

# Decision Notice

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## Decision 026/2017: Mr Tom Gordon and the Scottish Ministers

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### Creation of a Scottish Monetary Authority

Reference No: 201601258

Decision Date: 1 March 2017



Scottish Information  
Commissioner

## Summary

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On 3 February 2016, the Scottish Ministers were asked for information regarding the creation of a Scottish Monetary Authority, to include any information on the potential appointment of Professor John Kay to act as head of that Authority.

The Ministers withheld some information because they considered disclosure would substantially prejudice the effective conduct of public affairs. The Ministers also stated that they did not hold any information about the appointment of Professor John Kay.

The Commissioner accepted that the Ministers did not hold any information about the potential appointment of Professor John Kay. The Commissioner also found that the Ministers wrongly withheld other information, including some information which they believed was outside the scope of the request. She required the Ministers to disclose this information.

## 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); 17(1) (Information not held); 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 3 February 2016, Mr Gordon made a request for information to the Scottish Ministers (the Ministers). The information requested was:

*All items of information held since 1 January 2013 by the Office of the Chief Economic Adviser in relation to the potential creation of a Scottish Monetary Authority.*

*This should include all material related to the potential appointment of the economist Professor John Kay to lead such an authority, as discussed in Alex Salmond's book *The Dream Shall Never Die* and all related correspondence, both internal and with others outside the Scottish Government.*

2. The Ministers failed to respond and, on 8 March 2016, Mr Gordon wrote to the Ministers, requiring a review on the basis that they had failed to respond.
3. On 12 July 2016, Mr Gordon applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
4. On 17 June 2016, following his application to the Commissioner, the Ministers notified Mr Gordon of the outcome of their review. They gave him notice, in terms of section 17(1) of FOISA, that they did not hold any information regarding the appointment of Professor John Kay as leader of a Scottish Monetary Authority. With regard to the outstanding part of his request, the Ministers disclosed some information to Mr Gordon, but they withheld the remainder under section 30(c) of FOISA.

5. Mr Gordon was dissatisfied with the outcome of the Ministers' review because he did not accept that they did not hold some of the information he requested, and he did not accept that the Ministers were right to withhold information under section 30(c) of FOISA.

## **Investigation**

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6. The application was accepted as valid. The Commissioner confirmed that Mr Gordon 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 26 July 2016, the Ministers were notified in writing that Mr Gordon had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Gordon. 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 and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

## **Commissioner's analysis and findings**

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9. 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 Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Information which is out of scope or not considered**

#### *Names of junior staff*

10. During the investigation, Mr Gordon explained that while he was interested in obtaining staff names, he was only interested in senior members of staff (those holding Deputy Director, Director, Private Secretary or Chief Economist posts). He was not interested in obtaining the names of any junior staff.
11. Documents (i) and (ii) both contain names of junior staff. As Mr Gordon does not require this information, the Commissioner will exclude these names from her consideration of these documents, and will only consider whether the names of staff who hold Director, Deputy Director, Private Secretary or Chief Economist posts were correctly withheld.
12. The Ministers also withheld some information in documents (ii) and (iii) on the basis that it is outwith the scope of Mr Gordon's request for information.

#### *Document (ii)*

13. Document (ii) is a report which details the Scottish Government's plans for monetary policy, financial stability and a central bank, in the event of Scottish independence. It contains information about the creation of a Scottish Monetary Authority (which the Ministers are withholding under section 30(c) of FOISA). It also contains information about the wider economic considerations of Scottish Independence. The Ministers have indicated that this broader information is outwith the scope of the request and, accordingly, they have withheld it from Mr Gordon.

14. The Commissioner has reviewed the information in document (ii) that the Ministers consider to be outwith the scope of the request. She considers that it is background information regarding the wider aspects of economic policy, and goes beyond the potential creation of a Scottish Monetary Authority. Accordingly, the Commissioner agrees that some of the information contained in document (ii) is outwith the scope of Mr Gordon's request. She will not consider this information any further.

*Document (iii)*

15. Document (iii) discusses the options for a Scottish Monetary Institute (Authority) in an independent Scotland.
16. The Ministers have argued that parts of document (iii) fall outwith the scope of Mr Gordon's request. They submitted that Mr Gordon was seeking information regarding the Scottish Monetary Authority/Institute and his request was not for entire documents. The Ministers argued that while the title and some elements of the document relate to his request for information, the sections they have determined to be out of scope do not relate to the establishment of a Scottish Monetary Authority, but constitute information that was useful in establishing the Scottish Government's understanding of current institutions and how they were established. The Ministers maintained that this information was not relevant to the request.
17. The Commissioner has reviewed the information in question. She considers that the Ministers have taken an overly narrow interpretation of Mr Gordon's request by concluding that parts of this document do not fall within its scope. The context created by the title of the document brings the whole document within its scope.
18. The Ministers were made aware of the Commissioner's view that all information in document (iii) is covered by the terms of Mr Gordon's request. They have not applied any exemptions to this information (the information in document (iii) that they consider to be outwith the scope of Mr Gordon's request). Given this, and given the Commissioner's view that the information falls within the scope of the request, she requires the Ministers to disclose this information to Mr Gordon.

**Withheld information**

19. The Ministers are withholding information from three documents under section 30(c) of FOISA. Some of the information in documents (i) and (ii) is outwith the scope of Mr Gordon's request and will not be considered in this decision. Details of the information being withheld and considered by the Commissioner are as follows:
  - (i) A spreadsheet described as "Transition Plan Finance Annex – Scottish Monetary Institute". This document was withheld in its entirety under 30(c) of FOISA; the names of junior staff are not considered in this decision.
  - (ii) A report described as a "Plan for monetary policy, financial stability and the central bank". Parts of this report are withheld under section 30(c) of FOISA, while some information is outwith the scope of the request and one paragraph was disclosed to Mr Gordon by the Ministers.
  - (iii) A discussion paper described as "Options for a Scottish Monetary Institute in an independent Scotland". Parts of this report are withheld under section 30(c) of FOISA, while six paragraphs were disclosed to Mr Gordon by the Ministers.

### *Names of senior staff*

20. During the investigation, the Ministers stated that they were “content for the names of Deputy Directors and above to be released to Mr Gordon”. The Ministers stated that there were three members of senior staff listed in documents (i) and (ii) and that all three had given consent for their names to be disclosed.
21. The Commissioner notes that while the Ministers stated they were content for these names to be disclosed to Mr Gordon, they have not actually disclosed them. She now requires the Ministers to do so.

### **Section 17(1) – Information not held**

22. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
23. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. In this case, the Ministers notified Mr Gordon that they did not hold any information about the appointment of Professor John Kay to head up a Scottish Monetary Authority.

### *Submissions from Mr Gordon*

24. In his application, Mr Gordon disputed the Ministers’ statement that they held no information regarding the potential appointment of Professor John Kay.
25. Mr Gordon referred to passages from Alex Salmond’s book “The dream shall never die” where the former First Minister discussed how he asked Professor John Kay to head a Scottish Monetary Authority over dinner at Gleneagles on 12 September 2014. In the book, Alex Salmond states that he and Professor John Kay drew up “a list of specialists with central bank experience and financial technicians with the weight and record to impress”. He added: “Over the next few days I will contact them one by one to secure their services”.
26. Mr Gordon doubted that Mr Salmond would have had the names and/or numbers of all of these individuals in his contacts book and he submitted that it was likely that civil servants would have helped Mr Salmond make contact with them. Mr Gordon questioned the Ministers’ assertions that they hold no record of Professor Kay’s potential role, “especially if the then First Minister was making follow-up calls as a result of [Professor] Kay’s agreement”.
27. In addition, Mr Gordon noted that the Ministers told him that they did not “hold any information relevant to [his] request on the appointment of Professor John Kay to head up a Scottish Monetary Authority”. Mr Gordon noted that his request was not seeking information about the “appointment” of Professor John Kay, but was seeking information about his “potential appointment”, which is broader in scope.

### *Submissions from the Ministers*

28. In their submissions to the Commissioner, the Ministers stated that they did not hold any information regarding Professor John Kay’s potential consideration for the post of Governor of a Scottish Monetary Authority or Institute.

29. The Ministers explained, and provided evidence of, the searches and enquiries upon which they based their conclusion that they did not hold the information requested. They confirmed that these searches and enquiries were repeated during the Commissioner's investigation.
30. In particular, the Ministers searched their electronic Records and Document Management system (eRDM) using the search terms "John Kay". The Ministers explained that the search for "John Kay" did retrieve various documents, but none of them related to the Scottish Monetary Authority/Institute or his potential appointment as governor. As evidence, the Ministers provided the Commissioner with a screenshot that listed each record retrieved on the eRDM database under the "John Kay" search, with a date and description.
31. The Ministers also asked staff in the Office of the Chief Economic Advisor (OCEA) if they held any information relating to the request, but each staff member provided a "nil return" and no information was located. The Ministers provided the Commissioner with the emails from each OCEA staff member confirming that they held no information.
32. The Ministers were asked about their procedures and policies regarding records management "housekeeping"; in particular, whether staff are required to delete or archive information when they move departments within the Scottish Government. The Ministers explained that there is no policy requiring officials to destroy, delete or archive information when they move or leave the organisation. As part of their day to day work, all information relevant to the public record is stored in the eRDM. The Ministers submitted that it is good practice for an official moving or leaving to ensure all information held in their inbox and the other document storage areas of their desktop is checked and saved into the eRDM, if relevant.

#### *The Commissioner's conclusions*

33. Mr Gordon has explained why he thinks the Ministers would hold information regarding the potential appointment of Professor John Kay, and the Commissioner considers his expectation to be reasonable.
34. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) actually held by the public authority.
35. The Commissioner cannot be sure that the Ministers have never held the information requested by Mr Gordon: it may well have been held for a time and then discarded when no longer relevant. However, she is satisfied, on balance of probabilities, that the Ministers did not hold information about the potential appointment of Professor John Kay at the time of Mr Gordon's request. The Ministers have conducted thorough searches and have provided the Commissioner with evidence of these searches.
36. As a result of the search evidence provided, the Commissioner is satisfied that the Ministers were entitled to conclude that they held no information falling within the scope of this part of Mr Gordon's request for information.

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

37. 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 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 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. The exemption (if found to be engaged) is also subject to the public interest test in section 2(1)(b) of FOISA.
38. The Ministers are withholding the entirety of document (i) and parts of documents (ii) and (iii) under section 30(c) of FOISA.

### *Submissions from the Ministers*

39. The Ministers argued that disclosure of the withheld information would limit the Scottish Government's ability to fully consider and develop plans for a macroeconomic framework, should the need arise. They submitted that having a robust and fully developed macroeconomic framework is key to economic stability. They noted that the withheld information sets out initial scenarios and estimates for a Scottish Monetary Authority, and commented that the exact role and development of this would depend on the outcome of negotiations and the nature of any final agreement.
40. The Ministers submitted that this framework is critical to market expectations of economic stability and that it is important that the Scottish Government is seen as committed to the macroeconomic framework it sets out, including the structure of a Scottish Monetary Authority, in the event of an independence vote. The Ministers argued that disclosure of details of the scenarios and options which officials and Ministers have considered in relation to this could substantially prejudice the Scottish Government's ability to establish a coherent macroeconomic framework, of which the Scottish Monetary Authority forms a critical component, in the event of an independence vote.
41. The Ministers stated that much of the content of the three documents they wished to withhold contains the thinking and items for consideration that will allow Ministers and officials to move forwards toward the final policy options relating to the establishment of a Scottish Monetary Authority. There are still areas where further work needs to be done and decisions taken on the details of the delivery mechanism following any future negotiations with the UK Government. They argued that revealing details of initial internal discussions and advice, before these negotiations take place, would be likely to cause confusion about the delivery mechanism and would prejudice ongoing policy development work and Ministerial considerations.

### *Document (i)*

42. The Ministers stated that document (i) consists of the estimated costs and workings on potential staff numbers and costs in the creation of a Scottish Monetary Authority. They argued that this spreadsheet, and its constituent parts, forms the building blocks from which the Scottish Government would start if and when there was an agreed need for a Scottish Monetary Authority. The Ministers submitted that although this work was conducted in the run up to the 2014 Independence Referendum, it is still relevant today: the Scottish Government has set out a clear potential for a further Independence Referendum following

the recent UK wide decision to leave the EU. There is also the potential for significant change in devolved responsibilities in negotiation with the UK parliament.

43. The Ministers contended that there is a considerable need for Ministers and officials to hold and maintain potential policies and financial calculations that will allow them to react and respond to situations as they may arise, particularly if they are relevant to the future economic wellbeing of Scotland. While there is the “potential likelihood” that the details in document (i) may be implemented, the Ministers argued that it was critical to maintain the ability to respond to circumstances as they arise.
44. The Ministers acknowledged that the figures in document (i) would require revising, but considered that disclosure “would create a situation where the figures and workings of the Scottish Government would be released to public and media scrutiny and debate”. If this happened, they believed it would impact on Ministers’ and officials’ “ability to engage and propose solutions and options, particularly on such a contentious issue where information is likely to be taken out of context”.
45. The Ministers considered that disclosure of the information in document (i) would be likely to confuse issues and destabilise the Scottish Government’s ability to respond and establish a Scottish Monetary Authority if required. The information could also be used by political campaigners to constrain UK and Scottish Government Ministerial relations “at this sensitive time”.
46. The Ministers explained that document (i) was embedded in a draft document (document (ii)) that had not been cleared by Ministers, and disclosure of this document would risk giving the impression that it represented the Ministers’ settled views. They argued that, given the centrality of monetary policy – evidenced by the material impact a central bank governor’s comments can have on economic prosperity – a misinterpretation of the Ministers’ position and early thinking could have a significant impact on investment in Scotland.
47. The Ministers noted that the sensitivity of monetary policy is evidenced by the fact that the Bank of England is not obliged to answer information requests made under the Freedom of Information Act 2000 (FOIA) to the extent that they relate to monetary policy. (Part VI of Schedule 1 to FOIA makes it clear that the Bank of England is subject to FOIA only in respect of information held for purposes other than those of its functions with respect to monetary policy, financial operations intended to support financial institutions for the purposes of maintaining stability and the provision of private banking services and related services.) The Ministers argued that this highlights the sensitive nature of monetary policy and its centrality to economic stability.

#### *Documents (ii) and (iii)*

48. With regard to documents (ii) and (iii), the Ministers stated that the information withheld under section 30(c) of FOISA was used for the development of the policy on the potential creation of a Scottish Monetary Authority. Both documents are marked as drafts, which meant they had not been cleared by Ministers: they submitted that disclosure of this information could be misconstrued as their final position on monetary policy for Scotland and on the establishment of a Scottish Monetary Authority.
49. The Ministers explained that the information contained in documents (ii) and (iii) forms the details and consideration which they and their officials used to establish the potential format, financial and staffing needs and costs in creating a Scottish Monetary Authority. They argued that this information is central to the Scottish Government’s ability to establish a



Scottish Monetary Authority if required, and that disclosure of these plans and/or potential scenarios would significantly prejudice the ability of Ministers and officials to further develop the policy or options following an independence vote.

50. The Ministers claimed that disclosure would prematurely release the information to public and political scrutiny and debate, which would lead to the information being considered out of context. If this happened, the Ministers argued that it would significantly prejudice the ability of the Scottish Government to find consensus and maintain the relationships with the UK Government and the Treasury that will be required.

#### *Submissions from Mr Gordon*

51. Mr Gordon disagreed with the Ministers' reliance on section 30(c) of FOISA. He argued that the exemption contained in section 30(c) of FOISA sets a very high test of "substantial prejudice" to the conduct of public affairs. Mr Gordon noted the Ministers' argument that disclosure could prejudice the Scottish Government's ability to "conduct any future referendum on Scottish Independence or subsequent negotiations". To him, this seemed to be an attempt to create an indefinite block on the release of material about the conduct of the first referendum on Scottish independence. Mr Gordon contended that as the next referendum may not occur for another 10 or 20 years, or might never occur, the Ministers' arguments were not reasonable.
52. Mr Gordon again referenced the high harm threshold set for section 30(c) of FOISA, and argued that it was highly implausible that only one side of A4 paper could be disclosed, and that every word and line of the material covered by the original information request is capable of substantially damaging the conduct of public affairs in Scotland.

#### *Commissioner's conclusions*

53. The Commissioner has considered the nature and content of the withheld information, along with the submissions from both parties.
54. The Commissioner accepts as reasonable the Ministers' statement that economic stability requires a "robust and fully developed macroeconomic framework". The Commissioner also accepts that the Ministers have a responsibility to the Scottish people to be prepared for changing financial and economic circumstances (such as that represented by a "Yes" vote in an Independence Referendum). She would expect the Ministers to be prepared to anticipate and respond to change quickly, and that policies and financial calculations regarding the possible scenarios that might unfold would be at the forefront of such preparedness.

#### *Document (i)*

55. The information contained in document (i) consists of estimated costs associated with creating a Scottish Monetary Authority and its likely structure, and was prepared prior to the 2014 Independence Referendum.
56. The Ministers appear to be suggesting that the information contained in document (i) would be essential to any future creation of a Scottish Monetary Authority, and that while the information is now a few years old, it is still relevant today. The Ministers have also argued that any misinterpretation of the information (and of the Ministers' position and early thinking) could have a substantially detrimental impact on investment in Scotland.
57. The Commissioner acknowledges that the proposed structure and estimated costs of a Scottish Monetary Authority might still have relevance in relation to future developments,

even though the independence referendum for which this information was created has now taken place.

58. However, the wider political and economic climate has changed since document (i) was created, and the Commissioner considers it unlikely, based on the submissions made to her by the Ministers, that the proposals would be taken forward unamended if a Scottish Monetary Authority was to be re-considered now or at any future point. For this reason, the Commissioner is not persuaded that the information in document (i) retains the relevance claimed by the Ministers. While she does not dismiss the possibility that the information is capable of misinterpretation, she has not been persuaded that, if this occurred, it would incur harm at the level anticipated by the Ministers. It is clear that the information was compiled for a specific purpose at a specific time: following the referendum, circumstances changed, and the document will not longer be required for the original purpose. The Commissioner would also remind the Ministers that it is open to them to provide contextual information to aid interpretation, or avoid misinterpretation, of the information.
59. The Ministers have also argued that disclosure of document (i) would be likely to cause substantial confusion and destabilise the Scottish Government's ability to respond and establish a Scottish Monetary Authority, if required.
60. The Commissioner does not accept these arguments. If the Ministers were of the view that it was in Scotland's best interests for a Scottish Monetary Authority to be established, then they would do so, regardless of whether the information in document (i) was disclosed or not. The Commissioner has been provided with no evidence to explain why disclosure of the information contained in document (i) would hinder the Ministers' ability to create such an Authority. Nor has she been provided with any evidence or convincing explanation of the "confusion" that disclosure might cause.
61. The Ministers have also indicated that because a second Independence Referendum is "highly likely", the facts and figures in document (i) are highly relevant to ongoing government policy. They submitted that, at the time of their review outcome (17 June 2016), the Scottish Government had stated that it reserved the right to hold a referendum if there was a material change in circumstances, particularly if Scotland was to be taken out of the EU against its will.
62. The Commissioner questioned the Ministers on this point, and asked them whether it was evident that a second independence referendum was, in all probability (rather than possibly) a *Government intention* as opposed to a political statement. In response, the Ministers referred to six publications, including the SNP 2016 manifesto and statements made by the First Minister, as evidence of a second independence referendum being a stated policy of the Scottish Government.
63. The Commissioner has examined the six documents referenced by the Ministers and has taken into account the date of Mr Gordon's initial request and request for review. The Commissioner notes that Mr Gordon's request for review was made on 8 March 2016, but the Ministers did not respond to Mr Gordon until 17 June 2016, after she had compelled them to do so in *Decision 148/2016 Mr Tom Gordon and the Scottish Ministers*<sup>1</sup>. The Commissioner notes that all but all but one of the six documents referred to by the Ministers

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600948.aspx>

were published *after* the Ministers issued their review outcome on 17 June 2016, and all of them were published after Mr Gordon had made his initial request and his request for review.

64. The Commissioner must consider the circumstances that existed at the time the Ministers carried out their review: she cannot accept that documents published after that time are evidence of Scottish Government policy or intentions existing at the time Mr Gordon made his request or at the time the Ministers reviewed their response to that request.
65. The Ministers have presented no evidence or argument to support their view that disclosure of the information in document (i) would be likely to affect investment in Scotland, given the risk of misinterpretation of the information (and of the Ministers' position). In the absence of any persuasive evidence or explanation to support any of the arguments put forward by the Ministers, the Commissioner cannot accept that disclosure of document (i) would, or would be likely to, prejudice substantially the effective conduct of public affairs, and she does not accept that the Ministers were correct to withhold the information under the exemption in section 30(c) of FOISA.
66. As the Commissioner has found the exemption in section 30(c) was wrongly applied to document (i), she is not required to consider the public interest test in section 2(1)(b) of FOISA.

*Documents (ii) and (iii)*

67. Both of these documents contain information that discusses the potential creation of a Scottish Monetary Authority. Parts of the documents describe how a Scottish Monetary Authority would operate and what its functions and responsibilities would be. Both of the documents are marked as "draft" and the Ministers again expressed concern about disclosure of such "draft" documents. The Ministers argued that disclosure might lead people to believe that the information within the documents has been cleared by Ministers and represents their final position on monetary policy for Scotland, or their final position on the establishment of a Scottish Monetary Authority.
68. As indicated above, the Commissioner does not accept that the risk of "misinterpretation" of the Ministers' views is likely to satisfy the harm test required by section 30(c) of FOISA, on the evidence presented by the Ministers. In any event, if the Ministers are concerned that the public might misinterpret the information in these documents in any significant way, they are entitled to provide explanatory notes along with the disclosure. This would enable the Ministers to provide their own narrative and reduce the risk of misinterpretation.
69. The Commissioner also acknowledges that it is important, given the nature of devolution, that the Scottish Government has a working relationship with the UK Government; the effective conduct of public affairs requires that this relationship is functional.
70. The Commissioner acknowledges the Ministers' concerns that disclosure of the withheld information could impact on this relationship, and may negatively impact on the Scottish Government's ability to find consensus with the UK Government (and the Treasury) in the event of an independence vote. However, on the basis of the evidence provided to her, the Commissioner does not accept that disclosure of the information contained in documents (ii) and (iii) would substantially undermine or otherwise substantially prejudice the relationship between the Scottish and UK Governments.
71. As discussed above, the Commissioner is not satisfied that a second Independence Referendum was established government policy at the time of Mr Gordon's initial request (3

February 2016). Therefore, she cannot accept the Ministers' argument that disclosure, in response to Mr Gordon's request, would have threatened the ability of the Scottish Government to fully prepare for a "Yes" vote in a second Independence Referendum. She does not accept that disclosure of policy options prepared in advance of the 2014 Independence Referendum would still be as relevant in the event of a second independence referendum.

72. Additionally, the Commissioner would note that the UK Government and the Scottish Government are two separate entities and often pursue contrasting policies and take differing political positions. These differences sometimes lead to public criticism of the other's policies and the Commissioner cannot see why the effective conduct of public affairs would be prejudiced by the disclosure of the withheld information, but not by the often explicit public criticism the UK Government and the Scottish Government make to, and about, each other.
73. In conclusion, the Commissioner is not satisfied that the Ministers have offered evidence or explanation to convince her that disclosure of the information contained in documents (ii) and (iii) would, or would be likely to, prejudice substantially the effective conduct of public affairs.
74. As the Commissioner has found the exemption in section 30(c) was wrongly applied, she is not required to consider the public interest test in section 2(1)(b) of FOISA.
75. The Commissioner requires the Ministers to disclose to Mr Gordon all of the information withheld under section 30(c) of FOISA in documents (ii) and (iii).

#### **Has all relevant information been identified?**

76. While the Commissioner is satisfied that the Ministers did not hold any information about the potential appointment of Professor John Kay as head of a Scottish Monetary Authority, she questioned whether the Ministers had located all of the information they held regarding the main aspect of Mr Gordon's request.
77. The Ministers provided the Commissioner with three documents that fell within the scope of Mr Gordon's request. The Commissioner was surprised at how apparently little information was held, given the importance the Ministers placed on the information regarding the potential creation of a Scottish Monetary Authority in the future. Additionally, the Ministers' submissions indicated that the creation of a Scottish Monetary Authority was still a "live" policy option which may be actioned either as a result of a second independence referendum or as part of further devolution. Given this, the Commissioner queried why the Ministers only appeared to hold three relevant documents.
78. The Commissioner asked the Ministers to provide details of the searches they had undertaken. They were also asked questions about the location of the three identified documents, in case other information might also be held there.
79. In response, the Ministers explained that they searched the eRDM for any information that contained the words Scottish Monetary Authority or Scottish Monetary Institute, and that staff currently working in the OCEA were asked to conduct similar searches on their own records and to provide a nil response if nothing was located. The Ministers provided the Commissioner with copies of these "nil response" emails. They also explained that a former member of OCEA staff had identified the three documents withheld in this case, and this officer had directed the Ministers to a secure file where the information was stored. Two other officers who worked on the same subject matter had since left the Scottish Government. The Ministers stated that they had searched the divisional folders and had not

been able to locate any relevant information saved by either of these two former employees into the divisional folders.

80. Having considered the Ministers' submissions, the Commissioner is satisfied that the searches conducted by the Ministers were adequate and, on the balance of probabilities, likely to retrieve any relevant information which they hold. She accepts that the only information to consider in this case is found in documents (i), (ii) and (iii).

### **Information to be disclosed**

81. The Commissioner has concluded:

- (i) The whole of document (iii) is within the scope of Mr Gordon's request and therefore any information withheld by the Ministers on the basis that it is outwith the scope of the request must be disclosed to Mr Gordon.
- (ii) The Ministers must disclose the names of three senior members of staff in documents (i) and (ii)
- (iii) The Ministers must disclose all of the information which was wrongly withheld under section 30(c) of FOISA.

## **Decision**

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The Commissioner finds that 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 Gordon.

The Commissioner finds that:

- (i) The Ministers correctly notified Mr Gordon, in terms of section 17(1) of FOISA, that they did not hold information regarding the potential appointment of Professor John Kay as head of a Scottish Monetary Authority.
- (ii) The Ministers wrongly identified information in document (iii) as being outwith the scope of Mr Gordon's request for information, and failed to disclose it or apply an exemption.
- (iii) The Ministers wrongly withheld the names of three senior members of staff from Mr Gordon.
- (iv) The Ministers were not entitled to withhold information under section 30(c) of FOISA.

The Commissioner therefore requires the Scottish Ministers to disclose the information specified in paragraph 81 to Mr Gordon by **15 April 2017**.

## **Appeal**

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Should either Mr Gordon 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.

## **Enforcement**

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If the Scottish Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Ministers as if they had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**1 March 2017**

## Appendix 1: Relevant statutory provisions

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### 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.

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- (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.

...

#### 17 Notice that information is not held

- (1) Where-

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or  
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

....

#### 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**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**