



Scottish Information
Commissioner
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Decision Notice 003/2025

Draft independence referendum Bill

Authority: Scottish Ministers
Case Ref: 202200345

Summary

The Applicant asked the Authority for information regarding the Scottish Parliament's legal competence in relation to a draft independence referendum Bill (including the Law Officers' view on competence, if a view was provided). The Authority withheld some of the information as it considered it was legally privileged, and it refused to confirm or deny whether the Law Officers had provided advice. The Commissioner investigated and found that the Authority had generally complied with FOISA in responding to the Applicant's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 29(1)(c) (Formulation of Scottish Administration policy etc.); 30(b)(ii) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 26 January 2022, the Applicant made a request for information to the Authority. They asked for:
 - (i) any correspondence or briefing papers around the competency of the draft independence referendum Bill

- (ii) confirmation of whether the Scottish Law Officers said such a Bill was within the competence of the Scottish Parliament.
2. The Authority responded on 23 February 2022, in the following terms:
 - for part (i) of the request, it advised the Applicant that some of the information was already published (and therefore exempt under section 25(1) of FOISA) and it withheld other information under sections 30(b)(ii) and 36(1) of FOISA
 - for part (ii) of the request, it refused to confirm or deny, in terms of section 18(1) of FOISA, whether the requested information existed or was held by it. It also stated that, if the information did exist or was held, an exemption under section 29(1)(c) of FOISA would apply.
 3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because the public interest favoured disclosure of the information requested.
 4. The Authority notified the Applicant of the outcome of its review on 18 March 2022, which fully upheld its original response without modification.
 5. On 22 March 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because:
 - they disagreed with the exemptions applied
 - they considered the public interest favoured disclosure of the information requested for part (i) of their request and disclosure of whether the Authority had sought Law Officers' advice for part (ii) of their request.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 25 April 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld in relation to part (i) of the Applicant's request. The Authority provided the information, and the case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. The Authority provided its comments.
9. During the investigation, the Authority withdrew its reliance on the exemption in section 30(b)(ii) of FOISA and identified that a small amount of information previously considered out of scope in fact fell within part (i) of the Applicant's request. The Authority disclosed redacted copies of this information to the Applicant, withholding a small amount of information under the exemptions in sections 36(1) and 38(1)(b) of FOISA.
10. The Applicant subsequently confirmed that, with regard to the information withheld under section 38(1)(b), they were content for the Commissioner's decision to be restricted to the personal information of senior Authority officials. Having reviewed the withheld information,

the Commissioner is satisfied that it does not relate to senior Authority officials. He will therefore not consider the application of the exemption in section 38(1)(b) of FOISA further in his decision.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
12. As stated in previous decisions, in [Scottish Ministers v Scottish Information Commissioner \[2006\] CSIH 8](#)¹, at paragraph [18], the Court of Session recognised that:
"in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
13. In this decision notice, the Commissioner has endeavoured to give as full account of his reasoning as he can, but, by necessity, in this case the comments of the Court of Session are applicable to some aspects.

Background

14. The Commissioner considers the following information may be helpful in explaining the background of the Applicant's request, and the Commissioner's decision:
15. [Section 29 of the Scotland Act 1998](#)² relates to the competence of the Scottish Parliament to make laws. It provides that:
 - (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
 - (2) A provision is outside that competence so far as any of the following paragraphs apply –
...
(b) it relates to reserved matters.
...
16. The [Scottish Ministerial Code 2018](#)³ (in effect at the time of the request) specifies (at paragraph 3.4) that all Bills introduced to the Scottish Parliament must be accompanied by a statement confirming that they are within the legislative competence of the Scottish Parliament, which must be cleared by the Law Officers.
17. In 2012, the UK Government granted the Authority temporary powers under section 30 of the Scotland Act 1998 to enable it to carry out a referendum on independence, which subsequently took place on 18 September 2014, and which saw Scotland vote against becoming an independent country.
18. On 14 January 2020, the UK Government, in response to a formal request from the then First Minister, confirmed that it would not grant such powers to permit a second independence referendum to take place later that year.

¹ <https://webarchive.nrscotland.gov.uk/20240713015729/https://scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff0000d74aa7>

² <https://www.legislation.gov.uk/ukpga/1998/46/section/29>

³ <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/documents/>

19. On 1 September 2020, the Authority committed to publishing a draft Bill which would set out the timing of, and question to be used in, a second independence referendum. The Authority indicated its intention to introduce this Bill to the Scottish Parliament in the term which followed the May 2021 Scottish Parliamentary elections.
20. On 21 March 2021, the Authority published its [draft Independence Referendum Bill](#)⁴ but it did not introduce this Bill to the Scottish Parliament.
21. On 7 September 2021, the then First Minister stated that it was the Authority's intention to hold a second independence referendum before the end of 2023.
22. On 28 June 2022, and subsequent to its review response, the Authority [published a Referendum Bill](#)⁵. The then First Minister proposed 19 October 2023 as the date for an advisory second independence referendum and confirmed that the Lord Advocate would seek the Supreme Court's view on whether the Scottish Parliament had the power to legislate for a referendum on independence. The then First Minister also confirmed that the Referendum Bill would immediately be introduced to the Scottish Parliament if the Supreme Court ruled that the Scottish Parliament had such a power.
23. On the same day, the Lord Advocate referred to the Supreme Court the question of whether part of the Independence Referendum Bill related to reserved matters stating that she did not possess the "necessary degree of confidence" that a bill would be within devolved competence.
24. On 23 November 2022, the Supreme Court ruled that the Scottish Parliament did not have the power to legislate for an independence referendum as this related to reserved matters under the Scotland Act 1998.

Information disclosed during the investigation

25. The Authority originally withheld a small amount of information relating to part (i) of the request under section 30(b)(ii) of FOISA. The Authority also considered that a small amount of further information fell outwith the scope of part (i) of the request.
26. During the investigation, the Authority withdrew its reliance on 30(b)(ii) for some of this information and accepted that other information fell within scope (and was not otherwise exempt from disclosure). The Authority disclosed this information to the Applicant.
27. As the Authority disclosed further information to the Applicant during the investigation that it either accepted it had not been entitled to withhold or that it should have disclosed sooner, the Commissioner must find that the Authority failed to comply with section 1(1) of FOISA in this respect.

Section 36(1) - Confidentiality

28. The Authority withheld information falling within the scope of part (i) of the request under the exemption in section 36(1) of FOISA.
29. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.

⁴ <https://www.gov.scot/publications/draft-independence-referendum-bill/>

⁵ <https://www.gov.scot/publications/scottish-independence-referendum-bill/>

30. Legal advice privilege applies to communications in which legal advice is sought or provided. For legal advice privilege to apply, certain conditions must be fulfilled:
- (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with the client.
31. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case. The information cannot be privileged unless it is also confidential.
32. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
33. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.
34. The Authority submitted that the information withheld in relation to part (i) of the Applicant's request constituted confidential communications between in-house legal advisers acting in their professional capacity, the Authority being the client to whom legal advice was being provided.
35. The Authority stated that all of the material was either made or effected for the principal or dominant purpose of seeking or giving legal advice (or evidenced those communications).
36. Disclosure of the withheld information would, in the Authority's view, breach legal professional privilege by divulging information about the points considered by lawyers, the extent of their comments and the issues being flagged up for further consideration. The Authority considered all necessary conditions for legal advice privilege were satisfied.
37. The Authority also argued that a claim to confidentiality in legal proceedings could be maintained because the withheld information was only shared between the Authority and its legal advisers. Therefore, the information remained confidential at the time they responded to the Applicant's request and requirement for review (and this remained the case). Accordingly, legal professional privilege in relation to this information had not been waived.

The Commissioner's view

38. Having considered the withheld information, the context in which it was created and the Authority's submissions, the Commissioner accepts that all of the withheld information meets the conditions for legal advice privilege to apply.
39. The exemption in section 36(1) 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 decided that the information is exempt under section 36(1), the Commissioner must 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 public interest test – section 36(1)

The Applicant's submissions on the public interest

40. The Applicant submitted that in terms of the public interest the issue of a second Scottish independence referendum (and by association advice on the competency of the draft Bill in question) was second only to the COVID-19 pandemic.
41. The Applicant argued that if the Authority wished the electorate to support its position on a second referendum, then, by extension, the public interest required full transparency and disclosure of information relating to the Scottish Parliament's competence to consider a referendum Bill.
42. The Applicant submitted that the Authority's intention to introduce a Bill with the potential to radically change Scotland's constitution, and the likelihood of that Bill being challenged in court (with the concomitant cost to the taxpayer), meant that the public interest overwhelmingly favoured disclosure of the information requested. This was particularly so if:
 - the information revealed advice on the Bill's competence had not been sought
 - Law Officers had advised that the Bill was not competent.
43. The Applicant submitted that proper Ministerial accountability demanded transparency as to whether advice had been sought on the Bill's competency given the likelihood of future legal challenge.
44. The Applicant noted that the Authority had itself [previously disclosed legal advice](#)⁶ where it recognised that the advice related to issues of significant public interest.
45. The Applicant also referred to [Decision 048/2022](#)⁷ of the Commissioner, in which he recognised (at paragraphs 40 and 42) the significant public interest in the question of a second independence referendum and that the Authority could disclose legal advice where there were compelling public interest reasons to do so. The Applicant considered this to be such a case.
46. The Applicant noted that, after their appeal, the question of competence had been referred to, and settled by, the Supreme Court, which had ruled that the Scottish Parliament did not have the power to hold an independence referendum without the UK Government's consent.
47. Given this ruling, and the significant legal cost of the reference to the Supreme Court to the taxpayer, the Applicant argued that the public interest strongly favoured disclosure of the information requested (particularly if the legal advice had indicated that the Authority was unlikely to win such a case). The Applicant submitted that disclosure would ensure Government decision making at the time of the reference could be understood, and scrutinised, in the interests of ensuring accountability in the use of public funds.
48. The Applicant also argued that, given the matter of competence had been conclusively settled, it was in the public interest to know whether publication of the draft Bill had been a "stunt".

⁶ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56231222>

⁷ <https://www.foi.scot/sites/default/files/2022-04/Decision048-2022.pdf>

49. Finally, the Applicant submitted that the information withheld under section 36(1) of FOISA was now likely a matter of public record given the Authority's arguments had been considered during the Supreme Court case.

The Authority's submissions on the public interest

50. The Authority recognised the public interest in disclosure of the withheld information as part of open, transparent and accountable government. The Authority also accepted that disclosure would permit greater public understanding of the legislative process in relation to a second independence referendum.
51. However, the Authority submitted that there was a very strong public interest in maintaining the exemption relating to legal professional privilege in this case, for the following reasons:
- it remains important in all cases that lawyers can provide free and frank legal advice, which considers and discusses all issues and options, without fear that the advice may be disclosed and, as a result, potentially taken out of context
 - in areas such as this, which are the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective
 - in preparing legislation, in particular, it is vital that lawyers, officials and Ministers have the private space to fully and frankly consider legislative proposals. Policy and legal issues need to be identified and explored in an environment that enables, fosters and protects a free and frank exchange of legal views to enable final decisions to be taken about how and whether to take forward Bill proposals
52. The Authority concluded that there was a strong public interest in protecting the confidentiality of the withheld information to ensure that it was able to discuss and take policy decisions in full possession of thorough and candid legal advice. This would ensure that the Authority could take decisions in a fully informed legal context, having received legal advice in confidence as any other client would.
53. In summary, and on balance, the Authority considered that, in this case, the public interest in maintaining the exemption in section 36(1) of FOISA outweighed that in disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing full and detailed internal consideration of the legal issues in relation to the consideration of legislative proposals.

The Commissioner's view on the public interest

54. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)⁸. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
55. The Commissioner recognises that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a

⁸ <https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

compelling public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):

- the privileged material discloses wrongdoing by/within an authority
- the material discloses a misrepresentation to the public of advice received
- the material discloses an apparently irresponsible and wilful disregard of advice
- a large number of people are affected by the advice
- the passage of time is so great that disclosure cannot cause harm.

56. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority to receive full, unhindered legal advice.
57. However, as the Applicant pointed out in his submissions, the Authority has itself previously chosen to publish legal advice. This clearly shows that the Authority recognises that there can be compelling public interest reasons for disclosure of legal advice (as envisaged by paragraph 2.40 of the Scottish Ministerial Code 2018 and the [Scottish Ministerial Code 2023⁹](#)).
58. The Commissioner considers it clear, as set out in paragraph 40 of Decision 048/2022, that the question of a second independence referendum is of significant public interest for a substantial portion of the Scottish population. He therefore accepts that disclosure of the withheld information would contribute to informing public debate on this matter.
59. However, while he recognises the significant public interest in the subject matter of the request, the Commissioner must take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice.
60. The Commissioner notes the Applicant's position that the Lord Advocate's reference to the Supreme Court of the question of competence (and the Supreme Court's ruling on that matter in November 2022) added to the public interest in disclosure of the withheld information.
61. However, when determining the public interest, the Commissioner must assess this in relation to the specific circumstances of the case on each occasion and at the time of the review outcome (at the latest). In other words, his decision on the public interest in this case will be based on an assessment of the circumstances in March 2022 (the date of the Authority's review outcome) – prior to the Lord Advocate's reference to the Supreme Court (in June 2022).
62. This means that the Commissioner is required to assess the public interest in disclosure of the withheld information prior to, and absent the context of, the Lord Advocate's reference to the Supreme Court on 28 June 2022.
63. As rehearsed earlier, the Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such

⁹ <https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2023/07/scottish-ministerial-code-2023-edition/documents/scottish-ministerial-code-2023-edition/scottish-ministerial-code-2023-edition/govscot%3Adocument/scottish-ministerial-code-2023-edition.pdf>

comprehensive advice being available to the Authority, its ability to come to fully informed decisions would be restricted, which would not be in the public interest.

64. Having considered the substance of the withheld information and the circumstances at the date of the Authority's review outcome, the Commissioner is not satisfied that the public interest in disclosure of the withheld information is significant enough to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
65. In conclusion, after careful consideration, the Commissioner is satisfied that the Authority correctly withheld all of the information falling within scope of part (i) of the Applicant's request under section 36(1) of FOISA.
66. However, the Commissioner would like to stress again that his assessment of the public interest was limited to the circumstances at as the date of the Authority's review outcome (at the latest).

Section 18(1) – neither confirm nor deny

67. For part (ii) of the request, the Authority applied section 18(1) of FOISA and refused to confirm or deny whether the requested information existed or was held by it. If the information did exist or was held, the Authority stated that an exemption under section 29(1)(c) of FOISA would apply.
68. In the Commissioner's view, part (ii) of the Applicant's request can be read as a request for:
 - simple confirmation of whether the Law Officers had provided a view on competence, or
 - the Law Officers' substantive view on competence (if a view was sought and provided).
69. In the circumstances, the Commissioner is satisfied it was reasonable, given the context of the request, for the Authority to interpret the Applicant's request as being for the Law Officers' substantive view on competence (if a view was sought and provided).
70. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by it; and
 - (ii) if the information existed and was held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
71. Where an authority has chosen to rely on section 18, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. He must also establish whether, if the information existed and were held by the authority, the authority would be justified in refusing to disclose that information by virtue of the exemptions listed in section 18.
72. Where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually

exists or is held by the authority. This means he is unable to comment in any detail on the Authority's reliance on any of the exemptions referred to, or on other matters which could have the effect of indicating whether the information exists or is held by the Authority.

73. In this case, the Authority argued that the information, if it existed and were held, would be exempt from disclosure by virtue of section 29(1)(c) of FOISA.
74. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information (if it existed and were held) would be exempt information under one or more of the listed exemptions. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption outweighs any public interest there would be in disclosing any relevant information it held.
75. The Commissioner must first, therefore, consider whether the Authority could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and were held.

Section 29(1)(c) – the provision of advice by Law Officers

76. Under section 29(1)(c) of FOISA, information held by the Authority is exempt from disclosure if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The definition of "Law Officers" in section 29(4) of FOISA includes the Attorney General as well as the Scottish Law Officers.
77. Given the terms of the request, the Commissioner is satisfied that the exemption in section 29(1)(c) of FOISA would apply to the information requested (if it existed and were held).
78. Section 29(1)(c) is a qualified exemption, which means that the exemption is subject to the public interest test required by section 2(1)(b) of FOISA.

The public interest test – section 29(1)(c)

The Applicant's submissions on the public interest test – section 29(1)(c)

79. To the extent that the Applicant's arguments on the public interest test relating to section 29(1)(c) of FOISA are similar to those submitted in relation to section 36(1)(1), the Commissioner has not reproduced those submissions here.
80. The Applicant submitted that the Law Officers' Convention was a convention and not a law and could therefore be waived where there was significant public interest in doing so. In this regard, the Applicant referred to the Authority's decision to [publish legal advice](#)¹⁰, including an opinion from the Lord Advocate, in relation to its handling of harassment complaints relating to former First Minister Alex Salmond.
81. The Applicant further noted that the Commissioner had previously recognised in [Decision 048/2022](#) (at paragraphs 40 and 42) both the significant public interest in the question of a second independence referendum in Scotland and that the Authority recognised there were circumstances where there could be compelling reasons for disclosure of legal advice.

¹⁰ <https://www.gov.scot/publications/legal-advice-related-to-the-parliamentary-inquiry-into-the-scottish-governments-handling-of-harassment-complaints-sghhc/>

82. The Applicant contended that the [Commissioner's own guidance](#)¹¹ stated that the Law Officers' Convention did not apply to Bills introduced to the Scottish Parliament. While the Applicant accepted that the draft Bill had not been introduced to Parliament, they argued it was in the public interest to know whether publication of the draft Bill, which formed an integral part of the then Government's "[Programme for Government](#)"¹², had been given "legal sign off" by Law Officers.
83. The Applicant again noted that, after their appeal, the question of competence had been settled by the Supreme Court, at significant cost to the taxpayer. The Applicant considered that the circumstances (and requirement for Ministerial accountability) were significantly similar to those where the Authority had chosen to disclose legal advice.
84. The Applicant argued that the reference to the Supreme Court had been exceptional and that disclosure of legal advice provided to the Authority in relation to the draft Bill would significantly improve public understanding of the Authority's decision to refer the question of competence to the Supreme Court (which would therefore clearly be in the public interest).
85. In all the circumstances, the Applicant considered that the public interest in transparency and accountability favoured disclosure of the withheld information.

The Authority's submissions on the public interest – section 29(1)(c)

86. The Authority's view was that the information, if it existed and were held, related to the provision of advice by Law Officers and there was a strong public interest in upholding the Law Officers' Convention and in avoiding undermining that Convention.
87. The Law Officers' Convention is, in short, that neither the fact that the Law Officers have (or have not) advised nor the content of their advice may be disclosed outside government without their consent. The Authority referred to the decision of the High Court of Justice in [HM Treasury v The Information Commissioner and Evan Owen \[2009\] EWHC 1811 \(Admin\)](#)¹³, and argued that this decision supported its view in upholding the Convention.
88. The Authority acknowledged that there could be circumstances in which it is appropriate to seek consent from Law Officers to disclose advice (if it existed and were held), but such consent would only be sought in exceptional circumstances. The Authority submitted that it did not consider the circumstances in this case were exceptional.
89. In summary, and on balance, the Authority concluded that the public interest in maintaining the exemption outweighed that in disclosure, given the overriding public interest in maintaining the Law Officers' Convention and the lack of a compelling overriding public interest in disclosure.

The Commissioner's view on the public interest – section 29(1)(c)

90. As rehearsed earlier, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Where information relates to the seeking and providing of advice by Law Officers, FOISA provides specific protection from disclosure under the terms of section 29(1)(c) of FOISA and the Commissioner recognises there is a strong public

¹¹ <https://www.foi.scot/sites/default/files/2022-04/BriefingSection29FormulationofScottishAdministrationPolicy.pdf>

¹² <https://www.gov.scot/publications/protecting-scotland-renewing-scotland-governments-programme-scotland-2020-2021/>

¹³ <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1811.html>

interest in maintaining the protection that this affords to any of the Law Officers. Section 29(1)(c) is accordingly closely connected to the Law Officers' Convention, and the case law, referred to by the Authority, acknowledges the strong public interest in maintaining this convention.

91. The Commissioner recognises that there may be circumstances where the public interest in disclosure of information is stronger than the public interest in upholding the Law Officers' Convention. It is noteworthy that this exemption is not an absolute one.
92. The Commissioner accepts that the publication of a draft independence referendum Bill formed part of the then Government's Programme for Government. It is clear that a second independence referendum was a live issue at the time of the Applicant's request.
93. However, as rehearsed earlier, when determining the public interest, the Commissioner must assess this in relation to the specific circumstances of the case on each occasion and at the time of the review outcome (at the latest). His decision on the public interest in this case will therefore be based on an assessment of the circumstances in March 2022 (the date of the Authority's review outcome) – prior to the Lord Advocate's reference to the Supreme Court (in June 2022).
94. The Commissioner recognises that the information requested would (if it existed and were held) relate to a draft Bill published in accordance with a government commitment to do so, at a time that a provisional timescale had been announced for a second referendum and when it was [a matter of public debate](#)¹⁴ whether the competence of the Scottish Parliament to consider such a Bill could be ruled on by the Supreme Court.
95. In this context, the Commissioner accepts that disclosure of the information requested (if it existed and were held) would enhance both public understanding of advice provided on the Scottish Parliament's competence in relation to a Scottish independence referendum (which he has accepted is of significant public interest for a substantial portion of the Scottish population) and the Authority's decision making in relation to this matter.
96. While he recognises that there was a clear direction of travel with regard to a second independence referendum at the time of the request, the Commissioner must note again that the draft Bill, while published, had not been introduced to Parliament and the competence of the Scottish Parliament to consider such a Bill had not yet been tested (nor had any reference to the Supreme Court relating to the Scottish Parliament's competence on this matter been announced).
97. The Commissioner finds this to be a case where the public interest is finely balanced. However, having considered the competing public interest arguments and the circumstances as at the date of the review outcome, he is not persuaded that in this particular case the public interest in disclosure of the information (if it existed and were held) would outweigh that in maintaining the exemption under section 29(1)(c) of FOISA.
98. In the Commissioner's view, section 29(1)(c) of FOISA clearly creates an expectation that requests for advice to, and advice received from, the Law Officers should be protected under FOISA (though there may be circumstances where the public interest in disclosure is stronger than the public interest in upholding the Law Officers' Convention). While the Commissioner accepts that there would be a significant public interest in disclosure of the information requested (if it existed and were held), he considers that, in this case, the strong

¹⁴ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-57047898>

public interest in maintaining the Law Officers' Convention outweighs the public interest in disclosure.

99. In the Commissioner's view, there is a strong public interest in ensuring that all public authorities, including the Authority, are able to obtain and consider legal advice on a confidential basis before taking (or electing not to take) particular actions. This point was highlighted in the judgment of the Supreme Court in [Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 \[2022\] UKSC 31](#)¹⁵ (at paragraphs 44 and 45):
- "Law Officers ... are not infallible"
 - "The Lord Advocate may be mistaken, with the consequence that a legitimate and politically important proposal for legislation will never see the light of day"
 - "It would be more consistent with the rule of law and with the intention of the Scotland Act ... for the Lord Advocate... to be able to obtain an authoritative judicial decision on the point".
100. On balance, the Commissioner is not persuaded that in this particular case the public interest in disclosure of the information, if it existed and were held, would outweigh that in maintaining the exemption under 29(1)(c) of FOISA given the strong public interest in maintaining the confidentiality afforded by the Law Officers' Convention.
101. Consequently, the Commissioner is satisfied that the information requested, if it existed and were held, would be exempt from disclosure under section 29(1)(c) of FOISA and that the Authority could give a refusal notice, under section 16(1) of FOISA, on the basis that the information would be exempt information.

The public interest test – section 18(1)

The Applicant's view on the public interest – section 18(1)

102. The Applicant submitted that, had the Authority been correct to withhold any specific views provided by the Law Officers, then public interest favoured it confirming or denying (at the very least) whether such views had been provided.
103. The Applicant argued that [Decision 111/2024](#)¹⁶ of the Commissioner (at paragraphs 48-55), which related to legal advice regarding the status of Scotland within the EU following independence, found that where a topic was of considerable political importance and public interest the principle of open government favoured scrutiny and understanding of procedures followed by Ministers in their policy development processes (i.e. confirming or denying the existence of such information).

The Authority's view on the public interest – section 18(1)

104. The Authority explained that it refused the Applicant's request under section 18(1) of FOISA because it considered that to reveal whether the information requested existed or was held would be contrary to the public interest.
105. The Authority argued that there was a continued public interest generally in preserving the Law Officers' Convention, which extended to refusing to confirm or deny whether the

¹⁵ https://supremecourt.uk/uploads/uksc_2022_0098_judgment_5ca161fc9b.pdf

¹⁶ <https://www.foi.scot/sites/default/files/Decision111-2012.pdf>

information requested in this case existed or was held. The Authority submitted that this approach was reflected in paragraph 2.35 of the [Scottish Ministerial Code 2018](#).

106. The Authority noted comments made by Mr Justice Blake (at paragraph 54) in the *HM Treasury v The Information Commissioner and Evan Owen* (cited above) that:

“Parliament intended real weight should continue to be afforded to this aspect of the Law Officers’ Convention ... the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining the exemption even in the absence of evidence of particular damage.”

107. The Authority also considered that the information, if it existed and were held, would be confidential and subject to legal professional privilege.
108. In summary, the Authority submitted that the public interest in withholding the information (if held) outweighed any public interest in favour of release, because of the strong public interest in upholding the Law Officers’ Convention.

The Commissioner’s view on the public interest – section 18(1)

109. The matter under consideration here is whether revealing whether the Law Officers provided advice to the Authority on the competence of a draft referendum Bill is contrary to the public interest.
110. While the Commissioner accepts that there is significant public interest in the topic of a second independence referendum, and the competence of the draft Bill referred to in the request, he considers, given the crucial role played by the Law Officers’ Convention, that it would not be in the public interest in this case to reveal whether the Law Officers had provided a view on competence (or the contents of such a view, if one was provided) at the time of the Authority’s initial response or its review outcome.
111. Consequently, the Commissioner is satisfied that the Authority was entitled to refuse to confirm or deny, in accordance with section 18(1) of FOISA, whether the information requested by the Applicant existed or was held.
112. As rehearsed earlier, were the same request to be made now, or even made relatively shortly after the request in this case, the Commissioner’s conclusion on the public interest may well be different. The Commissioner’s conclusions on section 18(1), read with section 29(1)(c), are specific to the timing of this particular request and all other relevant circumstances (including the terms of that request). Notwithstanding the continuing importance of the Law Officers’ Convention, the Commissioner cannot discount the possibility of considerations justifying a different conclusion being reached on the exemption, with or without section 18(1), in the future.

Decision

The Commissioner finds that the Authority generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

For part (i) of the request, the Commissioner finds that, by relying on the exemption in section 36(1), the Authority complied with FOISA.

For part (ii) of the request, the Commissioner finds that the Authority was entitled to refuse to confirm or deny whether it held any relevant information.

However, the Commissioner finds that, by applying the exemption in section 30(b)(ii) of FOISA to withhold certain information and failing to disclose other information falling within the scope of the Applicant's request (which was not otherwise exempt), the Authority failed to comply with Part 1.

Given that the Authority disclosed this information to the Applicant during his investigation, the Commissioner does not require the Authority to take any action in respect of these failures in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner

14 January 2025