

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 17 March 2008

**Public Authority:** The Scotland Office  
**Address:** 1 Melville Office  
Edinburgh  
EH3 7HW

### Summary

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The complainant requested access to two files on Needs Assessment Studies held by the National Archives of Scotland. The Scotland Office refused to disclose this information under sections 29 and 35 of the Act. The Commissioner has investigated and found that section 35 is engaged but that the public interest favours disclosure of the information. The Commissioner also found that section 29 is not engaged. The Commissioner requires the public authority to disclose the requested information within 35 calendar days of this notice.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant has advised that on 1 June 2006 he made the following request for information to the National Archives of Scotland (NAS):

*"I would like to request access to the following files under the Freedom of Information (Scotland) Act:*

*SOE6/1/1708 Needs Assessment Study (NAS): Scottish Public Expenditure 1984-1984*

*SOE6/1/1709 Needs Assessment Study (NAS): Scottish Public Expenditure 1984 -1987*

3. On 10 July 2006 the NAS responded informing the complainant that the requested files had now been returned from the Scottish Executive and upon inspection by the Scottish Executive they were considered exempt under section 29 of the Freedom of Information Act (Scotland) (FOISA). This exemption applies to the Formulation of Scottish Administration Policy.
4. On 10 July 2006 the complainant wrote to request an internal review of this decision. The complainant asked the NAS to reconsider if all the information contained in the file is exempt under section 29 FOISA and why the files were labelled as 'open' in the NAS catalogue.
5. The NAS responded on 4 August 2006 having completed its review of the files. NAS explained that on review it had found that the files relate to a function which is reserved to the UK government under the Scotland Act 1998 which means that the NAS hold the files on behalf of the UK government and so they are subject to the Freedom of Information Act 2000. NAS advised the complainant to redirect his request to the Scotland Office.
6. On 7 August 2006 the complainant wrote to the Scottish Information Commissioner to request advice as to the appropriate course of action to take and for some advice as to whether he now needed to apply to the Scotland Office.
7. On 8 August 2006 the Scottish Information Commissioner responded explaining that any file transferred to the Scottish Office before devolution would need to be considered under the terms of FOISA but that information transferred after devolution would not; this information would be held by the NAS on behalf of the Scotland Office and therefore not held by a public authority under FOISA. The Scottish Information Commissioner advised the complainant to re submit his request to the Scotland Office.
8. On 11 August 2006 the complainant resubmitted his request to the Scotland Office.
9. The Scotland Office responded on 7 September 2006 informing the complainant that having reviewed the files it considered the information was exempt under sections 35(1) (a) and (b) and 29(1) (a) and (b) of the Act. In assessing the public interest test in relation to both exemption the Scotland Office concluded that the public interest favoured maintaining the exemptions.
10. On 26 September 2006 the complainant requested an internal review of this decision. The complainant asked the Scotland Office to consider how the information related to ministerial communications; if there was any statistical information in the files; and how disclosure would prejudice the economy.
11. On 15 November 2006 the Scotland Office completed its internal review and communicated the findings to the complainant. The internal review upheld the decision to withhold the requested information under sections 35 and 29 of the Act.

## The Investigation

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### Scope of the case

12. On 17 November 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to reconsider the Scotland Office's application of the exemptions to the information requested.

### Chronology

14. On 30 November 2007 the Commissioner began his investigation by contacting the Scotland Office and asking them to provide a copy of the information and further information regarding the application of the exemptions and the public interest test considered both for and against maintaining the exemption.
15. The Scotland Office responded on 16 January 2008 providing the Commissioner with a copy of the withheld information and some further arguments to support the application of the exemptions to it.
16. The Commissioner wrote again on 17 January 2008 explaining in more detail how the exemptions can be engaged and asking the Scotland Office for further explanation regarding their application.
17. The Scotland Office responded on 31 January 2008 providing further arguments to support its application of the exemptions.

### Findings of Fact

18. File SOE6/1/1708 Needs Assessment Study (NAS) 1984-1984 is described in the National Archives of Scotland Catalogue as:

*"Discussion notes and up dates on public expenditure, recent trends and suggested ways of reducing baseline provision for the Scotland Office.*

*The suitability of NAS as a means of allocation resource."*

19. File SOE6/1/1709 Needs Assessment Study (NAS) 1984-1987 is described in the National Archives of Scotland Catalogue as:

*"Discussion and meetings notes detailing qualifications, weights, factors and expenditure data used in the Study. Suitability of model to assess claims of excess against relative needs."*

## Analysis

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### Exemption: Section 29 'The Economy'

20. Section 29 states that information is exempt information if its disclosure would, or would be likely to prejudice (a) the economic interests of the United Kingdom or any part of the United Kingdom or (b) the financial interests of any administration in the United Kingdom.
21. The Scotland Office explained that much of the information contained within the two files is out of date and potentially inaccurate, which could be misleading to any reader of the information. The information in the files refers to the financial allocation of funds across the UK and any inaccurate information within the files would detract from the current mechanism which has a strong record of delivering transparent allocations.
22. The Scotland Office explained that the discussions centre on the use of the Barnett Formula for allocating funds. The Barnett Formula has been used for over twenty years and is the means of determining the budgets of the three territorial departments and now the devolved administrations. The Barnett formula does not determine the overall size of the budgets but provides that, where comparable, changes to programmes in England result in equivalent changes in the budgets of the devolved administrations calculated on the basis of population shares. The formula is still in use and a major enquiry into it was conducted by the Treasury Committee in 1997 and 1998. The Scotland Office believe that release of this information which does not have the benefit of seeing the Barnett Formula in operation for any length of time could bring unwarranted instability to the process if out of date and inaccurate data were labelled as new information.
23. The Scotland Office further explained that the economic interests of the United Kingdom and the economic interest of the devolved administrations are served by stability which is delivered by certainty over public finances. If this information were released it could affect this stability which would have an adverse affect on the delivery of public services because of a disruption over public finances.
24. The Commissioner has applied the test for 'would or would be likely to prejudice' as set out in the Tribunal decision EA/2005/005 '*John Connor Press Associates vs. the Information Commissioner*'. The Tribunal confirmed that test for would be likely to prejudice means that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (Para 15). This was further expanded in the Tribunal decision *Hogan vs. the Information Commissioner* EA/2005/0026 and *Bexley vs. the Information Commissioner* EA/2006/0060.
25. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur'

the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the change should be greater – more probable than not.

26. The Commissioner has noted the arguments put forwards by the Scotland Office but does not find that these demonstrate how disclosure of the information would, or would be likely to prejudice either the economic interest of the United Kingdom or the financial interests of any administration.
27. It is clear from reading the files that the information is not 'new information' but information which dates back to 1984 and is in excess of twenty years old. It is also clear from the papers that the figures used in the Needs Assessment Study were being heavily criticised at the time from a number of sources. The Commissioner does not accept the Scotland Office's arguments that releasing inaccurate data which is in excess of twenty years old would, or would be likely to, prejudice the economy or bring instability to the process of budget allocation. It is clear from the contents of the files that at the time the figures and calculation used were heavily criticised and whilst the Commissioner accepts that disclosure of this information may reignite debate on the use of the formula and on the funding of the devolved administrations he does not consider that this demonstrates a prejudice to the economy.
28. The Scotland Office's concerns that the data is inaccurate are noted but the Commissioner does not consider that because the data is out of date and potentially inaccurate is a sufficient justification for withholding information under section 29. The Commissioner also notes that the content of the files themselves make it clear that the figures used may not be accurate and are clearly out of date from the age of the files.
29. The Commissioner finds that section 29 is not engaged as the Scotland Office have failed to demonstrate that disclosure would, or would be likely to, prejudice the economic interests of the United Kingdom or the financial interest of any administration.

**Section 35 (1) (a) 'formulation or development of government policy' and (b) 'ministerial communications'**

30. Section 35(1) of the Act provides that information held by a government department or by the National Assembly for Wales is exempt information if it relates (a) the formulation or development of government policy or (b) ministerial communications.
31. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is

about the development of options and priorities for Ministers, who determine which options, should be translated into political action.

32. The Commissioner has obtained a copy of the three papers and considers that the information contained within falls within the definition of 'formulation and development' of policy. The files discuss, analyse and criticise the calculations used for funding allocations in Scotland and contain submission papers to Ministers on the impact and concerns of the proposal on how to fund the administrations. The Commissioner therefore accepts that the information relates to the formulation of the policy as to who to fund the Scottish administration. The Commissioner has also considered if the information relates to ministerial communications. A number of the papers within the files have no author or details as to whom the paper was sent, however, the Commissioner accepts that it is likely that many of the papers were sent to Ministers either from other Ministers or from Civil Servants acting on behalf of their Minister.
33. Having considered the information withheld by the Scotland Office, the Commissioner takes the view that all of it engages section 35(1) (a). The Commissioner also takes the view that some of the information relates to ministerial communications and is therefore exempt under section 35(1) (b).

### **Public Interest Test**

34. Section 35 is a qualified exemption and the Commissioner must therefore decide if the public interest in favour of maintaining the exemption is outweighed by the public interest in disclosure of the requested information.
36. The Scotland Office argued that a public argument over out of date and inaccurate data which diverts time away from the delivery of public services is not in the public interest. Similarly, a release of inaccurate information which could bias any decision with regards to adopting a needs based assessment is not in the public interest. Decisions on government policy should be made on the best possible information and in this case would be served by robust authenticated data rather than severely outdated data which would only confuse the situation.
37. The Scotland Office explained that the information was prepared at a time before devolution, a time which was characterised by conflict over budget allocation. Since this time there has been a much greater degree of transparency and accountability brought to the process of funding devolved counties. Releasing this file would harm the credibility of the process unnecessarily by ignoring the beneficial operation of the Barnett formula over the intervening twenty years.
38. The Scotland Office also explained that the decision has been made not to run another Needs Assessment Study, but the overall policy decision of how to fund the devolved administrations is still open. It is government policy that there is no intention to revise or move away from the Barnett formula but if this were to change then a needs assessment would undoubtedly be one of the options under consideration. Any public presence of earlier dubious efforts at such analysis could prejudice the ability of Ministers to make a clear and fair decision.

39. The Commissioner notes that the use of the Barnett formula to determine funding for the devolved administration is public knowledge. Whilst the Commissioner accepts that criticism and debate of the Barnett formula is and was ongoing at the time of the request he does not believe that disclosure of the requested information would inhibit the government's ability to reassess its policy on funding. The Commissioner also does not accept that disclosure would harm the credibility of the current process as the information clearly dates back to a period before the Barnett formula was robustly tested and since then there have been two major enquiries into it.
40. The Scotland Office also argued that release of information which illustrates a different procedural approach being taken than would be today could encourage a return to this approach.
41. The Commissioner rejects this argument. He does not consider that disclosure of information which is clearly over twenty years old and relates to a period of history prior to devolution would have this negative effect. There is no reason to suppose that release of historical information about a previous government's approach to funding would have such a strong influence on thinking today.
42. The Scotland Office concluded that it is hard to see how release of the file passes the public interest test. It acknowledged that it is in the public interest to see how needs were seen in Scotland by the Civil Service 20 years ago. However, it reiterated that the data has fundamental flaws with its accuracy and questioned how the public interest would be served by providing a false picture of reality. The Commissioner considers that the funding of the devolved administrations is still a topic of which there is much public interest and he rejects the argument from the Scotland Office that release of historical and potentially inaccurate information is not in the public interest. The Scotland Office state that disclosure would only serve to re-open an argument that the passage of time has resolved through implementation and successful improvement to the mechanics of the funding process. It would not be in the public interest to have out of date and inaccurate data prejudice the ability of ministers to make any decision that needs to be made in this area.
43. In reaching a decision as to where the balance of the public interest lies the Commissioner has had regard to the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006). The Tribunal stated that '*The timing of a request is of paramount importance*'. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the '*threat of lurid headlines depicting that which has been merely broached as agreed policy*'. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a '*parliamentary statement announcing the policy... will normally mark the end of the process of formulation*'. In this case the information relates to the funding of the Scottish administration, the Scotland Office have acknowledged that it is government policy that there is no intention to revise or move away from the current funding arrangement in place, the Barnett formula,

but argue that the decision on how to fund the administrations is still a live policy area. The Commissioner does not accept this argument but agrees that the decision on how to fund the devolved administrations is a policy decision which has already been made. The Commissioner also notes that the information in questions is over 20 years old.

44. The Tribunal also placed a significant weight on considering the information itself. The Scotland Office are concerned that disclosure of out of data and inaccurate information would have two effects: it would reopen a public argument on an issue which has already been resolved; and it would bias or prejudice ministerial decisions on funding in the future. The Commissioner does not consider that disclosure of historical information would have this negative effect. Whilst it may further public debate on the issue of funding, providing a historical context to previous decisions and debates, the Commissioner considers this to be in the public interest. The Commissioner also does not consider that disclosure would bias or prejudice future decisions, as previously stated the information is clearly historical and is unlikely to be seen as 'new information'. The accuracy of the data may be questionable however; the Scotland Office can place this in context by explaining this to the complainant when disclosing the information. The Commissioner also does not accept that Ministers would use this historic information to form the basis for future decision.
45. The Commissioner considers that disclosure of the information would promote and further understanding of the issues under consideration from a period of relative recent history and provide an insight into how the political landscape has changed.
46. The Commissioner's assessment is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

## The Decision

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- 47 The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act as it incorrectly applied sections 35 and 29 to withhold the requested information

## Steps Required

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48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- (i) Disclosure the information withheld under sections 35 and 29.

49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.



## **Failure to comply**

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50. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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51. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 17<sup>th</sup> day of March 2008**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### The economy.

**Section 29(1)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, or
- (b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).”

**Section 29(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

### Formulation of Government Policy

**Section 35(1)** provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

**Section 35(2)** provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

**Section 35(3)** provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

**Section 35(4)** provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information

which has been used, or is intended to be used, to provide an informed background to decision-taking.”

**Section 35(5)** provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.”