

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2018

Public Authority: The Scotland Office

Address: foi@scotlandoffice.gsi.gov.uk

Decision (including any steps ordered)

1. The complainant submitted a request to the Scotland Office seeking information about its social media campaigns. It provided the complainant with some information but sought to withhold information about the evaluations of these campaigns on the basis of section 35(1)(a) (formulation and development of government policy) and information about the costs of the campaigns on the basis of section 43(2) commercial interests. The Commissioner has concluded that the Scotland Office can rely on these exemptions in the manner in which it has to withhold the information about the evaluation of the campaigns and the cost of these campaigns.

Request and response

2. The complainant submitted the following request to the Scotland Office on 26 June 2017:

'I would like to know the following information about digital and social media marketing campaigns administered by the Scotland Office in the last 12 months. This could include information on, but not limited to, activities the department has undertaken involving Google Adwords, Facebook, Twitter, Instagram, YouTube and LinkedIn.

1. Please supply copies of all digital assets produced to support digital/social media campaigns administered by the Scotland Office. If this is not possible, please provide links to where these assets can be found online.

2. Please supply details of the digital media platforms where each digital asset was published, and the budget attached to promoting each asset, on each platform.

3. Where a platform allows the user to select a specific target audience for either organic or paid distribution, please supply details of the audiences selected by the Scotland Office for each digital asset, on each platform, where it was published or displayed.

4. Please supply copies of all briefing notes, and evaluation reports produced by, or for, consumption of Scotland Office staff where the scope and impact of these digital campaigns are discussed.

5. Lastly, please provide me with any information held by Scotland Office staff that outline the strategy or planning of future campaigns that may involve digital/social media marketing from the office.'

3. The Scotland Office responded to the request on 21 July 2017 and refused it on the basis of section 12 (cost limit) of the FOIA.

4. The complainant contacted the Scotland Office on 31 July 2017 and asked it to conduct an internal review of this response. In the same email he also submitted the following refined request:

'To move forwards, I can confirm that I am happy to limit my request to details of paid-for - as opposed to organic - social media assets and campaigns.

These assets, and the targeting data, should be straightforward to identify, as they can all be accessed from the "ad managers" provided by the various social media platforms.'

5. The Scotland Office responded to this email on 29 August 2017 and explained to him that although he had asked for an internal review, as he had also submitted a refined request it intended to treat his email of 31 July 2017 as a new request rather than as a request for an internal review. However, the Scotland Office explained that it considered the information falling within the scope of the refined request to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA and that it needed additional time to consider the balance of the public interest test.

6. The Scotland Office informed him of the outcome of its public interest test deliberations on 20 September 2017. In relation to request 1 the Scotland Office explained that it:

'use[d] social media channels to target the public of Scotland as digital activity continues to offer the most cost effective way to reach large numbers of citizens. The content placed on each platform is already in

the public domain, and available at the following links:
<https://www.facebook.com/scotlandoffice/>
<https://twitter.com/UKGovScotland/>

7. In relation to request 2, the Scotland Office explained that the digital assets were accessible on the above platforms. With regard to the remaining information falling within the scope of the refined request the Scotland Office explained that it considered this to be exempt from disclosure on the basis of section 43(2) and it had concluded that the public interest favoured maintaining the exemption.
8. During the course of the course of the Commissioner's investigation of the complaint, the Scotland Office provided the complainant with further information falling within the scope of his request. More specifically, it provided him with a campaign grid which covered the timescale of the request. This showed the name of the individual paid-for campaigns, audience targeting information and the social media platform hosting the digital assets. The Scotland Office redacted the cost spent on each campaign on the basis of section 43(2) of FOIA. The Scotland Office also explained that it was withholding the evaluations reports about these campaigns on the basis of section 35(1)(a) of FOIA. It also noted that the evaluations contain certain metric information (eg cost per click and engagement rates) which it also considered to be exempt from disclosure on the basis of section 43(2).

Scope of the case

9. The complainant contacted the Commissioner on 22 September 2017 in order to complain about the Scotland Office's handling of his refined request.
10. At the point this decision notice is being issued, the outstanding aspects of the complaint are:
 - (a) the Scotland Office's decision to withhold, in their entirety, the evaluations of its social media campaigns falling within the scope of the request on the basis of section 35(1)(a). It also considers parts of these evaluations to be exempt from disclosure on the basis of section 43(2) of FOIA.
 - (b) The Scotland Office's decision to redact the total cost of each campaign on the basis of section 43(2) of FOIA from the copy of the campaign grid provided to the complainant.

Reasons for decision

Section 35 – formulation and development of government policy

11. Section 35(1)(a) of FOIA states 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'

12. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

13. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

14. However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins.

15. This is not to say that policy design and implementation are always entirely separate. The Commissioner recognises that they are becoming increasingly integrated, and that many implementation issues will also relate to policy formulation. Considering the risks and realities of implementation may be an important factor when assessing policy options. If implementation issues are actively considered as part of the policy design (ie before a policy decision is finalised) and feed into that process, they will also relate to the formulation of the policy.

16. Even after a policy decision has been made, issues arising during implementation may then feedback into a policy improvement process, and some details may be adapted on an ad hoc basis during implementation. However, fine-tuning the details of a policy does not automatically amount to policy development, and sometimes may more accurately be seen as adjustments to its implementation. Whether a

particular change amounts to policy development will depend on the facts of that case.

17. In particular, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between.
18. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
19. The Scotland Office argued that the information related unequivocally to the formulation and development of government policy, the policies in question being the names of the various campaigns identified in the disclosed campaign grid, eg trade and devolution. More specifically, the Scotland Office explained that the withheld information contained details of the specific objectives in relation to each online campaign associated with these specific policies as well as evaluations as to the effectiveness of these campaigns. The Scotland Office also noted that the evaluations of the campaigns were also used to shape the future of policies in question.
20. The Commissioner is satisfied that the evaluations reports fall into the scope of section 35(1)(a) of FOIA. In her view this information relates to the development of the policies in question and more specifically about how these policies are communicated to particular audiences. Given the link between the evaluations of the effectiveness of these campaigns, and the link back into the wider policy development process, the Commissioner is satisfied that the policy in question does not simply relate to policy implementation.
21. Section 35(1)(a) is therefore engaged.

Public interest test

22. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in disclosure of the withheld information

23. The Scotland Office acknowledged that there is a general interest in disclosure of information and that openness in government may increase public trust in, and engagement with, the government.

24. The complainant argued that there was a significant amount of public interest in government departments' use of online media campaigns and consequently there was a clear public interest in disclosing information about the assessment and strategies associated with the Scotland Office's social media campaigns.

Public interest in maintaining the exemption

25. The Scotland Office noted that the overall policy aims of the department are already in the public domain through its Single Departmental Plan, and the UK government's campaign strategy and priorities are set out in the Government Communications Plan. However, the Scotland Office emphasised that the details of the formulation and development of policy in relation to specific campaigns for the specific objectives is not in the public domain and it needed a safe space to be able to evaluate and develop campaigns to achieve government objectives in Scotland. The Scotland Office argued that the withheld information contained clear evidence of this evaluation and policy development.
26. More specifically, it argued that the policy formulation and development underlying the evaluation reports is an area which requires freedom to experiment and candour about the interim results. The Scotland Office noted that the policy development in relation to these campaigns is still ongoing and they are still undergoing development and refinement in light of the evaluations.
27. The Scotland Office argued that it would be counterproductive to the policy making process if departments were unable to evaluate the results of their policy formulation and development and to further develop such policies without having to publish their evaluations routinely. The Scotland Office suggested that this would run entirely counter to the agile and evidence-based approach to policy development that produces effective results.
28. Finally, the Scotland Office argued that it would be detrimental to its specific policy objectives if it was inhibited from rigorous and candid monitoring in terms of sentiment and media reaction to its campaigns.

Balance of the public interest arguments

29. With regard to the safe space arguments, in line with the comments of the Information Tribunal¹, the Commissioner accepts that significant

¹ *Department for Education and Skills (DES) v Information Commissioner and Evening Standard* EA/2006/0006

weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this request, the Commissioner notes that at the point the request was submitted the campaigns discussed in the evaluation reports were either on-going or recurrent campaigns. Furthermore, having considered the nature of the withheld information she accepts that its disclosure is likely to interfere in the safe space that the Scotland Office needs to develop effective policy, both in respect of amending the messaging of these campaigns and the future direction of the policies themselves, given that it contain detailed and candid assessments of the effectiveness of the online campaigns. Consequently, in the circumstances of this case the Commissioner believes that significant and notable weight should be attributed to the safe space arguments.

30. With regard to the public interest in disclosure, the Commissioner recognises that as government departments increasingly use social media platforms as a means of communicating their policies there is understandably a corresponding and legitimate public interest in the disclosure of information about these online campaigns. Disclosure of the particular information that the Scotland Office has withheld under section 35(1)(a) would provide the public with a detailed insight into its analysis of the effectiveness of these campaigns, including some of the metrics involved in the procurement of these campaigns (eg cost per engagement figures). Disclosure could also provide the public with an insight into how the Scotland Office use online campaigns, and more specifically the evaluation of these campaigns, to influence and feed into its broader policy making. The public interest in disclosure of the withheld information should not therefore be underestimated.
31. However, the Commissioner has ultimately concluded that the public interest favours maintaining the exemption contained at section 35(1)(a) and withholding the evaluation reports. In reaching this conclusion she has been influenced by the fact that the information relates to live policy making and moreover that the negative effects of disclosure are likely to be on both the effectiveness of the social media campaigns themselves and also the underlying and broader policy making process.

Section 43(2) – commercial interests

32. Section 43(2) states that that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any party.

33. The Scotland Office has redacted the amount spent on each campaign from the campaign grid disclosed to the complainant on the basis of section 43(2) of FOIA. It has also argued that some of the information contained within the evaluation reports, namely various metrics relating to the campaigns (such as cost per click and engagement rates) is also exempt from disclosure on the basis of section 43(2).
34. In terms of this second category of information as the Commissioner has already concluded that the entirety of the evaluation reports themselves are already exempt from disclosure, she has not considered whether this category of information is also exempt from disclosure on the basis of section 43(2) of FOIA. Rather she has simply considered whether section 43(2) provides a basis to withhold the amount spent on each campaign.

The complainant's position

35. The complainant argued that it was extremely unlikely that Facebook and Twitter negotiated special rates with civil servants and thus disclosure of the information withheld under section 43(2) would be unlikely to harm the Scotland Office's interests. In any case, he noted that the Scotland Office had previously released information on social media advertising costs, as had other public authorities.²

The Scotland Office's position

36. The Scotland Office argued that the complainant's speculation on the result of negotiations on advertising rates did not make a material change to the application of section 43(2) in this case. Rather, it remained of the view that disclosure of the amount spent on each campaign would be likely to prejudice the commercial interests of the Scotland Office, and other UK government departments. This is because disclosure of these costs – whether subject to special rates or otherwise – would be likely to prejudice the Scotland Office's, and more broadly government's, ability to negotiate advantageous rates in the future.
37. In support of this point, the Scotland Office explained that the current media buying contract used by central government will face a process of renewal in the future. It argued that it was not difficult to imagine a potential applicant using this sort of information in future to argue that government has a precedent for paying certain rates and arguing this precedent should inform future buying patterns, rather than offering

² <https://discourse.scot/2017/04/22/uk-government-spends-47000-on-social-media-ads-highlighting-scotlands-trading-position/>
https://www.whatdotheyknow.com/request/social_media_marketing_3#incoming-1057768

rates which would enable the government to achieve absolute best value for money.

38. The Scotland Office argued that the same argument also applied to any *ad hoc* spending which may be required in the future; setting an anchor point for its spend on a particular campaign would provide third parties with less motivation to provide best value for money by arguing that the Scotland Office had a precedent for paying certain rates.
39. Finally, in relation to the complainant's reference to previous disclosures of the information about social media advertising costs, the Scotland Office argued that the information previously disclosed was higher level data and not the same as the information being withheld here which consisted of the specific costs of particular campaigns in a specific 12 month period.

The Commissioner's position

40. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
41. With regard to the first criterion of the three limb test described above the Commissioner is satisfied that the nature of the prejudice envisaged by the Scotland Office relates to the interests which section 43(2) is designed to protect.

42. With regard to the second criterion, the Commissioner is satisfied that the disclosure of the costs per campaign has the potential to harm the commercial interests of both the Scotland Office and also other government departments. She has reached this conclusion because in her view the Scotland Office's submissions plausibly demonstrate a number of different ways in which prejudice could occur to the parties in question such that there is clearly a causal relationship between disclosure of the withheld information and prejudice occurring to the commercial interests of those parties. Moreover, the Commissioner is satisfied that any such prejudice would clearly be of substance.
43. With regard to the third criterion, the Commissioner is persuaded that there is a real and significant risk of prejudice occurring if the information is disclosed. In reaching this conclusion she notes that the information redacted from the campaign grid would provide the specific figure per individual campaign allied to the specific audience that was targeted. In the Commissioner's opinion the Scotland Office's argument that such information could be used by potential future suppliers to benchmark their costs of advertising is a compelling one. In reaching this conclusion she has also placed weight on the argument that disclosure risks prejudicing not simply the Scotland Office's *ad hoc* social media advertising spending, more also potentially the central government media buying contract.
44. In reaching this conclusion the Commissioner has considered the information previously disclosed by the Scotland Office concerning advertising rates. It is the Commissioner's understanding that the information previously disclosed consists of the total amount spent by the Scotland Office per month on social media advertising. It has also disclosed the total amount spent in 2016-17 on the campaign to promote trade with the rest of the UK, broken down by the amount paid to (Google) PCC, Twitter and Facebook. Having done so, the Commissioner agrees with the Scotland Office that the information previously released is not same as that being withheld namely, specific advertising rates for particular campaigns allied to the audiences targeted. Disclosure of the information redacted from the campaign grid would provide a much greater insight into the Scotland Office's spend on social media advertising and represents a genuine risk into harming both its commercial interests and those of the other government departments for the reasons discussed above. In respect of the withheld information concerning the trade campaign the Commissioner notes that this is more specific than the information about this campaign previously disclosed under FOIA by the Scotland Office (see footnote 2). Furthermore, in relation to the disclosures of information by the Food Standards Agency Scotland, the Commissioner notes that comparable information being withheld by the Scotland Office does not appear to have been disclosed.

45. Section 43(2) is therefore engaged.

Public interest test

46. Section 43 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 43(2) outweighs the public interest in disclosing the information.
47. The Scotland Office acknowledged that there is a strong public interest in information about public spending being available to the public to enable it to understand the purposes on which government departments have incurred expenditure and to enable it to assess whether or not value for money is achieved. However, the Scotland Office argued that this public interest was already met by the information it had previously published about spending on social media.
48. Furthermore, the Scotland Office argued that there is also a strong public interest in protecting the commercial interests of government departments and enabling them to negotiate advantageous terms with the suppliers thus securing value for money. It emphasised that this public interest would be undermined by the release of information it maintains is exempt from disclosure on basis of section 43(2) and for that reason it concluded that the public interest in withholding this particular information outweighed the public interest in disclosure.
49. The Commissioner agrees that there is a clear public interest in the disclosure of information which would allow the public to understand how government money has been spent. Disclosure of the specific information which has been withheld would provide the public with an insight into how much had been spent on particular advertising campaigns allied to the audiences targeted by those campaigns. However, the Commissioner agrees with the Scotland Office that there is a very strong public interest in ensuring that government departments secure best value for public money. In light of this, and taking into account the information already in the public domain about the Scotland Office's spend on social media marketing, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 43(2) of FOIA.

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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