more information to Mr Johnson.

The Commissioner investigated and found that the Ministers were entitled to withhold the remaining information under sections 29(1) (Formulation of Scottish Administration policy, etc.) and 30(c) (Prejudice to effective conduct of public affairs) of FOISA.

She also found that the Ministers initially failed to identify all of the information falling within the scope of Mr Johnson's request and that they wrongly withheld information which they subsequently disclosed to him during the investigation.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) and (b), (4) (definitions of "government policy" and "Ministerial communications") and (5) (Formulation of Scottish Administration policy etc.); 30(c) (Prejudice to effective conduct of public affairs)

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

## Background

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1. On 20 November 2014, Mr Johnson made a request for information to the Ministers. The information request stated:

*"I would be grateful if you could provide the following information about promises on pages 529 and 530 of Scotland's Future, the Scottish Government's White Paper [the White Paper] on independence, that television viewers would retain access to all BBC programming at no extra cost:*

- (a) *please provide the content of all documents and research discussing and substantiating this claim*
- (b) *please provide the content of all documents considering the likelihood of this occurring*
- (c) *please provide the content of all documents considering the consequences of this not occurring*
- (d) *please provide the content of all documents considering the ramifications of no deal being reached to share programming between the Scottish Broadcasting Service and the BBC*

- (e) *please provide the content of all documents considering changes in the way the Scottish Broadcasting Service would operate when compared with how the BBC currently operates.”*
2. The Ministers responded on 19 February 2015. They provided Mr Johnson with a website link where he could view some of the information and withheld other information under various exemptions in FOISA.
  3. On 24 February 2015, Mr Johnson wrote to the Ministers requesting a review of their decision. He considered that the Ministers had failed to give sufficient weight to the public interest in the information being disclosed.
  4. The Ministers notified Mr Johnson of the outcome of their review on 3 June 2015. The Ministers disclosed some further information, but withheld the remainder under sections 29(1)(a) and (b) and 30(c) of FOISA.
  5. On 26 June 2015, Mr Johnson wrote to the Commissioner. Mr Johnson applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Johnson was dissatisfied with the outcome of the Ministers’ review. He disagreed with the application of sections 29 and 30 of FOISA and felt that the information should be in the public domain.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Johnson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 22 July 2015, the Ministers were notified in writing that Mr Johnson had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Johnston. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application, including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers provided the investigating officer with their comments.
10. Mr Johnson was also asked for, and provided, further comments.
11. During the investigation, the Ministers disclosed some of the withheld information to Mr Johnson. They also located one further document which was partially within the scope of his request. They withheld the information which fell within scope under sections 29(1)(a) and (b) and 30(c) of FOISA.

## **Commissioner’s analysis and findings**

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12. 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 Johnson and the Ministers. She is satisfied that no matter of relevance has been overlooked.

## **Information held by the Ministers**

13. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information.
14. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4).
15. The investigating officer asked the Ministers for details of the searches they had carried out to locate information within the scope of Mr Johnson's request.
16. The Ministers explained that documents relating to the preparation of the White Paper were filed separately in its eRDM and that the search concentrated on those records. Additionally, a further search was carried out on the wider broadcasting files in its eRDM and checks were also made with colleagues in the Constitution Division and Cabinet Secretariat. The request handler and his team also checked their own inboxes for any further records.
17. The Commissioner notes that, when the Ministers were notified about Mr Johnson's appeal, their Broadcasting Team carried out further searches to double check that there were no additional documents within the scope of the request. At this stage, one additional document was found which was partially in scope. This was withheld under sections 29(1)(b) and 30(c) of FOISA.
18. Having considered the Ministers' submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) the Ministers had taken adequate steps to identify and locate the information they held which fell within the scope of Mr Johnson's request. It is clear, however, that they failed to do this in responding to Mr Johnson's information request and requirement for review. As a result, the Ministers failed to comply fully with section 1(1) of FOISA.

### *The withheld information*

19. The Ministers withheld parts of five documents: a Ministerial briefing pack, two Cabinet papers and associated minutes, a transition plan and an email.

## **Section 29(1)(b) of FOISA - Ministerial communications**

20. The Commissioner will consider this exemption in respect of parts of two Cabinet papers and associated minutes, and parts of an email to the Permanent Secretary.
21. Under section 29(1)(b) of FOISA, information held by the Scottish Administration is exempt information if it relates to Ministerial communications. These are defined in section 29(4) as communications between Ministers, including (in particular) communications relating to proceedings of the Scottish Cabinet or any committee of that Cabinet.
22. The Commissioner has considered the nature and content of the information. She is satisfied that the information contained in the Cabinet papers and minutes relates to Ministerial communications and, as such, is exempt from disclosure under section 29(1)(b) of FOISA.
23. However, she is not satisfied that the information in the email to the Permanent Secretary relates to Ministerial communications. The sender of the email is not a Minister (as defined in section 29(5) of FOISA) and is not sending the email on behalf of a Minister. There is

nothing in the email which refers to communications between Ministers. The email cannot, therefore, be exempt from disclosure in terms of section 29(1)(b).

24. As such, the Commissioner finds that section 29(1)(b) has been wrongly applied to this email. The Ministers also applied section 30(c) of FOISA to this email: the Commissioner will consider that exemption below.
25. The exemption in section 29(1)(b) is a qualified one, subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must consider whether, in all the circumstances of this case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (i.e. in withholding the information).

#### *Public interest test*

26. Mr Johnson provided public interest submissions covering three of the exemptions applied by the Ministers. These are set out below.

#### Submissions from Mr Johnson

27. Mr Johnson stated that he wanted to discover the factual basis of the White Paper's claim about the future of the BBC. He stated that the Ministers' response set out what the policy on broadcasting was, but provided nothing on the background to the policy, the thinking that went into it, or the evidence that formed its basis.
28. Mr Johnson said that the White Paper promised that television viewers in Scotland would continue to have access to all BBC programming free of charge in an independent Scotland. He stated that this was based on an assertion that the new Scottish Broadcasting Service (the SBS), which would inherit the assets of BBC Scotland, would swap its programming output with that of the BBC in the remainder of the UK without any money changing hands.
29. Mr Johnson thought this was an unlikely scenario given that the combined commercial value of the programmes produced in England, Wales and Northern Ireland would far exceed that of the SBS. He stated that such an arrangement would be totally unprecedented and commented that BBC Worldwide currently sells its programmes at the best price it can get to all other countries wishing to buy them.
30. Mr Johnson said it was in the public interest to find out:
  - (a) what evidence the Ministers had accrued from industry experts or elsewhere to suggest their plan was a likely outcome?
  - (b) had there been any warnings from Scottish civil servants, Whitehall or the BBC that the "programme swap" plan was not likely to occur?
  - (c) had Ministers considered any alternative scenarios, such as Scottish viewers having to pay for BBC programming with some form of subscription fee in addition to the SBS licence fee?
31. He stated that the response to his FOI request would also be of public interest even if there were *none* of these things in the Scottish Government's records, as this would suggest that Scottish Ministers had formulated the policy without taking expert evidence and with no assurances that it would be likely to occur.
32. Mr Johnson submitted that the Ministers' response gave insufficient weight to the public interest in disclosing the information. He stated that the future of the BBC in an independent Scotland had been a major issue in the referendum. He considered that the SNP's

assurance that BBC programming would continue uninterrupted was an important part of their argument that leaving the UK would be relatively painless with minor disruption to Scots' everyday lives.

33. He was of the view that the genesis of the policy should be made public, especially as the referendum was over and the policy would not be put into action. He submitted that disclosing the information would not compromise the Ministers' current legislative programme in any way.

#### Submissions from the Ministers

34. The Ministers acknowledged that there was a degree of public interest in disclosure for reasons of openness and transparency, but argued that there was a stronger public interest in allowing both officials and Ministers to have a private space to receive and consider advice before reaching a final, agreed position.
35. They believed that Mr Johnson may have misunderstood the Scottish Government's position. The Ministers commented that Mr Johnson's initial request had correctly referred to Scottish Government commitments that viewers in Scotland would receive BBC programming "at no extra cost", meaning that there would be no increase in the licence fee at the point of transfer of responsibility. However, when he sought a review, Mr Johnson appeared to suggest, incorrectly, that the Scottish Government had committed that the BBC would provide its programming free of charge.
36. The Ministers stated that, while the Scottish Government was proposing a joint venture arrangement, it was not something that it had committed to. The Ministers said that the White Paper made it clear that this would need to be subject to negotiation with the BBC: they had tried to make this clear to Mr Johnson when they carried out a review. The Ministers stated that the point had also been made clear in Fiona Hyslop's (the Cabinet Secretary for Culture, Europe and External Affairs) speech to the Royal Television Society in which she asserted that buying in BBC programming on a commercial basis would still be an affordable option if agreement could not be reached on a joint venture model.
37. The Ministers stated that, while a public position had partly been reached (as set out in the White Paper), there were still areas where further work needed to be done and decisions needed to be taken in the light of future negotiations with the BBC and the UK Government. Revealing details of initial internal discussions and advice before those negotiations take place would, the Ministers argued, be likely to cause confusion about what the delivery mechanism would be and would also prejudice future ongoing policy development work and Ministerial considerations.
38. The Ministers stated that it was important for Cabinet Ministers to be able to deliberate on options freely and frankly in private. Disclosing the Cabinet Papers and minutes would prematurely reveal the nature of Ministers' views; this would be likely to dissuade Cabinet Secretaries from expressing their views freely and from ensuring that robust consideration of options takes place in Cabinet on similar matters in the future. This would undermine the effectiveness of Cabinet's role in collective decision-making through thorough scrutiny of significant Scottish Government policy proposals and would not be in the public interest.
39. The Ministers considered that, on balance, the public interest lay in favour of safeguarding the ability of Cabinet Ministers to have free and frank discussions in private about detailed options to help agree Scottish Government policy without the details of those discussions

being made public. This was particularly important here, as the discussions date from a relatively early stage in the policy development process.

### The Commissioner's view

40. The Commissioner has considered the submissions from both Mr Johnson and the Ministers. She has also taken account of the fact that the Ministers were, at the time of reviewing their response to Mr Johnson's request, involved in the renewal process for the BBC's charter which expires at the end of 2016 (and, indeed, still are). She accepts that there is a degree of sensitivity in relation to communications and potential communications between the Ministers and the BBC.
41. The Commissioner has also considered the effect that disclosure of the withheld information could have on current and pending relations between the Ministers and the BBC, and how this might affect the obtaining of the best possible value for the public purse in any negotiations, accepting that disclosing the internal discussions could prejudice ongoing development work.
42. The Commissioner concludes, on balance, and in all the circumstances of the case, that the public interest in disclosing the information is not outweighed by that in maintaining the exemption in section 29(1)(b) of FOISA.

### **Section 30(c) of FOISA - prejudice to the effective conduct of public affairs**

43. The Commissioner will consider this exemption in respect of parts of a broadcasting and media transition plan and the email to the Permanent Secretary.
44. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
45. There is a high standard to be met in applying the tests in section 30(c). The prejudice in question must be substantial and therefore of real and demonstrable significance. It must also be at least likely: prejudice cannot be a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances. This may include the timing of the request.
46. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
47. The Ministers asserted that disclosing the information would be likely to prejudice substantially the Scottish Government's position in any future negotiations with the BBC or the UK Government on the provision of BBC programming in Scotland or on other closely related negotiations on how broadcasting should be delivered in Scotland under further devolution or independence.
48. The Ministers argued that disclosing the information would be likely to significantly harm the smooth running of government by putting the Scottish Government at a disadvantage in future negotiations with the BBC and the UK Government. Neither the BBC nor the UK Government have been required to disclose details of their likely negotiating position on these matters, so it would place the Scottish Government at a significant disadvantage in seeking the best possible outcome. It was also likely that disclosure would damage

relationships and trust between the Scottish Government and the BBC. The Ministers stated that it was important that the Scottish Government maintain a good relationship with the BBC, particularly in the event of future negotiations on the provision of BBC programming in Scotland.

49. The Ministers also pointed out that the Scottish Government has, for the very first time, a formal role in the BBC Charter Renewal. This involves negotiating with the BBC and the UK Government on various policy considerations, including the structure, funding and commissioning of programming. A key Scottish Government policy proposal is that the BBC move to a more representative, federal model and develop a distinct Scottish channel. This, the Ministers stated, involved consideration of areas directly related to Mr Johnson's query. The Ministers stated that there was ongoing and sensitive policy development in this area.
50. The Ministers also submitted that they were currently compiling material from their transition plans which could be made available for pro-active publication in the future.
51. Having considered the submissions by both parties, the Commissioner accepts that disclosing the withheld information would be likely to have a substantially detrimental effect on the Ministers' position. Negotiations on policy development were, and would be, ongoing in relation to the Ministers' involvement in the negotiation process for the BBC Charter renewal in 2016.
52. The Commissioner recognises that the test to be considered in relation to section 30(c) of FOISA is high, but she accepts in this instance that disclosure would be likely to prejudice substantially the effective conduct of public affairs. In the circumstances, the Commissioner accepts that the exemption in section 30(c) was correctly applied.

#### *Public interest test*

53. Mr Johnson's submissions on the public interest test were as outlined at paragraphs 28 to 34 above.
54. The Ministers considered that it was not in the public interest to disclose the information. Disclosure would undermine the Scottish Government's negotiating position and its ability to secure the best possible outcome for Scotland in any future negotiations with the BBC and/or the UK Government. Such negotiations would be needed in the event that either further devolution of broadcasting was agreed or, following a further referendum, there was a vote in favour of independence. The Ministers stated that there was no public interest in putting the Scottish Government at such a disadvantage in such negotiations. The Ministers were of the view that there was a greater public interest in ensuring a level playing field in any future negotiations.
55. The Commissioner has carefully considered both the Ministers' and Mr Johnson's submissions in the context of the withheld information.
56. She considers that it would not be in the public interest for the Ministers to be disadvantaged in any negotiations with either the BBC or the UK government and that the public interest lies in obtaining best value for the public purse. The Commissioner has therefore concluded, on balance, and in all the circumstances of the case, that the public interest in disclosing the information is not outweighed by that in maintaining the exemption in section 30(c) of FOISA.



## **Section 29(1)(a) of FOISA – Formulation and development of Government policy**

57. The Commissioner will consider this exemption in respect of parts of a briefing pack for the Cabinet Secretary for Cultural and External Affairs.
58. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" is exempt information if it relates to the formulation or development of government policy. The "Scottish Administration" is defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff.
59. "Formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
60. 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 subsequently determine which of these should be translated into political action and/or legislation, and when.
61. Given the ongoing negotiations between the Scottish Government and the BBC, the Commissioner is satisfied that the information in question relates to the ongoing development of government policy. It therefore falls within the scope of the exemption in section 29(1)(a) of FOISA.

### *Public interest test*

62. Mr Johnson's submissions were as outlined at paragraphs 27 to 33 above.
63. The Ministers' submissions in respect of section 29 of FOISA are as set out at paragraphs 35 to 40 above. They argued that, on balance, the public interest weighed in favour of safeguarding the thoroughness of the ongoing policy development process until final detailed proposals could be agreed.
64. The Commissioner has carefully considered both the Ministers' and Mr Johnson's submissions in the context of the withheld information. While she accepts that disclosing the information could contribute to public debate, disclosing early deliberation on the formulation of an incomplete policy which is still under consideration would not be in the public interest.
65. She therefore concludes, on balance, and in all the circumstances of the case, that the public interest in disclosing the information is not outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA.

## Decision

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

The Commissioner finds that the information withheld by the Ministers was exempt from disclosure.

However, the Ministers initially failed to identify all of the information falling within the scope of Mr Johnson's request and also withheld information which they subsequently disclosed to him during the investigation. In doing this, the Ministers failed to comply with section 1(1) of FOISA.

Given that this information has now been disclosed to Mr Johnson the Commissioner does not require the Ministers to take any action in respect of this failure in response to Mr Johnson's application.

## Appeal

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Should either Mr Johnson or 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**

**7 March 2016**

### 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that -

...

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

#### 29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
- (a) the formulation or development of government policy;
  - (b) Ministerial communications

...

- (4) In this section-

“government policy” means -

- (a) the policy of the Scottish Administration; and
- (b) in relation to information created before 1<sup>st</sup> July 1999, the policy of the Government of the United Kingdom;

...

“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); ...

- (5) In the definitions of “Ministerial communications” and “Ministerial private office” in subsection (4), “Minister” means a member of the Scottish Executive or a junior Scottish Minister.

### **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

**Scottish Information Commissioner**

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