

Decision Notice 065/2023

Timescale for Scotland joining the EU

Public authority: Scottish Ministers

Case Ref: 202101494



Scottish Information
Commissioner

Summary

The Ministers were asked for details of any analysis undertaken to determine how long it would take an independent Scotland to re-join the EU. The Ministers disclosed some information, but withheld the remainder on the grounds that it was exempt from disclosure. The Commissioner found that the Ministers had partially breached FOISA in responding to the request. The Ministers failed to identify all of the information falling within the scope of the request, and they were not entitled to apply the exemptions in 29(1)(a), 30(b)(i) and (ii) to all of the information they were withholding. However, the Commissioner found that the Ministers were entitled to withhold some information under section 29(1)(a) and 30(b)(ii) of FOISA. The Commissioner required the Ministers to disclose the information they had wrongly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) and (2) (Formulation of Scottish Administration policy etc.); 30(b) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

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

1. On 30 July 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). Referring to previous correspondence on future Scottish membership of the EU, the information requested was:
 - a) *... I am unable to find any reference to how you have concluded that the Public Interest test or indeed the section 29(1)(a) exemption should be applied. Could you firstly therefore please forward me any documentation you have which details this.*
 - b) *... any analysis that the Scottish Government have carried out, since 2016, which assesses the timeframe which would be required for an Independent Scotland to re-join the EU.*
2. The Ministers responded on 27 August 2021 and provided the Applicant with information falling within the scope of request a). In response to request b), the Ministers provided the Applicant with information they had previously disclosed to him, but they continued to withhold some information from these documents under sections 29(1)(a) and 30(b)(i) and (ii) of FOISA. The Ministers also provided the Applicant with a weblink to information published by a third party.
3. On 30 August 2021, the Applicant wrote to the Ministers, requesting a review of their decision as he did not agree that exemptions applied to the information being withheld under request b).
4. The Ministers notified the Applicant of the outcome of their review on 27 September 2021. They disclosed some additional information, but they maintained that the exemptions contained in section 29(1)(a) and 30(b)(i) and (ii) applied to the remaining withheld information. The Ministers also identified one further document that fell within the scope of his request, and they withheld this under section 30(b)(i) of FOISA. In addition, the Ministers

notified the Applicant that a small amount of information was now being withheld under section 38(1)(b) of FOISA.

5. On 2 December 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he did not agree that the exemptions applied and, even if they did, he considered that the public interest favoured disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 2 December 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. 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 to answer specific questions. These related to their reasons for relying on the exemptions contained in section 29(1)(a) and 30(b)(i) and (ii) of FOISA.

Commissioner's analysis and findings

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 him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Withheld information

10. The Ministers identified 13 documents of potential relevance to the Applicant's information request. They considered some of the information in these to be outwith the scope of the request, and they withheld some information under the exemptions contained in section 29(1)(a), 30(b)(i) and (ii) and 38(1)(b) of FOISA. During the investigation, the Applicant confirmed that he was not seeking the personal data being withheld under section 38(1)(b) of FOISA, and so the Commissioner will not consider this information in his decision (this accounts for all of the withheld information in documents 1 and 2).
11. The Ministers have submitted that documents 5, 7, 8 and 9 are wholly outwith the scope of the request and that parts of documents 3, 4, 6, 10, 12 and 13 are also outwith the scope of the request.
12. The Ministers are withholding information contained in documents 4 and 10 under section 29(1)(a) of FOISA. They are withholding information contained in documents 6 and 11 under section 30(b)(i) of FOISA, and they are withholding information contained in documents 3, 4, 10 and 13 under section 30(b)(ii) of FOISA.
13. The Commissioner will consider the application of these three exemptions and he will also consider whether the information the Ministers have identified as being outwith the scope of the request, is actually outwith scope.

Out of scope information

14. As noted above, the Ministers have argued that the whole of documents 5, 7, 8 and 9, and parts of documents 3, 4, 6, 10, 12 and 13, are outwith the scope of the request.
15. The Commissioner has reviewed all of the information considered out of scope and he is satisfied that documents 5, 7 and 9 are wholly outwith the scope of the request.
16. The Commissioner notes that none of these three documents contain any information regarding the timescales for an independent Scotland to join the EU, and so the Commissioner finds that they are outwith the scope of the request and need not be considered further.
17. The Commissioner has also reviewed the content of document 10 and he is satisfied that the Ministers have correctly identified information within that document as being out of scope of the request. He notes that this information does not address timeframes at all. He is satisfied that all of the information in document 10 that has been deemed out of scope of the request, has been correctly identified.
18. However, the Commissioner does not agree with the Ministers' views on the out of scope information in the remaining documents.
19. He notes that document 8 contains a summary of a paper published by a third party, which is publicly available online. While this paper does not contain the research outcomes or views of the Scottish Government, it is information that does discuss the timescales that may apply to an independent Scotland joining the EU. The Ministers acknowledge that the summary was prepared for Ministerial consideration, and in that context, in the Commissioner's view, this meets the terms of the request and so the content of document 8 must be considered within scope.
20. The Commissioner has also reviewed documents 3, 4, 6, 12 and 13, including the parts of these documents that the Ministers have argued to be out of scope of the request. While he agrees that some information in these documents is not relevant to the request, he does not accept that all of the information marked up by the Ministers as being out of scope is actually out of scope.
21. In document 13, the Ministers highlighted a significant amount of information as being outwith the scope of the Applicant's information request. The Commissioner largely agrees with the Ministers, as the majority of the information does not contain any reference to timescales. However, the Commissioner finds that the first three bullet points of paragraph 11 are relevant to the request. Given this, the Commissioner finds that this information does fall within the scope of the request.
22. The Commissioner also finds that there are multiple sections in documents 3, 4, 6 and 12 which have been marked as "out of scope" but which he considers to be within the scope of the request. The Commissioner will not describe each section in detail here, but he notes that the information he deems to be within scope is information that directly relates to analysis undertaken with a view to determining how long it might take Scotland to re-join the EU.
23. The Ministers have maintained that any information held concerning other nations' timescales for joining the EU is not relevant to the Applicant's request, but the Commissioner disagrees. He notes that the Applicant has asked for "any analysis that the Scottish Government have carried out, since 2016, which assesses the timeframe which would be

required for an Independent Scotland to re-join the EU". There would be no apparent reason for any such information to be held, unless the experience of those other nations was considered relevant to how long it might take Scotland to join the EU. Otherwise, any such inclusion must have been entirely random, which is surely not what the Ministers intended. In his view, any such information held would clearly constitute (or, at least, be directly related to) "analysis" of the timeframes that could apply to an independent Scotland.

24. Likewise, any information which discusses timescales for obtaining membership of other bodies in the context of potential membership of the EU would, in the Commissioner's view, be in scope.
25. During the investigation, the investigating officer notified the Ministers that she considered that some of the "out of scope" information was within the scope of the request, and she explained why she had taken this view. The Ministers were asked to review the information they had previously deemed to be outwith the scope of the request, and to apply exemptions to any information they now considered to fall within scope of the request. In response, the Ministers maintained that all of the information they had marked as being outwith the scope of the request, was "out of scope" and they did not apply any exemptions to it. As the Ministers declined to apply any exemptions to this information, where the Commissioner has found information to fall within the scope of the request, he requires the Ministers to disclose it to the Applicant.
26. The Commissioner has provided the Ministers with annotated copies of the withheld documents that clearly set out which information he has found to be within the scope of the Applicant's request.

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

27. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff) is exempt information if it relates to the formulation or development of government policy.
28. "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.
29. 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.
30. As noted above, the Ministers have withheld information contained in documents 4 and 10 under section 29(1)(a) of FOISA.

The Ministers' submissions

31. The Ministers argued that the approach to developing the Scottish Government's policy on joining the EU remains an active area of policy formulation. They submitted that the information withheld under section 29(1)(a) should be considered policy because there are various routes that Scotland could take to join the EU. They noted that Ministers would

decide the optimum route to joining the EU based on advice from officials, and they argued it was imperative that officials present Ministers with a wide range of policy options, even if some options would ultimately not be taken forward.

32. The Ministers submitted that at the time of the request (as well as at the time of the review) the issue of EU accession was very much a "live" matter which remained under consideration. In addition, they argued that they did not consider the withheld information in this case included any statistical information used to provide an informed background to the taking of the decision, and noted that (in any case) no policy decisions in relation to Scotland's route to joining the EU had been taken (if they had been, in line with section 29(2), any such statistical information would no longer be covered by the exemption).
33. The Ministers explained that the withheld material related to the development of an approach to meeting Scotland's objective of joining the EU. They noted that the headings in document 4 outlined policy options or choices. The Ministers contended that officials needed to be able to set out options as part of initial policy considerations. They stressed that the importance of officials being able to do so candidly, to fully consider a wide range of options at early stages in the policy development process and to consider any associated risks to ensure policy decisions are fully informed.

The Commissioner's views on 29(1)(a)

34. For information to be exempt under section 29(1)(a) of FOISA, it only has to "relate to" the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Ministers, who will subsequently determine which of these should be translated into political action and when.
35. Having considered the withheld information, the Commissioner is satisfied that the majority of the information that has been withheld under this exemption relates to the formulation or development of Government policy and, accordingly, that the exemption in section 29(1)(a) of FOISA is engaged: the information provides the Ministers with a range of options to consider on potential routes to joining the EU.
36. The Commissioner accepts that this information was intended to assist Ministers and officials in formulating or developing policy on how an independent Scotland could re-join the EU.

Public interest test

37. As indicated above, the exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having concluded that most of the withheld information is exempt under section 29(1)(a), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.

The Applicant's submissions on the public interest test

38. The Applicant noted that the Scottish Government had a very clear policy on EU Membership, and that it had repeatedly referred to this policy in its correspondence and in statements given by its Ministers and MSPs.
39. The Applicant questioned why it would not be in the public interest to provide details of the analysis on how long EU membership would take, given the fact that EU membership was a long-stated aim of the Scottish Government.

The Ministers' submissions on the public interest test

40. The Ministers recognised that there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, they maintained there was a greater public interest in high-quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. They contended that Ministers and officials needed to be able to consider all available options and to debate those rigorously to fully understand their possible implications. The Ministers argued that premature disclosure of these options would seriously undermine internal debate on the various routes Scotland could take to join the EU, which in turn would undermine the quality of the policy-making process. If this occurred, the Ministers contended, it would not be in the public interest.

The Commissioner's views on the public interest test

41. The Commissioner has considered carefully the representations made by both the Applicant and the Ministers when balancing the public interest both for and against disclosure of the information.
42. The Commissioner recognises the public interest in ensuring that all options are explored and deliberated by the Ministers, which may require some private space to be afforded, where ideas can be considered and a range of views gathered. With an important issue such as Scotland's future membership of the EU and the timeframe for achieving accession, the Commissioner acknowledges that there is a strong public interest in allowing a degree of private space to enable options to be considered.
43. On the other hand, the Commissioner agrees that there is a substantial public interest in the disclosure of information that would contribute to transparency and accountability, allowing scrutiny of matters being considered in the process of policy formulation and development. This would assist the public in understanding the very important policy issues under consideration and the likely consequences of any decisions to be taken, which are matters of legitimate public debate.
44. In all the circumstances of this case, he is satisfied that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. There is a strong public interest in allowing the public to understand the various options open to an independent Scotland, in relation to re-joining the EU and in understanding how long each option might take.
45. There are strong public interest arguments that the analysis the Ministers have undertaken in this regard should be made available to the wider electorate, as they consider what their vote in any potential second independence referendum would be. Disclosure of this information would enable the voting public to make a more informed decision, and this is clearly in the public interest.
46. As the public interest in maintaining the exemption is outweighed by that in disclosure of the information, the Commissioner finds that the Ministers were not entitled to rely on section 29(1)(a) of FOISA in responding to this request.

Section 30(b)(i) - Substantial inhibition to provision of free and frank advice

47. The Ministers are withholding some information in documents 6 and 11 under section 30(b)(i) of FOISA. Section 30(b)(i) provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

48. In applying the exemption in section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Ministers' submissions

49. The Ministers argued that the exemption under section 30(b)(i) applied to the information withheld in documents 6 and 11, because disclosure would, or would be likely to, inhibit substantially the provision of free and frank advice from officials within the Scottish Government. They explained that there were a range of possible routes to an independent Scotland joining the EU. The Ministers argued that it was essential that officials could present the advantages and disadvantages of each route to Ministers, even where it was unlikely that a particular route would be chosen as the preferred policy option. They explained that this included identifying risks and concerns and providing a candid assessment of how each approach might be viewed by external stakeholders, such as the EU Commission.
50. The Ministers stressed that they had not applied this exemption to all advice, and that officials had considered the effects of disclosure before applying exemptions. In this instance, the Ministers argued that the advice was particularly sensitive and, if officials were required to disclose it, they would be inhibited from providing similar information in the future.

The Commissioner's views on 30(b)(i)

51. The Commissioner has considered all the submissions made by the Ministers and the Applicant, along with the withheld information under consideration.
52. While the Commissioner accepts that Ministers must (in appropriate circumstances) have private space in which to obtain and consider candid advice from officials, he is not persuaded that disclosure of this particular information would prevent this from continuing in future.
53. The Commissioner notes that the information being withheld under section 30(b)(i) is not attributed to any particular individual, as names have been withheld under section 38(1)(b) of FOISA. It is, therefore, not clear to the Commissioner why disclosure of this advice would, or would be likely to, inhibit substantially the free and frank provision of advice in the future.
54. The Ministers have argued that document 11 includes candid comments. The Commissioner notes that the Ministers have already disclosed some information in document 11 that relates to some of the withheld information, and (bearing this in mind) he cannot see how the withheld information meets the requirements of section 30(b)(i) of FOISA. The Commissioner has not been persuaded of the harm that would be caused by disclosure of the withheld information in document 11.
55. In document 6, the Commissioner notes that some of the information that has been withheld under 30(b)(i) is, arguably, candid advice, but he is not convinced that disclosure of this advice would prevent officials from offering similar advice in the future. Furthermore, he notes that some of the information refers to comments made by third parties. He does not consider that disclosure would inhibit the provision of free and frank advice in the future.
56. The Commissioner is not persuaded that section 30(b)(i) applies to any of the information being withheld by the Ministers in documents 6 and 11.

Public interest test

57. The exemption in section 30(b)(i) 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. Although the Commissioner has concluded that none of the information withheld under 30(b)(i) falls under the exemption, he will, nevertheless, go on to consider the public interest in order to demonstrate that he has fully considered all of the issues raised by the Ministers. As a result, the Commissioner will now 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.

The Applicant's submissions on the public interest test

58. The Applicant referred to the fact that re-joining the EU was Scottish Government policy, and he noted that the Scottish Government had argued for Scotland to hold a second independence referendum and vote to become an Independent Country in order to join the EU.

59. The Applicant contended that analysis on the likely timeframe for Scotland re-joining the EU must have been undertaken when determining this policy and, as this analysis might influence how citizens of Scotland would vote in a second independence referendum, then disclosure of the information was clearly in the public interest.

The Ministers' submissions on the public interest test

60. The Ministers recognised that there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate, particularly in relation to a high profile matter like the routes to an independent Scotland joining the EU.

61. However, they maintained there was a greater public interest in allowing Ministers and officials a private space within which to deliberate, explore and refine the Scottish Government's position in relation to the range of options for an independent Scotland to join the EU.

62. The Ministers argued that this private space was essential to enable all options to be properly considered, even where it was unlikely that a particular route would be chosen as the preferred policy option, so that good decisions could be taken based on fully informed advice and evidence.

63. The Ministers contended that premature disclosure was likely to substantially affect the willingness of Scottish Government officials to set out their iterative thoughts in such sensitive discussions, which, in turn, would affect the provision of advice between Scottish Government officials and Ministers. If this occurred, the Ministers argued, it would undermine the Scottish Government's Ministers' and officials' ability to engage on key issues and ensure a quality decision-making process, which would not be in the public interest.

64. The Ministers submitted that the public interest in withholding the information outweighed that in favour of disclosing it.

The Commissioner's views on the public interest test

65. The Commissioner has carefully considered all of the public interest arguments he has received.

66. The Commissioner accepts that Ministers and officials must, where appropriate, have a private space in which to freely consider free and frank advice, in order to reach an informed conclusion. This is particularly important in developing areas of government policy, when

officials need to consider a range of policy options and provide Scottish Ministers with candid advice on each option. The policy under consideration in this instance relates to the actions or routes that an independent Scotland may or may not take, and it is clearly a policy area of high importance.

67. As noted above, the Commissioner does not consider the information withheld under section 30(b)(i) in this case, to be particularly sensitive, nor is he persuaded of the harm that would be caused by its disclosure. However, even if he did accept that disclosure of the information withheld under section 30(b)(i) of FOISA, would, or would be likely to, inhibit substantially the free and frank provision of advice, he would find that the public interest favoured its disclosure.
68. Given the prominence and importance of the issue of an independent Scotland being able to re-join the EU, the Commissioner considers that, if the Ministers held any advice on how long that process would be likely to take, then its disclosure would be very much in the public interest. The Commissioner takes the view that the length of time it would take to re-join the EU might well be a key factor for individuals in deciding how to cast their vote in any potential second referendum on Scottish independence.
69. In all of the circumstances of the case, therefore, if the Commissioner had found the information to be exempt under section 30(b)(i) of FOISA, he would have concluded that the public interest in maintaining the exemption was outweighed by the public interest in making the information available. He therefore finds that the Ministers were not entitled to withhold information under section 30(b)(i) of FOISA, and he requires this information to be disclosed.

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

70. The Ministers are withholding information in document 3, 4, 10 and 13 under section 30(b)(ii) of FOISA. Section 30(b)(ii) provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
71. As is the case with the exemption contained in section 30(b)(i), the chief consideration when applying the exemption in section 30(b)(ii) is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the exchange of views. The inhibition in question must be substantial and therefore of real and demonstrable significance.

The Ministers' submissions

72. The Ministers explained that their rationale for the application of this exemption was to ensure that officials and Ministers had, and continued to have, the ability to communicate freely and frankly. The Ministers noted that an organisation's position on any issue does not typically emerge fully formed, and that it is usually the result of careful discussion and the exchange of views of various internal and external stakeholders. For the Scottish Government, this process includes advice to Ministers, who must make the ultimate judgement. The Ministers argued that it was vital that Scottish Government Ministers and officials were able to express and debate their views frankly and confidentially.
73. The Ministers referred to the information they were withholding, and claimed that if this very early, rough work, identifying risks and concerns and providing a candid assessment of how each approach might be viewed by external stakeholders such as the EU Commission, were to be released, officials would exercise an increased degree of caution in preparing such

papers in future. If this occurred, the Ministers argued that there would be a qualitative change in the views expressed, the options offered, the recommendations made and the substance of the information contained in those papers.

74. The Ministers also argued that it would be far less likely that a full range of options would be put forward by officials, particularly when not all options would necessarily be in line with a stated policy or be considered politically acceptable. In addition, fear over potential release might incline officials to play down or even ignore any concerns they might otherwise have raised.
75. The Ministers contended that all of this could limit the range of options considered, rendering the legislative and policy-making process less robust.
76. The Ministers submitted that if it were generally understood (by officials and Scottish Government Ministers) that initial work, to freely and frankly flag issues, might be released at an early stage of the deliberation process, the way in which these positions might be interpreted by the public would have a stronger influence on the way policy was developed than a more considered approach looking at a full range of options, including those less obviously acceptable.
77. The Ministers noted that they had not applied section 30(b)(ii) of FOISA to all views in the documents. Before applying the exemption, they assessed the effects of disclosure. The Ministers argued that there was a clear relationship between the information withheld and the inhibition that would result from its disclosure. The Ministers referred to a specific example of the information being withheld under section 30(b)(ii), and they noted that some questions had still not been fully resolved. The Ministers submitted that officials must be given private space for considering the many factors and variables that would shape the answers to such questions. The Ministers stressed that disclosure would inhibit the space in which all policy options could be considered.

The Commissioner's views on 30(b)(ii)

78. The Commissioner has considered all of the submissions made by the Ministers and the Applicant, along with the withheld information under consideration. He notes that the Ministers are withholding one paragraph in documents 10 and 13 under section 30(b)(ii) of FOISA, and multiple parts of documents 3 and 4 under the same exemption.
79. The Commissioner does not accept that the exemption applies to the information redacted from document 13, or to paragraphs 3, 22 and 44 of document 4, or page 4 of document 3. In each instance, the Commissioner is not satisfied that disclosure of the redacted information would, or would be likely to, cause the harm claimed. He notes that the information withheld in paragraphs 3, 22 and 44 of document 4 is relatively mundane: it does not offer a frank and politically unacceptable view, rather it makes deductions which are unlikely to surprise the reasonably informed observer. The Commissioner does not accept that its disclosure would, or would be likely to, prevent officials from providing free and frank views in the future.
80. He also notes that the information redacted from page 4 of document 3 refers to public statements previously made by a third party, and it draws conclusions from those statements. Given the public nature of the original third party comments, and the somewhat obvious conclusions drawn by the official, the Commissioner is not satisfied that disclosure of this information would, or would be likely to, cause the harm claimed.

81. Finally, the Commissioner has considered the information redacted under section 30(b)(ii) of FOISA in document 13, and he finds that the exemption does not apply. The Commissioner does not consider the views expressed in the redacted paragraph to be particularly novel or extreme, and he cannot see how disclosure of these views would, or would be likely to, substantially inhibit the provision of free and frank views in the future. However, in order to assure the Ministers that he has considered all of their arguments, he will go on to consider the public interest test as it applies to the information contained in document 13.
82. The Commissioner notes that officials that are tasked with providing discussion papers or analysing the likely impact of policy decisions are doing so because it is part of their job. If officials failed to take into account all policy options when giving their views, it is arguable that they would be failing to carry out their duties. The Commissioner cannot see why disclosure of the information discussed above would, or would be likely to, inhibit officials from providing free and frank views in the future, particularly when the names of the officials who provided the views have been withheld.
83. The Commissioner requires the Ministers to disclose the information in documents 3 and 4 that he has found to have been incorrectly withheld under section 30(b)(ii) of FOISA.
84. The Commissioner is satisfied that the exemption applies to the remaining information in documents 3, 4 and 10.
85. As noted by the Ministers, the information in document 10 contains a candid expression of views and involves issues that have yet to be resolved. The Commissioner accepts that its disclosure could cause the harm claimed and would, or would be likely to, dissuade officials in the future from providing similar views.
86. The Commissioner is also satisfied that section 30(b)(ii) of FOISA has been correctly applied to the remaining information contained in document 4. The Commissioner is satisfied that, on these occasions, disclosure would, or would be likely to, cause the harm claimed by the Ministers.
87. The Commissioner accepts that the exemption has been correctly applied to the remaining withheld information in document 3. The Commissioner is satisfied that the views expressed are candid and that their disclosure would, or would be likely to, substantially inhibit the free and frank exchange of views for the purposes of deliberation.
88. In all the circumstances of the case, the Commissioner accepts that disclosure of the withheld information referred to in paragraph 88 would, or would be likely to, result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation, as argued by the Ministers. As such, he is satisfied that the information outlined above was exempt from disclosure in terms of section 30(b)(ii) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test

89. The exemption in section 30(b)(ii) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner will consider the public interest test as it applies to all of the information that has been correctly withheld under the exemption, as well as the information in document 13.
90. As noted above, although the Commissioner does not accept that the information redacted under section 30(b)(ii) in document 13 has been correctly withheld, he will consider the public interest as it applies to this information, in order to demonstrate that he has fully considered

all of the issues raised by the Ministers. The Commissioner will now 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.

The Applicant's submissions on the public interest test

91. As noted above, the Applicant commented that the Scottish Government had clearly stated, on many occasions, that it would want an independent Scotland to re-join the EU. The Applicant submitted that the Scottish Government had also argued that Scotland needed an independence referendum due to the negative impact of Brexit, and had provided analysis of the damage Brexit had done to the Scottish economy.
92. The Applicant has questioned why, if the Scottish Government's stated policy aim is for Scotland to become an independent country and re-join the EU, it does not want to provide the public with details of the analysis it has conducted on how long re-joining the EU would take.
93. The Applicant argued that the length of time it would be likely to take to re-join the EU would be a major factor in whether or not someone voted for Scottish independence in a referendum.
94. The Applicant argued that the public needed to have access to this information in order to make an informed choice in the next independence referendum, and that disclosure of the information he had requested was strongly in the public interest.

The Ministers' submissions on the public interest test

95. The Ministers recognised that there was a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate, particularly in relation to a high-profile matter like the routes to an independent Scotland joining the EU.
96. However, they contended that there was also a strong public interest in ensuring that, where necessary, advice in areas of ongoing policy development could take place in a non-public arena, which would enable rigorous and frank debate without fear that such considerations would be picked over out of context. The Ministers argued that it was in the public interest for decision-making to be based on the best advice available, with a full consideration of all the options, including those that might not immediately be considered broadly politically acceptable.
97. The Ministers submitted that, for Government to succeed in upholding that public interest, officials had to be free to consider, as in any other organisation, all available options, however unpalatable. They needed to be able to debate those options rigorously, to expose all their merits and demerits and to understand their possible implications, without the fear of premature disclosure which might close off discussion and development of better options. Their candour in doing so would be affected by their assessment of whether the content of their discussions would be disclosed in the near future, especially when it might undermine or constrain the Government's view on settled policy or policy that was still under discussion and development.
98. The Ministers acknowledged that the public interest test must be considered on a case by case basis, but they maintained that the information requested related to an important and ongoing process, i.e. the process of an independent Scotland joining the EU, and they contended that there could be a public interest in the protection of a process in itself. As an example, the Ministers submitted that they would argue there was a public interest in protecting internal communications in cases where the likely effect of releasing information

would be the suppression of effective communication in the future (because the advice or deliberations would be oral instead of being written down).

99. In the light of an assessment of the affect that disclosure could have, now and in the future, the Ministers concluded that the public interest lay in favour of withholding the information.

The Commissioner's views on the public interest test

100. The Commissioner has considered the public interest test arguments put forward by both the Ministers and the Applicant. He recognises the substantial public interest that exists in the prospect of an independent Scotland re-joining the EU, particularly in relation to the practicalities of such a process and particularly the timescales involved.
101. The Commissioner accepts the Applicant's argument that the issue of EU membership and the length of time it would take for an independent Scotland to re-join the EU, are matters that voters in Scotland would reasonably wish to know more about, and that knowledge of such matters might influence the way they vote in a second independence referendum. Given this, the public interest in disclosure of the information is considerable.
102. When deciding where the public interest lies, the Commissioner must assess the specific circumstances of the case.
103. As noted above, the Commissioner is satisfied that disclosure of the information (other than the information mentioned in relation to document 13) would, or would be likely to, inhibit substantially the free and frank exchange of views for deliberation. He accepts that it is vital that officials feel able to share their views freely, particularly on matters of political sensitivity, and particularly where those views may not be palatable to the wider public. Any action which would inhibit this process would not be in the public interest. However, the public interest in voters knowing the details of analysis conducted to determine the likely timescales involved in an independent Scotland re-joining the EU is significant and cannot be underestimated.
104. Given this, the Commissioner has carefully reviewed all of the information that has been withheld under section 30(b)(ii) of FOISA, and he has determined that the public interest favours disclosure of the information in documents 10 and 13, and that it also favours disclosure of multiple paragraphs in documents 3 and 4. In general, where the Commissioner has found the public interest to lie in disclosure, it is because the views expressed are not that contentious, and the information very much relates to the timescales affecting EU accession, understanding of which is strongly in the public interest.
105. However, the Commissioner has found that the public interest favours maintaining the exemption and withholding some information contained in documents 3 and 4. In general, the Commissioner has found that the public interest favours maintaining the exemption in instances where the views expressed are overtly political or sensitive in nature, and he accepts that their disclosure would, or would be likely to, cause the harm claimed by the Ministers.
106. The Commissioner therefore finds that the Ministers were entitled to withhold some of the information in documents 3 and 4 under section 30(b)(ii) of FOISA, but that they wrongly applied this exemption to the remaining information withheld under section 30(b)(ii) of FOISA, as the public interest favoured disclosure.
107. As noted previously, the Commissioner will provide the Ministers with an annotated copy of the documents, indicating which information is to be withheld and which is to be disclosed.

Decision

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 the Applicant(s).

The Commissioner finds that by correctly withholding some information under section 29(1)(a) and 30(b)(ii) of FOISA, the Ministers complied with Part 1.

However, by failing to identify all of the information falling within the scope of the request, and by wrongly withholding some information under sections 29(1)(a), 30(b)(i) and 30(b)(ii) of FOISA, the Ministers failed to comply with Part 1.

The Commissioner therefore requires the Ministers to provide the Applicant with the information they have wrongly withheld, by 17 August 2023.

Appeal

Should either the Applicant 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.

Enforcement

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

Daren Fitzhenry
Scottish Information Commissioner

03 July 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

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

2 Effect of exemptions

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

...

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

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-

- (a) the formulation or development of government policy;

...

- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-

- (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or

- (b) paragraph (b) of that subsection, as relating to Ministerial communications.

...

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-

- (i) the free and frank provision of advice; or

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

Scottish Information Commissioner

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