

Decision Notice



Decision 025/2011 Mr Simon Johnson of the Daily Telegraph and the Scottish Ministers

Revised local income tax revenue projections

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www.itspublicknowledge.info

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Summary

Mr Simon Johnson (Mr Johnson), the Scottish Political Editor of the Daily Telegraph, requested information relating to revised local income tax revenue projections from the Scottish Ministers (the Ministers). The Ministers withheld information on the grounds that it was exempt from disclosure under section 29(1)(a) of FOISA, which applies to any information that relates to the formulation or development of government policy.

The information withheld by the Ministers comprised a single document prepared by the Office of the Chief Economic Advisor. During the investigation, various steps were taken to establish whether any further information was held. Having reviewed a number of documents that had been considered by the Ministers and judged not to be relevant to Mr Johnson's request, the Commissioner took the view that one document contained further information falling within the terms of his request. The Ministers indicated that they would also consider this information to be exempt in terms of section 29(1)(a) of FOISA.

The Commissioner found that the exemption in section 29(1)(a) applied to the relevant information in both of the documents under consideration. However, he concluded that the public interest in maintaining this exemption was outweighed by the public interest in disclosing the information. The Commissioner required the Ministers to disclose the relevant information to Mr Johnson.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1) (Effect of exemptions) and 29(1)(a), (2)(a), (3) and (4) (Formulation of Scottish Administration policy etc.)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.



Background

1. On 17 February 2009, Mr Johnson, the Scottish Political Editor of the Daily Telegraph, wrote to the Ministers requesting the following information:
 - a. revised local income tax revenue projections based on the information and changes contained in the November 2008 pre-budget report. (Mr Johnson noted that these revised projections were referred to in an answer to a written parliamentary question, which was given on 5 December 2008¹) and
 - b. any documents, including emails, reports and minutes of meetings, that discuss the implications of these figures.
2. The Ministers replied on 29 April 2009. They withheld information requested by Mr Johnson on the grounds that it was exempt from disclosure under section 29(1)(a) of FOISA, which applies to any information that relates to the formulation or development of government policy. The Ministers maintained that the public interest favoured maintaining this exemption because the risk of exposure of such information may cause future advice and deliberations to take place with a narrower range of advisors or without being fully recorded.
3. On 30 April 2009, Mr Johnson wrote to the Ministers requesting a review of their decision. He disputed the Ministers' claim that disclosure would compromise future advice and deliberations, noting that the policy of introducing local income tax had been dropped for the remainder of the current parliament. He maintained that the decision to refuse his request gave insufficient weight to the public interest in disclosure, pointing out that local government finance is an important subject to most households.
4. The Ministers notified Mr Johnson of the outcome of their review on 24 July 2009. This upheld their previous decision without amendment.
5. On 27 July 2009, Mr Johnson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Minister's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Johnson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

¹ See: www.scottish.parliament.uk/Apps2/Business/PQA/default.aspx?pg=S3W-18225



Investigation

7. On 29 July 2009, the Ministers were notified in writing that an application had been received from Mr Johnson and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested, which comprised a single document, prepared by the Office of the Chief Economic Advisor and setting out revised revenue projections and the assumptions upon which they were founded. The case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers on 11 August 2009, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to provide details of their reasoning when applying the exemption in section 29(1)(a) of FOISA to the document supplied.
9. The Ministers were also asked to check whether any further information was held that would fall within the scope of Mr Johnson's request. The investigator asked particularly whether any information was held regarding discussion of the projections that were set out in the report supplied.
10. The Ministers provided their submissions on 31 August 2009. These provided background information regarding the policy to replace council tax with a local income tax and detailed submissions regarding their application of the exemption in section 29(1)(a) and the associated public interest test. The Ministers also maintained that the document already supplied was the only information held that fell within the scope of Mr Johnson's information request.
11. In further communications, the Ministers were asked additional questions with respect to the status of the policy formulation process with respect to local income tax, and to explain the searches undertaken to locate any relevant information. During the investigation, further searches were undertaken by the Ministers in response to a request from the Commissioner, to ensure that these had encompassed communications solely between Ministers, or between Ministers and Special Advisers.
12. The Ministers also provided copies of records relating to their initial searches for information, and copies of documents that were reviewed in order to determine whether they fell within the scope of Mr Johnson's information request. Following a review of these documents, the Ministers were invited to comment further on one document in the light of the Commissioner's initial view that parts of it fell within the scope of Mr Johnson's request.
13. The Ministers' response maintained that they still considered this document to fall outside the scope of Mr Johnson's request. However, they confirmed that should the Commissioner consider it to fall within the scope of his information request, they considered the relevant information also to be exempt from disclosure in terms of section 29(1)(a) of FOISA.



14. At two stages during the investigation, the Ministers claimed that the part of Mr Johnson's information request seeking documents discussing the implications of the revised income tax projections is not a valid information request in terms of FOISA. Discussion of this point (which was raised by the Ministers also in relation to a number of other cases at the end of 2009) has caused delay in the completion of this case. However, the Ministers accepted during the investigation that Mr Johnson's request was entirely valid and so the Commissioner has made his decision without further reference to this point.
15. During the investigation, Mr Johnson was also invited to provide comments on the reasons why he considered the public interest in disclosing the withheld information outweighed the public interest in withholding it. His comments were received in September 2009 and his patience in the face of considerable delay in the completion of this case has been appreciated.
16. The submissions received from both Mr Johnson and the Ministers are summarised (where relevant) below.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Johnson and the Ministers and is satisfied that no matter of relevance has been overlooked.

Background on local income tax

18. Before setting out the Commissioner's conclusions in full, it is helpful to explain the context for Mr Johnson's information request.
19. The abolition of council tax and its replacement with a local income tax has been a key policy of the current Scottish Government. It was a central commitment within the SNP's manifesto² for the May 2007 Scottish Parliamentary election, and the Ministers' programme for government³ issued soon after that election (in September 2007) indicated that the Government would begin detailed consultation on the proposals. A consultation took place between March and July 2008 and, in September 2008, the First Minister announced⁴ that a Council Tax Abolition Bill would form part of the legislative programme for the year ahead.

² See: www.snp.org/node/13534

³ see: www.scotland.gov.uk/Resource/Doc/197113/0052743.pdf

⁴ See: www.scotland.gov.uk/News/Releases/2008/09/03100801



20. However, on 11 February 2009, the Cabinet Secretary for Finance and Sustainable Growth announced to the Scottish Parliament that the Scottish Government would not bring forward legislation to abolish council tax and replace it with a local income tax within the current Parliament. His comments highlighted that there was insufficient parliamentary support to allow the legislation to be passed, and that the economic climate had changed in the period since the proposals were first made. The Cabinet Secretary said⁵:

“When we launched the proposal in 2007, we identified a £450 million tax saving, with two thirds of Scots being better off and fewer than two out of 10 at the very top of the income scale paying a little more in taxation.

However, the financial context has changed. The current Labour Government in London has announced a reduction of as much as £500 million in Scotland’s budget next year and the next. [...] It would not be wise – indeed, it would not be possible – to introduce a tax reduction of the scale that we propose in the face of such swingeing Westminster-imposed cuts.

We have also taken account of the parliamentary vote on 4 December [2008] and the experience of the budget process of the last two weeks. Those two events highlighted in the starkest possible terms the realities of minority government.

[...] In short, we cannot put together a stable majority to enable us successfully to steer detailed local income tax legislation through this Parliament. [...]

The Cabinet has therefore decided not to introduce legislation to abolish the unfair council tax and abolish it with a local income tax until after the election in 2011. However, members should make no mistake – the Government will fight that election to win a parliamentary majority that backs the abolition of the unfair council tax.”

21. Mr Johnston’s information request was made on 17 February 2009, six days after this announcement.

The withheld information

22. As noted above, the Ministers identified only a single document as falling within the scope of Mr Johnson’s information request.
23. The document identified by the Ministers was prepared by the Office of the Chief Economic Advisor and set out revised revenue projections and the assumptions upon which they were founded. This document will be referred to in what follows as the OCEA report.
24. During the investigation, various steps were taken to establish whether the Ministers had identified all relevant information.

⁵ See: www.scottish.parliament.uk/Apps2/business/orsearch/ReportView.aspx?r=4847



25. The Ministers were asked about the generation of the OCEA report and whether there were any records of meeting or other communications discussing the implications of its content. They were also asked to provide details of the searches undertaken to locate relevant information and copies of documents which had been located and reviewed, but judged to fall outside the scope of the request.
26. The Commissioner also met with officials to discuss the case and the circumstances surrounding the Ministers' decision to not to introduce the planned legislation. At his request, further steps were undertaken to establish whether any of the Ministers or special advisors were aware of any further information (beyond that exchanged also with officials) held by or on behalf of the Ministers which would fall within the scope of Mr Johnson's information request.
27. Having considered the Ministers' responses to the questions put by his office, the Commissioner is satisfied that the searches undertaken by the Ministers to locate any information falling within the scope of Mr Johnson's information request were (by the end of his investigation) appropriate and sufficient for the purpose of locating any recorded information capable of being retrieved by reasonable means. These searches found no additional information.
28. However, having considered the documents that were reviewed by the Ministers and concluded to fall outside the scope of Mr Johnson's information request, the Commissioner considers that one document (numbered B15) contains information which falls within the scope of the request. B15 is a memo submitted to the Cabinet Secretary for Finance and Sustainable Growth enclosing the OCEA report.
29. The investigating officer informed the Ministers that the Commissioner's initial view was that the document appeared to discuss the implications of the revised local income tax revenue projections contained in the OCEA report. The Ministers were invited to comment on this point, and to indicate whether they would also consider this information exempt in terms of section 29(1)(a) if the Commissioner's final decision also reflected his initial view.
30. The Ministers' response on this point indicated that document B15 had been considered carefully, but they did not consider any part of it contained either the revised revenue projections or discussion thereof, as requested by Mr Johnson.
31. The Commissioner must be careful in his decisions to avoid disclosing the content of any information under consideration. This limits his ability to state fully his reasons for drawing his conclusion with respect to document B15. However, he has considered all of the Ministers' points, but has concluded that the information within this document, excluding paragraphs 8 and 9, the associated headings and the second bullet point in paragraph 10, falls within the scope of Mr Johnson's information request.
32. In reaching this conclusion, he has noted that the second part of Mr Johnson's request seeks "any documents that discuss the implications of" the revised local income tax projections. While Mr Johnson expressed this part of his request by reference to the documents containing the information he was seeking, the Commissioner considers it to be clear that he wished to access the information within such documents.



33. The Ministers have pointed out with respect to each paragraph within B15 that they do not contain either the projections or, in their view, discussion of the implications of these. The Commissioner accepts that some of the paragraphs highlighted as potentially relevant to Mr Johnson's information request do not individually provide projections or discussions of their implications.
34. However, the Commissioner considers that the paragraphs he considers to be relevant, when read together, constitute a document which does discuss the implications of the revised projections, albeit to a limited extent. The Commissioner would note that he considers discussion of the implications of the revised projections is set out in paragraphs 5 (especially the second sentence) and paragraph 6 (especially the final sentence). The information therein which does not directly discuss the projections contains information about the format in which the communication was sent, its date, sender and recipient, the wider context in which the discussion was raised, and what the Minister was asked to do in response to the comments and the Commissioner considers that this falls within the scope of Mr Johnson's request.
35. The parts of B15 which the Commissioner considers to fall outside the scope of Mr Johnson's request clearly relate to matters other than the content of the OCEA report and the implications of the revenue projections therein and so provide no additional information that the Commissioner considers relevant to Mr Johnson's information request.
36. Having concluded that the content of B15, excluding paragraphs 8 and 9, the associated headings and the second bullet point in paragraph 10 falls within the scope of Mr Johnson's information request, the Commissioner has proceeded to consider whether the Ministers were entitled to withhold both this information and the OCEA report in terms of the exemption in section 29(1)(a) of FOISA.
37. As in any case, the Minister has considered the application of section 29(1)(a) and the public interest in the circumstances that existed at the point where the Ministers notified Mr Johnson of the outcome of their review. In this case, that point was on 24 July 2009. The Commissioner has disregarded any developments in the period since that date.

Section 29(1)(a) – formulation of Scottish Administration policy

38. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (the Ministers) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
39. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation and when.



40. The Commissioner is satisfied that the information within the OCEA report, and the relevant parts of B15, relate in their entirety to the formulation of the Scottish Ministers' policy with respect to the abolition of council tax and its replacement with a local income tax.
41. However, section 29(2)(a) indicates that, once a policy decision has been taken, statistical information used to provide an informed background to the taking of that decision can not be regarded as relating to the formulation or development of the policy in question.
42. The Commissioner noted that the OCEA report contains a range of statistical information and carefully considered whether the provision in section 29(2)(a) would prevent the application of section 29(1)(a) to this information. The Ministers were invited to comment on this point, and on whether their decision not to introduce legislation to introduce local income tax within the current parliament meant (as was suggested by Mr Johnson's comments) that the policy had been dropped.
43. The Ministers' response on this point indicated that the policy of abolishing council tax and replacing it with a local income tax had not been dropped. Rather, this policy remained in place, but the introduction of the proposed legislation had been delayed. The Ministers maintained that the information under consideration related to ongoing policy development, and provided details of a number of areas in which work was ongoing with a view to introducing legislation early in the next session of the Scottish Parliament. They indicated that work in these areas should allow legislative drafting to progress significantly from mid-2010 onwards.
44. In the light of these comments, the Commissioner accepts that section 29(2)(a) is not applicable in this case. He recognises that the Ministers did take a decision to delay the introduction of any legislation to replace council tax with a local income tax, but that this did not amount to the dropping of the associated policy by the Government. Decisions to introduce legislation, to determine its content, or to drop the policy altogether would be taken at a later date, and by a future government after the May 2011 Scottish Parliamentary elections. The Commissioner accepts that the policy development process remains ongoing within the Scottish Government in anticipation of such a bill being introduced by the Ministers, should they be in a position to form a Government for a second term from May 2011.
45. In the light of the above, the Commissioner accepts that the exemption in section 29(1)(a) applies to all of the information in the OCEA report and the parts of document B15 which fall within the scope of Mr Johnson's information request.

Public interest test

46. The exemption in section 29(1)(a) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner must therefore 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 in section 29(1)(a).



47. Section 29(3) of FOISA prompts particular consideration of the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision. The Commissioner has noted that, for the reasons discussed in paragraphs 42–44 above, this consideration does not apply in this case, since the information under consideration relates to ongoing policy development within a process in which final decisions have yet to be taken.
48. When asked to comment on the public interest in accessing the information under consideration, Mr Johnson argued that since the proposal to introduce legislation introducing a local income tax has been dropped for the duration of the current parliament, releasing the information could not prejudice the decision-making of the current administration. He maintained that the exemption in section 29(1)(a) should not be applied so broadly as to argue that releasing the information might prejudice future administrations' policy-making after 2011. He also argued that the information he had requested would be out of date by the time of any future legislation being brought forward.
49. Mr Johnson also indicated that he found it hard to comprehend why this information could not be provided when local income tax revenue projections were provided by the Cabinet Secretary for Finance and Sustainable Growth when the policy was proposed. He drew the Commissioner's attention to the response given to a question in the Scottish Parliament in December 2008, indicating that revised revenue projections would be published early in the new year⁶.
50. Finally, Mr Johnson submitted that the Ministers' decision to reject his request did not give enough importance to the public interest in disclosure of the information. He highlighted that local government finance is an important subject to households across the country, and argued that they are entitled to see what the proposed reforms would have meant for them and their local council services, had they been introduced.
51. The Ministers have recognised the public interest in the disclosure of as much information as possible to encourage open government and contribute to accountability. They acknowledged that, in this case in particular, where the policy in question is of substantial and ongoing public interest, the release of the information could contribute to more informed debate and greater public interest in the policy development and decision-making processes.
52. However, against these public interests, the Ministers maintained that there is also a need for the Government to base its decisions on the best advice possible. For this reason, the Ministers argued that they need to be allowed the room to consider all policy options and to consider the implications of that advice without that information being disclosed prior to a decision being made. They maintained that to do so could potentially undermine the commissioning and use of evidence in current and future policy development, providing a disincentive to consider the widest possible range of evidence and advice in future decision-making.

⁶ See: www.scottish.parliament.uk/Apps2/Business/PQA/default.aspx?pg=S3W-18225



53. On balance, the Ministers submitted that the risks to good government and policy development in this instance, and the potential influence on future policy development and decision making, meant that the balance lay in favour of maintaining the exemption.
54. The Ministers also highlighted that they considered the information under consideration in this case to be sensitive in that there was the potential for it to be misinterpreted to unreasonably prejudice the case for particular policy options. The Ministers maintained that disclosure in response to Mr Johnson's information request would be premature; highlighting that the assumptions made continue to be scrutinised and assessed. They maintained that it would be misleading to provide the withheld information in isolation.

Conclusions regarding the public interest

55. The Commissioner has considered all of the points made by both Mr Johnson and the Ministers when balancing the public interest for and against disclosure of the information under consideration.
56. He has noted Mr Johnson's concerns about the withholding information where it relates to development of policy to be taken forward by a future administration. However, there is nothing within section 29(1)(a) of FOISA that limits application only to the development of policy within the term of an existing Parliament. The Commissioner recognises that an incumbent administration will work to develop policy in certain areas with a view to legislation being introduced during the following parliament. It is in the public interest that such longer term policy formulation is possible, to avoid the work of government starting from afresh at the start of each Parliamentary term. It will be recognised, however, that policy development in such areas will cease after the election if a government is formed by a party which does not support the policy proposals or wish to take them forward.
57. The Commissioner agrees with both Mr Johnson and the Ministers that there is significant public interest in disclosure of the information within the OCEA report and the relevant parts of document B15. The information therein would contribute significantly to public understanding of how and why changing financial and economic circumstances in the period since 2007 had affected the viability of the Ministers' policy to replace council tax with a local income tax. This could in turn allow informed discussion of the longer term viability of any such plans as economic circumstances have changed in the period since the revised revenue projections were prepared.
58. The Commissioner has given significant weight to this public interest since any changes to the system of local taxation would have implications for every household in Scotland. The significance of the changes proposed by the Scottish Ministers (including the potential effect on the financial circumstances of many individuals) persuade the Commissioner that there is considerable public interest in ensuring public understanding of the effect of changing economic circumstances on the projected level of income generated via local income tax.



59. Against this, the Commissioner has balanced the public interest in preventing harm to the effective conduct of government. The Ministers have suggested that disclosing the information could lead to Ministers formulating policy without the benefit of considered advice, or result in pressure to reduce the recording of evidence, discussions and policy development.
60. In the circumstances of this case, the Commissioner has given only limited weight to these arguments. He considers that a complex policy such as the Ministers' proposals for replacing council tax with a local income tax could not be taken forward without the type of facts and analysis under consideration in this case being sought by and available to Ministers and other stakeholders.
61. As the Ministers have noted, policy development in this area requires the robust analysis of projections and the assumptions underlying these to inform the development of policy in the light of the prevailing economic conditions. The Commissioner considers it highly improbable, that disclosure in this case would lead to policy formulation processes of a similar nature in future proceeding without robust written advice of a similar nature being sought and given.
62. Turning to the effects of disclosure of the information on the particular policy formulation process under consideration, the Commissioner recognises that disclosure of the information under consideration will prompt public discussion of whether the figures support or undermine the case for the replacement of council tax with a local income tax.
63. Critics and supporters of the policy may well interpret the withheld information as supporting their own view of its viability. However, the Commissioner does not consider the scope for misinterpretation of the information therein to be a factor against disclosure. Any risk of misinterpretation of any information disclosed under FOISA can be avoided by providing background or contextual information alongside the information to prevent misunderstanding arising from its consideration in isolation.
64. While the Commissioner accepts that policy formulation with respect to the replacement of council tax with a local income tax remains ongoing within the Scottish Government, he also considers that the policy formulation process entered into a new phase at the point where the Ministers took their decision in January 2009 to delay the introduction of legislation until the next Parliament.
65. The Commissioner considers that this decision created a weighty public interest in understanding the local income tax revenue projections available to the Ministers at that time and the discussion of the implications of such projections. The Commissioner considers that this public interest significantly outweighs the public interest in enabling the ongoing work to prepare for the delayed introduction legislation after the elections in May 2011 to continue in private, particularly given that his view that the disclosure of the information would not unduly prejudice such work.
66. On balance, therefore, the Commissioner has concluded that the public interest in disclosing the information outweighs the public interest in maintaining the exemption in section 29(1)(a).



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Simon Johnson.

He finds that the content of document B15, excluding paragraphs 8 and 9 and the associated headings, and the second bullet point in paragraph 10, fell within the scope of Mr Johnson's information request. He also found that, by withholding this information and the OCEA report under the exemption in section 29(1)(a) of FOISA, the Ministers failed to comply with section 1(1).

The Commissioner therefore requires the Ministers to disclose the OCEA report and the relevant parts of document B15, by 28 March 2011.

Appeal

Should either Mr Johnson or the Ministers wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
09 February 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to –
- (a) the formulation or development of government policy;

...



- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-
 - (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
 - ...
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section-

"government policy" means-

 - (a) the policy of the Scottish Administration; and
 - (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom; ...