

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 April 2018

**Public Authority:** The Scotland Office

**Address:** Dover House

Whitehall

London

SW1A 2AU

### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Scotland Office seeking copies of communications it exchanged with HM Treasury, along with notes of any meetings between the two departments, about the confidence and supply arrangement with the DUP which the government agreed in June 2017. The Scotland Office refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemptions contained at sections 28(2), by virtue of section 28(1) (relations within the UK) and 35(3) by virtue of sections 35(1)(a) (formulation and development of government policy) and (b) (Ministerial communications) of FOIA. The Commissioner has concluded that section 28(2) is not engaged. She accepts that section 35(3) is engaged, however she has concluded that the public interest in the Scotland Office confirming whether it holds the requested information outweighs the public interest in maintaining the exemption.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - confirm or deny whether information falling within the scope of the request is held, and disclose or refuse any information identified.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. The complainant submitted the following request to the Scotland Office on 30 June 2017:

*'Could you please provide me with the following under Freedom of Information:*

*Any communication between the Scotland Office and the Treasury between 6 June and 27 June (inclusive) on the funding implications of the confidence and supply arrangement with the DUP; any requests for extra funding for Scotland in this period; or extra funding for Scotland*

*Any communication between the Scotland Office and Downing Street between 6 June and 27 June on the funding implications of the confidence and supply arrangement with the DUP; any requests for extra funding for Scotland in this period; any direct contact between the Secretary of State for Scotland and the Chancellor in relation to the Barnett formula and/or extra funding for Scotland*

*Minutes of any meetings between the Scotland Office and the Treasury and/or Downing Street of the issue of funding for Scotland in relation to the confidence and supply deal with the DUP.'*

5. The Scotland Office responded on 28 July 2017. It refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemptions contained at section 35(3), by virtue of section 35(1)(a), and section 28(3), by virtue of section 28(1) of FOIA.
6. The complainant contacted the Scotland Office on 3 August 2017 and asked it to conduct an internal review of this decision.
7. The Scotland Office informed him of the outcome of the internal review on 1 December 2017. The review upheld the decision to refuse to confirm or deny whether any information was held on the basis of the exemptions cited in the refusal notice.

## Scope of the case

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8. The complainant contacted the Commissioner on 7 November 2017 to complain about the Scotland Office's failure to complete the internal review. Following the completion of the internal review the complainant confirmed that he was dissatisfied with the Scotland Office's failure to provide him with the information he had requested. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant with the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant with the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
9. As explained above, the Scotland Office is seeking to rely on sections 35(3) and 28(2), by virtue of section 35(1)(a) and section 28(1) respectively, to refuse to confirm or deny whether it holds information falling within the scope of the request.<sup>1</sup> Therefore this notice only considers whether the Scotland Office is entitled, on the basis of these exemptions, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.
10. With regard to the complainant's concerns about the time taken to complete the internal review, FOIA does not prescribe a time limit within which such reviews should be completed. However, the Commissioner has commented on the time it took the Scotland Office to complete the internal review in the Other Matters section of this notice.

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<sup>1</sup> During the course of the Commissioner's investigation the Scotland Office argued that section 35(3) applied by virtue of section 35(1)(b) (Ministerial communications) since the request sought communications between the Secretary of State for Scotland and the Chancellor.

## Reasons for decision

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### Section 35(3) – government policy and Ministerial communications

11. Section 35(3) of FOIA states 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).'*

12. In the circumstances of this case the subsections within section 35(1) which have been cited by the Scotland Office are (a) and (b). These sections state the information is exempt if it relates to:

*'(a) the formulation or development of government policy,  
(b) Ministerial communications,'*

13. To engage section 35(3) a public authority has to be able to explain why the requested information (if held) would fall within the scope of one of the exemptions contained within section 35(1).

14. In terms of section 35(1)(a), 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.

15. 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.

16. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

17. Set against these criteria, the Commissioner is satisfied that if the Scotland Office held information falling within the scope of the request, ie information relating to various aspects of the confidence and supply arrangement with the DUP, then it would fall within the definition of section 35(1)(a).
18. Furthermore, as the request seeks communications concerning '*any direct contact between the Secretary of State for Scotland and the Chancellor in relation to the Barnett formula and/or extra funding for Scotland*' the Commissioner is satisfied that if such information were held it would fall within the scope of the exemption contained at section 35(1)(b).
19. Section 35(3) is therefore engaged.

### **Public interest test**

20. However, section 35(3) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

#### *Public interest arguments in favour of confirming whether or not the requested information is held*

21. The complainant's submissions in respect of his request focused on the public interest in disclosure of the requested information as opposed to the public interest in confirming whether or not the information was held. He made the following points:
  - Economic; there has been significant discussion about the money involved in this deal and he argued that it would inform public debate if the requested information was released.
  - Constitutional; given questions over the future relationship between Scotland and the rest of the UK, he argued that the requested information would play an important role in informing the public about discussion in the UK government and the role the Scotland Office plays.
  - Political; given the Secretary of State for Scotland's media interviews on the subject on BBC outlets and newspapers, he argued that it is clearly in the public interest that any evidence relating to the issue is published.

- Accountability; given questions over what role the Secretary of State for Scotland played in trying to secure further funding, he argued that the public has an interest in knowing what conversations took place.
22. The complainant also argued that there are significant questions over how decisions are made to allocate funds out with the Barnett process and it is therefore in the public interest for any communication on this to be available to the public.
  23. The complainant also disputed the Scotland Office's view that confirming whether the information was held would create 'unreasonable expectations' in the future. The complainant argued that compliance with section 1(1)(a) in this case would not stop cases being assessed individually, as they are at the moment. Moreover, he argued that the public should not be refused information under FOIA based on speculation that its disclosure could fuel an unreasonable expectation in another case.

*Public interest arguments in maintaining the exclusion to confirm or deny whether the requested information is held*

24. The Scotland Office argued that it was in the public interest to protect the government's ability to discuss policy issues in confidence with devolved administrations and reach well informed decisions. It emphasised the need for a safe space for government departments to consider any developments that impact on spending, such as the arrangement with the DUP, and to be able to consider any wider implications and options in confidence.
25. The Scotland Office also argued that the confirm or deny provisions within FOIA are only meaningful if they are used consistently by individual public authorities, and, in relation to certain requests, if they are used consistently by government departments acting collectively. It argued that if similar circumstances to the confidence and supply arrangement with the DUP were to arise in the future the way government departments had answered this particular request (and others on the same issue) could be used to interpret answers to the future requests. Furthermore, since the complainant's request relates to communications between HM Treasury and the Scotland Office his request is one of those cases where the provisions need to be used consistently across government. On this point, the Scotland Office noted that the complainant had made the same request of HM Treasury and HM Treasury had neither confirmed nor denied whether it held the information. The Scotland Office argued that it was therefore essential that it adopted the same approach so that the relevant provisions in FOIA were not to be undermined.

*Balance of the public interest arguments*

26. The Commissioner agrees with the Scotland Office that government departments need a safe space in which to have confidential discussions about the formulation and development of policy. If the Scotland Office complied with section 1(1)(a) of FOIA in relation to this request the Commissioner accepts that it would effectively be confirming whether the Scotland Office and HM Treasury had discussed the confidence and supply arrangement with the DUP during the period covered by the request. Furthermore, if the Scotland Office did hold information falling within the scope of this request, and confirmed this in line with section 1(1)(a), then it could also be potentially be inferred that the Secretary of State for Scotland and the Chancellor exchanged correspondence about this matter given that part of the request sought copies of correspondence between these two Ministers. Moreover, the Commissioner accepts that there is a public interest in ensuring that the nature of discussions between Cabinet Ministers remains confidential not only to ensure effective policy making but also to protect the principle of collective Cabinet responsibility. In theory, the Commissioner therefore accepts that compliance with section 1(1)(a) would encroach upon the confidential space in which she accepts the government needs to formulate effective government policy and moreover could potentially undermine the principle of collective Cabinet responsibility. Furthermore, given that the complainant's request is dated 30 June 2017, she accepts that policy making in relation to the confidence and supply arrangement with the DUP was very recent and this, again in theory, adds further support for the need to protect this confidential space and thus uphold the exemption contained at section 35(3).
27. However, in the particular circumstances of this case, the Commissioner considers that the Secretary of State for Scotland's comments about the confidence and supply arrangement with the DUP significantly undermine his department's case for maintaining the exemption contained at section 35(3). Prior to the announcement of the terms of the agreement on 26 June 2017 the Secretary of State indicated that he would not support a deal that sought to subvert the Barnett rules:

*'I certainly won't support funding which is deliberately sought to subvert the Barnett rules.'*

*'We have clear rules about funding of different parts of the United Kingdom. If the funding falls within Barnett consequentials, it should come to Scotland'<sup>2</sup>*

28. Following the announcement of the deal, including confirmation that the additional funding for Northern Ireland would be given outside of the Barnett funding system, the Secretary of State indicated his support for the agreement.<sup>3</sup>
29. In the Commissioner's opinion, in light of these comments it is difficult to see how simply confirming whether or not the Scotland Office and HM Treasury exchanged communications or held a meeting(s) about the DUP agreement would be genuinely prejudicial to the government's policy making on this subject. The Commissioner's rationale being that it is clear from the Secretary of State's comments that he had clear – and publicly aired – views on the basis for any such deal, ie that it should not subvert the Barnett rules. In the Commissioner's view, given Secretary of State's views, it seems reasonable to conclude that at least *some* discussion would have taken place between the Scotland Office and HM Treasury on this topic during the period covered by the request. Therefore, the Commissioner questions the extent to which compliance with section 1(1)(a) of FOIA in relation to this request would actually infringe on the government's safe space. In the context of section 35(1)(b), the Commissioner notes that only part of the request seeks Ministerial communications. Therefore, *if* the Scotland Office did hold information falling within the scope of the request and confirmed this, it would not definitely be revealing that the Secretary of State and Chancellor had exchanged correspondence on this issue and therefore the extent to which complying with section 1(1)(a) would undermine the confidentiality of Ministerial communications is limited.
30. If it is in fact the case that the Scotland Office does not hold any information falling within the scope of the request then the Commissioner's view is that there is arguably a significant public interest in revealing this given the Secretary of State's comments. That is to say, prior to the confirmation of the terms of this agreement, he had publicly expressed concerns as to the basis of the additional funding for Northern Ireland but despite this no communications were exchanged between his department and HM Treasury and no record of any meetings between

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<sup>2</sup> <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-40318441>

<sup>3</sup> <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-40419849>



the two departments on this subject were made (if of course such meetings took place).

31. More broadly, the Commissioner believes that the complainant's submissions, whilst focused on the public interest in disclosure of the information (if held) as opposed to compliance with section 1(1)(a), provide a strong case for the Scotland Office confirming or denying whether it holds information falling within the scope of this request.
32. Finally, with regard to the Scotland Office's argument that the neither confirm nor deny (NCND) provisions need to be applied consistently in order to be effective, the Commissioner supports this line of argument. However, section 35(3) is a qualified exemption and consequently there will be requests where the public interest favours compliance with section 1(1)(a) despite the importance of maintaining a consistent approach to the application of the NCND provisions and despite any particular arguments for maintaining a NCND exemption in the specific circumstances of a request.
33. The Commissioner has concluded that this is such a case and in her view the public interest in the Scotland Office complying with section 1(1)(a) of FOIA outweighs the public interest in it maintaining the exclusion to confirm or deny. She has reached this conclusion given the cumulative effect of the two factors discussed above: firstly, she is not persuaded that compliance with section 1(1)(a) would, in the particular circumstances of this case, be particularly harmful to either government policy making or infringe significantly on the confidentiality of Ministerial communications. Secondly, she believes that there is clear and compelling public interest in confirming whether the Scotland Office and HM Treasury exchanged correspondence or held minuted meetings about the DUP confidence and supply arrangement during the period covered by the complainant's request.

## **Section 28 - Relations within the United Kingdom**

34. Section 28(1) of FOIA states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration'*

35. Section 28(2) of FOIA states 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).'*

*The Scotland Office's position*

36. In its responses to the complainant the Scotland Office argued that confirming whether or not it held the requested information would damage relations between the Scotland Office and the devolved administrations and disrupt future communications.
37. Furthermore, in its submissions to the Commissioner the Scotland Office argued that communications between Ministers and their officials might (if held) also relate to communications with Scottish government Ministers and their officials. The Scotland Office argued that such communications between administrations are a necessary part of the governance of the UK but need to take place on a confidential, or semi-confidential, basis. It argued that the Scottish Government would not expect the Scotland Office to disclose any communications of this nature and vice versa. Therefore, the Scotland Office explained that it had cited section 28(2) in response to this request.
38. In order for a prejudice based exemption, such as section 28(2), to be engaged the Commissioner considers 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 - or in this case confirmation as to whether or not the requested information is held - 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 - or the confirmation as to whether or not the requested information is held - 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, confirmation as to whether the requested information is held 'would be likely' to result in prejudice or confirmation as to whether the requested information is held '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 to discharge.
39. With regard to the first criterion, the Commissioner is satisfied that this is clearly met given that the nature of prejudice envisaged by the

Scotland Office, namely prejudice to the relations between the devolved administrations and central government departments, is clearly one that falls within the scope of the exemption contained at section 28(1).

40. However, the Commissioner is not persuaded that the second criterion is met. In her view the Scotland Office's argument, as outlined in its response to the complainant, that complying with section 1(1)(a) would be likely to prejudice relations within the UK is speculative and not supported by any rationale as to why or how this prejudice would occur in the particular circumstances of this case. Furthermore, in respect of the submissions provided to the Commissioner (ie paragraph 37), the Commissioner does not doubt that disclosure of correspondence between Scottish Government Ministers and the Scotland Office could potentially prejudice relations within the UK. She also accepts that confirmation as to whether the Scotland Office potentially holds such communications could, in theory, prejudice relations within the UK. However, in her view given the way in which the complainant's request is worded, confirmation as to whether the Scotland Office holds the requested information would not reveal whether the Scotland Office exchanged correspondence with the Scottish Government on this topic. Rather it would simply reveal whether the Scotland Office and HM Treasury had communication with each other about this matter.
41. Section 28(2) is therefore not engaged.

## **Other matters**

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42. As noted above, FOIA does not specify a time period within which public authorities must complete internal reviews. However, in the Commissioner's opinion most reviews should be completed within 20 working days and even reviews in more complex cases should be completed within 40 working days, a position set out in her guidance.<sup>4</sup> In the circumstances of this case the Scotland Office took 87 working days to complete the internal review. In the future the Commissioner expects the Scotland Office to ensure that it completes any internal reviews within the timescales set out in her guidance.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf> - see paragraph 84

## Right of appeal

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43. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
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